

Next Ord: 1713-11  
Next Res: 849-11

VISION STATEMENT

SEDRO-WOOLLEY IS A FRIENDLY CITY THAT IS CHARACTERIZED BY CITY GOVERNMENT AND CITIZENS WORKING TOGETHER TO ACHIEVE A PROSPEROUS, VIBRANT AND SAFE COMMUNITY

MISSION STATEMENT

TO PROVIDE SERVICES AND OPPORTUNITIES WHICH CREATE A COMMUNITY WHERE PEOPLE CHOOSE TO LIVE, WORK AND PLAY

**CITY COUNCIL WORKSESSION  
AGENDA**

**September 7, 2011**

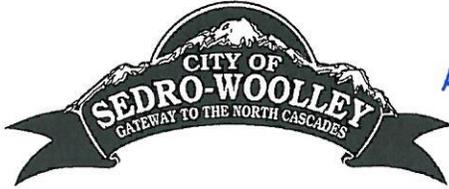
**7:00 PM**

**Sedro-Woolley Municipal Building  
Public Safety Training Room  
325 Metcalf Street**

- A. Agreement with BNSF regarding SR 20 widening project  
*(Staff Contact – Eron Berg)*
- B. Retaining impact fee and general facility charge credits for buildings that are demolished  
*(Staff Contact – Jack Moore)*
- C. Council Critical Goals and Objectives - Discussion
- D. Mayor/Council Roundtable Discussion  
*(Open discussion re: items of interest)*

**CITY COUNCIL  
WORKSESSION**

**SEP 07 2011**



**AGENDA ITEM     A**

**CITY OF SEDRO-WOOLLEY**  
Sedro-Woolley Municipal Building  
325 Metcalf Street  
Sedro-Woolley, WA 98284  
Phone (360) 855-9922  
Fax (360) 855-9923

Eron M. Berg  
City Supervisor/City Attorney

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MEMO TO: City Council  
FROM: Eron Berg  
RE: Ratification of contract with BNSF regarding SR 20 widening project  
DATE: September 7, 2011

ISSUE: Should the Council ratify and approve the attached agreement with BNSF regarding construction of the SR 20 project?

BACKGROUND: Due to severe time constraints, the attached agreement was signed last week and returned to BNSF for their action which should allow the project to remain on schedule with a total closure of SR 20 later this month.

This agreement addresses cost, liability, access and timing of work on BNSF ROW as well as work on the BNSF owned bridge that is part of our SR 20 project.

I'll be happy to discuss in more detail at the meeting.

RECOMMENDATION: Motion to ratify and approve the attached agreement with BNSF regarding construction of the SR 20 project.

## UNDERPASS AGREEMENT

BNSF File No. BF10001601  
Moore Street SR 20 Underpass  
U.S. D.O.T. No.085099X  
LS 403 MP 87.05  
Sumas Subdivision

This Agreement ("**Agreement**"), is executed to be effective as of \_\_\_\_\_ ("**Effective Date**"), by and between BNSF RAILWAY COMPANY, a Delaware corporation ("**BNSF**"), and the City of Sedro-Woolley, Washington a Municipal Corporation ("**Agency**").

### RECITALS:

WHEREAS, BNSF owns and operates a line of railroad in and through the City of Sedro-Woolley, State of WA;

WHEREAS, AGENCY owns and maintains Moore Street and related utilities through the City of Sedro-Woolley, Washington;

WHEREAS, Agency desires to modify the existing Moore Street SR 20 Road underpass by reconstructing the roadway at separated grades known as the Moore Street SR 20 Underpass and designated as SR 20 Moore Street Underpass road construction in Sedro-Woolley, WA, DOT 085099X, LS 403 MP 87.05, Sumas Subdivision;

WHEREAS, BNSF has requested consultation from Agency and involvement with Agency as part of Agency's SR 20/Moore Street widening project (Project 2011-PW-06);

