

**REPORT/RECOMMENDATION TO THE BOARD OF SUPERVISORS
OF SAN BERNARDINO COUNTY
AND RECORD OF ACTION**

May 7, 2024

FROM

NOEL CASTILLO, Director, Department of Public Works - Transportation

TERRY W. THOMPSON, Director, Real Estate Services Department

SUBJECT

Pipeline License and Pipeline Crossing Agreements with BNSF Railway Company and Union Pacific Railroad Company for the Glen Helen Parkway Bridge Over Cajon Wash Project in the Devore Area

RECOMMENDATION(S)

1. Find that approvals of the Pipeline License Agreement with BNSF Railway Company, and the Pipeline Crossing Agreement with Union Pacific Railroad Company, for non-exclusive licenses for continued permitted use of an approximately 192-foot crossing, and 100-foot crossing, respectively, for the Glen Helen Parkway Bridge Over Cajon Wash Project in the Devore Area is an exempt project under the California Environmental Quality Act Guidelines Section 15282(g) for railroad grade separation projects as set forth in Section 21080.13 of the Public Resource Code.
2. Approve Pipeline License **Agreement No. 24-378** with BNSF Railway Company, including non-standard terms, in an amount of \$3,700 and for a term of 25 years, for a non-exclusive license for continued permitted use of an approximately 192-foot crossing for the Glen Helen Parkway Bridge Over Cajon Wash Project in the Devore Area.
3. Approve Pipeline Crossing **Agreement No. 24-379** with Union Pacific Railroad Company, including non-standard terms, in an amount of \$13,870 for an undefined term, for a non-exclusive license for continued permitted use of approximately 100-foot crossing for the Glen Helen Parkway Bridge Over Cajon Wash Project in the Devore Area.
4. Direct the Department of Public Works to file the Notice of Exemption in accordance with the California Environmental Quality Act.

(Presenter: Terry W. Thompson, Director, 387-5000)

COUNTY AND CHIEF EXECUTIVE OFFICER GOALS & OBJECTIVES

Ensure Development of a Well-Planned, Balanced, and Sustainable County.

Provide for the Safety, Health and Social Service Needs of County Residents.

Pursue County Goals and Objectives by Working with Other Agencies and Stakeholders.

FINANCIAL IMPACT

Approval of this item will not result in the use of additional Discretionary General Funding (Net County Cost). The Department of Public Works (DPW) is funded by Gas Tax revenue, fees and other federal, state and local funding. The total cost of the Pipeline License Agreement with BNSF Railway Company (BNSF) will be a one-time fee of \$3,700 and the total cost of the Pipeline Crossing Agreement with Union Pacific Railroad Company (UPRR) will be a one-time fee of \$13,870 for the Glen Helen Parkway Bridge Over Cajon Wash in the Devore Area

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(Project). These agreements are funded by the San Bernardino County Transportation Authority at 72.2% (\$12,686) with a local match of 22.8% (\$4,884) funded by Discretionary General Funding allocated to DPW in the 2015-16 and 2023-24 recommended budgets. Sufficient appropriation and revenue are included in the DPW's 2023-24 Road Operations budget (6650002000 11H14057) and will be included in future recommended budgets.

BACKGROUND INFORMATION

The Glen Helen Bridge experiences traffic congestion during events at the nearby Glen Helen Amphitheater, as well as during closures on Interstate 15 and Interstate 215. The Project will replace the existing two-lane bridge with a longer four-lane bridge that will withstand a 100-year storm event. This bridge is the second part of a two-phase project to help minimize flooding and road closures, while mitigating traffic congestion by providing alternate routes for Interstate 15 and Interstate 215.

The acquisition of non-exclusive licenses for two pipeline crossings of approximately 192-feet and 100-feet from BNSF and UPRR are required for construction and maintenance of a storm drain facility in connection with Project. The storm drain will serve to convey storm water runoff into the Cajon Wash and will be crossing under existing BNSF and UPRR properties. Accordingly, this item seeks approval of the Pipeline License Agreement and the Pipeline Crossing Agreement with BNSF and UPRR, respectively, for the needed pipeline crossings.

Summary of License Terms

Licensors:	BNSF	UPRR
Location:	One pipeline, 54 inches in diameter inside a 72-inch steel casing, across or along Licensors' rail corridor at or near the station of Muscoy, San Bernardino County, Line Segment 7600, Mile Post 70.84 as shown on Drawing No. 89061, dated November 7, 2023, attached to the agreement as Exhibit "A."	One pipeline, 54 inches in diameter inside a 72-inch steel casing, across or along Licensors' rail corridor at or near Mile Post 479.99, San Bernardino County, as shown attached to the agreement as Exhibit "A."
Size:	Approximately 192-feet crossing	Approximately 100-feet crossing
Term:	25 year license	Continuing until terminated
Options:	None	None
Fee/Cost:	\$3,700 – One-time license fee payment	\$13,870 – One-time license fee payment
Annual Increases:	None	None
Improvement Cost:	None	None
Maintenance:	Licensee	Licensee
Utilities:	Licensee	Licensee
Insurance:	The Certificate of Liability Insurance as required by the license, including	The Certificate of Liability Insurance as required by the

