

## **EASEMENT AGREEMENT NUMBER \_\_\_\_\_**

**(Construction and Maintenance of Culvert System and Hike/Bike Trail – Subsurface Only)**

Date: \_\_\_\_\_, 2018

For good and valuable consideration the receipt whereof is hereby acknowledged,

**DAKOTA, MINNESOTA AND EASTERN RAILROAD CORPORATION,**

a Delaware corporation doing business as Canadian Pacific, having its principal place of business at 700 Canadian Pacific Plaza, 120 S. Sixth Street, Minneapolis, Minnesota 55402 ("Grantor")

hereby grants unto

**THE CITY OF DUBUQUE, IOWA**, a government agency ("Grantee"),

an easement ("Easement") described and conditioned as follows:

1.0 **DESCRIPTION OF PROPERTY:** The Easement is granted under a strip of land located in Dubuque, Dubuque County, Iowa, more fully described as:

**PART OF LOT 1-1 OF MINERAL LOT 106, PART OF LOT 50 OF MINERAL LOT 107, PART OF LOTS 1 THRU 4 AND LOT 5 OF BLOCK 1, PART OF LOTS 1 & 2 OF BLOCK 2, PART OF VACATED ALLEY IN BLOCK 1, AND PART OF VACATED 19TH STREET ALL IN RAILROAD ADDITION, IN THE CITY OF DUBUQUE, IOWA, MORE PARTICULARLY DESCRIBED AS FOLLOWS:**

**COMMENCING AT THE NORTHEAST CORNER OF LOT 2 OF BEE BRANCH SUBDIVISION NO. 11;**

**THENCE SOUTH 34 DEGREES 08 MINUTES 12 SECONDS EAST, 209.66 FEET ALONG THE EAST LINE OF SAID LOT 2 TO THE SOUTHEAST CORNER OF SAID LOT 2 AND THE POINT OF BEGINNING;**

**THENCE NORTH 22 DEGREES 11 MINUTES 29 SECONDS EAST, 36.60 FEET;**

**THENCE SOUTH 59 DEGREES 49 MINUTES 23 SECONDS EAST, 182.11 FEET TO THE EAST RIGHT OF WAY LINE OF DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION;**

**THENCE SOUTH 30 DEGREES 30 MINUTES 25 SECONDS WEST, 110.74 FEET ALONG SAID EAST RIGHT OF WAY LINE;**

EASEMENT: Dubuque, Iowa  
AGR No. \_\_\_\_\_

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DM & E, Grantor  
City of Dubuque, Grantee

THENCE CONTINUING SOUTHWESTERLY ALONG SAID EAST RIGHT OF WAY LINE A DISTANCE OF 51.59 FEET ALONG THE ARC OF A CIRCULAR CURVE CONCAVE TO THE SOUTHEAST, HAVING A RADIUS OF 877.30 FEET, A CENTRAL ANGLE OF 3 DEGREES 22 MINUTES 10 SECONDS, AND WHOSE CORD BEARS SOUTH 28 DEGREES 49 MINUTES 20 SECONDS WEST, 51.59 FEET;

THENCE NORTH 59 DEGREES 49 MINUTES 16 SECONDS WEST, 159.93 FEET TO THE WEST RIGHT OF WAY LINE OF THE DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION;

THENCE NORTH 22 DEGREES 11 MINUTES 29 SECONDS EAST, 127.30 FEET ALONG SAID WEST RIGHT OF WAY LINE TO THE POINT OF BEGINNING.

CONTAINING 27,662 FEET, MORE OR LESS, AND SUBJECT TO EASEMENTS, RESERVATIONS, RESTRICTIONS, AND RIGHT-OF-WAY RECORD AND NOT OF RECORD.

and hereinafter referred to as the "**Easement Area**." The Easement Area is shown in the drawing attached hereto as **Exhibit A** and made a part hereof.

This grant of the Easement includes the transfer by Grantor to Grantee of ownership of and responsibility for the two existing 10 foot by 11 foot box culverts within and extending beyond the Easement Area ("**Existing Culverts**") and the concrete floors and wing walls located at the inlets of the Existing Culverts.

The Easement Area is underground only and does not include the surface of the land overlying the Easement Area.

2.0 **PURPOSE:** The Easement shall be limited to the installation, construction, maintenance, repair, replacement, and use of an underground channelization of Bee Branch Creek under Grantor's railroad right-of-way and tracks through six (6) eight (8)-foot diameter steel culverts with inlet and outlet headwalls (the "**Steel Culverts**"), the Existing Culverts, four (4) twelve (12)-foot by ten (10)-foot reinforced concrete box culverts (the "**Box Culverts**") to provide for the free flow of water from the Upper Bee Branch Creek north of Garfield Avenue through the Grantor's property at 506 Garfield Avenue to a proposed reinforced concrete transition structure (the "**Transition Structure**") that will allow for the flow to transition from the Box Culverts to the Steel Culverts and the Existing Culverts; and a headwall structure at the downstream end of the Steel Culverts and the Existing Culverts where the water will flow into the Lower Bee Branch creek; and the modification of the Existing Culverts for utilization for grade-separated pedestrian and non-motorized cycle traffic and trail purposes and as residual stormwater / flood mitigation structures ("**Trail Purposes**") (together hereinafter referred to as the "**Culvert System**"). The Grantee shall be solely responsible for the functioning of the Culvert System and shall maintain an adequate outlet for water conveyed by the Culvert System over and across property not owned by Grantor.

3.0 **RESERVATIONS:** Grantor reserves unto itself, and its successors and assigns:

- 3.1 fee title to the Easement Area; Grantee's maintenance and use of the Easement Area, however long continued, shall not vest in the Grantee rights adverse to those of the Grantor other than those granted by this Agreement;
- 3.2 the exclusive right and privilege to use the Easement Area for the maintenance, construction, and operation of railroad tracks and facilities and other purposes in a manner that does not unreasonably interfere with the Grantee's use of the Easement Area pursuant to this Agreement; and

- 3.3 the right to permit other parties to use the Easement Area in a manner that does not unreasonably interfere with the Grantee's use of the Easement Area pursuant to this Agreement;
- 3.4 the right of incidental use of the Easement Area in a manner that does not unreasonably interfere with the Grantee's use of the Easement Area pursuant to this Agreement; and
- 3.5 the right and privilege to use the Easement Area for any and all other purposes that are not inconsistent with the use thereof for the purpose or purposes permitted by this Agreement or which unreasonably interferes with or restricts the rights granted to Grantee.
- 3.6 Notwithstanding anything to the contrary contained herein, Grantor's railroad operations, tracks and facilities shall be deemed superior to the rights granted to the Grantee under this Agreement.

#### **4.0 TERM, TERMINATION AND EXPIRATION:**

- 4.1 This Easement shall remain in effect so long as required by Grantee for the functioning of the Culvert System. Additionally, the Easement shall be subject to termination or expiration as follows:
  - 4.1.1 **Abandonment:** In the event Grantee fails to use or occupy any part of the Easement Area for a period of twelve (12) consecutive months and Grantor serves upon Grantee a written notice alleging such failure and abandonment of the Easement. If Grantee does not refute said allegation or make use of the Culvert System within 30 days following receipt of said written notice, then Grantee shall be deemed to have agreed with Grantor's allegations and the Easement shall therewith be extinguished.
  - 4.1.2 **Removal:** In the event Grantee substantially removes the Culvert System with the written consent of Grantor and with the intent of not replacing it, then the Easement shall therewith be extinguished.
  - 4.1.3 **Breach:** If Grantee is unable or unwilling to cure a breach of any of the provisions of this Agreement within thirty (30) days (or such longer period as may be reasonably required if Grantee promptly initiates the cure and diligently prosecutes the cure to completion) following receipt of a written notice from Grantor detailing such breach, then at Grantor's sole option this Easement may therewith be extinguished. The foregoing shall be subject, however, to reasonable seasonal accommodations for any physical work to the Culvert System required to cure a breach.

This Section 4.1 shall not be deemed to limit Grantor's ability to enforce the obligations of Grantee to maintain the Culvert System pursuant to the terms of this Agreement.

#### **5.0 CULVERT CONSTRUCTION, MAINTENANCE AND REMOVAL WORK:**

- 5.1 The initial construction of the Culvert System will be pursuant to the separate construction agreement (the "**Construction Agreement**") between the parties, dated \_\_\_\_\_, 2018. The Grantee shall retain ownership of the Culvert System after construction.

- 5.2 If, in the unlikely event it becomes necessary, Grantee, at Grantee's sole expense, shall promptly make such repairs to or changes in the Culvert System, including reasonable changes in location, as Grantor may require to accommodate changes in railroad operations, construction of railroad facilities or the safety of persons, railroad operations or the environment, Grantor covenants that it shall not unreasonably act upon its rights contained in this section 5.2.
- 5.3 Grantee shall at all times during the term of this Agreement, at Grantee's sole cost and expense, keep and maintain the Culvert System in a structurally safe and sound condition, in good repair, clear of obstructions, and in compliance with the plans and specifications therefor and this Agreement. Without limiting the generality of the foregoing, it is expressly acknowledged that Grantee's maintenance obligations shall apply to the Steel Culverts, the two Existing Culverts, the concrete floors and wing walls located at the inlets of the Existing Culverts, the Box Culverts, and the Transition Structure. Grantor shall have no obligation whatsoever, monetary or non-monetary, to maintain the Culvert System.
- 5.4 Any repair, reconstruction, removal or other changes or modifications to the Culvert System, except those made on an emergency basis, made after completion of the Culvert's initial construction, shall be subject to a separate construction agreement between the parties that will include the provisions set forth in Exhibit B, or such other provisions that at the time are necessary for the safety of persons, community, railroad operations and the environment.
- 5.5 Except as may be expressly provided in any separate construction or maintenance agreement, Grantee shall have no right to enter or make any use of the surface of the land overlying the Easement Area for construction, maintenance, reconstruction, removal, changes, or modifications of or to the Culvert System. Upon written request by Grantee, Grantor shall reasonably grant access to the two Existing Culverts for purposes of maintenance of the two Existing Culverts.

6.0 **TAXES AND ASSESSMENTS:** Grantee shall assume and pay any taxes or assessments which may be levied by any competent authority by reason of the existence or use of said land for the Culvert System.

7.0 **LIABILITY AND HOLD HARMLESS: INDEMNITY:**

- 7.1 **Damage to Railroad facilities.** If any railroad tracks, facilities, or equipment owned, used, or maintained by the Grantor are damaged by Grantee or the Culvert System, the Grantor shall repair (or arrange for the repair of) such damage and the Grantee shall pay the full cost of such repair within 30 days after the Grantor shall tender a bill therefor.
- 7.2 **Assumption of risks.** Grantee acknowledges that it is fully aware of the dangers of working on and about railroad property and railroad operations and knowingly and willingly assumes the risk of harm (e.g., injury to or death of persons and damage to or destruction of property) that may occur while on and about Grantor's property. Without in any way limiting the scope of the preceding sentence, Grantee assumes the risk that the Culvert System and any monitoring wells, elevations bench marks, reference points, and other installations or property of Grantee located within, under, above, or in the vicinity of the Easement Area may be disturbed, damaged, or destroyed as the result of railroad operations or mishaps by third persons. As an inducement to Grantor to grant the rights herein and as part consideration therefor, Grantee agrees that it shall not make any claim against and shall hold harmless Grantor, its officers, agents, and employees on account of the same, even if such disturbance, damage, or destruction arises from the negligence of the Grantor or its employees, agents, or invitees, but excluding damage or destruction

that is attributable to Grantor's gross negligence or willful misconduct. Grantee assumes full responsibility for protecting its installations and personal property from theft and vandalism while such installations and personal property are on Grantor's property. For purposes of this Agreement, the Parties agree that "gross negligence or willful misconduct" shall be defined as the intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another; such a gross want of care and regard for the rights of others as to justify the presumption of willfulness and wantonness, including all of the following elements: (1) knowledge of the peril to be apprehended; (2) knowledge that injury, damage or loss is a probable, as opposed to a possible, result of the danger; and (3) a conscious failure to avoid the peril.

7.3 **Indemnification Provisions.** To the fullest extent permitted by law, the Grantee shall defend, indemnify and hold harmless the Grantor Indemnified Parties (as defined below) from and against all claims, demands, actions, suits, judgments, losses, damages (including, but not limited to, lost profits and other actual, compensatory, direct, consequential, punitive, and exemplary damages), expenses, penalties, fines, sanctions, court costs, litigation costs, and attorneys' fees arising out of or relating to any breach of this Agreement, any destruction of (or damage to) any property or natural resource, any upstream or downstream flooding caused in whole or in part by the Culvert System, any injury to (or death of) any person, or any environmental pollution or contamination whatsoever, where such destruction, damage, injury, death, pollution, or contamination actually or allegedly arises in whole or in part from the work, any action or omission of the Grantee, its employees, agents, contractors and subcontractors, while on or about the Grantor's property pursuant to this Agreement, or the exercise by the Grantee of the rights granted by this Agreement, including but not limited to damage to Grantor's railroad tracks caused by or associated in any way with the Culvert System, except to the extent caused by the gross negligence or willful misconduct of Grantor Indemnified Parties. As used in this Agreement, "**Grantor Indemnified Parties**" means the following businesses and their officers, directors, employees, successors, assigns and agents: Dakota, Minnesota & Eastern Railroad Corporation, Soo Line Holding Company, Soo Line Corporation, Canadian Pacific Railway Company, any company doing business as Canadian Pacific Railway or Canadian Pacific, and any railway company or contractor operating trains or rail equipment upon railway tracks in close proximity to Grantor property, together with the parent companies, subsidiaries, and affiliated companies of all of the foregoing.

7.4 **Insurance Provisions.** Grantee is a member of and has an Agreement with the Iowa Communities Assurance Pool (ICAP), a local government risk pool authorized by Iowa Code Sec. 670.7. Grantee shall maintain in full force and effect its membership in ICAP (and, during construction of the Culvert System, cause its contractor to procure and maintain in effect the insurance policies required under the Construction Agreement) at all times during the term of this Easement, with initial limits of coverage shown in brackets "[ ]" as follows:

7.4.1. Commercial General Liability coverage with a combined single limit of \$[5,000,000].

7.4.2 The above ICAP agreement shall further be subject to the following:

a. The coverage limits of the ICAP agreement shall be initially as shown in brackets, but such amounts shall after one year from the date hereof be such amounts as Grantor reasonably deems standard for work in close proximity to railroad operations.

b. The ICAP agreement shall name the Grantor as an additional party. Prior to commencement of any work upon the Easement Area, the Grantor must receive and approve a certificate of coverage for the ICAP agreement stating that such coverage will not be canceled or materially changed without ten (10) days written notice being given to the Grantor. The certificate of coverage shall include the following endorsement:

"It is agreed that the coverage evidenced by this certificate covers the liability assumed by the insured in connection with the use as set forth in the easement grant dated \_\_\_\_\_, 2018 by Dakota, Minnesota & Eastern Railroad Corporation to the City of Dubuque."

