

2007-003890

Klamath County, Oregon



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03/08/2007 03:19:31 PM

Fee: \$66.00

MTCLW 232

RECORDING COVER SHEET

THIS COVER SHEET HAS BEEN PREPARED
BY THE PERSON REPRESENTING THE
ATTACHED INSTRUMENT FOR RECORDING.
ANY ERRORS IN THIS COVER SHEET DO NOT
AFFECT THE TRANSACTION(S) CONTAINED
IN THE INSTRUMENT ITSELF.

After Recording, Return To:

AMERITITLE

300 Klamath Ave. Klamath Falls

1. Name(s) of the Transaction(s):

Franchise Agreement

2. Direct Party (Grantor):

Klamath County, a political subdivision of the State of Oregon

3. Indirect Party (Grantee):

BNSF RAILWAY COMPANY

4. True and Actual Consideration Paid:

\$10.00

5. Legal Description:

see instrument

44⁰⁰

FRANCHISE AGREEMENT

KNOW ALL MEN BY THESE PRESENTS, that KLAMATH COUNTY, a political subdivision of the State of Oregon ("Grantor"), for Ten and No/100 Dollars (\$10.00) to it paid by BNSF RAILWAY COMPANY (formerly known as The Burlington Northern and Santa Fe Railway Company), a Delaware corporation ("Grantee"), whose address for purposes of this instrument is 2500 Lou Menk Drive, Fort Worth, Texas 76131, and the promises of the Grantee hereinafter specified, does hereby GRANT, BARGAIN, SELL AND CONVEY unto the Grantee, subject to the terms and conditions hereinafter set forth, a non-exclusive franchise ("Franchise") over, upon, across, through and under that certain franchise area (the "Franchise Area"), situated in Klamath County, State of Oregon, as depicted in on the drawing attached hereto as Exhibit "A" and as further described on Exhibit "A-1" attached hereto, such Franchise to be for the sole purposes of constructing, operating, maintaining, repairing, modifying, reinstalling, relocating, replacing and removal of a rail line and/or other structures for rail movement and operations (collectively, "Railroad Facility").


The rights granted under this Franchise Agreement are made subject to and upon the following express conditions:

1. Grantee acknowledges that the Franchise granted pursuant to this Franchise Agreement is non-exclusive. Grantor hereby reserves to itself, its successors and assigns, all rights in and to the Franchise Area and the right to use and enjoy the surface and subsurface thereof for any and all purposes; provided however, Grantor covenants and agrees that it shall not grant, assign, convey or transfer any franchise, license, permit or other interest in the Franchise Area to any other party for rail operations or other rail uses. Subject to Grantor's covenant in the foregoing sentence related to rail operations and other rail uses, Grantor specifically RESERVES AND RETAINS FOR THE BENEFIT OF GRANTOR, ITS SUCCESSORS AND ASSIGNS, without limitation: (i) the right of passage over the Franchise Area and (ii) the right to use the Franchise Area for the location, construction, reconstruction, relocation and operation of such surface or subsurface pipelines, transmission lines, fiber optics, telecommunications lines, drainage lines and other facilities and improvements as necessary or desired by Grantor. Notwithstanding the foregoing or anything contained herein to the contrary, however, Grantor and its successors' and assigns' exercise of Grantor's reserved rights shall in no event interfere with Grantee's Railroad Facility or Grantee's operations, the determination of what constitutes interference being in Grantee's sole and absolute discretion. The franchise rights granted pursuant to this Franchise Agreement are neither exclusive nor a dedication of the Franchise Area to the public. Title to the Rail Facility shall be and remain in Grantee, and Grantee, at its sole cost and expense, shall have the right to remove the Rail Facility at any time and, as provided herein, shall remove the Rail Facility at the expiration or termination of the Franchise.

