

ENVIRONMENTAL PROTECTION DECLARATION OF RESTRICTIVE COVENANTS

CURTIS METALS MAINTENANCE FACILITY

This Environmental Protection Declaration of Restrictive Covenants ("EPDRC") is made this 21st day of July, 2004 by and between the Burlington Northern and Santa Fe Railway Company ("Grantor"), having an address of 2500 Lou Menk Drive, Fort Worth, Texas, 76131 and the City of Curtis, Nebraska ("Grantee"), having an address of P.O. Box 6, Curtis, Nebraska, 69025. The United States of America c/o the United States Environmental Protection Agency Region VII ("EPA") having an address of 901 North Fifth Street, Kansas City, Kansas, 66101, is an intended third-party beneficiary to this EPDRC.

WITNESSETH:

1. WHEREAS, Grantor is the owner of real property located in Frontier County, Nebraska at U.S. Highway 18, in Curtis, Nebraska, latitude 40°37'30" and longitude 100°31'12", more particularly described in Exhibit A attached hereto and made a part hereof (the "Property" or "Facility");
2. WHEREAS, the Curtis Metals Maintenance Facility ("CMMF") NED058808908 was located at the Property for which the EPA, pursuant to 40 C.F.R. § 270.41 and § 270.141, issued and modified a Post Closure Permit to require corrective remedial action at the Property;
3. WHEREAS, in the August 29, 2002 modification to the Post Closure Permit the Grantor agreed that if residual contamination remains on site in soils at a level that does not allow for unrestricted use, institutional controls would be implemented, which would include restrictive covenants and deed restrictions;
4. WHEREAS, the Grantor has implemented the remedy at the Property and residual soil contamination remains in the subsurface of the soil in some portions of the Property at a level that does not allow for unrestricted use;
5. WHEREAS, the parties hereto have agreed pursuant to the modification to the Post Closure Permit to impose on the Property use restrictions as covenants that will run with the land for the purpose of protecting human health and the environment; and
6. WHEREAS, the Grantor wishes to cooperate fully with the Grantee and EPA in the implementation of corrective measures at this Property.

NOW, THEREFORE,

7. Grantor, on behalf of itself, its successors and assigns, in consideration of the terms of the Post Closure Permit, does hereby covenant and declare that the Property shall be subject to the restrictions on use set forth below, and does convey to the Grantee, and its assigns, the perpetual right to enforce said use restrictions.

8. **Purpose:** It is the purpose of this instrument to convey to the Grantee real property rights, which will run with the land, to facilitate the remediation of past environmental contamination and to protect human health and the environment by reducing the risk of exposure to contaminants.
9. **Restrictions on use:** The following covenants, conditions, and restrictions apply to the use of the Property, run with the land and are binding on the Grantor, its heirs, successors, transferees, and assigns for the benefit of the Grantee and its successors, and assigns:
- unless approved in writing by the EPA or its assigns, the Facility shall not be used for residential purposes conducive to the sustained use by children nor for any purpose that could reasonably be expected to attract children for significant periods of time, including, but not limited to, schools, playgrounds, and child care facilities; and
 - unless approved in writing by EPA or its assigns, there shall be no disturbance of surface or subsurface of the Facility by filling, drilling, excavation, removal of topsoil, rock or minerals, or change of topography in any manner.
10. **Modification of use restrictions:** The above restrictions on use may be modified or terminated, in part or in whole, only upon written approval by the EPA or its assigns. If requested by the Grantor or its successors, such written modification shall be executed by EPA in recordable form.
11. **Reserved rights of Grantor:** Grantor hereby reserves unto itself, its successors and assigns, all rights and privileges in and to the use of the Property that are not incompatible with the restrictions, rights and covenants granted herein.
12. Nothing in this document shall limit or otherwise affect EPA's rights of entry and access or EPA's authority to take response actions under the Resource Conservation and Recovery Act ("RCRA"), or other federal law.
13. **No public access and use:** No right of access or use by the general public to any portion of the Property is conveyed by this instrument.
14. **Notice requirement:** Grantor agrees to include in any instrument conveying any interest in any portion of the Property, including, but not limited to deeds, leases and mortgages, a notice that is in substantially the same form:
- NOTICE: THE INTEREST CONVEYED HEREBY IS SUBJECT TO A DECLARATION OF RESTRICTIVE COVENANTS, DATED ____, 2004, RECORDED IN THE PUBLIC LAND RECORDS ON ____, 2004, IN BOOK ____, PAGE ____, IN FAVOR OF AND ENFORCEABLE BY THE CITY OF CURTIS, NEBRASKA AND THE UNITED STATES OF AMERICA.**
15. **Administrative jurisdiction:** The federal agency having administrative jurisdiction over the interests acquired by the United States by this instrument is the EPA.