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	Railroad Insurance, will be obtained by the Department prior to commencement.	Protective Liability	license, including Protective Liability Insurance, will be obtained by the Department prior to commencement.
Holdover:	No holdover language in license.		No holdover language in license.
Right to Terminate:	to Either party may terminate without cause upon 30 days written notice. Licensor may terminate for default under the agreement.		Either party may terminate without cause upon 30 days written notice. Licensor may terminate for default under the agreement.
Parking:	Not applicable.		Not applicable.

Both the Pipeline License Agreement and Pipeline Crossing Agreement include non-standard terms and omits certain County standard language. The non-standard and missing terms include the following:

1. The governing law for the Pipeline License Agreement is the state of Texas. The Pipeline Crossing Agreement is silent as to governing law.
 - The County standard contract requires California law.
 - Potential Impact: The Pipeline License Agreement will be interpreted under Texas state law. Any questions, issues or claims arising under the Pipeline License Agreement will require the District to hire outside counsel competent to advise on Texas state law, which may result in fees that exceed the total Pipeline License Agreement membership amount. The Pipeline Crossing Agreement is silent as to governing law. This results in uncertainty over which state's laws will govern the interpretation of the Pipeline Crossing Agreement and leads to ambiguity in interpretation of the contract terms. UPRR is a Delaware corporation. The Pipeline Crossing Agreement could be interpreted under any state law depending on where the claim is brought, including Delaware or California. Any questions, issues or claims arising under this contract could require the County to hire outside counsel competent to advise on the applicable state law, which may result in fees that exceed the total agreement amount.
2. The Pipeline License Agreement and Pipeline Crossing Agreement are silent upon the venue to bring and hear disputes.
 - The County standard contract requires venue for disputes to be San Bernardino County.
 - Potential Impact: The agreements are silent as to venue. This results in uncertainty over which state's court may hear disputes arising under the agreements. BNSF and UPRR are Delaware corporations. The agreements could be interpreted as to allow venue depending on where the claim is brought, including Delaware, Texas, or California. Any questions, issues or claims arising under this contract could require the County to hire outside counsel competent to advise on the applicable state law, which may result in fees that exceed the total contract amount.

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3. The Pipeline License Agreement requires payment of interest upon any sum not paid within 30-days of the date of invoice in an amount at an annual rate equal to the lesser of (i) the prime rate last published in The Wall Street Journal in the preceding December plus two and one-half percent, or (ii) the maximum rate permitted by law.
 - County standard payment terms are Net 60 days with no interest or late payment penalties.
 - Potential Impact: County standard processing time is 60 days or more. Failing to pay net 30 days will result in a material breach of the contract, which would allow BNSF to terminate the agreement and seek other legal remedies, including charging the County interest at a rate of an annual rate equal to the lesser of (i) the prime rate last published in The Wall Street Journal in the preceding December plus two and one-half percent, or (ii) the maximum rate permitted by law. County Counsel cannot advise on whether, and to what extent, Texas law may provide for such late payments and penalties to the extent allowable by applicable law.
4. The Pipeline License Agreement and Pipeline Crossing Agreement provide for prevailing parties attorneys' fees for all costs and expenses for litigation or other court action or adjudicatory proceeding.
 - The County standard contract requires each party to bear its own costs and attorney fees, regardless of who is the prevailing party.
 - Potential Impact: If BNSF or UPRR institutes any legal proceedings related to the agreements, and if it is the prevailing party, it will be entitled to recover reasonable attorneys' fees, which could exceed the total agreement amount.
5. The Pipeline License Agreement and Pipeline Crossing Agreement require the County to release and hold harmless BNSF and UPRR for, from, and against any and all liabilities of any nature, directly or indirectly arising from in whole or in part from, or related to, the agreements.
 - The County standard contract does not include a waiver, release, hold harmless, or limitation of liability.
 - Potential Impact: The agreements require the County to waive, release, hold harmless, and limit liability to the County for all claims arising from or which may arise from the agreements. Claims could exceed the waiver, release, and liability cap and the agreement amount leaving the County financially liable for the excess. In addition, the County's liability under the agreements are not similarly limited. County Counsel cannot advise on, whether and to what extent, Texas or Delaware law may limit or expand the exclusion of limits to the extent prohibited by applicable law.
6. The Pipeline License Agreement disclaims all warranties of any kind, including that BNSF gives no warranty, express or implied, title to the premises, quiet enjoyment, merchantability, habitability, or fitness for any particular purpose, or any other matter, of or for the work performed pursuant to the agreements.
 - The County standard contract provides that a contracting party fully warrants its services and deliverables they provide to the County.
 - Potential Impact: The County's use of the services, deliverables, and work under the agreement is solely at its own risk. Under California law, a party is not required to provide any warranty.