2. The parties acknowledge and agree that, as a material consideration for the grant of the Franchise by Grantor to Grantee, Grantee is simultaneously herewith granting an easement ("Drainage Easement") to Grantor over certain property located in Klamath County for the sole purposes of constructing, reconstructing, installing, repairing, and maintaining public drainage and appurtenant connections and related facilities ("Drainage Facilities"), all as further described in the Drainage Easement. The parties further acknowledge and agree that the original fully executed and acknowledged Drainage Easement and the original fully executed and acknowledged Franchise shall each be promptly delivered by the last party to execute to: LandAmerica American Title Company ("Title Company"), 6029 Beltline Road, Suite 250, Dallas, Texas 75254, Attn: Carole Badgett, Senior Vice President, telephone: (972) 789-8426, facsimile (972) 789-8029, e-mail: Carole.Badgett@LandAm.com. Title Company shall hold the originals in escrow and shall not record either the Drainage Easement or the Franchise until it has received:

a. Immediately available funds in the form of a federal wire transfer, certified or cashier's check, or such other means of funding acceptable to Title Company so as to constitute readily available funds for immediate disbursement by Title Company ("Readily Available Funds") from:

i. Grantee in an amount equal to the sum of:

- (1) the cost of the Franchise Title Policy (as hereinafter defined),
- (2) ~~the cost of the Franchise Area Survey (as hereinafter defined)~~ 
- (3) one-half of Title Company's escrow fee and
- (4) the cost of recording the Franchise.

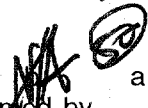
ii. Grantor in an amount equal to the sum of:

- (1) the cost of the Drainage Easement Title Policy (as defined in the Drainage Easement),
- (2) the cost of the Drainage Easement Area Survey (as defined in the Drainage Easement),
- (3) one-half of Title Company's escrow fee and
- (4) the cost of recording the Drainage Easement.

b. Such other and further documents as may be reasonably required to consummate the transactions contemplated by this Franchise Agreement and the Drainage Easement Agreement and for Title Company to: (i) issue the Franchise Title Policy and the Drainage Easement Title Policy pursuant to this Franchise Agreement and the Drainage Easement Agreement and (ii) disburse the Readily Available Funds collected under Section 2.a. above to the party(ies) entitled to such disbursements.

3. Within thirty (30) days after the Effective Date, Grantee shall, at its sole cost and expense, obtain:

a. an ALTA Owner's Policy ("**Franchise Title Policy**") issued by Title Company, or a binding commitment by Title Company to issue the Franchise Title Policy, insuring Grantee's interest in the Franchise, and

 a current on-the-ground staked survey ("**Franchise Area Survey**") of the Franchise Area performed by _____ ("**Surveyor**"), which Franchise Area Survey must: (i) be certified to Grantor, Grantee and the Title Company, (ii) reflect the actual dimensions of and the total number of gross and net acres within the land described therein, (iii) identify any rights-of-way, easements, or other encumbrances by applicable recording reference, (iv) show the location of all improvements (including, but not limited to, railroad tracks), (v) be conducted in accordance with the Minimum Detail Requirements and Standards for Land Title Surveys of the American Title Association and American Congress on Surveying and Mapping, and (vi) include the Surveyor's registered number and seal, the date of the survey, and a surveyor certificate reasonably acceptable to Grantor, Grantee and the Title Company.

c. Notwithstanding anything contained herein to the contrary, Grantor has no obligation whatsoever, monetary or otherwise, with respect to the Franchise Title Policy, the Franchise Area Survey or any matters disclosed therein.

4. The Franchise is granted subject to any and all restrictions, covenants, easements, licenses, permits, leases and other encumbrances of record, if any, relating to the Franchise Area and subject to all applicable federal, state and local laws, regulations, ordinances, restrictions, covenants and court or administrative decisions and orders, including without limitation zoning laws, regulations, and ordinances of municipal and other governmental authorities (collectively, "**Laws**").