## 8.0 **MISCELLANEOUS:**

- 8.1 **Grantee/Grantor:** As used in this Agreement, the terms "**Grantee**" and "**Grantor**" shall include the parties first named above and their respective successors or assigns.
- 8.2 **Headings:** The paragraph headings used in this Agreement are used solely for the purpose of convenience. They are not intended to, and do not, modify or limit the wording of the paragraphs to which they are appended, and they shall not be used or construed as guides to the interpretation of said paragraphs.
- 8.3 **Severability of Terms:** Each provision, paragraph, sentence, clause, phrase, and word of this Agreement shall apply to the extent permitted by applicable law and is intended to be severable. If any provision, paragraph, sentence, clause, phrase or word of this indenture is illegal or invalid for any reason whatsoever, such illegality or invalidity shall not affect the legality or validity of the remainder of this Agreement.
- 8.4 **No Waiver:** Any act or omission constituting a breach of this Agreement shall be limited to such act or omission and shall not be construed as a permanent or continuing waiver thereof.
- 8.5 **Notices:** Any notice given by a party pursuant to this Agreement, shall be good if served upon the other party, or if deposited in a United States post office, certified mail, addressed to the other party at its last known address.
- 8.6 **Merger:** The Construction Agreement and this Agreement completely outline all of the rights, responsibilities, and obligations of the parties hereto and may not be amended or altered except by an instrument in writing signed by both parties. Furthermore, the Construction Agreement and this Agreement merge all prior oral representations and negotiations of the parties hereto.
- 8.7 **No Warranty:** Grantor does not warrant title to the Easement Area, and makes no representations or warranties, express or implied, as to the habitability of the Easement Area or the fitness of the Easement Area for Grantee's purpose or any other particular purpose.
- 8.8 **Default and Remedies:** In the event of any violation by Grantor or Grantee of any of the provisions of this Agreement, in addition to the right to collect damages and/or receive specific performance, the Grantor or Grantee will have the right to seek an injunction of such violation from a court of competent jurisdiction. The prevailing party in any such action shall be entitled to an award of its reasonable attorney's fees incurred in enforcing this Agreement. In addition, in the event the Grantee fails to perform any of the provisions of this Agreement or violates any of the provisions hereof, the Grantor may cure such default;

provided, however, that written notice of such intention, specifying the nature of the alleged default and the actions to be performed, has been given to the Grantee not less than thirty (30) days prior to the commencement of such action or such lesser time if, in the reasonable judgment of the Grantor, such default is emergency in nature. In the event the Grantor fails to perform any of the provisions of this Agreement or violates any provisions hereof, the Grantee may cure such default at the Grantee's sole cost and expense; provided however, that written notice of such intention, specifying the nature of the alleged default and the actions to be performed, has been given to the Grantor not less than thirty (30) days prior to the commencement of such action or such lesser time if, in the reasonable judgment of the Grantee, such default is emergency in nature, and only if the Grantor approves and authorizes the Grantee's proposed cure in writing. If the Grantor elects to perform the action to have been performed by the Grantee, on completion of such action, an itemized statement of the costs thereof will be submitted to the Grantee, and the amount thereof will be immediately due and payable by the Grantee to the Grantor. The remedies specified herein shall be cumulative and in addition to all other remedies permitted at law or in equity. Notwithstanding anything in the foregoing that might be construed to the contrary, Grantor shall not be required to give notice to Grantee prior to repairing or arranging for the repair of tracks, facilities, or equipment damaged by Grantee or the Culvert System.

8.9 No Partnership, Joint Venture, or Shared Enterprise. The Grantee's construction and operation of the Culvert System in accordance with this Agreement shall not be deemed to create a partnership, joint venture, or shared enterprise of any kind with the Grantor.

This Agreement shall inure to the benefit of and be binding upon the successors and assigns of the Grantor and the Grantee.

**DAKOTA, MINNESOTA AND EASTERN RAILROAD  
CORPORATION**  
doing business as Canadian Pacific

By: \_\_\_\_\_

Name: \_\_\_\_\_

Its: \_\_\_\_\_

STATE OF MINNESOTA      )  
                                  ) ss:  
COUNTY OF HENNEPIN      )

The foregoing easement was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 2018, by\_\_\_\_\_, the \_\_\_\_\_ of Dakota, Minnesota and Eastern Railroad Corporation, a Delaware corporation, on behalf of the corporation.

Notary Seal

Notary Public

This instrument was drafted by:  
Real Estate Department  
700 Canadian Pacific Plaza  
120 South Sixth Street  
Minneapolis MN 55402

EASEMENT: Dubuque, Iowa  
AGR No. \_\_\_\_\_

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DM & E, Grantor  
City of Dubuque, Grantee

EXHIBIT A  
(Drawing of Easement Area)

[See following page]

EASEMENT: Dubuque, Iowa  
AGR No.\_\_\_\_\_

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DM & E, Grantor  
City of Dubuque, Grantee

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## PERMANENT EASEMENT EXHIBIT A

PERMANENT EASEMENT UNDER AND THROUGH PART OF LOT 1-1 OF  
MINERAL LOT 106, PART OF LOT 50 OF MINERAL LOT 107, PART OF LOTS 1  
THRU 4 AND LOT 5 OF BLOCK 1, PART OF LOTS 1 & 2 OF BLOCK 2,  
PART OF VACATED ALLEY IN BLOCK 1, AND PART OF VACATED 19TH  
STREET ALL IN RAILROAD ADDITION, IN THE CITY OF DUBUQUE, IOWA

### GRAPHIC SCALE

DRAWING MAY HAVE BEEN REDUCED

SUBSURFACE EASEMENT TO  
BE GRANTED TO THE CITY OF  
DUBUQUE WITH TRANSFER OF  
TWIN BOX OWNERSHIP (TYP)

- EXISTING TWIN  
BOX CULVERT

SUBSURFACE EASEMENT TO BE GRANTED  
WITH TRANSFER OF TWIN BOX OWNERSHIP  
NOT IN VACATED ROW'S 5,133 SQ. FT. +/-

TOTAL EASEMENT 27,662 SQ. FT. +/-  
VACATED ROW 8,069 SQ. FT. +/-  
NEW EASEMENT 14,460 SQ. FT. +/-

LEGEND  
EASEMENT EXCEPTION AREAS AS RETAINED  
BY CITY PER DOC. # 4035-85  
— — — LOT LINE  
— • — PROPOSED EASEMENT LINE  
P.O.B. POINT OF BEGINNING  
R.O.W. RIGHT OF WAY  
ML MINERAL LOT

PROPRIETOR: IOWA, CHICAGO & EASTERN RAILROAD  
CORP. (DBA CP RAILWAY)  
PREPARED FOR: CITY OF DUBUQUE  
DATE PREPARED: JAN. 24, 2018. REV. MAY 30, 2018

NOTE  
THIS SURVEY IS SUBJECT TO  
EASEMENTS, RESERVATIONS,  
RESTRICTIONS AND  
RIGHTS-OF-WAY OF RECORD  
AND NOT OF RECORD.



EASEMENT: Dubuque, Iowa  
AGR No.

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DM & E, Grantor  
City of Dubuque, Grantee

## PERMANENT EASEMENT EXHIBIT A

PERMANENT EASEMENT UNDER AND THROUGH PART OF LOT 1-1 OF MINERAL LOT 106, PART OF LOT 50 OF MINERAL LOT 107, PART OF LOTS 1 THRU 4 AND LOT 5 OF BLOCK 1, PART OF LOTS 1 & 2 OF BLOCK 2, PART OF VACATED ALLEY IN BLOCK 1, AND PART OF VACATED 19TH STREET ALL IN RAILROAD ADDITION, IN THE CITY OF DUBUQUE, IOWA

### LEGAL DESCRIPTION

A permanent easement located under and through part of Lot 1-1 of Mineral Lot 106, part of Lot 50 of Mineral Lot 107, part of Lots 1, 2, 3, 4, and 5 of Block 1, part of Lots 1 and 2 of Block 2, part of Vacated Alley in Block 1, and part of Vacated 19th Street all in Railroad Addition, in the City of Dubuque, Iowa, more particularly described as follows;

Commencing at the Northeast Corner of Lot 2 of Bee Branch Subdivision No. 11;

Thence South 34 degrees 08 minutes 12 seconds East, 209.66 feet along the east line of said Lot 2 to the Southeast Corner of said Lot 2 and the Point of Beginning;

Thence North 22 degrees 11 minutes 29 seconds East, 36.60 feet;

Thence South 59 degrees 49 minutes 23 seconds East, 182.11 feet to the East Right of Way line of the Canadian Pacific Railway;

Thence South 30 degrees 30 minutes 25 seconds West, 110.74 feet along said East Right of Way line;

Thence continuing Southwesterly along said East Right of Way Line a distance of 51.59 feet along the arc of a circular curve concave to the Southeast, having a radius of 877.30 feet, a central angle of 3 degrees 22 minutes 10 seconds, and whose cord bears South 28 degrees 49 minutes 20 seconds West, 51.59 feet;

Thence North 59 degrees 49 minutes 16 seconds West, 159.93 feet to the West Right of Way line of the Canadian Pacific Railway;

Thence North 22 degrees 11 minutes 29 seconds East, 127.30 feet along said West Right of Way line to the Point of Beginning.

Containing 27,662 feet, more or less, and subject to easements, reservations, restrictions, and right-of-way record and not of record.

PROPRIETOR: IOWA, CHICAGO & EASTERN RAILROAD CORP. (DBA CP RAILWAY)  
PREPARED FOR: CITY OF DUBUQUE  
DATE PREPARED: JAN. 24, 2018, REV. 5-30-18



**EXHIBIT B**  
Requirements for Entry unto railroad property for  
Maintenance or repair of Culvert System.

1. As used herein, the term "**Culvert Work**" shall mean the installation, maintenance, repair, changing or renewal of the Culvert System the requires the grading, excavation or disturbance of soil adjacent or above the Culvert System, or such activities that could result in impacts to the adjacent railroad operations including, but not limited to, as vibration, noise, smoke and fumes. Work does not include the use or maintenance activities such as cleaning, painting, or electrical work where the foregoing impacts to soil or railroad operations are not present.
2. Grantee, shall secure all necessary public approvals and permits for any Culvert Work in the Easement Area.
3. Prior to any Culvert Work, Grantee shall be responsible for determining the location and existence of any pipes, wires, conduits, sewers, piling or other obstructions to Grantee's Culvert Work. Grantee expressly assumes the risk of damage to the foregoing pipes, wires, conduits, sewers, piling or other obstructions, if any, and agrees to pay any claims arising from damage thereto in connection with its Culvert Work. Grantor makes no representation by the granting of this indenture that the Easement Area is free of any such pipes, wires, conduits, sewers, pilings or other obstructions.
- .4. Grantee shall not carry on any Culvert Work until:
  - A. it shall have given Grantor at least five (5) days' written notice, and
  - B. an authorized representative of Grantor shall, at Grantor's election, be present to supervise same. Upon bills being rendered for the authorized representative's supervision, Grantee shall promptly reimburse Grantor for all reasonable expenses incurred by it in connection with such supervision, including all labor costs for flagmen supplied by Grantor to protect railroad operations, and for the entire cost of the furnishing, installation and later removal of any temporary supports for said tracks, if any.
5. Prior to the commencement of Culvert Work, the Grantee shall require any third party contractor acting on behalf of the Grantee pursuant to this Easement to:
  - A. to the extent permitted by law, execute and deliver to the Grantor a release of liability that shall provide that the contractor shall indemnify, hold harmless and defend the Indemnitees (as defined below) from and against all claims arising out of, resulting from or relating to any loss of (or damage to) any property or business or any injury to (or death of) any person, where such loss, damage, injury, or death actually or allegedly arises (whether directly or indirectly, wholly or in part) from any negligence or willful misconduct of the Contractor (or its employees, agents, or contractors) while on the Easement Area pursuant to this Easement. Indemnitees means Grantor, its subsidiaries, affiliated companies and parent companies, and their directors, officers, employees and agents, including without limitation, Soo Line Railroad Company, Delaware and Hudson Railroad Corporation, Dakota, Minnesota and Eastern Railroad Corporation, Soo Line Corporation, Wyoming, Dakota Railroad Properties, Inc., The Milwaukee Motor Transportation Company, Hiawatha Transfer Company, and Canadian and Pacific Railway Company.
  - B. to maintain during any period of time that any of its employees or agents or equipment are upon the Property, policies of insurance conforming to the insurance requirements set forth in the Construction Agreement.

C. The above polices of insurance shall further be subject to the following:

- i. The coverage limits of the foregoing policies shall be initially as set forth in the Construction Agreement, but such amounts shall after one year from the date of this Easement Agreement be such amounts as Grantor reasonably deems standard for work in close proximity to railroad operations.
- ii. Each such insurance policy shall name the Grantor as an additional Insured. Prior to commencement of any work upon the Easement Area, the Grantor must receive and approve a certificate or certificates of insurance for each such insurance policy stating that such coverage will not be canceled or materially changed without ten (10) days written notice being given to the Grantor. The certificate for the Commercial General Liability Policy of insurance shall include the following endorsement:

“It is agreed that the policy or policies of insurance evidenced by this certificate covers the liability assumed by the insured in connection with work to be performed in connection with the Roadway as set forth in the easement grant dated \_\_\_\_\_, 20\_\_ by Dakota, Minnesota & Eastern Railroad Corporation to the City of Dubuque including work upon railroad property, within railroad right of way and in close proximity of operating railroad tracks.”

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EASEMENT: Dubuque, Iowa  
AGR No. \_\_\_\_\_

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DM & E, Grantor  
City of Dubuque, Grantee

CORE/2061322.0024/138216959.7

**EASEMENT AGREEMENT NUMBER** \_\_\_\_\_  
**(Construction and Maintenance of Culvert System and Hike/Bike Trail)**

Date: \_\_\_\_\_, 2018

For good and valuable consideration the receipt whereof is hereby acknowledged,

**DAKOTA, MINNESOTA AND EASTERN RAILROAD CORPORATION,**

a Delaware corporation doing business as Canadian Pacific, having its principal place of business at 700 Canadian Pacific Plaza, 120 S. Sixth Street, Minneapolis, Minnesota 55402 ("Grantor")

hereby grants unto

**THE CITY OF DUBUQUE, IOWA**, a government agency ("Grantee"),

an easement ("Easement") described and conditioned as follows:

1.0 **DESCRIPTION OF PROPERTY:** The Easement is granted across a strip of land located in Dubuque, Dubuque County, Iowa, more fully described as:

**Parts of Lots 44 thru 50 in Mineral Lot 107, in the City of Dubuque, Iowa, more particularly described as follows:**

**Beginning at the Southeast Corner of Lot 2 of Bee Branch Subdivision No. 11;**

**Thence North 34 degrees 08 minutes 12 seconds West, 209.66 feet along the east line of said Lot 2 to the south Right of Way line of Garfield Avenue and the Northeast Corner of said Lot 2;**

**Thence North 55 degrees 47 minutes 48 seconds East, 33.23 feet along said Right of Way line;**

**Thence South 51 degrees 59 minutes 38 seconds East, 59.96 feet;**

**Thence South 34 degrees 23 minutes 47 seconds East, 117.89 feet;**

**Thence South 22 degrees 11 minutes 29 seconds West, 62.66 feet to the Point of Beginning.**

**Containing 9,442 feet, more or less, and subject to easements, reservations, restrictions, and right-of-way record and not of record.**

EASEMENT: Dubuque, Iowa  
AGR No. \_\_\_\_\_

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DM & E, Grantor  
City of Dubuque, Grantee

and hereinafter referred to as the "**Easement Area**." The Easement Area is shown in the drawing attached hereto as **Exhibit A** and made a part hereof.

2.0 **PURPOSE:** The Easement shall be limited to the installation, construction, maintenance, repair, replacement, and use of an underground channelization of Bee Branch Creek under Grantor's railroad right-of-way and tracks through six (6) eight (8)-foot diameter steel culverts with inlet and outlet headwalls (the "**Steel Culverts**"), the Existing Culverts, four (4) twelve (12)-foot by ten (10)-foot reinforced concrete box culverts (the "**Box Culverts**") to provide for the free flow of water from the Upper Bee Branch Creek north of Garfield Avenue through the Grantor's property at 506 Garfield Avenue to a proposed reinforced concrete transition structure (the "**Transition Structure**") that will allow for the flow to transition from the Box Culverts to the Steel Culverts and the Existing Culverts; and a headwall structure at the downstream end of the Steel Culverts and the Existing Culverts where the water will flow into the Lower Bee Branch creek; and the modification of the Existing Culverts for utilization for grade-separated pedestrian and non-motorized cycle traffic and trail purposes and as residual stormwater / flood mitigation structures ("**Trail Purposes**") (together hereinafter referred to as the "**Culvert System**"). The Grantee shall be solely responsible for the functioning of the Culvert System and shall maintain an adequate outlet for water conveyed by the Culvert System over and across property not owned by Grantor.

3.0 **RESERVATIONS:** Grantor reserves unto itself, and its successors and assigns:

- 3.1 fee title to the Easement Area; Grantee's maintenance and use of the Easement Area, however long continued, shall not vest in the Grantee rights adverse to those of the Grantor other than those granted by this Agreement;
- 3.2 the exclusive right and privilege to use the Easement Area for the maintenance, construction, and operation of railroad tracks and facilities and other purposes in a manner that does not unreasonably interfere with the Grantee's use of the Easement Area pursuant to this Agreement; and
- 3.3 the right to permit other parties to use the Easement Area in a manner that does not unreasonably interfere with the Grantee's use of the Easement Area pursuant to this Agreement;
- 3.4 the right of incidental use of the Easement Area in a manner that does not unreasonably interfere with the Grantee's use of the Easement Area pursuant to this Agreement; and
- 3.5 the right and privilege to use the Easement Area for any and all other purposes that are not inconsistent with the use thereof for the purpose or purposes permitted by this Agreement or which unreasonably interferes with or restricts the rights granted to Grantee.
- 3.6 Notwithstanding anything to the contrary contained herein, Grantor's railroad operations, tracks and facilities shall be deemed superior to the rights granted to the Grantee under this Agreement.