WHEREAS, Agency and BNSF desire to work cooperatively on this Project; and

NOW, THEREFORE, in consideration of the mutual covenants and agreements of the parties contained herein, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

### ARTICLE I)      SCOPE OF WORK

1. The term "**Project**" as used herein includes any and all work related to the construction of the proposed Moore Street SR 20 Underpass (hereinafter referred to as the "**Structure**"), more particularly described on the Exhibit A attached hereto and incorporated herein, including, but not limited to, any and all changes to telephone, telegraph, signal and electrical lines and appurtenances, temporary and permanent track work, fencing, grading, alterations to or new construction of drainage facilities, preliminary and construction engineering and contract preparation. Temporary controls during construction must be in compliance with Section 8A-5, "Traffic Controls During Construction and Maintenance" of the Manual of Uniform Traffic Control Devices ("MUTCD"), U.S. Department of Transportation.

## **ARTICLE II) BNSF OBLIGATIONS**

In consideration of the covenants of Agency set forth herein and the faithful performance thereof, BNSF agrees as follows:

1. BNSF will furnish all labor, materials, tools, and equipment for railroad work required for the construction of the Project, such railroad work and the estimated cost thereof being as shown on Exhibit D attached hereto and made a part hereof. In the event construction on the Project has not commenced within six (6) months following the Effective Date, BNSF may, in its sole and absolute discretion, revise the cost estimates set forth in said Exhibit D. In such event, the revised cost estimates will become a part of this Agreement as though originally set forth herein. Any item of work incidental to the items listed on Exhibit D not specifically mentioned therein may be included as a part of this Agreement upon written approval of Agency, which approval will not be unreasonably withheld. Construction of the Project must include the following railroad work by BNSF:

- (a) Procurement of materials, equipment and supplies necessary for the railroad work;
- (b) Preliminary engineering, design, and contract preparation;
- (c) Furnishing of flagging services during construction of the Project as required and set forth in further detail on Exhibit C;
- (d) Furnishing engineering and inspection as required in connection with the construction of the Project;
- (e) Providing a contract project coordinator, at Agency's expense, to serve as a project manager for the Project;

2. BNSF will do all railroad work set forth in Article II, Section 1 above on an actual cost basis, when BNSF, in its sole discretion, determines it is required by its labor

agreements to perform such work with its own employees working under applicable collective bargaining agreements.

3. Agency agrees to reimburse BNSF for work of an emergency nature caused by Agency or Agency's contractor in connection with the Project which BNSF deems is reasonably necessary for the immediate restoration of railroad operations, or for the protection of persons or BNSF property. Such work may be performed by BNSF without prior approval of Agency and Agency agrees to fully reimburse BNSF for all such emergency work.

4. BNSF may charge Agency for insurance expenses, including self-insurance expenses, when such expenses cover the cost of Employer's Liability (including, without limitation, liability under the Federal Employer's Liability Act) in connection with the construction of the Project. Such charges will be considered part of the actual cost of the Project, regardless of the nature or amount of ultimate liability for injury, loss or death to BNSF's employees, if any.

5. During the construction of the Project, BNSF will send Agency progressive invoices detailing the costs of the railroad work performed by BNSF under this Agreement. Agency must reimburse BNSF for completed force-account work within thirty (30) days of the date of the invoice for such work. Upon completion of the Project, BNSF will send Agency a detailed invoice of final costs, segregated as to labor and materials for each item in the recapitulation shown on Exhibit D. Pursuant to this section and Article IV, Section 5 herein, Agency must pay the final invoice within ninety (90) days of the date of the final invoice. BNSF will assess a finance charge of .033% per day (12% per annum) on any unpaid sums or other charges due under this Agreement which are past its credit terms. The finance charge continues to accrue daily until the date payment is received by BNSF, not the date payment is made or the date postmarked on the payment. Finance charges will be assessed on delinquent sums and other charges as of the end of the month and will be reduced by amounts in dispute and any unposted payments received by the month's end. Finance charges will be noted on invoices sent to Agency under this section.