5. The Franchise shall continue to be in effect until Grantee, or its successors and assigns, ceases to use the Franchise Area for Grantee's purposes and Grantee, or its successors or assigns, removes Grantee's Rail Facility from the Franchise Area. Grantee's Rail Facility, machinery and other equipment located on the Franchise Area are and shall remain the property of Grantee. Upon termination of this Franchise for any reason, Grantee shall remove the Rail Facility and all machinery and other equipment belonging to Grantee from the Franchise Area within forty-five (45) days of such termination, weather and site conditions permitting.

6. Grantee has the right, at Grantee's expense, to draw electricity and other utilities over, upon, across, through or under the Franchise Area that Grantee, in its sole discretion, considers necessary or convenient to construct, operate, maintain, repair, modify, reinstall, relocate, replace or remove Grantee's Rail Facility. The foregoing right does not, by prescription, necessity or otherwise, grant the Grantee the right to place any of the foregoing outside of the Franchise Area or to use property outside of the Franchise Area to access the Franchise Area for any of the foregoing. Grantee shall not permit the existence of any nuisance or accumulation of junk, debris or other unsightly materials on the Franchise Area and shall keep the Franchise Area in a clean and safe condition.

7. Grantee shall have the right to remove and discard any and all fences, improvements, brush, foliage, trees or other obstructions within the Franchise Area at any and all times and from time to time.

8. To the extent any streets or roadways are located within the Franchise Area, Grantee agrees to maintain, at its sole cost and expense, the grade of any streets or roadways and otherwise improve and repair the grade to the same condition as existing at the effective date of this Franchise Agreement. Grantee further agrees to construct and maintain, at its sole cost and expense, all at-grade crossings over streets or roadways that are required to be constructed and maintained pursuant to orders of the ODOT Rail Division.

9. Grantee acknowledges that Grantor has made no representation whatsoever to Grantee concerning the state or condition of the Franchise Area, or any personal property located thereon, or the nature or extent of Grantor's ownership interest in the Franchise Area. Grantee has not relied on any statement or declaration of Grantor, oral or in writing, as an inducement to entering into this Franchise Agreement, other than as set forth herein. GRANTOR HEREBY DISCLAIMS ANY REPRESENTATION OR WARRANTY, WHETHER EXPRESS OR IMPLIED, AS TO THE DESIGN OR CONDITION OF ANY PROPERTY PRESENT ON OR CONSTITUTING THE FRANCHISE AREA, ITS MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE, THE QUALITY OF THE MATERIAL OR WORKMANSHIP OF ANY SUCH PROPERTY, OR THE CONFORMITY OF ANY SUCH PROPERTY TO ITS INTENDED USES. GRANTOR SHALL NOT BE RESPONSIBLE TO GRANTEE OR ANY OF GRANTEE'S CONTRACTORS FOR ANY DAMAGES RELATING TO THE DESIGN, CONDITION, QUALITY, SAFETY, MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE OF ANY PROPERTY PRESENT ON OR CONSTITUTING THE FRANCHISE AREA, OR THE CONFORMITY OF ANY SUCH PROPERTY TO ITS INTENDED USES. GRANTEE ACCEPTS ALL RIGHTS GRANTED UNDER THIS FRANCHISE AGREEMENT IN THE FRANCHISE AREA IN AN "AS IS, WHERE IS" AND "WITH ALL FAULTS" CONDITION, AND SUBJECT TO ALL LIMITATIONS ON GRANTOR'S RIGHTS, INTERESTS AND TITLE TO THE FRANCHISE AREA.

10. GRANTOR DOES NOT WARRANT ITS TITLE TO THE FRANCHISE AREA NOR UNDERTAKE TO DEFEND GRANTEE IN THE PEACEABLE POSSESSION OR USE THEREOF. NO COVENANT OF QUIET ENJOYMENT IS MADE. In case of the eviction of Grantee by anyone owning or claiming title to or any interest in the Franchise Area, Grantor shall not be liable to refund Grantee any compensation paid hereunder.