4.0 **TERM, TERMINATION AND EXPIRATION:**

4.1 This Easement shall remain in effect so long as required by Grantee for the functioning of the Culvert System. Additionally, the Easement shall be subject to termination or expiration as follows:

4.1.1 **Abandonment:** In the event Grantee fails to use or occupy any part of the Easement Area for a period of twelve (12) consecutive months and Grantor serves upon Grantee a written notice alleging such failure and abandonment of the Easement. If Grantee does not refute said allegation or make use of the

Culvert System within 30 days following receipt of said written notice, then Grantee shall be deemed to have agreed with Grantor's allegations and the Easement shall therewith be extinguished.

- 4.1.2 **Removal:** In the event Grantee substantially removes, or abandons and fills, the Culvert System with the written consent of Grantor and with the intent of not replacing it, then the Easement shall therewith be extinguished.
- 4.1.3 **Breach:** If Grantee is unable or unwilling to cure a breach of any of the provisions of this Agreement within thirty (30) days (or such longer period as may be reasonably required if Grantee promptly initiates the cure and diligently prosecutes the cure to completion) following receipt of a written notice from Grantor detailing such breach, then at Grantor's sole option this Easement may therewith be extinguished. The foregoing shall be subject, however, to reasonable seasonal accommodations for any physical work to the Culvert System required to cure a breach.

This Section 4.1 shall not be deemed to limit Grantor's ability to enforce the obligations of Grantee to maintain the Culvert System pursuant to the terms of this Agreement.

## 5.0 **CULVERT CONSTRUCTION, MAINTENANCE AND REMOVAL WORK:**

- 5.1 The initial construction of the Culvert System will be pursuant to the separate construction agreement (the "**Construction Agreement**") between the parties, dated \_\_\_\_\_, 2018. The Grantee shall retain ownership of the Culvert System after construction.
- 5.2 If, in the unlikely event it becomes necessary, Grantee, at Grantee's sole expense, shall promptly make such repairs to or changes in the Culvert System, including reasonable changes in location, as Grantor may require to accommodate changes in railroad operations, construction of railroad facilities or the safety of persons, railroad operations or the environment, Grantor covenants that it shall not unreasonably act upon its rights contained in this section 5.2.
- 5.3 Grantee shall at all times during the term of this Agreement, at Grantee's sole cost and expense, keep and maintain the Culvert System in a structurally safe and sound condition, in good repair, clear of obstructions, and in compliance with the plans and specifications therefor and this Agreement. Without limiting the generality of the foregoing, it is expressly acknowledged that Grantee's maintenance obligations shall apply to the Steel Culverts, the two Existing Culverts, the concrete floors and wing walls located at the inlets of the Existing Culverts, the Box Culverts, and the Transition Structure. Grantor shall have no obligation whatsoever, monetary or non-monetary, to maintain the Culvert System.
- 5.4 Any repair, reconstruction, removal or other changes or modifications to the Culvert System, except those made on an emergency basis, made after completion of the Culvert's initial construction, shall be subject to a separate construction agreement between the parties that will include the provisions set forth in Exhibit B, or such other provisions that at the time are necessary for the safety of persons, community, railroad operations and the environment.
- 5.5 Except as may be expressly provided in any separate construction or maintenance agreement, Grantee shall have no right to enter or make any use of the surface of the land overlying the Easement Area for construction, maintenance, reconstruction, removal, changes, or modifications of or to the Culvert System. Upon written request by Grantee, Grantor shall reasonably grant access to the Surface Inlet Area for purposes of maintenance of the two Existing Culverts and the concrete floors and wing walls located at the inlets of the Existing Culverts.

6.0 **TAXES AND ASSESSMENTS:** Grantee shall assume and pay any taxes or assessments which may be levied by any competent authority by reason of the existence or use of said land for the Culvert System.

7.0 **LIABILITY AND HOLD HARMLESS; INDEMNITY:**

7.1 **Damage to Railroad facilities.** If any railroad tracks, facilities, or equipment owned, used, or maintained by the Grantor are damaged by Grantee or the Culvert System, the Grantor shall repair (or arrange for the repair of) such damage and the Grantee shall pay the full cost of such repair within 30 days after the Grantor shall tender a bill therefor.

7.2 **Assumption of risks.** Grantee acknowledges that it is fully aware of the dangers of working on and about railroad property and railroad operations and knowingly and willingly assumes the risk of harm (e.g., injury to or death of persons and damage to or destruction of property) that may occur while on and about Grantor's property. Without in any way limiting the scope of the preceding sentence, Grantee assumes the risk that the Culvert System and any monitoring wells, elevations bench marks, reference points, and other installations or property of Grantee located within, under, above, or in the vicinity of the Easement Area may be disturbed, damaged, or destroyed as the result of railroad operations or mishaps by third persons. As an inducement to Grantor to grant the rights herein and as part consideration therefor, Grantee agrees that it shall not make any claim against and shall hold harmless Grantor, its officers, agents, and employees on account of the same, even if such disturbance, damage, or destruction arises from the negligence of the Grantor or its employees, agents, or invitees, but excluding damage or destruction that is attributable to Grantor's gross negligence or willful misconduct. Grantee assumes full responsibility for protecting its installations and personal property from theft and vandalism while such installations and personal property are on Grantor's property. For purposes of this Agreement, the Parties agree that "gross negligence or willful misconduct" shall be defined as the intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another; such a gross want of care and regard for the rights of others as to justify the presumption of willfulness and wantonness, including all of the following elements: (1) knowledge of the peril to be apprehended; (2) knowledge that injury, damage or loss is a probable, as opposed to a possible, result of the danger; and (3) a conscious failure to avoid the peril.

7.3 **Indemnification Provisions.** To the fullest extent permitted by law, the Grantee shall defend, indemnify and hold harmless the Grantor Indemnified Parties (as defined below) from and against all claims, demands, actions, suits, judgments, losses, damages (including, but not limited to, lost profits and other actual, compensatory, direct, consequential, punitive, and exemplary damages), expenses, penalties, fines, sanctions, court costs, litigation costs, and attorneys' fees arising out of or relating to any breach of this Agreement, any destruction of (or damage to) any property or natural resource, any upstream or downstream flooding caused in whole or in part by the Culvert System, any injury to (or death of) any person, or any environmental pollution or contamination whatsoever, where such destruction, damage, injury, death, pollution, or contamination actually or allegedly arises in whole or in part from the work, any action or omission of the Grantee, its employees, agents, contractors and subcontractors, while on or about the Grantor's property pursuant to this Agreement, or the exercise by the Grantee of the rights granted by this Agreement, including but not limited to damage to Grantor's railroad tracks caused by or associated in any way with the Culvert System, except to the extent caused by the gross negligence or willful misconduct of Grantor Indemnified Parties. As used in this Agreement, "**Grantor Indemnified Parties**" means the following businesses and their officers, directors, employees, successors, assigns and agents: Dakota, Minnesota & Eastern Railroad Corporation, Soo Line Holding Company, Soo Line Corporation, Canadian Pacific Railway Company, any company doing business as Canadian Pacific Railway or Canadian Pacific, and any railway company or contractor operating trains or rail equipment upon railway tracks in close proximity to Grantor

property, together with the parent companies, subsidiaries, and affiliated companies of all of the foregoing.

7.4 Insurance Provisions. Grantee is a member of and has an Agreement with the Iowa Communities Assurance Pool (ICAP), a local government risk pool authorized by Iowa Code Sec. 670.7. Grantee shall maintain in full force and effect its membership in ICAP (and, during construction of the Culvert System, cause its contractor to procure and maintain in effect the insurance policies required under the Construction Agreement) at all times during the term of this Easement, with initial limits of coverage shown in brackets “[ ]” as follows:

7.4.1. Commercial General Liability coverage with a combined single limit of \$[5,000,000].

7.4.2 The above ICAP agreement shall further be subject to the following:

- a. The coverage limits of the ICAP agreement shall be initially as shown in brackets, but such amounts shall after one year from the date hereof be such amounts as Grantor reasonably deems standard for work in close proximity to railroad operations.
- b. The ICAP agreement shall name the Grantor as an additional party. Prior to commencement of any work upon the Easement Area, the Grantor must receive and approve a certificate of coverage for the ICAP agreement stating that such coverage will not be canceled or materially changed without ten (10) days written notice being given to the Grantor. The certificate of coverage shall include the following endorsement:

“It is agreed that the coverage evidenced by this certificate covers the liability assumed by the insured in connection with the use as set forth in the easement grant dated \_\_\_\_\_, 2018 by Dakota, Minnesota & Eastern Railroad Corporation to the City of Dubuque.”

## 8.0 **MISCELLANEOUS:**

- 8.1 Grantee/Grantor: As used in this Agreement, the terms “**Grantee**” and “**Grantor**” shall include the parties first named above and their respective successors or assigns.
- 8.2 Headings: The paragraph headings used in this Agreement are used solely for the purpose of convenience. They are not intended to, and do not, modify or limit the wording of the paragraphs to which they are appended, and they shall not be used or construed as guides to the interpretation of said paragraphs.
- 8.3 Severability of Terms: Each provision, paragraph, sentence, clause, phrase, and word of this Agreement shall apply to the extent permitted by applicable law and is intended to be severable. If any provision, paragraph, sentence, clause, phrase or word of this indenture is illegal or invalid for any reason whatsoever, such illegality or invalidity shall not affect the legality or validity of the remainder of this Agreement.
- 8.4 No Waiver: Any act or omission constituting a breach of this Agreement shall be limited to such act or omission and shall not be construed as a permanent or continuing waiver thereof.
- 8.5 Notices: Any notice given by a party pursuant to this Agreement, shall be good if served upon the other party, or if deposited in a United States post office, certified mail, addressed to the other party at its last known address.

8.6 **Merger:** The Construction Agreement and this Agreement completely outline all of the rights, responsibilities, and obligations of the parties hereto and may not be amended or altered except by an instrument in writing signed by both parties. Furthermore, the Construction Agreement and this Agreement merge all prior oral representations and negotiations of the parties hereto.

8.7 **No Warranty:** Grantor does not warrant title to the Easement Area, and makes no representations or warranties, express or implied, as to the habitability of the Easement Area or the fitness of the Easement Area for Grantee's purpose or any other particular purpose.

8.8 **Default and Remedies:** In the event of any violation by Grantor or Grantee of any of the provisions of this Agreement, in addition to the right to collect damages and/or receive specific performance, the Grantor or Grantee will have the right to seek an injunction of such violation from a court of competent jurisdiction. The prevailing party in any such action shall be entitled to an award of its reasonable attorney's fees incurred in enforcing this Agreement. In addition, in the event the Grantee fails to perform any of the provisions of this Agreement or violates any of the provisions hereof, the Grantor may cure such default; provided, however, that written notice of such intention, specifying the nature of the alleged default and the actions to be performed, has been given to the Grantee not less than thirty (30) days prior to the commencement of such action or such lesser time if, in the reasonable judgment of the Grantor, such default is emergency in nature. In the event the Grantor fails to perform any of the provisions of this Agreement or violates any provisions hereof, the Grantee may cure such default at the Grantee's sole cost and expense; provided however, that written notice of such intention, specifying the nature of the alleged default and the actions to be performed, has been given to the Grantor not less than thirty (30) days prior to the commencement of such action or such lesser time if, in the reasonable judgment of the Grantee, such default is emergency in nature, and only if the Grantor approves and authorizes the Grantee's proposed cure in writing. If the Grantor elects to perform the action to have been performed by the Grantee, on completion of such action, an itemized statement of the costs thereof will be submitted to the Grantee, and the amount thereof will be immediately due and payable by the Grantee to the Grantor. The remedies specified herein shall be cumulative and in addition to all other remedies permitted at law or in equity. Notwithstanding anything in the foregoing that might be construed to the contrary, Grantor shall not be required to give notice to Grantee prior to repairing or arranging for the repair of tracks, facilities, or equipment damaged by Grantee or the Culvert System.

8.9 **No Partnership, Joint Venture, or Shared Enterprise.** The Grantee's construction and operation of the Culvert System in accordance with this Agreement shall not be deemed to create a partnership, joint venture, or shared enterprise of any kind with the Grantor.

This Agreement shall inure to the benefit of and be binding upon the successors and assigns of the Grantor and the Grantee.

**DAKOTA, MINNESOTA AND EASTERN RAILROAD  
CORPORATION**  
doing business as Canadian Pacific

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

STATE OF MINNESOTA      )  
                                    ) ss:  
COUNTY OF HENNEPIN      )

EASEMENT: Dubuque, Iowa  
AGR No. \_\_\_\_\_

Page 6 of 12

DM & E, Grantor  
City of Dubuque, Grantee

The foregoing easement was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 2018, by \_\_\_\_\_, the \_\_\_\_\_ of Dakota, Minnesota and Eastern Railroad Corporation, a Delaware corporation, on behalf of the corporation.

Notary Seal

Notary Public

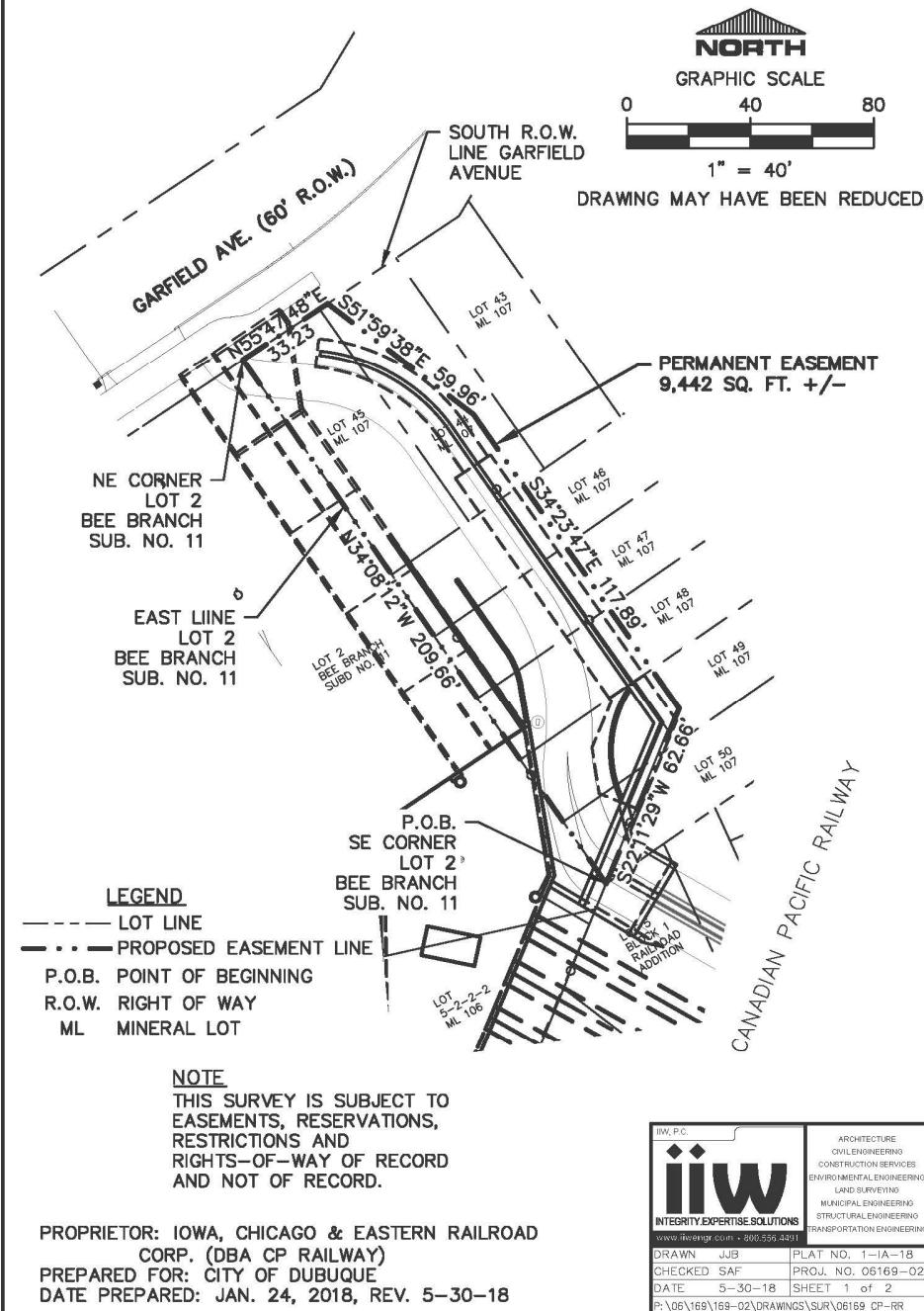
This instrument was drafted by:  
Real Estate Department  
700 Canadian Pacific Plaza  
120 South Sixth Street  
Minneapolis MN 55402

EXHIBIT B

(Drawing of Easement Area)

[See following page]

**PERMANENT EASEMENT EXHIBIT B**  
**PERMANENT EASEMENT ACROSS PARTS OF LOTS 44**  
**THRU 50 IN MINERAL LOT 107, IN THE CITY OF**  
**DUBUQUE, IOWA**



EASEMENT: Dubuque, Iowa  
AGR No. \_\_\_\_\_

Page 9 of 12

DM & E, Grantor  
City of Dubuque, Grantee

**PERMANENT EASEMENT EXHIBIT B**  
**PERMANENT EASEMENT ACROSS PARTS OF LOTS 44**  
**THRU 50 IN MINERAL LOT 107, IN THE CITY OF**  
**DUBUQUE, IOWA**

LEGAL DESCRIPTION

A permanent easement located across parts of Lots 44 thru 50 in Mineral Lot 107, in the City of Dubuque, Iowa, more particularly described as follows;

Beginning at the Southeast Corner of Lot 2 of Bee Branch Subdivision No. 11;

Thence North 34 degrees 08 minutes 12 seconds West, 209.66 feet along the east line of said Lot 2 to the south Right of Way line of Garfield Avenue and the Northeast Corner of said Lot 2;

Thence North 55 degrees 47 minutes 48 seconds East, 33.23 feet along said Right of Way line;

Thence South 51 degrees 59 minutes 38 seconds East, 59.96 feet;

Thence South 34 degrees 23 minutes 47 seconds East, 117.89 feet;

Thence South 22 degrees 11 minutes 29 seconds West, 62.66 feet to the Point of Beginning.