6. Except in the event of an emergency, costs shall not exceed sixty thousand four hundred ninety four Dollars (\$60,494.00) unless approved in writing by Agency.

**ARTICLE III) AGENCY OBLIGATIONS**

In consideration of the covenants of BNSF set forth herein and the faithful performance thereof, Agency agrees as follows:

1. Agency has furnished BNSF with plans and specifications for the Project. Electronic sets of said plans (reduced size 11" x 17"), together with copies of calculations, and copies of specifications in **English Units**, have been submitted to and approved by BNSF. Said plans and specifications are part of this Agreement and are

hereby incorporated herein. Any approval of the plans and specifications by BNSF shall in no way obligate BNSF in any manner with respect to the finished product design and/or construction. Any approval by BNSF shall mean only that the plans and specifications meet the subjective standards of BNSF, and such approval by BNSF shall not be deemed to mean that the plans and specifications or construction is structurally sound and appropriate or that such plans and specifications meet applicable regulations, laws, statutes or local ordinances and/or building codes.

2. Agency will make any required application and obtain all required permits and approvals for the construction of the Project.

3. Agency will provide for and maintain minimum vertical and horizontal clearances, as required in Exhibit C and as approved by BNSF as part of the plans and specifications for the Project.

4. Agency owns all rights of way necessary for the construction of the Project.

5. Agency must make any and all arrangements, in compliance with BNSF's Utility Accommodation Manual (<http://www.bnsf.com/communities/faqs/pdf/utility.pdf>), for the installation or relocation of wire lines, pipe lines and other facilities owned by private persons, companies, corporations, political subdivisions or public utilities other than BNSF which may be necessary for the construction of the Project.

6. Agency will construct the Project as shown on the attached Exhibit A and do all work ("Agency's Work") provided for in the plans and specifications for the Project, except railroad work that will be performed by BNSF hereunder. Agency will furnish all labor, materials, tools and equipment for the performance of Agency's Work. The principal elements of Agency's Work are as follows:

- (a) Reconstruction of the roadway;
- (b) All necessary grading and paving, including backfill of excavations and restoration of disturbed vegetation on BNSF's right-of-way;
- (d) Provide suitable drainage, both temporary and permanent;
- (b) Provide appropriate pedestrian control during construction;
- (f) Job site cleanup including removal of all construction materials, concrete debris, surplus soil, refuse, contaminated soils, asphalt debris, litter and other waste materials to the satisfaction of BNSF;

7. Agency agrees to apply and maintain signage or placards indicating: (1) D.O.T. Crossing number 085099X and (2) Vertical clearance signs which indicate the actual vertical clearance from the bottom of the Structure to the top of the pavement, in

conspicuous locations on the Structure; BNSF grants access for Agency to apply and maintain said placards or signage.

8. Agency's Work will be performed by Agency or Agency's contractor in a manner that will not endanger or interfere with the safe and timely operations of BNSF and its facilities.

9. Agency must require its contractor(s) to notify BNSF's Roadmaster at least thirty (30) calendar days prior to requesting a BNSF flagman in accordance with the requirements of Exhibit C attached hereto. Additionally, Agency must require its contractor(s) to notify BNSF's Manager of Public Projects thirty (30) calendar days prior to commencing work on BNSF property or near BNSF tracks.

10. Intentionally left blank.

11. Agency or its contractor(s) must submit copies of any plans (including sets of calculations in **English Units**) for proposed shoring, falsework or cribbing to be used over, under, or adjacent to BNSF's tracks to BNSF's Manager of Public Projects for approval. Shoring, falsework or cribbing, if used by Agency's contractor in the performance of the project and potentially impacting the Underpass, shall be submitted for BNSF approval and shall comply with all applicable requirements promulgated by state and federal agencies, departments, commissions and other legislative bodies.