16. Enforcement: The Grantee shall be entitled to enforce the terms of this instrument by resort to specific performance or legal process. All remedies available hereunder shall be in addition to any and all other remedies at law or in equity. Enforcement of the terms of this instrument shall be at the discretion of the Grantee, and any forbearance, delay or omission to exercise their rights under this instrument in the event of a breach of any term of this instrument shall not be deemed to be a waiver by the Grantee of such terms or of any subsequent breach of the same or any other term, or of any of the rights of the Grantee under this instrument.

17. Waiver of certain defenses: Grantor hereby waives any defenses of laches, estoppel or prescription.

18. Covenants: Grantor hereby covenants to and with the United States and its assigns, that the Grantor is lawfully seized in fee simple of the Property, that the Grantor has a good and lawful right and power to sell and convey the Property or any interest therein, that the Property is free and clear of encumbrances, except those noted on Exhibit B attached hereto, and that the Grantor will forever warrant and defend the title thereto and the quiet possession thereof.

19. Notices: Any notice, demand, request, consent, approval, or communication that any party desires or is required to give to the other shall be in writing and shall either be served personally or sent first class mail postage prepaid, addressed as follows;

To Grantor:

Greg Jeffries, Manager Environmental Remediation
The Burlington Northern Santa Fe Railway Company
80 44th Avenue
Minneapolis, Minnesota 55421

With copy to:

Dave Schneider, General Director- Real Estate
The Burlington Northern Santa Fe Railway Company
2500 Lou Menk Drive, AOB-3rd Floor
Fort Worth, TX 76131

and

Russell Light, Senior General Attorney
The Burlington Northern Santa Fe Railway Company
2500 Lou Menk Drive, AOB-3rd Floor
Fort Worth, TX 76131

To Grantee:

City Administrator
City of Curtis
P.O. Box 6
Curtis, Nebraska 69025

To EPA, third-party beneficiary:
U.S. Environmental Protection Agency, Region VII
Air, RCRA & Toxics Division/RCAP
Curtis Metals Maintenance Facility
901 North Fifth Street
Kansas City, Kansas 66101

20. General Provisions

a. Controlling law: The interpretation and performance of this instrument shall be governed by the laws of the United States or, if there are not applicable federal laws, by the law of the State of Nebraska.

b. Liberal construction: Any general rule of construction to the contrary notwithstanding, this instrument shall be liberally construed in favor of the grant to effect the purpose of this instrument and the policy and purpose of RCRA. If any provision of this instrument is found to be ambiguous, an interpretation consistent with the purpose of this instrument that would render the provisions valid shall be favored over any interpretation that would render it invalid.

c. Severability: If any provision of this instrument, or the applicability of it to any person or circumstances, is found to be invalid, the remainder of the provisions of this instrument, or the application of such provisions to persons or circumstances other than those to which it is found to be invalid, as the case may be, shall not be affected thereby.

d. Entire agreement: This instrument sets forth the entire agreement of the parties with respect to the rights and restrictions created hereby, and supercedes all prior discussions, negotiations, understandings, or agreements relating thereto, all of which are merged herein.

e. No forfeiture: Nothing contained herein will result in a forfeiture or reversion of Grantor's title in any respect.

f. Successors: The covenants, terms, conditions, and restrictions of this instrument shall be binding upon, and inure to the benefit of, the parties hereto and their respective personal representatives, heirs, successors, and assigns and shall continue as a servitude running in perpetuity with the Property. The term "Grantor", whenever used herein, and any pronouns used in place thereof, shall include the persons and/or entities named at the beginning of this document, identified as "Grantor" and their personal representatives, heirs, successors, and assigns. The term "Grantee", wherever used herein, and any pronouns used in place thereof, shall include the persons and/or entities named at the beginning of this document, identified as "Grantee" and their personal representatives, heirs, successors, and assigns. The rights of the Grantee and Grantor under this instrument are freely assignable, subject to the notice provisions hereof.

g. Termination of rights and obligations: A party's rights and obligations under this instrument terminate upon transfer of the party's interest in the Property except that liability for acts or omissions occurring prior to the transfer shall survive transfer.

h. Captions: The captions in this instrument have been inserted solely for the convenience of reference and are not a part of this instrument and shall not have any effect upon construction or interpretation.

i. Counterparts: The parties may execute this instrument in two or more counterparts, which shall, in aggregate, be signed by all parties; each counterpart shall be deemed an original instrument as against any party who has signed it. In the event of any disparity between the counterparts produced, the recorded counterpart shall be controlling.