Containing 9,442 feet, more or less, and subject to easements, reservations, restrictions, and right-of-way record and not of record.

PROPRIETOR: IOWA, CHICAGO & EASTERN RAILROAD  
CORP. (DBA CP RAILWAY)  
PREPARED FOR: CITY OF DUBUQUE  
DATE PREPARED: JAN. 24, 2018, REV. 5-30-18



EASEMENT: Dubuque, Iowa  
AGR No. \_\_\_\_\_

Page 10 of 12

DM & E, Grantor  
City of Dubuque, Grantee

**EXHIBIT B**  
Requirements for Entry unto railroad property for  
Maintenance or repair of Culvert System.

- 1 As used herein, the term "**Culvert Work**" shall mean the installation, maintenance, repair, changing or renewal of the Culvert System the requires the grading, excavation or disturbance of soil adjacent or above the Culvert System, or such activities that could result in impacts to the adjacent railroad operations including, but not limited to, as vibration, noise, smoke and fumes. Work does not include the use or maintenance activities such as cleaning, painting, or electrical work where the foregoing impacts to soil or railroad operations are not present.
2. Grantee, shall secure all necessary public approvals and permits for any Culvert Work in the Easement Area.
- 3 Prior to any Culvert Work, Grantee shall be responsible for determining the location and existence of any pipes, wires, conduits, sewers, piling or other obstructions to Grantee's Culvert Work. Grantee expressly assumes the risk of damage to the foregoing pipes, wires, conduits, sewers, piling or other obstructions, if any, and agrees to pay any claims arising from damage thereto in connection with its Culvert Work. Grantor makes no representation by the granting of this indenture that the Easement Area is free of any such pipes, wires, conduits, sewers, pilings or other obstructions.
- .4 Grantee shall not carry on any Culvert Work until:
  - A. it shall have given Grantor at least five (5) days' written notice, and
  - B. an authorized representative of Grantor shall, at Grantor's election, be present to supervise same. Upon bills being rendered for the authorized representative's supervision, Grantee shall promptly reimburse Grantor for all reasonable expenses incurred by it in connection with such supervision, including all labor costs for flagmen supplied by Grantor to protect railroad operations, and for the entire cost of the furnishing, installation and later removal of any temporary supports for said tracks, if any.
5. Prior to the commencement of Culvert Work, the Grantee shall require any third party contractor acting on behalf of the Grantee pursuant to this Easement to:
  - A. to the extent permitted by law, execute and deliver to the Grantor a release of liability that shall provide that the contractor shall indemnify, hold harmless and defend the Indemnitees (as defined below) from and against all claims arising out of, resulting from or relating to any loss of (or damage to) any property or business or any injury to (or death of) any person, where such loss, damage, injury, or death actually or allegedly arises (whether directly or indirectly, wholly or in part) from any negligence or willful misconduct of the Contractor (or its employees, agents, or contractors) while on the Easement Area pursuant to this Easement. Indemnitees means Grantor, its subsidiaries, affiliated companies and parent companies, and their directors, officers, employees and agents, including without limitation, Soo Line Railroad Company, Delaware and Hudson Railroad Corporation, Dakota, Minnesota and Eastern Railroad Corporation, Soo Line Corporation, Wyoming, Dakota Railroad Properties, Inc., The Milwaukee Motor Transportation Company, Hiawatha Transfer Company, and Canadian and Pacific Railway Company.
  - B. to maintain during any period of time that any of its employees or agents or equipment are upon the Property, policies of insurance conforming to the insurance requirements set forth in the Construction Agreement
  - C. The above policies of insurance shall further be subject to the following:
    - i. The coverage limits of the foregoing policies shall be initially as set forth in the Construction Agreement, but such amounts shall after one year from the date of this

Easement Agreement be such amounts as Grantor reasonably deems standard for work in close proximity to railroad operations.

- ii. Each such insurance policy shall name the Grantor as an additional Insured. Prior to commencement of any work upon the Easement Area, the Grantor must receive and approve a certificate or certificates of insurance for each such insurance policy stating that such coverage will not be canceled or materially changed without ten (10) days written notice being given to the Grantor. The certificate for the Commercial General Liability Policy of insurance shall include the following endorsement:

"It is agreed that the policy or policies of insurance evidenced by this certificate covers the liability assumed by the insured in connection with work to be performed in connection with the Roadway as set forth in the easement grant dated \_\_\_\_\_, 20\_\_\_\_ by Dakota, Minnesota & Eastern Railroad Corporation to the City of Dubuque including work upon railroad property, within railroad right of way and in close proximity of operating railroad tracks."

01536555-1\10422-183

**TEMPORARY EASEMENT AGREEMENT NUMBER \_\_\_\_\_**  
**(Temporary Construction of Culvert System and Hike/Bike Trail)**

Date: \_\_\_\_\_, 2018

For good and valuable consideration the receipt whereof is hereby acknowledged,

**DAKOTA, MINNESOTA AND EASTERN RAILROAD CORPORATION,**

a Delaware corporation doing business as Canadian Pacific, having its principal place of business at 700 Canadian Pacific Plaza, 120 S. Sixth Street, Minneapolis, Minnesota 55402, ("Grantor")

hereby grants unto

**THE CITY OF DUBUQUE, IOWA**, a government agency, ("Grantee"),

a temporary easement ("Temporary Easement") described and conditioned as follows:

**1.0 DESCRIPTION OF PROPERTY:** The Temporary Easement is granted over, across, and through a strip of land located in Dubuque, Dubuque County, Iowa, more fully described and depicted on the drawing attached hereto as **Exhibit A** and made a part hereof, and hereinafter referred to as the "Temporary Easement Area."

**2.0 PURPOSE:** The Temporary Easement shall be limited to construction activities associated with the installation and construction of storm sewer and hike / bike trail improvements adjacent to the Temporary Easement Area ("City Improvements") in accordance with the Construction Agreement as defined in Section 5.1 below (said installation and construction, hereinafter, the "Construction Project").

**3.0 RESERVATIONS:** Grantor reserves unto itself, and its successors and assigns:

3.1 fee title to the Temporary Easement Area; Grantee's maintenance and use of the Temporary Easement Area, however long continued, shall not vest in the Grantee rights adverse to those of the Grantor other than those granted by this Agreement;

3.2 the exclusive right and privilege to use the Temporary Easement Area for the maintenance, construction, and operation of railroad tracks and facilities and other purposes in a manner that does not unreasonably interfere with the Grantee's use of the Temporary Easement Area pursuant to this Agreement;

- 3.3 the right to permit other parties to use the Temporary Easement Area in a manner that does not unreasonably interfere with the Grantee's use of the Temporary Easement Area pursuant to this Agreement;
- 3.4 the right of incidental use of the Temporary Easement Area in a manner that does not unreasonably interfere with the Grantee's use of the Temporary Easement Area pursuant to this Agreement; and
- 3.5 the right and privilege to use the Temporary Easement Area for any and all other purposes that are not inconsistent with the use thereof for the purpose or purposes permitted by this Agreement or which unreasonably interferes with or restricts the rights granted to Grantee.
- 3.6 Notwithstanding anything to the contrary contained herein, Grantor's railroad operations, tracks and facilities shall be deemed superior to the rights granted to the Grantee under this Agreement.

**4.0 TERM, TERMINATION AND EXPIRATION:**

- 4.1 This Temporary Easement shall remain in effect until the earlier of: a) so long as required by Grantee during the Construction Project, or b) the two year anniversary of the date of execution of this Temporary Easement ("Expiration Date"), after which this Temporary Easement shall terminate without further action by either Party; provided that if Grantee's Construction Project has not been completed by the Expiration Date, Grantee may request an extension in writing, which extension shall not be unreasonably withheld by Grantor but may, in Grantor's sole discretion, be subject to a reasonable fee to be paid by Grantee prior to commencement of such extension. Additionally, the Temporary Easement shall be subject to termination or expiration as follows:
  - 4.1.1 **Breach:** If Grantee is unable or unwilling to cure a breach of any of the provisions of this Agreement within thirty (30) days (or such longer period as may be reasonably required if Grantee promptly initiates the cure and diligently prosecutes the cure to completion) following receipt of a written notice from Grantor detailing such breach, then this Temporary Easement shall therewith be terminated. The foregoing shall be subject, however, to reasonable seasonal accommodations for any physical work required to cure a breach.

**5.0 CONSTRUCTION, MAINTENANCE AND REMOVAL WORK:**

- 5.1 The use of the Temporary Easement Area for the Construction Project will be pursuant to the separate construction agreement between the parties, dated \_\_\_\_\_, 2018 (the "Construction Agreement").
- 5.2 Grantee shall at all times during the term of this Temporary Easement Agreement, at Grantee's sole cost and expense, keep and maintain any improvements located upon the Temporary Easement Area in a structurally safe and sound condition, in good repair and in compliance with the plans and specifications therefor and this Temporary Easement Agreement. Grantee shall not permit the existence of any nuisance or the accumulation of junk, debris or other unsightly materials on the Temporary Easement Area and shall keep the Temporary Easement Area in a clean and safe condition. Grantor shall have no obligation whatsoever, monetary or non-monetary, to maintain any improvements in the Temporary Easement Area.

6.0 **TAXES AND ASSESSMENTS:** Grantee shall assume and pay any taxes or assessments which may be levied by any competent authority by reason of the existence or use of said land for the Construction Project.

7.0 **LIABILITY AND HOLD HARMLESS; INDEMNITY:**

7.1 Damage to Railroad facilities. If any railroad tracks, facilities, or equipment owned, used, or maintained by the Grantor are damaged by Grantee or the City Improvements, the Grantor shall repair (or arrange for the repair of) such damage and the Grantee shall pay the full cost of such repair within 30 days after the Grantor shall tender a bill therefor.

7.2 Assumption of risks. Grantee acknowledges that it is fully aware of the dangers of working on and about railroad property and railroad operations and knowingly and willingly assumes the risk of harm (e.g., injury to or death of persons and damage to or destruction of property) that may occur while on and about Grantor's property. Without in any way limiting the scope of the preceding sentence, Grantee assumes the risk that the City Improvements and any monitoring wells, elevations bench marks, reference points, and other installations or property of Grantee located within, under, above, or in the vicinity of the Easement Area may be disturbed, damaged, or destroyed as the result of railroad operations or mishaps by third persons. As an inducement to Grantor to grant the rights herein and as part consideration therefor, Grantee agrees that it shall not make any claim against and shall hold harmless Grantor, its officers, agents, and employees on account of the same, even if such disturbance, damage, or destruction arises from the negligence of the Grantor or its employees, agents, or invitees, but excluding damage or destruction that is attributable to Grantor's gross negligence or willful misconduct. Grantee assumes full responsibility for protecting its installations and personal property from theft and vandalism while such installations and personal property are on Grantor's property. For purposes of this Agreement, the Parties agree that "gross negligence or willful misconduct" shall be defined as the intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another; such a gross want of care and regard for the rights of others as to justify the presumption of willfulness and wantonness, including all of the following elements: (1) knowledge of the peril to be apprehended; (2) knowledge that injury, damage or loss is a probable, as opposed to a possible, result of the danger; and (3) a conscious failure to avoid the peril.

7.3 **Indemnification Provisions.** To the fullest extent permitted by law, the Grantee shall defend, indemnify and hold harmless the Grantor Indemnified Parties (as defined below) from and against all claims, demands, actions, suits, judgments, losses, damages (including, but not limited to, lost profits and other actual, compensatory, direct, consequential, punitive, and exemplary damages), expenses, penalties, fines, sanctions, court costs, litigation costs, and attorneys' fees arising out of or relating to any breach of this Agreement, any destruction of (or damage to) any property or natural resource, any upstream or downstream flooding caused in whole or in part by the City Improvements, any injury to (or death of) any person, or any environmental pollution or contamination whatsoever, where such destruction, damage, injury, death, pollution, or contamination actually or allegedly arises in whole or in part from the work, any action or omission of the Grantee, its employees, agents, contractors and subcontractors, while on or about the Grantor's property pursuant to this Agreement, or the exercise by the Grantee of the rights granted by this Agreement, including but not limited to damage to Grantor's railroad tracks caused by or associated in any way with the City Improvements, except to the extent caused by the gross negligence or willful misconduct of Grantor Indemnified Parties. As used in this Agreement, "Grantor Indemnified Parties" means the following businesses and their officers, directors, employees, successors, assigns and agents: Dakota, Minnesota & Eastern Railroad Corporation, Soo Line Holding Company, Soo Line Corporation, Canadian Pacific Railway Company, any company doing business as Canadian Pacific Railway or Canadian Pacific, and any railway company or contractor operating trains or rail equipment upon railway tracks in close proximity to Grantor property, together with the parent companies, subsidiaries, and affiliated companies of all of the foregoing.

7.4 **Insurance Provisions.** Grantee is a member of and has an Agreement with the Iowa Communities Assurance Pool (ICAP), a local government risk pool authorized by Iowa Code Sec. 670.7. Grantee shall maintain in full force and effect its membership in ICAP (and, during construction of the Culvert System, cause its contractor to procure and maintain in effect the insurance policies required under the Construction Agreement) at all times during the term of this Easement, with initial limits of coverage shown in brackets "[ ]" as follows:

7.4.1. Commercial General Liability coverage with a combined single limit of \$[5,000,000].

7.4.2 The above ICAP agreement shall further be subject to the following:

- a. The coverage limits of the ICAP agreement shall be initially as shown in brackets, but such amounts shall after one year from the date hereof be such amounts as Grantor reasonably deems standard for work in close proximity to railroad operations.
- b. The ICAP agreement shall name the Grantor as an additional party. Prior to commencement of any work upon the Easement Area, the Grantor must receive and approve a certificate of coverage for the ICAP agreement stating that such coverage will not be canceled or materially changed without ten (10) days written notice being given to the Grantor. The certificate of coverage shall include the following endorsement:

"It is agreed that the coverage evidenced by this certificate covers the liability assumed by the insured in connection with the use as set forth in the easement grant dated \_\_\_\_\_, 2018 by Dakota, Minnesota & Eastern Railroad Corporation to the City of Dubuque."