12. Agency must include the following provisions in any contract with its contractor(s) performing work on said Project:

- (a) The Provider is placed on notice that fiber optic, communication and other cable lines and systems (collectively, the "Lines") owned by various telecommunications companies may be buried on BNSF's property or right-of-way. The locations of these Lines have been included on the plans based on information from the telecommunications companies. The Provider will be responsible for contacting BNSF's Engineering Representative, Ben Steinkamp, BNSF's Signal Representative, Jim Moore, and the telecommunications companies and notifying them of any work that may damage these Lines or facilities and/or interfere with their service. The Provider must also mark all Lines shown on the plans or marked in the field in order to verify their locations. The Provider must also use all reasonable methods when working in the BNSF right-of-way or on BNSF property to determine if any other Lines (fiber optic, cable, communication or otherwise) may exist.
- (b) The Provider will be responsible for the rearrangement of any facilities or Lines determined to interfere with the construction. The Provider must cooperate fully with any telecommunications company(ies) in performing such rearrangements.

- (c) Failure to mark or identify these Lines will be sufficient cause for BNSF's engineering representative (Ben Steinkamp) to stop construction at no cost to the Agency or BNSF until these items are completed.
- (d) In addition to the liability terms contained elsewhere in this Agreement, the Provider hereby indemnifies, defends and holds harmless BNSF for, from and against all cost, liability, and expense whatsoever (including, without limitation, attorney's fees and court costs and expenses) arising out of or in any way contributed to by any act or omission of Provider, its subcontractors, agents and/or employees that cause or in any way or degree contribute to (1) any damage to or destruction of any Lines by Provider, and/or its subcontractors, agents and/or employees, on BNSF's property or within BNSF's right-of-way, (2) any injury to or death of any person employed by or on behalf of any telecommunications company, and/or its contractor, agents and/or employees, on BNSF's property or within BNSF's right-of-way, and/or (3) any claim or cause of action for alleged loss of profits or revenue by, or loss of service by a customer or user of such telecommunication company(ies). **THE LIABILITY ASSUMED BY PROVIDER WILL APPLY ONLY TO THE EXTENT OF THE NEGLIGENCE OF PROVIDER, ITS AGENTS OR EMPLOYEES, AND WILL NOT BE AFFECTED BY THE FACT, IF IT IS A FACT, THAT THE DAMAGE, DESTRUCTION, INJURY, DEATH, CAUSE OF ACTION OR CLAIM WAS OCCASIONED BY OR CONTRIBUTED TO BY THE NEGLIGENCE OF BNSF, ITS AGENTS, SERVANTS, EMPLOYEES OR OTHERWISE, EXCEPT TO THE EXTENT THAT SUCH CLAIMS ARE PROXIMATELY CAUSED BY THE INTENTIONAL MISCONDUCT OR SOLE NEGLIGENCE OF BNSF.**

**It is mutually negotiated between the parties that the indemnification obligation shall include all claims brought by Provider's employees against BNSF, its agents, servants, employees or otherwise, and Provider expressly waives its immunity under the industrial insurance act (RCW Title 51) and assumes potential liability for all actions brought by its employees.**

13. Agency must require compliance with the obligations set forth in this agreement, including Exhibit C and Exhibit C-1, and incorporate in each prime contract for construction of the Project, or the specifications therefore (i) the provisions set forth in Article III; (ii) the provisions set forth in Article IV; and (iii) the provisions set forth in Exhibit C and Exhibit C-1, attached hereto and by reference made a part hereof.