IN WITNESS WHEREOF, Grantor has caused this EPDRC to be signed in its name.

Executed this 30th day of August, 2004.

The Burlington Northern and Santa Fe Railway Company

by: D.P. Schneider
title: GENERAL DIRECTOR REAL ESTATE

APPROVED AS TO FORM

R. A. [Signature]
Burlington Northern Santa Fe Law Department

STATE OF Texas)
COUNTY OF Tarrant) ss

On this 31st Day of Aug., 2004, before me, the undersigned, a Notary Public in and for the County and State aforesaid, personally appeared D.P. Schneider, the Grantor that executed the foregoing instrument and acknowledged the execution of this instrument to be the free and voluntary act of said Grantor for the uses and purposes stated in this instrument, and on oath state that they are authorized to execute this instrument.

Witness my hand and seal hereto affixed the day and the year written above

Jammy K. Heurden
Notary Public in and for the State of Texas

My Commission Expires: _____



This EPDRC is accepted this 21st day of July, 2004.

Grantee: City of Curtis

by: [Signature]
title: Mayor

Attest: [Signature]
City Clerk

EXHIBIT "A"

That portion of the N $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 32, Township 8 North, Range 28 West of the 6th P. M., Frontier County, Nebraska, described as follows, to-wit:

Beginning at a point on the North line of said N $\frac{1}{2}$ NE $\frac{1}{4}$ distant 815 feet East of the Northwest corner of the NE $\frac{1}{4}$ of said Section 32; thence South 07° 55' East, taking said North line as a base from which to measured all angles, 402.5 feet, more or less, to a point 50 feet distant from and at right angles to Chicago, Burlington & Quincy Railroad Company's Main Track centerline, as originally located and constructed; thence South 64° 13' West, parallel with said Main Track centerline, 324.6 feet; thence North 07° 55' West to a point 75 feet distant from and at right angles to said Main Track centerline; thence North 64° 13' East, parallel with said Main Track centerline to a point 150 feet distant from and at right angles to the herein first course; thence North 07° 55' West, 377.26 feet; thence North 64° 13' East to the Point of Beginning.

ALSO,

Beginning at a point on the North line of said N $\frac{1}{2}$ NE $\frac{1}{4}$ distant 815 feet East of the Northwest corner of the NE $\frac{1}{4}$ of said Section 32; thence South 07° 55' East, taking said North line as a base from which to measured all angles, 452.96 feet to Chicago, Burlington & Quincy Railroad Company's Main Track centerline, as originally located and constructed; thence North 65° 24' East, along said Main Track centerline, 1,077.85 feet to the intersection with the North line of said Section 32; thence West along said section line 1,042.3 feet to the Point of Beginning, **EXCEPTING THEREFROM**, that portion lying within 50 feet of said Main Track centerline.

SUBJECT TO,

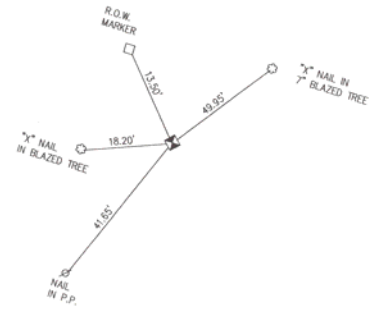
That certain Entry Agreement between the Burlington Northern and Santa Fe Railway Company and Clarence Burch an Individual, dated August 26, 2002; and

That certain Land Lease between the Burlington Northern and Santa Fe Railway Company and Nebraska, Kansas & Colorado RailNet, Inc., dated August 1, 2002.

Curtis, NE August 4, 2004

RECORDED AT FRONTIER COUNTY, NE
January 14, 2005 at 11:00 A.M.
 Book 44, *Misc*, Page 17

Darla M. Walther
 County Clerk/Register of Deeds



SECTION 32

SET 1/2" X 24" REE
W/ PLASTIC CAP
STAMPED RLS 554
MONITORING W/...
PIET...