## 8.0 **MISCELLANEOUS:**

- 8.1 **Grantee/Grantor:** As used in this Agreement, the terms “**Grantee**” and “**Grantor**” shall include the parties first named above and their respective successors or assigns.
- 8.2 **Headings:** The paragraph headings used in this Agreement are used solely for the purpose of convenience. They are not intended to, and do not, modify or limit the wording of the paragraphs to which they are appended, and they shall not be used or construed as guides to the interpretation of said paragraphs.
- 8.3 **Severability of Terms:** Each provision, paragraph, sentence, clause, phrase, and word of this Agreement shall apply to the extent permitted by applicable law and is intended to be severable. If any provision, paragraph, sentence, clause, phrase or word of this indenture is illegal or invalid for any reason whatsoever, such illegality or invalidity shall not affect the legality or validity of the remainder of this Agreement.
- 8.4 **No Waiver:** Any act or omission constituting a breach of this Agreement shall be limited to such act or omission and shall not be construed as a permanent or continuing waiver thereof.
- 8.5 **Notices:** Any notice given by a party pursuant to this Agreement, shall be good if served upon the other party, or if deposited in a United States post office, certified mail, addressed to the other party at its last known address.
- 8.6 **Merger:** The Construction Agreement and this Agreement completely outline all of the rights, responsibilities, and obligations of the parties hereto and may not be amended or altered except by an instrument in writing signed by both parties. Furthermore, the Construction Agreement and this Agreement merge all prior oral representations and negotiations of the parties hereto.
- 8.7 **No Warranty:** Grantor does not warrant title to the Temporary Easement Area, and makes no representations or warranties, express or implied, as to the habitability of the Temporary Easement Area or the fitness of the Temporary Easement Area for Grantee's purpose or any other particular purpose.
- 8.8 **Default and Remedies:** In the event of any violation by Grantor or Grantee of any of the provisions of this Agreement, in addition to the right to collect damages and/or receive specific performance, the Grantor or Grantee will have the right to seek an injunction of such violation from a court of competent jurisdiction. The prevailing party in any such action shall be entitled to an award of its reasonable attorney's fees incurred in enforcing this Agreement. In addition, in the event the Grantee fails to perform any of the provisions of this Agreement or violates any of the provisions hereof, the Grantor may cure such default; provided, however, that written notice of such intention, specifying the nature of the alleged default and the actions to be performed, has been given to the Grantee not less than thirty (30) days prior to the commencement of such action or such lesser time if, in the reasonable judgment of the Grantor, such default is emergency in nature. In the event the Grantor fails to perform any of the provisions of this Agreement or violates any provisions hereof, the Grantee may cure such default at the Grantee's sole cost and expense; provided however, that written notice of such intention, specifying the nature of the alleged default and the actions to be performed, has been given to the Grantor not less than thirty (30) days prior to the commencement of such action or such lesser time if, in the reasonable judgment of the Grantee, such default is emergency in nature, and only if the Grantor approves and authorizes the Grantee's proposed cure in writing. If the Grantor elects to perform the action to have been performed by the Grantee, on completion of such action, an itemized statement of the costs thereof will be submitted to the Grantee, and the amount thereof will be immediately due and payable by the Grantee to the Grantor. The remedies specified herein shall be cumulative and in addition to all other remedies permitted at law or in equity. Notwithstanding anything in the foregoing that might be construed to the contrary, Grantor shall not be required to give notice to Grantee prior

to repairing or arranging for the repair of tracks, facilities, or equipment damaged by Grantee or the City Improvements.

8.9 **No Partnership, Joint Venture, or Shared Enterprise.** The Grantee's construction activities in accordance with this Agreement shall not be deemed to create a partnership, joint venture, or shared enterprise of any kind with the Grantor.

This Agreement shall inure to the benefit of and be binding upon the successors and assigns of the Grantor and the Grantee.

**DAKOTA, MINNESOTA AND EASTERN RAILROAD  
CORPORATION**  
doing business as Canadian Pacific

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

STATE OF MINNESOTA      )  
                                    ) ss:  
COUNTY OF HENNEPIN      )

The foregoing easement was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 2018, by \_\_\_\_\_, the \_\_\_\_\_ of Dakota, Minnesota and Eastern Railroad Corporation, a Delaware corporation, on behalf of the corporation.

Notary Seal

Notary Public

This instrument was drafted by:  
Real Estate Department  
700 Canadian Pacific Plaza  
120 South Sixth Street  
Minneapolis, MN 55402

TEMP EASEMENT: Dubuque, Iowa  
AGR No. \_\_\_\_\_

Page 6 of 8

DM & E, Grantor  
City of Dubuque, Grantee

EXHIBIT C

(Drawing of Easement Area)

[See following page]

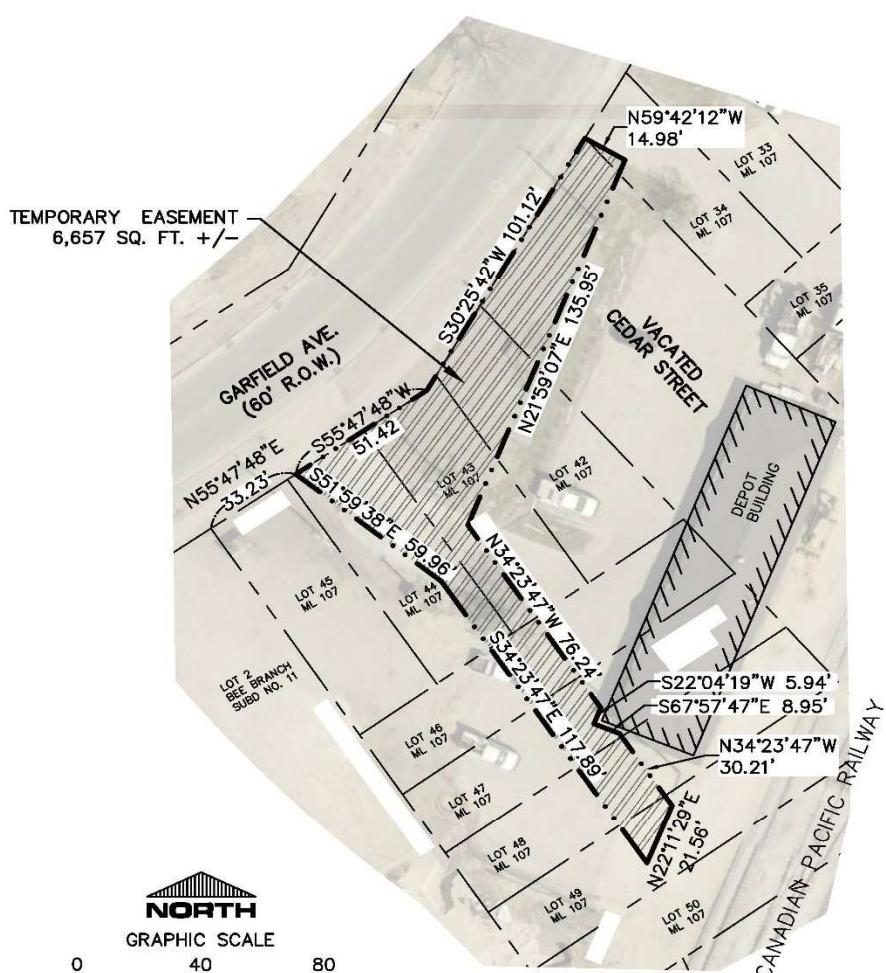
TEMP EASEMENT: Dubuque, Iowa  
AGR No. \_\_\_\_\_

Page 7 of 8

DM & E, Grantor  
City of Dubuque, Grantee

## TEMPORARY EASEMENT EXHIBIT C

TEMPORARY EASEMENT ACROSS PART OF VACATED  
CEDAR STREET, PARTS OF LOTS 34, 42, 43, 44, 46,  
47, 48, AND 49 IN MINERAL LOT 107, ALL IN THE  
CITY OF DUBUQUE, IOWA



NORTH

GRAPHIC SCALE

0 40 80

1" = 40'

NOTE  
THIS SURVEY IS SUBJECT TO  
EASEMENTS, RESERVATIONS,  
RESTRICTIONS AND RIGHTS-OF-WAY  
OF RECORD AND NOT OF RECORD.

PROPRIETOR: IOWA, CHICAGO & EASTERN RAILROAD  
CORP. (DBA CP RAILWAY)  
PREPARED FOR: CITY OF DUBUQUE  
DATE PREPARED: JAN. 24, 2018, REV. 5-30-18

LEGEND

— — — LOT LINE

— · — PROPOSED EASEMENT LINE

ML MINERAL LOT



www.iiwgr.com • 800.556.4491

ANCO-TECHNICAL  
CIVIL ENGINEERING INC  
CONSTRUCTION INSPECTION  
ENVIRONMENTAL ENGINEERING  
LAND SURVEYING  
MUNICIPAL ENGINEERING  
STRUCTURAL ENGINEERING  
TRANSPORTATION ENGINEERING

DRAWN	JJB	PLAT NO.	-IA-18
CHECKED	SAF	PROJ. NO.	06169-02
DATE	5-30-18	SHEET	1 of 1
P:\06\169\169-02\DRAWINGS\SUR\06169 CP-RR			

01536562-1\10422-183

TEMP EASEMENT: Dubuque, Iowa  
AGR No. \_\_\_\_\_

Page 8 of 8

DM & E, Grantor  
City of Dubuque, Grantee

**TEMPORARY EASEMENT AGREEMENT NUMBER \_\_\_\_\_**  
**(Temporary Construction of Culvert System and Hike/Bike Trail)**

Date: \_\_\_\_\_, 2018

For good and valuable consideration the receipt whereof is hereby acknowledged,

**DAKOTA, MINNESOTA AND EASTERN RAILROAD CORPORATION,**

a Delaware corporation doing business as Canadian Pacific, having its principal place of business at 700 Canadian Pacific Plaza, 120 S. Sixth Street, Minneapolis, Minnesota 55402, ("Grantor")

hereby grants unto

**THE CITY OF DUBUQUE, IOWA**, a government agency, ("Grantee"),

a temporary easement ("Temporary Easement") described and conditioned as follows:

**1.0 DESCRIPTION OF PROPERTY:** The Temporary Easement is granted over, across, and through two strips of land located in Dubuque, Dubuque County, Iowa, more fully described and depicted on the drawing attached hereto as **Exhibit A** and made a part hereof, and hereinafter referred to as the "Temporary Easement Area."

**2.0 PURPOSE:** The Temporary Easement shall be limited to construction activities associated with the installation and construction of storm sewer and hike / bike trail improvements adjacent to the Temporary Easement Area ("City Improvements") in accordance with the Construction Agreement as defined in Section 5.1 below (said installation and construction, hereinafter, the "Construction Project").

**3.0 RESERVATIONS:** Grantor reserves unto itself, and its successors and assigns:

- 3.1 fee title to the Temporary Easement Area; Grantee's maintenance and use of the Temporary Easement Area, however long continued, shall not vest in the Grantee rights adverse to those of the Grantor other than those granted by this Agreement;
- 3.2 the exclusive right and privilege to use the Temporary Easement Area for the maintenance, construction, and operation of railroad tracks and facilities and other purposes in a manner that does not unreasonably interfere with the Grantee's use of the Temporary Easement Area pursuant to this Agreement;

- 3.3 the right to permit other parties to use the Temporary Easement Area in a manner that does not unreasonably interfere with the Grantee's use of the Temporary Easement Area pursuant to this Agreement;
- 3.4 the right of incidental use of the Temporary Easement Area in a manner that does not unreasonably interfere with the Grantee's use of the Temporary Easement Area pursuant to this Agreement; and
- 3.5 the right and privilege to use the Temporary Easement Area for any and all other purposes that are not inconsistent with the use thereof for the purpose or purposes permitted by this Agreement or which unreasonably interferes with or restricts the rights granted to Grantee.
- 3.6 Notwithstanding anything to the contrary contained herein, Grantor's railroad operations, tracks and facilities shall be deemed superior to the rights granted to the Grantee under this Agreement.

#### **4.0 TERM, TERMINATION AND EXPIRATION:**

- 4.1 This Temporary Easement shall remain in effect until the earlier of: a) so long as required by Grantee during the Construction Project, or b) the two year anniversary of the date of execution of this Temporary Easement ("Expiration Date"), after which this Temporary Easement shall terminate without further action by either Party; provided that if Grantee's Construction Project has not been completed by the Expiration Date, Grantee may request an extension in writing, which extension shall not be unreasonably withheld by Grantor but may, in Grantor's sole discretion, be subject to a reasonable fee to be paid by Grantee prior to commencement of such extension. Additionally, the Temporary Easement shall be subject to termination or expiration as follows:
  - 4.1.1 **Breach:** If Grantee is unable or unwilling to cure a breach of any of the provisions of this Agreement within thirty (30) days (or such longer period as may be reasonably required if Grantee promptly initiates the cure and diligently prosecutes the cure to completion) following receipt of a written notice from Grantor detailing such breach, then this Temporary Easement shall therewith be terminated. The foregoing shall be subject, however, to reasonable seasonal accommodations for any physical work required to cure a breach.

#### **5.0 CONSTRUCTION, MAINTENANCE AND REMOVAL WORK:**

- 5.1 The use of the Temporary Easement Area for the Construction Project will be pursuant to the separate construction agreement between the parties, dated \_\_\_\_\_, 2018 (the "Construction Agreement").
- 5.2 Grantee shall at all times during the term of this Temporary Easement Agreement, at Grantee's sole cost and expense, keep and maintain any improvements located upon the Temporary Easement Area in a structurally safe and sound condition, in good repair and in compliance with the plans and specifications therefor and this Temporary Easement Agreement. Grantee shall not permit the existence of any nuisance or the accumulation of junk, debris or other unsightly materials on the Temporary Easement Area and shall keep the Temporary Easement Area in a clean and safe condition. Grantor shall have no obligation whatsoever, monetary or non-monetary, to maintain any improvements in the Temporary Easement Area.

#### **6.0 TAXES AND ASSESSMENTS: Grantee shall assume and pay any taxes or assessments which may be levied by any competent authority by reason of the existence or use of said land for the Construction Project.**

## 7.0 **LIABILITY AND HOLD HARMLESS; INDEMNITY:**

7.1 **Damage to Railroad facilities.** If any railroad tracks, facilities, or equipment owned, used, or maintained by the Grantor are damaged by Grantee or the City Improvements, the Grantor shall repair (or arrange for the repair of) such damage and the Grantee shall pay the full cost of such repair within 30 days after the Grantor shall tender a bill therefor.

7.2 **Assumption of risks.** Grantee acknowledges that it is fully aware of the dangers of working on and about railroad property and railroad operations and knowingly and willingly assumes the risk of harm (e.g., injury to or death of persons and damage to or destruction of property) that may occur while on and about Grantor's property. Without in any way limiting the scope of the preceding sentence, Grantee assumes the risk that the City Improvements and any monitoring wells, elevations bench marks, reference points, and other installations or property of Grantee located within, under, above, or in the vicinity of the Easement Area may be disturbed, damaged, or destroyed as the result of railroad operations or mishaps by third persons. As an inducement to Grantor to grant the rights herein and as part consideration therefor, Grantee agrees that it shall not make any claim against and shall hold harmless Grantor, its officers, agents, and employees on account of the same, even if such disturbance, damage, or destruction arises from the negligence of the Grantor or its employees, agents, or invitees, but excluding damage or destruction that is attributable to Grantor's gross negligence or willful misconduct. Grantee assumes full responsibility for protecting its installations and personal property from theft and vandalism while such installations and personal property are on Grantor's property. For purposes of this Agreement, the Parties agree that "gross negligence or willful misconduct" shall be defined as the intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another; such a gross want of care and regard for the rights of others as to justify the presumption of willfulness and wantonness, including all of the following elements: (1) knowledge of the peril to be apprehended; (2) knowledge that injury, damage or loss is a probable, as opposed to a possible, result of the danger; and (3) a conscious failure to avoid the peril.

7.3 **Indemnification Provisions.** To the fullest extent permitted by law, the Grantee shall defend, indemnify and hold harmless the Grantor Indemnified Parties (as defined below) from and against all claims, demands, actions, suits, judgments, losses, damages (including, but not limited to, lost profits and other actual, compensatory, direct, consequential, punitive, and exemplary damages), expenses, penalties, fines, sanctions, court costs, litigation costs, and attorneys' fees arising out of or relating to any breach of this Agreement, any destruction of (or damage to) any property or natural resource, any upstream or downstream flooding caused in whole or in part by the City Improvements, any injury to (or death of) any person, or any environmental pollution or contamination whatsoever, where such destruction, damage, injury, death, pollution, or contamination actually or allegedly arises in whole or in part from the work, any action or omission of the Grantee, its employees, agents, contractors and subcontractors, while on or about the Grantor's property pursuant to this Agreement, or the exercise by the Grantee of the rights granted by this Agreement, including but not limited to damage to Grantor's railroad tracks caused by or associated in any way with the City Improvements, except to the extent caused by the gross negligence or willful misconduct of Grantor Indemnified Parties. As used in this Agreement, "Grantor Indemnified Parties" means the following businesses and their officers, directors, employees, successors, assigns and agents: Dakota, Minnesota & Eastern Railroad Corporation, Soo Line Holding Company, Soo Line Corporation, Canadian Pacific Railway Company, any company doing business as Canadian Pacific Railway or Canadian Pacific, and any railway company or contractor operating trains or rail equipment upon railway tracks in close proximity to Grantor property, together with the parent companies, subsidiaries, and affiliated companies of all of the foregoing.