14. Except as otherwise provided below in this Section 14, all construction work performed hereunder by Agency for the Project will be pursuant to a contract or contracts to be let by Agency, and all such contracts must include the following:

- (a) All work performed under such contract or contracts within the limits of BNSF's right-of-way must be performed in a good and workmanlike manner in accordance with plans and specifications approved by BNSF;
- (b) Changes or modifications during construction that affect safety or BNSF operations must be subject to BNSF's approval;
- (c) No work will be commenced within BNSF's right-of-way until each of the prime contractors employed in connection with said work must have (i) executed and delivered to BNSF a letter agreement in the form of Exhibit C-1, and (ii) delivered to and secured BNSF's approval of the required insurance; and

15. Agency agrees to advise the appropriate BNSF Manager of Public Projects, in writing, of the completion date of the Project within thirty (30) days after such completion date. Additionally, Agency will notify BNSF's Manager of Public Projects, in writing, of the date on which Agency and/or its Contractor will meet with BNSF for the purpose of making final inspection of the Project.

**16. TO THE FULLEST EXTENT PERMITTED BY THE LAWS OF THE STATE OF WASHINGTON, AGENCY HEREBY RELEASES, INDEMNIFIES, DEFENDS AND HOLDS HARMLESS BNSF, ITS AFFILIATED COMPANIES, PARTNERS, SUCCESSORS, ASSIGNS, LEGAL REPRESENTATIVES, OFFICERS, DIRECTORS, SHAREHOLDERS, EMPLOYEES AND AGENTS FOR, FROM AND AGAINST ANY AND ALL CLAIMS, LIABILITIES, FINES, PENALTIES, COSTS, DAMAGES, LOSSES, LIENS, CAUSES OF ACTION, SUITS, DEMANDS, JUDGMENTS AND EXPENSES (INCLUDING, WITHOUT LIMITATION, COURT COSTS AND ATTORNEYS' FEES) OF ANY NATURE, KIND OR DESCRIPTION OF ANY PERSON (INCLUDING, WITHOUT LIMITATION, THE EMPLOYEES OF THE PARTIES HERETO) OR ENTITY DIRECTLY OR INDIRECTLY ARISING OUT OF, RESULTING FROM OR RELATED TO (IN WHOLE OR IN PART) (I) THE USE, OCCUPANCY OR PRESENCE OF AGENCY, ITS CONTRACTORS, SUBCONTRACTORS, EMPLOYEES OR AGENTS IN, ON, OR ABOUT THE CONSTRUCTION SITE, (II) THE PERFORMANCE, OR FAILURE TO PERFORM BY THE AGENCY, ITS CONTRACTORS, SUBCONTRACTORS, EMPLOYEES, OR AGENTS, ITS WORK OR ANY OBLIGATION UNDER THIS AGREEMENT, (III) THE SOLE OR CONTRIBUTING ACTS OR OMISSIONS OF AGENCY, ITS CONTRACTORS, SUBCONTRACTORS, EMPLOYEES, OR AGENTS IN, ON, OR ABOUT THE CONSTRUCTION SITE, (IV) AGENCY'S BREACH OF THE TEMPORARY CONSTRUCTION LICENSE OR EASEMENT GRANTED TO AGENCY PURSUANT TO ARTICLE II OF THIS AGREEMENT, (V) ANY RIGHTS OR INTERESTS GRANTED TO AGENCY PURSUANT TO THE TEMPORARY CONSTRUCTION LICENSE OR EASEMENT**

DISCUSSED IN ARTICLE II OF THIS AGREEMENT, (VI) AGENCY'S OCCUPATION AND USE OF BNSF'S PROPERTY OR RIGHT-OF-WAY, INCLUDING, WITHOUT LIMITATION, SUBSEQUENT MAINTENANCE OF THE STRUCTURE BY AGENCY, OR (VII) AN ACT OR OMISSION OF AGENCY OR ITS OFFICERS, AGENTS, INVITEES, EMPLOYEES OR CONTRACTORS OR ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY ANY OF THEM, OR ANYONE THEY CONTROL OR EXERCISE CONTROL OVER. THE LIABILITY ASSUMED BY AGENCY WILL APPLY ONLY TO THE EXTENT OF THE NEGLIGENCE OF AGENCY, ITS AGENTS OR EMPLOYEES, AND THIS WILL NOT BE AFFECTED BY THE FACT, IF IT IS A FACT, THAT THE DAMAGE, DESTRUCTION, INJURY OR DEATH WAS OCCASIONED BY OR CONTRIBUTED TO BY THE NEGLIGENCE OF BNSF, ITS AGENTS, SERVANTS, EMPLOYEES OR OTHERWISE, EXCEPT TO THE EXTENT THAT SUCH CLAIMS ARE PROXIMATELY CAUSED BY THE INTENTIONAL MISCONDUCT OR SOLE NEGLIGENCE OF BNSF.