11. Grantee shall, at its sole cost and expense, procure and maintain during the life of this Franchise Agreement the following insurance coverage:

a. Commercial General Liability Insurance. This insurance must contain broad form contractual liability with a combined single limit of a minimum of \$1,000,000 each occurrence and an aggregate limit of at least \$2,000,000. Coverage must be purchased on a post 1998 ISO occurrence form or equivalent and include coverage for, but not limited to, the following:

- ◆ Bodily Injury and Property Damage
- ◆ Personal Injury and Advertising Injury
- ◆ Fire legal liability
- ◆ Products and completed operations

This policy must also contain the following endorsements, which must be indicated on the certificate of insurance:

- ◆ The employee and workers compensation related exclusions in the above policy shall not apply with respect to claims related to railroad employees.
- ◆ The definition of insured contract must be amended to remove any exclusion or other limitation for any work being done within 50 feet of railroad property.
- ◆ Any exclusions related to the explosion, collapse and underground hazards must be removed.

No other endorsements limiting coverage may be included on the policy with regard to the work being performed under this Franchise or otherwise with respect to any obligations under this Franchise.

b. Business Automobile Insurance. This insurance must contain a combined single limit of at least \$1,000,000 per occurrence, and include coverage for, but not limited to, the following:

- ♦ Bodily injury and property damage
- ♦ Any and all vehicles owned, used or hired

c. Workers Compensation and Employers Liability Insurance. This insurance includes coverage for, but not limited to:

- ♦ Grantee's statutory liability under the worker's compensation Laws of the state(s) in which the work is to be performed. If optional under State Law, the insurance must cover all employees anyway.
- ♦ Employers' Liability (Part B) with limits of at least \$500,000 each accident, \$500,000 by disease policy limit, \$500,000 by disease each employee.

d. Other Requirements. In addition to the foregoing, the following other requirements shall apply to this Section:

i. Where allowable by Law, all policies (applying to coverage listed above) must not contain an exclusion for punitive damages and certificates of insurance must reflect that no exclusion exists.

ii. Grantee agrees to waive its right of recovery against Grantor for all claims and suits against Grantor resulting from Grantee's willful misconduct or negligent act or omission in its maintenance or use of the Franchise Area. In addition, its insurers, through the terms of the policy or policy endorsement, waive their right of subrogation against Grantor. The certificate of insurance must reflect the waiver of subrogation endorsement. Grantee further waives its right of recovery, and its insurers also waive their right of subrogation against Grantor, for loss of its owned or leased property or property under its care, custody or control.

iii. Grantee's insurance policies, through policy endorsement, must include wording which states that the policy will be primary and non-contributing with respect to any insurance carried by Grantor in regard to any claim that results from Grantee's willful misconduct or negligent act or omission in its maintenance or use of the Franchise Area. The certificate of insurance must reflect that the above wording is included in evidenced policies.

iv. All policy(ies) required above (excluding Workers Compensation and if applicable, Railroad Protective) must include a severability of interest endorsement and must name Grantor as an additional insured with respect to work performed under this Franchise. Severability of interest and naming Grantor as an additional insured must be indicated on the certificate of insurance.

v. Prior to commencing work, Grantee must furnish to Grantor a letter of self-insurance

vi. Any insurance policy must be written by a reputable insurance company acceptable to Grantor or with a current Best's Guide Rating of A- and Class VII or better, and authorized to do business in the state(s) in which the service is to be provided.

vii. Notwithstanding anything contained herein to the contrary, however, Grantor agrees that Grantee may meet these requirements through providing to Grantor proof of its program of self-insurance. Grantor agrees that BNSF Railway Company is insured under Burlington Northern Santa Fe Corporation's Excess Property and Liability Policies. Grantee's self-insured retention is in keeping with its net worth and cash flows and is consistent with that of other corporations of similar operations and size. Adequate reserves are maintained for claims within its retention.

12. Grantee's rights under this Franchise Agreement are and shall be subject and subordinate to any mortgage presently existing, if any, or hereafter placed upon all or any portion of the Franchise Area and any and all matters of record affecting the Franchise Area; provided, however, as a condition to this subordination by Grantee, Grantee's rights under the Franchise shall not be disturbed, nor shall the Franchise be terminated or otherwise affected by Grantor's default under any mortgage.