7.4 Insurance Provisions. Grantee is a member of and has an Agreement with the Iowa Communities Assurance Pool (ICAP), a local government risk pool authorized by Iowa Code Sec. 670.7. Grantee shall maintain in full force and effect its membership in ICAP (and, during construction of the Culvert System, cause its contractor to procure and maintain in effect the insurance policies required under the Construction Agreement) at all times during the term of this Easement, with initial limits of coverage shown in brackets "[ ]" as follows:

7.4.1. Commercial General Liability coverage with a combined single limit of \$[5,000,000].

7.4.2 The above ICAP agreement shall further be subject to the following:

- a. The coverage limits of the ICAP agreement shall be initially as shown in brackets, but such amounts shall after one year from the date hereof be such amounts as Grantor reasonably deems standard for work in close proximity to railroad operations.
- b. The ICAP agreement shall name the Grantor as an additional party. Prior to commencement of any work upon the Easement Area, the Grantor must receive and approve a certificate of coverage for the ICAP agreement stating that such coverage will not be canceled or materially changed without ten (10) days written notice being given to the Grantor. The certificate of coverage shall include the following endorsement:

"It is agreed that the coverage evidenced by this certificate covers the liability assumed by the insured in connection with the use as set forth in the easement grant dated \_\_\_\_\_, 2018 by Dakota, Minnesota & Eastern Railroad Corporation to the City of Dubuque."

## 8.0 MISCELLANEOUS:

- 8.1 Grantee/Grantor: As used in this Agreement, the terms "**Grantee**" and "**Grantor**" shall include the parties first named above and their respective successors or assigns.
- 8.2 Headings: The paragraph headings used in this Agreement are used solely for the purpose of convenience. They are not intended to, and do not, modify or limit the wording of the paragraphs to which they are appended, and they shall not be used or construed as guides to the interpretation of said paragraphs.
- 8.3 Severability of Terms: Each provision, paragraph, sentence, clause, phrase, and word of this Agreement shall apply to the extent permitted by applicable law and is intended to be severable. If any provision, paragraph, sentence, clause, phrase or word of this indenture is illegal or invalid for any reason whatsoever, such illegality or invalidity shall not affect the legality or validity of the remainder of this Agreement.
- 8.4 No Waiver: Any act or omission constituting a breach of this Agreement shall be limited to such act or omission and shall not be construed as a permanent or continuing waiver thereof.
- 8.5 Notices: Any notice given by a party pursuant to this Agreement, shall be good if served upon the other party, or if deposited in a United States post office, certified mail, addressed to the other party at its last known address.
- 8.6 Merger: The Construction Agreement and this Agreement completely outline all of the rights, responsibilities, and obligations of the parties hereto and may not be amended or altered except by an instrument in writing signed by both parties. Furthermore, the Construction Agreement and this Agreement merge all prior oral representations and negotiations of the parties hereto.

8.7 **No Warranty:** Grantor does not warrant title to the Temporary Easement Area, and makes no representations or warranties, express or implied, as to the habitability of the Temporary Easement Area or the fitness of the Temporary Easement Area for Grantee's purpose or any other particular purpose.

8.8 **Default and Remedies:** In the event of any violation by Grantor or Grantee of any of the provisions of this Agreement, in addition to the right to collect damages and/or receive specific performance, the Grantor or Grantee will have the right to seek an injunction of such violation from a court of competent jurisdiction. The prevailing party in any such action shall be entitled to an award of its reasonable attorney's fees incurred in enforcing this Agreement. In addition, in the event the Grantee fails to perform any of the provisions of this Agreement or violates any of the provisions hereof, the Grantor may cure such default; provided, however, that written notice of such intention, specifying the nature of the alleged default and the actions to be performed, has been given to the Grantee not less than thirty (30) days prior to the commencement of such action or such lesser time if, in the reasonable judgment of the Grantor, such default is emergency in nature. In the event the Grantor fails to perform any of the provisions of this Agreement or violates any provisions hereof, the Grantee may cure such default at the Grantee's sole cost and expense; provided however, that written notice of such intention, specifying the nature of the alleged default and the actions to be performed, has been given to the Grantor not less than thirty (30) days prior to the commencement of such action or such lesser time if, in the reasonable judgment of the Grantee, such default is emergency in nature, and only if the Grantor approves and authorizes the Grantee's proposed cure in writing. If the Grantor elects to perform the action to have been performed by the Grantee, on completion of such action, an itemized statement of the costs thereof will be submitted to the Grantee, and the amount thereof will be immediately due and payable by the Grantee to the Grantor. The remedies specified herein shall be cumulative and in addition to all other remedies permitted at law or in equity. Notwithstanding anything in the foregoing that might be construed to the contrary, Grantor shall not be required to give notice to Grantee prior to repairing or arranging for the repair of tracks, facilities, or equipment damaged by Grantee or the City Improvements.

8.9 **No Partnership, Joint Venture, or Shared Enterprise.** The Grantee's construction activities in accordance with this Agreement shall not be deemed to create a partnership, joint venture, or shared enterprise of any kind with the Grantor.

This Agreement shall inure to the benefit of and be binding upon the successors and assigns of the Grantor and the Grantee.

**DAKOTA, MINNESOTA AND EASTERN RAILROAD  
CORPORATION**  
doing business as Canadian Pacific

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

STATE OF MINNESOTA )  
 ) ss:  
COUNTY OF HENNEPIN )

TEMP EASEMENT: Dubuque, Iowa  
AGR No. \_\_\_\_\_

Page 5 of 8

DM & E, Grantor  
City of Dubuque, Grantee

The foregoing easement was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 2018, by \_\_\_\_\_, the \_\_\_\_\_, of Dakota, Minnesota and Eastern Railroad Corporation, a Delaware corporation, on behalf of the corporation.

Notary Seal

Notary Public

This instrument was drafted by:  
Real Estate Department  
700 Canadian Pacific Plaza  
120 South Sixth Street  
Minneapolis, MN 55402

TEMP EASEMENT: Dubuque, Iowa  
AGR No. \_\_\_\_\_

Page 6 of 8

DM & E, Grantor  
City of Dubuque, Grantee

EXHIBIT D  
(Drawing of Easement Area)

[See following page]

TEMP EASEMENT: Dubuque, Iowa  
AGR No. \_\_\_\_\_

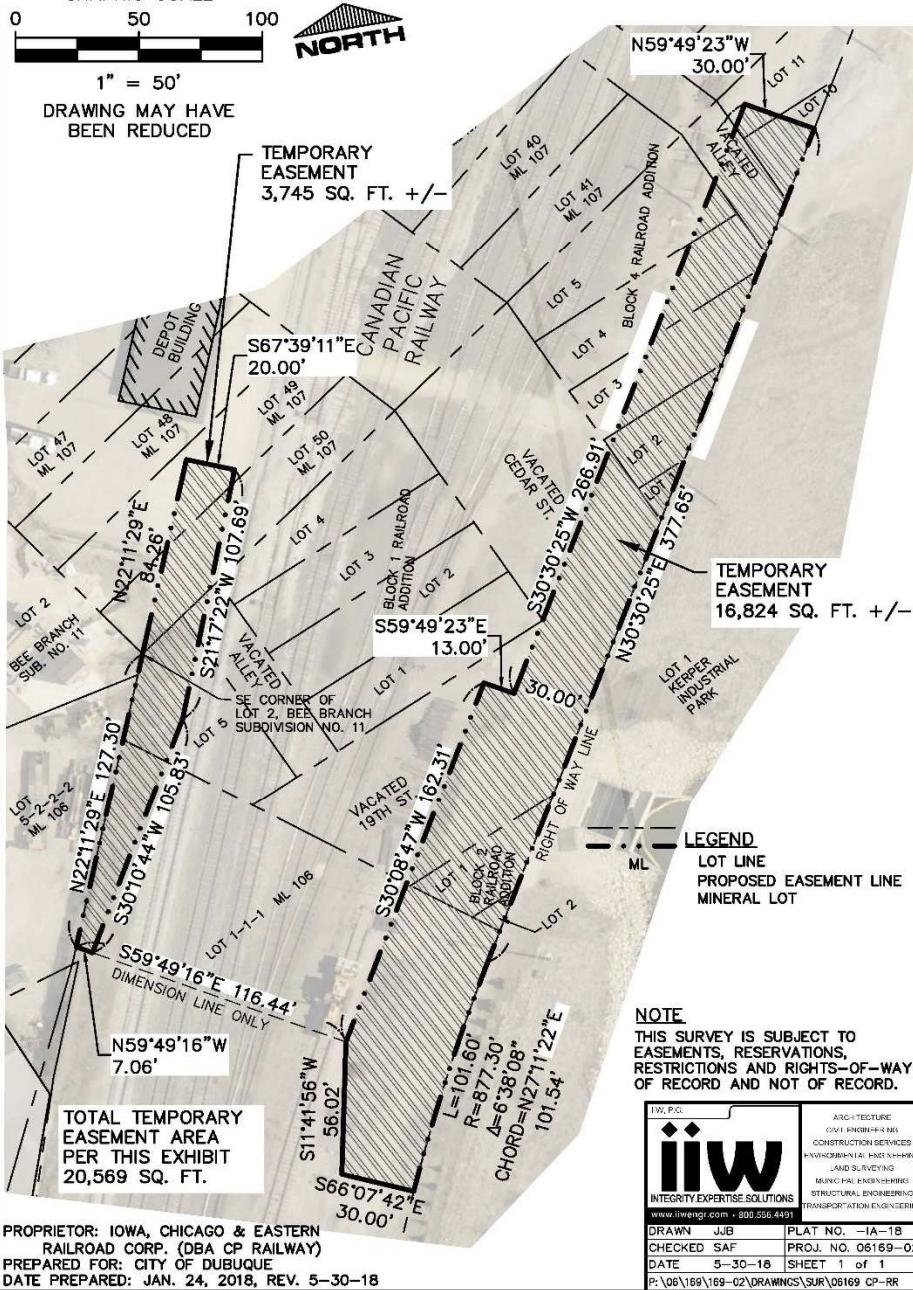
Page 7 of 8

DM & E, Grantor  
City of Dubuque, Grantee

## TEMPORARY EASEMENT EXHIBIT D

TEMPORARY EASEMENTS ACROSS PART OF LOTS 49 AND 50 OF MINERAL  
LOT 107, PART OF VACATED 19TH AND CEDAR STREETS, PART OF LOT 5  
AND PART OF VACATED ALLEY EAST OF LOT 5 IN BLOCK 1 RAILROAD  
ADDITION, PART OF LOTS 1 AND 2 IN BLOCK 2 RAILROAD ADDITION, PART  
OF LOTS 1 THRU 5, 10 & 11, AND PART OF VACATED ALLEY ALL IN BLOCK  
4 RAILROAD ADDITION, AND PART OF LOT 1-1-1 IN MINERAL LOT 106,  
ALL IN THE CITY OF DUBUQUE, IOWA

## GRAPHIC SCALE



PROPRIETOR: IOWA, CHICAGO & EASTERN  
RAILROAD CORP. (DBA CP RAILWAY)  
PREPARED FOR: CITY OF DUBUQUE  
DATE PREPARED: JAN. 24, 2018, REV. 5-30-18

01538419-1\10422-183

TEMP EASEMENT: Dubuque, Iowa  
AGR No. \_\_\_\_\_

Page 8 of 8

DM & E, Grantor  
City of Dubuque, Grantee

**TEMPORARY EASEMENT AGREEMENT NUMBER \_\_\_\_\_**  
**(Temporary Construction of Culvert System and Hike/Bike Trail)**

Date: \_\_\_\_\_, 2018

For good and valuable consideration the receipt whereof is hereby acknowledged,

**DAKOTA, MINNESOTA AND EASTERN RAILROAD CORPORATION,**

a Delaware corporation doing business as Canadian Pacific, having its principal place of business at 700 Canadian Pacific Plaza, 120 S. Sixth Street, Minneapolis, Minnesota 55402, ("Grantor")

hereby grants unto

**THE CITY OF DUBUQUE, IOWA**, a government agency, ("Grantee"),

a temporary easement ("Temporary Easement") described and conditioned as follows:

**1.0 DESCRIPTION OF PROPERTY:** The Temporary Easement is granted over, across, and through two strips of land located in Dubuque, Dubuque County, Iowa, more fully described and depicted on the drawing attached hereto as **Exhibit A** and made a part hereof, and hereinafter referred to as the "Temporary Easement Area."

**2.0 PURPOSE:** The Temporary Easement shall be limited to construction activities associated with the installation and construction of storm sewer and hike / bike trail improvements adjacent to the Temporary Easement Area ("City Improvements") in accordance with the Construction Agreement as defined in Section 5.1 below (said installation and construction, hereinafter, the "Construction Project").

**3.0 RESERVATIONS:** Grantor reserves unto itself, and its successors and assigns:

- 3.1 fee title to the Temporary Easement Area; Grantee's maintenance and use of the Temporary Easement Area, however long continued, shall not vest in the Grantee rights adverse to those of the Grantor other than those granted by this Agreement;
- 3.2 the exclusive right and privilege to use the Temporary Easement Area for the maintenance, construction, and operation of railroad tracks and facilities and other purposes in a manner that does not unreasonably interfere with the Grantee's use of the Temporary Easement Area pursuant to this Agreement;

- 3.3 the right to permit other parties to use the Temporary Easement Area in a manner that does not unreasonably interfere with the Grantee's use of the Temporary Easement Area pursuant to this Agreement;
- 3.4 the right of incidental use of the Temporary Easement Area in a manner that does not unreasonably interfere with the Grantee's use of the Temporary Easement Area pursuant to this Agreement; and
- 3.5 the right and privilege to use the Temporary Easement Area for any and all other purposes that are not inconsistent with the use thereof for the purpose or purposes permitted by this Agreement or which unreasonably interferes with or restricts the rights granted to Grantee.
- 3.6 Notwithstanding anything to the contrary contained herein, Grantor's railroad operations, tracks and facilities shall be deemed superior to the rights granted to the Grantee under this Agreement.

#### **4.0 TERM, TERMINATION AND EXPIRATION:**

- 4.1 This Temporary Easement shall remain in effect until the earlier of: a) so long as required by Grantee during the Construction Project, or b) the two year anniversary of the date of execution of this Temporary Easement ("Expiration Date"), after which this Temporary Easement shall terminate without further action by either Party; provided that if Grantee's Construction Project has not been completed by the Expiration Date, Grantee may request an extension in writing, which extension shall not be unreasonably withheld by Grantor but may, in Grantor's sole discretion, be subject to a reasonable fee to be paid by Grantee prior to commencement of such extension. Additionally, the Temporary Easement shall be subject to termination or expiration as follows:
  - 4.1.1 **Breach:** If Grantee is unable or unwilling to cure a breach of any of the provisions of this Agreement within thirty (30) days (or such longer period as may be reasonably required if Grantee promptly initiates the cure and diligently prosecutes the cure to completion) following receipt of a written notice from Grantor detailing such breach, then this Temporary Easement shall therewith be terminated. The foregoing shall be subject, however, to reasonable seasonal accommodations for any physical work required to cure a breach.

#### **5.0 CONSTRUCTION, MAINTENANCE AND REMOVAL WORK:**

- 5.1 The use of the Temporary Easement Area for the Construction Project will be pursuant to the separate construction agreement between the parties, dated \_\_\_\_\_, 2018 (the "Construction Agreement").
- 5.2 Grantee shall at all times during the term of this Temporary Easement Agreement, at Grantee's sole cost and expense, keep and maintain any improvements located upon the Temporary Easement Area in a structurally safe and sound condition, in good repair and in compliance with the plans and specifications therefor and this Temporary Easement Agreement. Grantee shall not permit the existence of any nuisance or the accumulation of junk, debris or other unsightly materials on the Temporary Easement Area and shall keep the Temporary Easement Area in a clean and safe condition. Grantor shall have no obligation whatsoever, monetary or non-monetary, to maintain any improvements in the Temporary Easement Area.

6.0 **TAXES AND ASSESSMENTS:** Grantee shall assume and pay any taxes or assessments which may be levied by any competent authority by reason of the existence or use of said land for the Construction Project.

7.0 **LIABILITY AND HOLD HARMLESS; INDEMNITY:**

7.1 **Damage to Railroad facilities.** If any railroad tracks, facilities, or equipment owned, used, or maintained by the Grantor are damaged by Grantee or the City Improvements, the Grantor shall repair (or arrange for the repair of) such damage and the Grantee shall pay the full cost of such repair within 30 days after the Grantor shall tender a bill therefor.