It is mutually negotiated between the parties that the indemnification obligation shall include all claims brought by Agency's employees against BNSF, its agents, servants, employees or otherwise, and Agency expressly waives its immunity under the industrial insurance act (RCW Title 51) and assumes potential liability for all actions brought by its employees.

17. Execution of this Agreement shall serve as Agency's written notice to proceed ("**Notice to Proceed**") with the railroad work as Agency has already awarded a contract for the Project and is ready to proceed. BNSF will not begin the railroad work (including, without limitation, procurement of supplies, equipment or materials) until written notice to proceed is received from Agency.

**ARTICLE IV) JOINT OBLIGATIONS**

IN CONSIDERATION of the premises, the parties hereto mutually agree to the following:

1. All work contemplated in this Agreement must be performed in a good and workmanlike manner and each portion must be promptly commenced by the party obligated hereunder to perform the same and thereafter diligently prosecuted to conclusion in its logical order and sequence. Furthermore, any changes or modifications during construction which affect BNSF will be subject to BNSF's written approval prior to the commencement of any such changes or modifications from Ben Steinkamp.

2. Agency must require its contractor(s) to reasonably adhere to the Project's construction schedule for all Project work. The parties hereto mutually agree that BNSF's failure to complete the railroad work in accordance with the construction schedule due to inclement weather or unforeseen railroad emergencies will not constitute a breach of this Agreement by BNSF and will not subject BNSF to any

liability. Regardless of the requirements of the construction schedule, BNSF reserves the right to reallocate the labor forces assigned to complete the railroad work in the event of an emergency to provide for the immediate restoration of railroad operations (BNSF or its related railroads) or to protect persons or property on or near any BNSF owned property. BNSF will not be liable for any additional costs or expenses resulting from any such reallocation of its labor forces. The parties mutually agree that any reallocation of labor forces by BNSF pursuant to this provision and any direct or indirect consequences or costs resulting from any such reallocation will not constitute a breach of this Agreement by BNSF.

4. BNSF will have the right to stop construction work on the Project if any of the following events take place: (i) Agency (or any of its contractors) performs the Project work in a manner contrary to the plans and specifications approved by BNSF; (ii) Agency (or any of its contractors), in BNSF's opinion, prosecutes the Project work in a manner which is hazardous to BNSF property, facilities or the safe and expeditious movement of railroad traffic; or (iii) the insurance described in the attached Exhibit C-1 is canceled during the course of the Project. The work stoppage will continue until all necessary actions are taken by Agency or its contractor to rectify the situation to the satisfaction of BNSF's Division Engineer or until additional insurance has been delivered to and accepted by BNSF. In the event of a breach of (i) this Agreement, (ii) the Temporary Construction License, or (iii) the Easement, BNSF may immediately terminate the Temporary Construction License or the Easement. Any such work stoppage under this provision will not give rise to any liability on the part of BNSF. BNSF's right to stop the work is in addition to any other rights BNSF may have including, but not limited to, actions or suits for damages or lost profits. In the event that BNSF desires to stop construction work on the Project, BNSF agrees to immediately notify the following individual in writing:

Mark A Freiburger  
325 Metcalf St  
Sedro-Woolley, WA 98284  
Phone: 360-855-3219  
Fax: 360-855-3219

Agency must supervise and inspect the operations of all Agency contractors to assure compliance with the plans and specifications approved by BNSF, the terms of this Agreement and all safety requirements of the BNSF railroad. If BNSF determines that proper supervision and inspection is not being performed by Agency personnel at any time during construction of the Project, BNSF has the right to stop construction (within or adjacent to its operating right-of-way). Construction of the Project will not proceed until Agency corrects the situation to BNSF's reasonable satisfaction. If BNSF feels the situation is not being corrected in an expeditious manner, BNSF will immediately notify Mark A. Freiburger for appropriate corrective action.