13. The Franchise shall (a) run with the land, (b) be binding upon Grantor, its successors, legal

representatives and assigns, and (c) inure to the benefit of Grantee, its successors, legal representatives and assigns.

14. Grantee shall have the right to assign or transfer this Franchise without Grantor's consent to any entity owned or controlled by Grantee or any parent or affiliate of Grantee and to any entity that is the successor of Grantee by reason of merger, consolidation or reorganization; provided, however, that the assignee in each instance assumes all of the obligations of Grantee hereunder. With Grantor's consent, which consent shall not be unreasonably withheld, conditioned or delayed, Grantee may assign or transfer a portion of its rights under this Franchise to third parties, provided such third party assumes a proportional share of the related obligations of the Grantee hereunder. Notwithstanding the foregoing, however, Grantee may, without Grantor's consent but subject to all provisions hereof, assign or transfer a portion of its rights under this Franchise to third parties for the purpose of collocating such third parties' communications equipment and related appurtenances on Grantee's Rail Facility.

15. This Franchise Agreement, together with the Drainage Easement, represents the full and complete agreement between Grantor and Grantee with respect to all matters relating to Grantee's use of the Franchise Area, and supersedes any and all other agreements between the parties hereto relating to Grantee's use of the Franchise Area as described herein.

16. If any action at law or in equity is necessary to enforce or interpret the terms of this Franchise Agreement, the prevailing party or parties shall be entitled to reasonable attorneys' fees, costs and necessary disbursements in addition to any other relief to which such party or parties may be entitled.

17. All questions concerning the interpretation or application of provisions of this Franchise Agreement shall be decided according to the substantive Laws of the State where the Franchise Area is located without regard to conflicts of law provisions.

18. If any provision of this Franchise Agreement is held to be illegal, invalid or unenforceable under present or future Laws, such provision will be fully severable and this Franchise Agreement will be construed and enforced as if such illegal, invalid or unenforceable provision is not a part hereof, and the remaining provisions hereof will remain in full force and effect. In lieu of any illegal, invalid or unenforceable provision herein, there will be added automatically as a part of this Franchise Agreement a provision as similar in its terms to such illegal, invalid or unenforceable provision as may be possible and be legal, valid and enforceable.

TO HAVE AND TO HOLD THE ABOVE-DESCRIBED FRANCHISE free and clear of all liens or claims by third parties, together with all the hereditaments and appurtenances thereunto belonging to Grantee for its use and enjoyment for the purposes aforesaid and for no other purpose whatsoever subject to the terms and conditions hereinbefore stated.

[The balance of this page has been intentionally left blank.]

IN WITNESS WHEREOF, this instrument has been executed to be effective as of the

20th
7th day of April
February 2005⁶

GRANTOR:

KLAMATH COUNTY, a political subdivision of the State of Oregon

By: William R. Brown
Name: Bill Brown
Title: Commissioner

GRANTEE:

BNSF RAILWAY COMPANY, a Delaware corporation

By: Blaine Bilderback
Name: Director - Acquisition & Development
Title: Blaine Bilderback

ACCEPTED AND AGREED AS TO SECTIONS 2 AND 3:

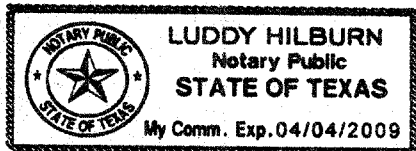
LANDAMERICA AMERICAN TITLE COMPANY, a(n) _____

By: Selena Thornton
Name: Selena Thornton
Title: Commercial Escrow Officer

THE STATE OF Texas
COUNTY OF Tarrant

§
§
§

This instrument was acknowledged before me on the 20 day of April, 2008, by Blaine Bilderbach
of BNSF Railway Company, a Delaware corporation, on behalf of said corporation.