7.2 **Assumption of risks.** Grantee acknowledges that it is fully aware of the dangers of working on and about railroad property and railroad operations and knowingly and willingly assumes the risk of harm (e.g., injury to or death of persons and damage to or destruction of property) that may occur while on and about Grantor's property. Without in any way limiting the scope of the preceding sentence, Grantee assumes the risk that the City Improvements and any monitoring wells, elevations bench marks, reference points, and other installations or property of Grantee located within, under, above, or in the vicinity of the Easement Area may be disturbed, damaged, or destroyed as the result of railroad operations or mishaps by third persons. As an inducement to Grantor to grant the rights herein and as part consideration therefor, Grantee agrees that it shall not make any claim against and shall hold harmless Grantor, its officers, agents, and employees on account of the same, even if such disturbance, damage, or destruction arises from the negligence of the Grantor or its employees, agents, or invitees, but excluding damage or destruction that is attributable to Grantor's gross negligence or willful misconduct. Grantee assumes full responsibility for protecting its installations and personal property from theft and vandalism while such installations and personal property are on Grantor's property. For purposes of this Agreement, the Parties agree that "gross negligence or willful misconduct" shall be defined as the intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another; such a gross want of care and regard for the rights of others as to justify the presumption of willfulness and wantonness, including all of the following elements: (1) knowledge of the peril to be apprehended; (2) knowledge that injury, damage or loss is a probable, as opposed to a possible, result of the danger; and (3) a conscious failure to avoid the peril.

7.3 **Indemnification Provisions.** To the fullest extent permitted by law, the Grantee shall defend, indemnify and hold harmless the Grantor Indemnified Parties (as defined below) from and against all claims, demands, actions, suits, judgments, losses, damages (including, but not limited to, lost profits and other actual, compensatory, direct, consequential, punitive, and exemplary damages), expenses, penalties, fines, sanctions, court costs, litigation costs, and attorneys' fees arising out of or relating to any breach of this Agreement, any destruction of (or damage to) any property or natural resource, any upstream or downstream flooding caused in whole or in part by the City Improvements, any injury to (or death of) any person, or any environmental pollution or contamination whatsoever, where such destruction, damage, injury, death, pollution, or contamination actually or allegedly arises in whole or in part from the work, any action or omission of the Grantee, its employees, agents, contractors and subcontractors, while on or about the Grantor's property pursuant to this Agreement, or the exercise by the Grantee of the rights granted by this Agreement, including but not limited to damage to Grantor's railroad tracks caused by or associated in any way with the City Improvements, except to the extent caused by the gross negligence or willful misconduct of Grantor Indemnified Parties. As used in this Agreement, "Grantor Indemnified Parties" means the following businesses and their officers, directors, employees, successors, assigns and agents: Dakota, Minnesota & Eastern Railroad Corporation, Soo Line Holding Company, Soo Line Corporation, Canadian Pacific Railway Company, any company doing business as Canadian Pacific Railway or Canadian Pacific, and any railway company or

contractor operating trains or rail equipment upon railway tracks in close proximity to Grantor property, together with the parent companies, subsidiaries, and affiliated companies of all of the foregoing.

7.4 **Insurance Provisions.** Grantee is a member of and has an Agreement with the Iowa Communities Assurance Pool (ICAP), a local government risk pool authorized by Iowa Code Sec. 670.7. Grantee shall maintain in full force and effect its membership in ICAP (and, during construction of the Culvert System, cause its contractor to procure and maintain in effect the insurance policies required under the Construction Agreement) at all times during the term of this Easement, with initial limits of coverage shown in brackets "[ ]" as follows:

7.4.1. Commercial General Liability coverage with a combined single limit of \$[5,000,000].

7.4.2 The above ICAP agreement shall further be subject to the following:

- a. The coverage limits of the ICAP agreement shall be initially as shown in brackets, but such amounts shall after one year from the date hereof be such amounts as Grantor reasonably deems standard for work in close proximity to railroad operations.
- b. The ICAP agreement shall name the Grantor as an additional party. Prior to commencement of any work upon the Easement Area, the Grantor must receive and approve a certificate of coverage for the ICAP agreement stating that such coverage will not be canceled or materially changed without ten (10) days written notice being given to the Grantor. The certificate of coverage shall include the following endorsement:

"It is agreed that the coverage evidenced by this certificate covers the liability assumed by the insured in connection with the use as set forth in the easement grant dated \_\_\_\_\_, 2018 by Dakota, Minnesota & Eastern Railroad Corporation to the City of Dubuque."

## 8.0 **MISCELLANEOUS:**

- 8.1 **Grantee/Grantor:** As used in this Agreement, the terms "**Grantee**" and "**Grantor**" shall include the parties first named above and their respective successors or assigns.
- 8.2 **Headings:** The paragraph headings used in this Agreement are used solely for the purpose of convenience. They are not intended to, and do not, modify or limit the wording of the paragraphs to which they are appended, and they shall not be used or construed as guides to the interpretation of said paragraphs.
- 8.3 **Severability of Terms:** Each provision, paragraph, sentence, clause, phrase, and word of this Agreement shall apply to the extent permitted by applicable law and is intended to be severable. If any provision, paragraph, sentence, clause, phrase or word of this indenture is illegal or invalid for any reason whatsoever, such illegality or invalidity shall not affect the legality or validity of the remainder of this Agreement.
- 8.4 **No Waiver:** Any act or omission constituting a breach of this Agreement shall be limited to such act or omission and shall not be construed as a permanent or continuing waiver thereof.
- 8.5 **Notices:** Any notice given by a party pursuant to this Agreement, shall be good if served upon the other party, or if deposited in a United States post office, certified mail, addressed to the other party at its last known address.

- 8.6 **Merger:** The Construction Agreement and this Agreement completely outline all of the rights, responsibilities, and obligations of the parties hereto and may not be amended or altered except by an instrument in writing signed by both parties. Furthermore, the Construction Agreement and this Agreement merge all prior oral representations and negotiations of the parties hereto.
- 8.7 **No Warranty:** Grantor does not warrant title to the Temporary Easement Area, and makes no representations or warranties, express or implied, as to the habitability of the Temporary Easement Area or the fitness of the Temporary Easement Area for Grantee's purpose or any other particular purpose.
- 8.8 **Default and Remedies:** In the event of any violation by Grantor or Grantee of any of the provisions of this Agreement, in addition to the right to collect damages and/or receive specific performance, the Grantor or Grantee will have the right to seek an injunction of such violation from a court of competent jurisdiction. The prevailing party in any such action shall be entitled to an award of its reasonable attorney's fees incurred in enforcing this Agreement. In addition, in the event the Grantee fails to perform any of the provisions of this Agreement or violates any of the provisions hereof, the Grantor may cure such default; provided, however, that written notice of such intention, specifying the nature of the alleged default and the actions to be performed, has been given to the Grantee not less than thirty (30) days prior to the commencement of such action or such lesser time if, in the reasonable judgment of the Grantor, such default is emergency in nature. In the event the Grantor fails to perform any of the provisions of this Agreement or violates any provisions hereof, the Grantee may cure such default at the Grantee's sole cost and expense; provided however, that written notice of such intention, specifying the nature of the alleged default and the actions to be performed, has been given to the Grantor not less than thirty (30) days prior to the commencement of such action or such lesser time if, in the reasonable judgment of the Grantee, such default is emergency in nature, and only if the Grantor approves and authorizes the Grantee's proposed cure in writing. If the Grantor elects to perform the action to have been performed by the Grantee, on completion of such action, an itemized statement of the costs thereof will be submitted to the Grantee, and the amount thereof will be immediately due and payable by the Grantee to the Grantor. The remedies specified herein shall be cumulative and in addition to all other remedies permitted at law or in equity. Notwithstanding anything in the foregoing that might be construed to the contrary, Grantor shall not be required to give notice to Grantee prior to repairing or arranging for the repair of tracks, facilities, or equipment damaged by Grantee or the City Improvements.
- 8.9 **No Partnership, Joint Venture, or Shared Enterprise.** The Grantee's construction activities in accordance with this Agreement shall not be deemed to create a partnership, joint venture, or shared enterprise of any kind with the Grantor.

This Agreement shall inure to the benefit of and be binding upon the successors and assigns of the Grantor and the Grantee.

**DAKOTA, MINNESOTA AND EASTERN RAILROAD  
CORPORATION**  
doing business as Canadian Pacific

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

TEMP EASEMENT: Dubuque, Iowa  
AGR No. \_\_\_\_\_

Page 5 of 8

DM & E, Grantor  
City of Dubuque, Grantee

STATE OF MINNESOTA      )  
                            ) ss:  
COUNTY OF HENNEPIN    )

The foregoing easement was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 2018, by  
\_\_\_\_\_, the \_\_\_\_\_ of Dakota, Minnesota and Eastern  
Railroad Corporation, a Delaware corporation, on behalf of the corporation.

Notary Seal

Notary Public

This instrument was drafted by:  
Real Estate Department  
700 Canadian Pacific Plaza  
120 South Sixth Street  
Minneapolis, MN 55402

TEMP EASEMENT: Dubuque, Iowa  
AGR No. \_\_\_\_\_

Page 6 of 8

DM & E, Grantor  
City of Dubuque, Grantee

EXHIBIT A  
(Drawing of Easement Area)

[See following page]

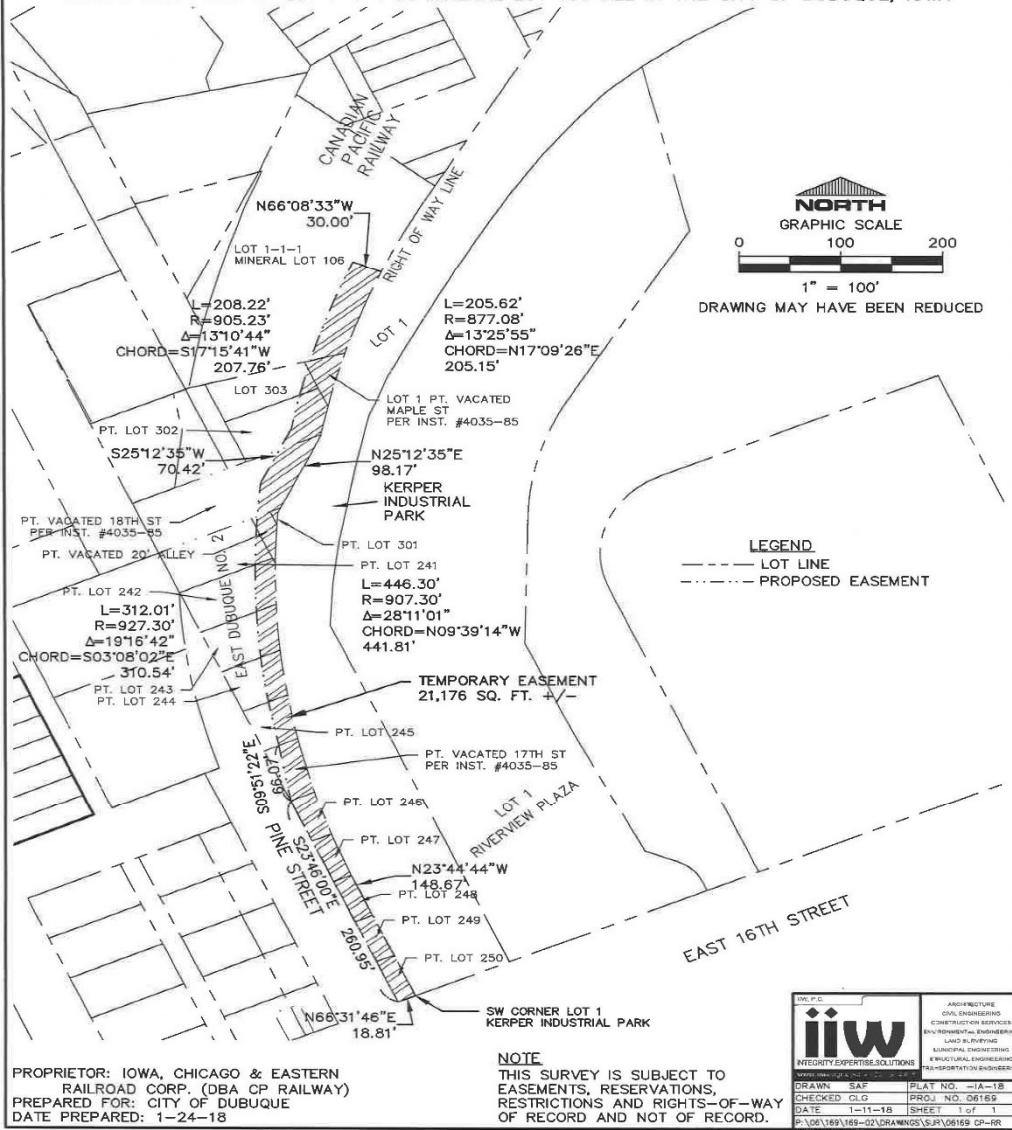
TEMP EASEMENT: Dubuque, Iowa  
AGR No. \_\_\_\_\_

Page 7 of 8

DM & E, Grantor  
City of Dubuque, Grantee

**TEMPORARY EASEMENT EXHIBIT E**

TEMPORARY EASEMENT ACROSS PARTS OF LOTS 241-250 AND LOTS 301-303 AND PT OF VACATED ALLEY BETWEEN LOT 242 AND LOT 301 ALL IN EAST DUBUQUE NO. 2 ALSO PARTS OF VACATED 17TH AND 18TH STREETS EAST OF PINE STREET AND PART OF LOT 1 A VACATED PORTION OF MAPLE STREET AND PART OF LOT 1-1-1 IN MINERAL LOT 106 ALL IN THE CITY OF DUBUQUE, IOWA



PROPRIETOR: IOWA, CHICAGO & EASTERN RAILROAD CORP. (DBA CP RAILWAY)  
PREPARED FOR: CITY OF DUBUQUE  
DATE PREPARED: 1-24-18

01538431-1\10422-183

TEMP EASEMENT: Dubuque, Iowa  
AGR No. \_\_\_\_\_

Page 8 of 8

DM & E, Grantor  
City of Dubuque, Grantee

## **TEMPORARY EASEMENT AGREEMENT NUMBER \_\_\_\_\_**

**(Temporary Construction of Culvert System and Hike/Bike Trail – Subsurface Only)**

Date: \_\_\_\_\_, 2018

For good and valuable consideration the receipt whereof is hereby acknowledged,

**DAKOTA, MINNESOTA AND EASTERN RAILROAD CORPORATION,**

a Delaware corporation doing business as Canadian Pacific, having its principal place of business at 700 Canadian Pacific Plaza, 120 S. Sixth Street, Minneapolis, Minnesota 55402, ("Grantor")

hereby grants unto

**THE CITY OF DUBUQUE, IOWA**, a government agency, ("Grantee"),

a temporary easement ("Temporary Easement") described and conditioned as follows:

**1.0 DESCRIPTION OF PROPERTY:** The Temporary Easement is granted under a strip of land located in Dubuque, Dubuque County, Iowa, more fully described and depicted on the drawing attached hereto as **Exhibit A** and made a part hereof, and hereinafter referred to as the "Temporary Easement Area."

**2.0 PURPOSE:** The Temporary Easement shall be limited to installation of temporary underground tie-backs associated with installation and construction of storm sewer and hike / bike trail improvements adjacent to the Temporary Easement Area ("City Improvements") in accordance with the Construction Agreement as defined in Section 5.1 below (said installation and construction, hereinafter, the "Construction Project").

The Temporary Easement Area is underground only and does not include the surface of the land overlying the Easement Area.

**3.0 RESERVATIONS:** Grantor reserves unto itself, and its successors and assigns:

3.1 fee title to the Temporary Easement Area; Grantee's maintenance and use of the Temporary Easement Area, however long continued, shall not vest in the Grantee rights adverse to those of the Grantor other than those granted by this Agreement;

3.2 the exclusive right and privilege to use the Temporary Easement Area for the maintenance, construction, and operation of railroad tracks and facilities and other purposes in a manner that

does not unreasonably interfere with the Grantee's use of the Temporary Easement Area pursuant to this Agreement;

- 3.3 the right to permit other parties to use the Temporary Easement Area in a manner that does not unreasonably interfere with the Grantee's use of the Temporary Easement Area pursuant to this Agreement;
- 3.4 the right of incidental use of the Temporary Easement Area in a manner that does not unreasonably interfere with the Grantee's use of the Temporary Easement Area pursuant to this Agreement; and
- 3.5 the right and privilege to use the Temporary Easement Area for any and all other purposes that are not inconsistent with the use thereof for the purpose or purposes permitted by this Agreement or which unreasonably interferes with or restricts the rights granted to Grantee.
- 3.6 Notwithstanding anything to the contrary contained herein, Grantor's railroad operations, tracks and facilities shall be deemed superior to the rights granted to the Grantee under this Agreement.