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7. The Pipeline License Agreement and Pipeline Crossing Agreement do not require BNSF or UPRR to meet the County insurance standards and require County to obtain Railroad Protective Liability Insurance.
 - The County standard contract requires contractors to carry appropriate insurance at limits and under conditions determined by the County's Risk Management Department.
 - Potential Impact: The agreements do not include County standard insurance requirements. This means that the County has no assurance that BNSF will be financially responsible for claims that may arise from the County's use of the software, which could result in expenses to the County that exceed the total agreement amount. In addition, County is required to obtain a policy for Railroad Protective Liability Insurance.
8. The County is required to indemnify BNSF and UPRR against any third-party claims, which may or could result from the work performed under the agreements.
 - The County standard contract does not include any indemnification or defense by the County of a Contractor.
 - Potential Impact: By agreeing to indemnify BNSF and UPRR, the County could be contractually waiving the protection of sovereign immunity. Claims that may otherwise be barred against the County, time limited, or expense limited could be brought against BNSF or UPRR without such limitations and the County would be responsible to defend and reimburse BNSF or UPRR for costs, expenses, and damages, which could exceed the total agreement amount. County Counsel cannot advise on, whether and to what extent, Texas or Delaware law may limit or expand this agreement term.
9. The Pipeline License Agreement and Pipeline Crossing Agreement do not require BNSF or UPRR to indemnify the County.
 - The County standard contract general indemnity provision requires the Contractor to indemnify, defend, and hold County harmless from third party claims arising out of the acts, errors or omissions of any person.
 - Potential Impact: BNSF and UPRR are not required to defend, indemnify or hold the County harmless from any claims, including indemnification for claims arising from BNSF's or UPRR's negligent or intentional acts. If the County is sued for any claim, in connection with BNSF or UPRR and the agreements, the County may be solely liable for the costs of defense and damages, which could exceed the total agreement amount. County Counsel cannot advise on whether and to what extent Texas or Delaware law may allow the County to require BNSF or UPRR to defend or indemnify it absent an express provision in the agreement.
10. The County may not assign the agreements without the written consent of BNSF and UPRR. Additionally, BNSF and UPRR may assign the agreements without notice to and without the consent of the County.
 - The County standard contract indicates the County must approve any assignment of the contract.
 - Potential Impact: The Pipeline License Agreement and Pipeline Crossing Agreement may be assigned to a third party without notice to the County and without the County's approval. This could allow the agreements to be assigned to

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a business with which the County is legally prohibited from doing business with due to issues of Federal debarment or suspension and conflict of interest, without the County's knowledge.

The Department recommends approval of the Pipeline License Agreement and Pipeline Crossing Agreement with BNSF and UPRR, respectively, including non-standard terms, in order to acquire necessary licenses for pipeline crossings for construction and maintenance of a storm drain facility in connection with Project.

On November 16, 2010 (Item No. 43), the Board of Supervisors (Board) determined that the Project was exempt under the California Environmental Quality Act (CEQA), approved the Project as defined in the Notice of Exemption, and directed the Clerk of the Board to post said notice. Additionally, on June 29, 2012, Caltrans determined the Project was excluded under National Environmental Policy Act (NEPA) Section 6005 of 23 United States Code 327. The project to approve these licenses with DPW was reviewed pursuant to CEQA and determined to be statutorily exempt under Guidelines Section 15282(g) for railroad grade separation projects as set forth in Section 21080.13 of the Public Resource Code because approval of a license agreement for a railroad grade separation project is an exempt activity under CEQA. There is no possibility that the licensing of the subject property will have a significant effect on the environment; therefore, the activity is exempt from the provisions of CEQA.

PROCUREMENT

Not applicable.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Aaron Gest, and John Tubbs II, Deputies County Counsel, 387-5455) on April 10, 2024; Finance (Jessica Trillo, Administrative Analyst III, 387-4222) on April 18, 2024; and County Finance and Administration (Paloma Hernandez-Barker, Deputy Executive Officer, 387-5423) on April 23, 2024.

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Record of Action of the Board of Supervisors
San Bernardino County

APPROVED (CONSENT CALENDAR)

Moved: Joe Baca, Jr. Seconded: Curt Hagman
Ayes: Jesse Armendarez, Dawn Rowe, Curt Hagman, Joe Baca, Jr.
Absent: Col. Paul Cook (Ret.)

Lynna Monell, CLERK OF THE BOARD

BY 
DATED: May 7, 2024



cc: PW/Trans - Nguyen w/agrees for sign
Contractor - c/o PW/Trans w/agree
File - w/agree
CCM 05/14/2024