Luddy Hilburn
Notary Public, State of TEXAS

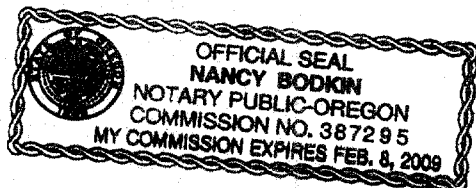
Luddy Hilburn
Notary's Typed or Printed Name

My Commission Expires 04/04/09

THE STATE OF Oregon
COUNTY OF Klamath

§
§
§

This instrument was acknowledged before me on the 7th day of February, 2008, by Chaumian
William R. Brown of Klamath County, a political subdivision of the State of Oregon, on behalf of said county.



Nancy Bodkin
Notary Public, State of Oregon

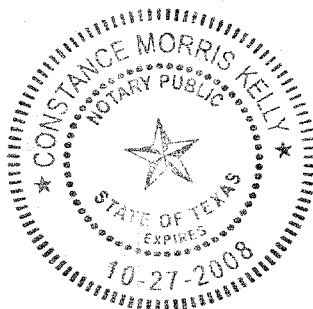
Nancy Bodkin
Notary's Typed or Printed Name

My Commission Expires Feb 8, 2009

THE STATE OF Texas
COUNTY OF Dallas

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This instrument was acknowledged before me on the 15th day of August, 2008, by Selena
Troutman of LandAmerica Title Company, a(n) title company, on behalf of said title company.



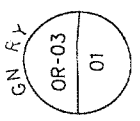
Constance Morris Kelly
Notary Public, State of Texas