#### **4.0 TERM, TERMINATION AND EXPIRATION:**

- 4.1 This Temporary Easement shall remain in effect until the earlier of: a) so long as required by Grantee during the Construction Project, or b) the two year anniversary of the date of execution of this Temporary Easement ("Expiration Date"), after which this Temporary Easement shall terminate without further action by either Party; provided that if Grantee's Construction Project has not been completed by the Expiration Date, Grantee may request an extension in writing, which extension shall not be unreasonably withheld by Grantor but may, in Grantor's sole discretion, be subject to a reasonable fee to be paid by Grantee prior to commencement of such extension. Additionally, the Temporary Easement shall be subject to termination or expiration as follows:
  - 4.1.1 **Breach:** If Grantee is unable or unwilling to cure a breach of any of the provisions of this Agreement within thirty (30) days (or such longer period as may be reasonably required if Grantee promptly initiates the cure and diligently prosecutes the cure to completion) following receipt of a written notice from Grantor detailing such breach, then this Temporary Easement shall therewith be terminated. The foregoing shall be subject, however, to reasonable seasonal accommodations for any physical work required to cure a breach.

#### **5.0 CONSTRUCTION, MAINTENANCE AND REMOVAL WORK:**

- 5.1 The use of the Temporary Easement Area for the Construction Project will be pursuant to the separate construction agreement between the parties, dated \_\_\_\_\_, 2018 (the "Construction Agreement").
- 5.2 Grantee shall at all times during the term of this Temporary Easement Agreement, at Grantee's sole cost and expense, keep and maintain any improvements located upon the Temporary Easement Area in a structurally safe and sound condition, in good repair and in compliance with the plans and specifications therefor and this Temporary Easement Agreement. Grantee shall not permit the existence of any nuisance or the accumulation of junk, debris or other unsightly materials on the Temporary Easement Area and shall keep the Temporary Easement Area in a clean and safe condition. Grantor shall have no obligation whatsoever, monetary or non-monetary, to maintain any improvements in the Temporary Easement Area.

6.0 **TAXES AND ASSESSMENTS:** Grantee shall assume and pay any taxes or assessments which may be levied by any competent authority by reason of the existence or use of said land for the Construction Project.

7.0 **LIABILITY AND HOLD HARMLESS; INDEMNITY:**

7.1 **Damage to Railroad facilities.** If any railroad tracks, facilities, or equipment owned, used, or maintained by the Grantor are damaged by Grantee or the City Improvements, the Grantor shall repair (or arrange for the repair of) such damage and the Grantee shall pay the full cost of such repair within 30 days after the Grantor shall tender a bill therefor.

7.2 **Assumption of risks.** Grantee acknowledges that it is fully aware of the dangers of working on and about railroad property and railroad operations and knowingly and willingly assumes the risk of harm (e.g., injury to or death of persons and damage to or destruction of property) that may occur while on and about Grantor's property. Without in any way limiting the scope of the preceding sentence, Grantee assumes the risk that the City Improvements and any monitoring wells, elevations bench marks, reference points, and other installations or property of Grantee located within, under, above, or in the vicinity of the Easement Area may be disturbed, damaged, or destroyed as the result of railroad operations or mishaps by third persons. As an inducement to Grantor to grant the rights herein and as part consideration therefor, Grantee agrees that it shall not make any claim against and shall hold harmless Grantor, its officers, agents, and employees on account of the same, even if such disturbance, damage, or destruction arises from the negligence of the Grantor or its employees, agents, or invitees, but excluding damage or destruction that is attributable to Grantor's gross negligence or willful misconduct. Grantee assumes full responsibility for protecting its installations and personal property from theft and vandalism while such installations and personal property are on Grantor's property. For purposes of this Agreement, the Parties agree that "gross negligence or willful misconduct" shall be defined as the intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another; such a gross want of care and regard for the rights of others as to justify the presumption of willfulness and wantonness, including all of the following elements: (1) knowledge of the peril to be apprehended; (2) knowledge that injury, damage or loss is a probable, as opposed to a possible, result of the danger; and (3) a conscious failure to avoid the peril.

7.3 **Indemnification Provisions.** To the fullest extent permitted by law, the Grantee shall defend, indemnify and hold harmless the Grantor Indemnified Parties (as defined below) from and against all claims, demands, actions, suits, judgments, losses, damages (including, but not limited to, lost profits and other actual, compensatory, direct, consequential, punitive, and exemplary damages), expenses, penalties, fines, sanctions, court costs, litigation costs, and attorneys' fees arising out of or relating to any breach of this Agreement, any destruction of (or damage to) any property or natural resource, any upstream or downstream flooding caused in whole or in part by the City Improvements, any injury to (or death of) any person, or any environmental pollution or contamination whatsoever, where such destruction, damage, injury, death, pollution, or contamination actually or allegedly arises in whole or in part from the work, any action or omission of the Grantee, its employees, agents, contractors and subcontractors, while on or about the Grantor's property pursuant to this Agreement, or the exercise by the Grantee of the rights granted by this Agreement, including but not limited to damage to Grantor's railroad tracks caused by or associated in any way with the City Improvements, except to the extent caused by the gross negligence or willful misconduct of Grantor Indemnified Parties. As used in this Agreement, "Grantor Indemnified Parties" means the following businesses and their officers, directors, employees, successors, assigns and agents: Dakota, Minnesota & Eastern Railroad Corporation, Soo Line Holding Company, Soo Line Corporation, Canadian Pacific Railway Company, any company doing business as Canadian Pacific Railway or Canadian Pacific, and any railway company or

contractor operating trains or rail equipment upon railway tracks in close proximity to Grantor property, together with the parent companies, subsidiaries, and affiliated companies of all of the foregoing.

7.4 Insurance Provisions. Grantee is a member of and has an Agreement with the Iowa Communities Assurance Pool (ICAP), a local government risk pool authorized by Iowa Code Sec. 670.7. Grantee shall maintain in full force and effect its membership in ICAP (and, during construction of the Culvert System, cause its contractor to procure and maintain in effect the insurance policies required under the Construction Agreement) at all times during the term of this Easement, with initial limits of coverage shown in brackets "[ ]" as follows:

7.4.1. Commercial General Liability coverage with a combined single limit of \$[5,000,000].

7.4.2 The above ICAP agreement shall further be subject to the following:

- a. The coverage limits of the ICAP agreement shall be initially as shown in brackets, but such amounts shall after one year from the date hereof be such amounts as Grantor reasonably deems standard for work in close proximity to railroad operations.
- b. The ICAP agreement shall name the Grantor as an additional party. Prior to commencement of any work upon the Easement Area, the Grantor must receive and approve a certificate of coverage for the ICAP agreement stating that such coverage will not be canceled or materially changed without ten (10) days written notice being given to the Grantor. The certificate of coverage shall include the following endorsement:

"It is agreed that the coverage evidenced by this certificate covers the liability assumed by the insured in connection with the use as set forth in the easement grant dated \_\_\_\_\_, 2018 by Dakota, Minnesota & Eastern Railroad Corporation to the City of Dubuque."

## 8.0 MISCELLANEOUS:

- 8.1 Grantee/Grantor: As used in this Agreement, the terms "**Grantee**" and "**Grantor**" shall include the parties first named above and their respective successors or assigns.
- 8.2 Headings: The paragraph headings used in this Agreement are used solely for the purpose of convenience. They are not intended to, and do not, modify or limit the wording of the paragraphs to which they are appended, and they shall not be used or construed as guides to the interpretation of said paragraphs.
- 8.3 Severability of Terms: Each provision, paragraph, sentence, clause, phrase, and word of this Agreement shall apply to the extent permitted by applicable law and is intended to be severable. If any provision, paragraph, sentence, clause, phrase or word of this indenture is illegal or invalid for any reason whatsoever, such illegality or invalidity shall not affect the legality or validity of the remainder of this Agreement.
- 8.4 No Waiver: Any act or omission constituting a breach of this Agreement shall be limited to such act or omission and shall not be construed as a permanent or continuing waiver thereof.
- 8.5 Notices: Any notice given by a party pursuant to this Agreement, shall be good if served upon the other party, or if deposited in a United States post office, certified mail, addressed to the other party at its last known address.

8.6 **Merger:** The Construction Agreement and this Agreement completely outline all of the rights, responsibilities, and obligations of the parties hereto and may not be amended or altered except by an instrument in writing signed by both parties. Furthermore, the Construction Agreement and this Agreement merge all prior oral representations and negotiations of the parties hereto.

8.7 **No Warranty:** Grantor does not warrant title to the Temporary Easement Area, and makes no representations or warranties, express or implied, as to the habitability of the Temporary Easement Area or the fitness of the Temporary Easement Area for Grantee's purpose or any other particular purpose.

8.8 **Default and Remedies:** In the event of any violation by Grantor or Grantee of any of the provisions of this Agreement, in addition to the right to collect damages and/or receive specific performance, the Grantor or Grantee will have the right to seek an injunction of such violation from a court of competent jurisdiction. The prevailing party in any such action shall be entitled to an award of its reasonable attorney's fees incurred in enforcing this Agreement. In addition, in the event the Grantee fails to perform any of the provisions of this Agreement or violates any of the provisions hereof, the Grantor may cure such default; provided, however, that written notice of such intention, specifying the nature of the alleged default and the actions to be performed, has been given to the Grantee not less than thirty (30) days prior to the commencement of such action or such lesser time if, in the reasonable judgment of the Grantor, such default is emergency in nature. In the event the Grantor fails to perform any of the provisions of this Agreement or violates any provisions hereof, the Grantee may cure such default at the Grantee's sole cost and expense; provided however, that written notice of such intention, specifying the nature of the alleged default and the actions to be performed, has been given to the Grantor not less than thirty (30) days prior to the commencement of such action or such lesser time if, in the reasonable judgment of the Grantee, such default is emergency in nature, and only if the Grantor approves and authorizes the Grantee's proposed cure in writing. If the Grantor elects to perform the action to have been performed by the Grantee, on completion of such action, an itemized statement of the costs thereof will be submitted to the Grantee, and the amount thereof will be immediately due and payable by the Grantee to the Grantor. The remedies specified herein shall be cumulative and in addition to all other remedies permitted at law or in equity. Notwithstanding anything in the foregoing that might be construed to the contrary, Grantor shall not be required to give notice to Grantee prior to repairing or arranging for the repair of tracks, facilities, or equipment damaged by Grantee or the City Improvements.

8.9 **No Partnership, Joint Venture, or Shared Enterprise.** The Grantee's construction activities in accordance with this Agreement shall not be deemed to create a partnership, joint venture, or shared enterprise of any kind with the Grantor.

This Agreement shall inure to the benefit of and be binding upon the successors and assigns of the Grantor and the Grantee.

**DAKOTA, MINNESOTA AND EASTERN RAILROAD  
CORPORATION**  
doing business as Canadian Pacific

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

STATE OF MINNESOTA )  
 ) ss:

TEMP EASEMENT: Dubuque, Iowa  
AGR No. \_\_\_\_\_

Page 5 of 8

DM & E, Grantor  
City of Dubuque, Grantee

COUNTY OF HENNEPIN )

The foregoing easement was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 2018, by  
\_\_\_\_\_, the \_\_\_\_\_ of Dakota, Minnesota and Eastern Railroad  
Corporation, a Delaware corporation, on behalf of the corporation.

Notary Seal

Notary Public

This instrument was drafted by:  
Real Estate Department  
700 Canadian Pacific Plaza  
120 South Sixth Street  
Minneapolis, MN 55402

TEMP EASEMENT: Dubuque, Iowa  
AGR No. \_\_\_\_\_

Page 6 of 8

DM & E, Grantor  
City of Dubuque, Grantee

EXHIBIT F  
(Drawing of Easement Area)

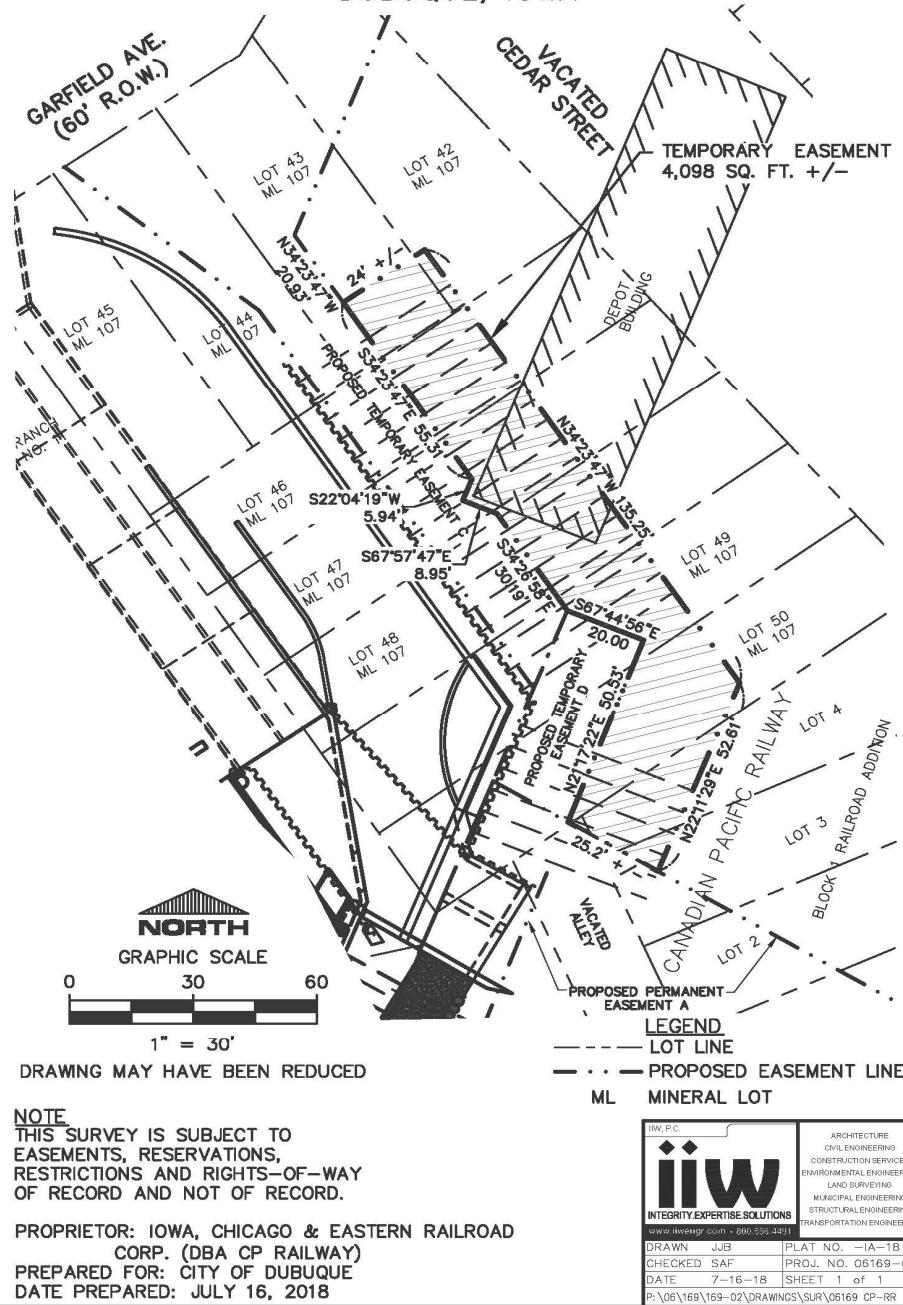
[See following page]

TEMP EASEMENT: Dubuque, Iowa  
AGR No. \_\_\_\_\_

Page 7 of 8

DM & E, Grantor  
City of Dubuque, Grantee

**TEMPORARY EASEMENT EXHIBIT F**  
 TEMPORARY EASEMENT UNDER PARTS OF LOTS 42, 43,  
 46, 47, 48, 49, AND 50 IN MINERAL LOT 107, AND  
 LOTS 3 AND 4 IN BLOCK 1 OF RAILROAD ADDITION AND  
 PART OF VACATED ALLEY ALL IN THE CITY OF  
 DUBUQUE, IOWA



01538439-1\10422-183

TEMP EASEMENT: Dubuque, Iowa  
 AGR No. \_\_\_\_\_

Page 8 of 8

DM & E, Grantor  
 City of Dubuque, Grantee