Constance Morris Kelly
Notary's Typed or Printed Name

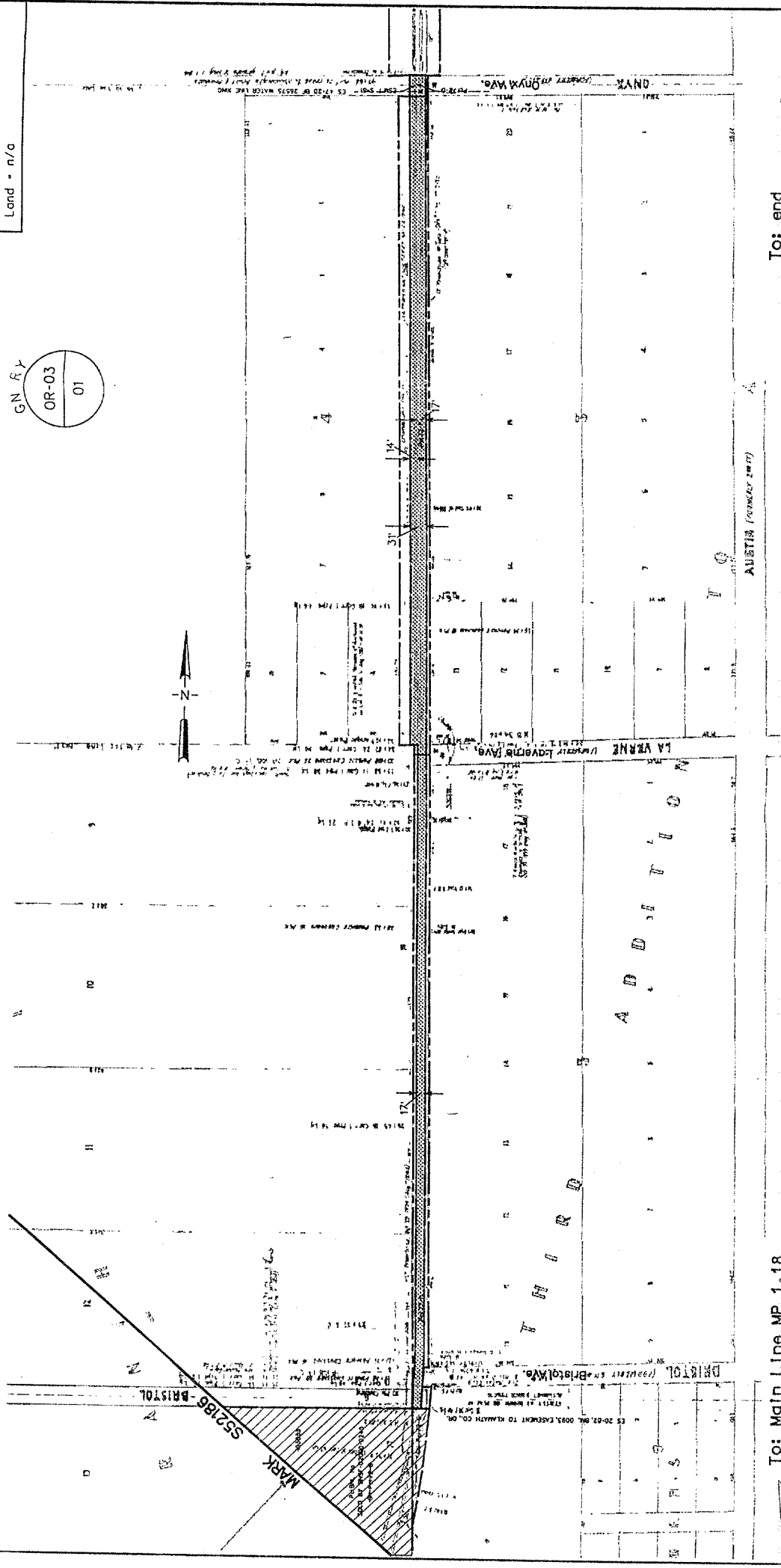
My Commission Expires _____

EXHIBIT "A"

BNSF File:
B&W Proj. No.:12196.003
MAP REFERENCE:
Sta. - S52187
R/W - r52566
Land - n/a



Scale: 1"= 200' +/-



To: end

Franchise of +/- 1.471 Ac.

To: Klamath County-Public Works Department
At: Klamath Falls
Klamath County,
Oregon

Northwest Division
Oregon Trunk Subdivision - L.S. 0055
Vdl. Sec. OR-3 GN RY
Map S-1
Sec. 10, T39S, R9E WILLM
February 25, 2004
ES 20+73 Opp. M.P. 1.18 THM

Legend:
[Hatched Box] Franchise Area

EXHIBIT "A-1"

Description of Franchise Area

A strip of land 17 feet wide, or 8½ feet in width on each side of a proposed centerline of a connecting track, over and across Third Avenue, Fourth Avenue, Fifth Avenue and Sixth Avenue and over, across and along First Street, all in the west half of Section 10, Township 39 South, Range 9 East of the Willamette Meridian.

The said proposed centerline being more particularly described as follows:

Commencing at the end of the centerline of a spur track of the Oregon, California & Eastern Railway Company in the southwest quarter of the southwest quarter of Section 3, Township 39 South, Range 9 East of the Willamette Meridian; thence southerly and tangent, being a prolongation of said centerline, 25.6 feet more or less to south line of said Section 3; thence continue southerly and tangent 20 feet more or less to the south line of said Third Avenue; thence southerly over Burlington Northern Inc. property to a point in the north line of Fourth Avenue which point is 14.5 feet east of the intersection of said north line of Fourth Avenue with the west quarter quarter line of Section 10, Township 39 South, Range 9 East of the Willamette Meridian; thence southerly along a line parallel to and 14.5 feet east of said west quarter quarter line of said Section 10, 2595.8 feet more or less to the north line of Sixth Avenue; thence southwesterly on a four degree curve to the right 40 feet to the south line of Sixth Avenue, and continuing on a curve southwesterly over Burlington Northern Inc. property to a point in the centerline of a wye tail track as now constructed of the Burlington Northern Inc.

ALSO

A strip of land fourteen (14) feet wide westerly of and parallel with the center line of right of way granted in the franchise recorded in Vol. 14, page 91, Commissioners' Journal, Klamath County, Oregon, the west line of said strip being twenty-two and five tenths (22.5) feet from said center line, and commencing on the north Street line of Laverne Avenue and continuing northward along Avalon Street to the North Street line of Onyx Avenue.