5. All expenses detailed in statements sent to Agency pursuant to Article II, Section 5 herein will comply with the terms and provisions of the Federal Aid Highway Program

Manual, U.S. Department of Transportation, as amended from time to time, which manual is hereby incorporated into and made a part of this Agreement by reference. The parties mutually agree that BNSF's preliminary engineering, design, and contract preparation costs described in Article II, Section 1 herein are part of the costs of the Project even though such work may have preceded the date of this Agreement.

6. In addition to the terms and conditions set forth elsewhere in this Agreement, BNSF and Agency agree to the following terms upon completion of construction of the Project:

- (a) Agency must apply and maintain vertical clearance signs which consistently and accurately describe the minimum actual vertical clearance from the bottom of the Structure to the top of any pavement.
- (b) Agency agrees to reimburse BNSF for the cost of track surfacing due to settlement caused by the construction under the Structure for a period not to exceed two (2) years from the date of final inspection pursuant to Article III, Section 15.
- (c) It is expressly understood by Agency and BNSF that any right to install utilities in BNSF right-of-way or Property will be governed by a separate permit or license agreement between the parties hereto.

7. Agency hereby grants to BNSF, at no cost or expense to BNSF, a permanent right of access from Agency property to BNSF tracks for maintenance purposes provided that BNSF will schedule with the City's Public Works Department for any access or work that impacts traffic.

8. Any books, papers, records and accounts of the parties hereto relating to the work hereunder or the costs or expenses for labor and material connected with the construction will at all reasonable times be open to inspection and audit by the agents and authorized representatives of the parties hereto, as well as the State of WA and the Federal Highway Administration, for a period of one (1) year from the date of the final BNSF invoice under this Agreement.

9. The covenants and provisions of this Agreement are binding upon and inure to the benefit of the successors and assigns of the parties hereto. Notwithstanding the preceding sentence, neither party hereto may assign any of its rights or obligations hereunder without the prior written consent of the other party.

10. In the event construction of the Project does not commence within 12 months of the Effective Date, this Agreement will become null and void.

11. Neither termination nor expiration of this Agreement will release either party from any liability or obligation under this Agreement, whether of indemnity or otherwise,

resulting from any acts, omissions or events happening prior to the date of termination or expiration.

12. To the maximum extent possible, each provision of this Agreement will be interpreted in such a manner as to be effective and valid under applicable law. If any provision of this Agreement is prohibited by, or held to be invalid under, applicable law, such provision will be ineffective solely to the extent of such prohibition or invalidity and the remainder of the provision will be enforceable.

13. This Agreement (including exhibits and other documents, manuals, etc. incorporated herein) is the full and complete agreement between BNSF and Agency with respect to the subject matter herein and supersedes any and all other prior agreements between the parties hereto.

14. Any notice provided for herein or concerning this Agreement must be in writing and will be deemed sufficiently given when sent by certified mail, return receipt requested, to the parties at the following addresses:

BNSF Railway Company:  
BNSF's Manager of Public Projects  
2454 Occidental Ave S #2-D  
Seattle, WA 98134

Agency:

Mark A. Freiburger, PE  
325 Metcalf St  
Sedro-Woolley, WA 98284  
Phone: 360-855-3219  
Fax: 360-855-3219

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed and attested by its duly qualified and authorized officials as of the day and year first above written.

**BNSF RAILWAY COMPANY**

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

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

Title: \_\_\_\_\_

WITNESS:

\_\_\_\_\_

**CITY OF SEDRO-WOOLLEY**

  
MAYOR

Attest:

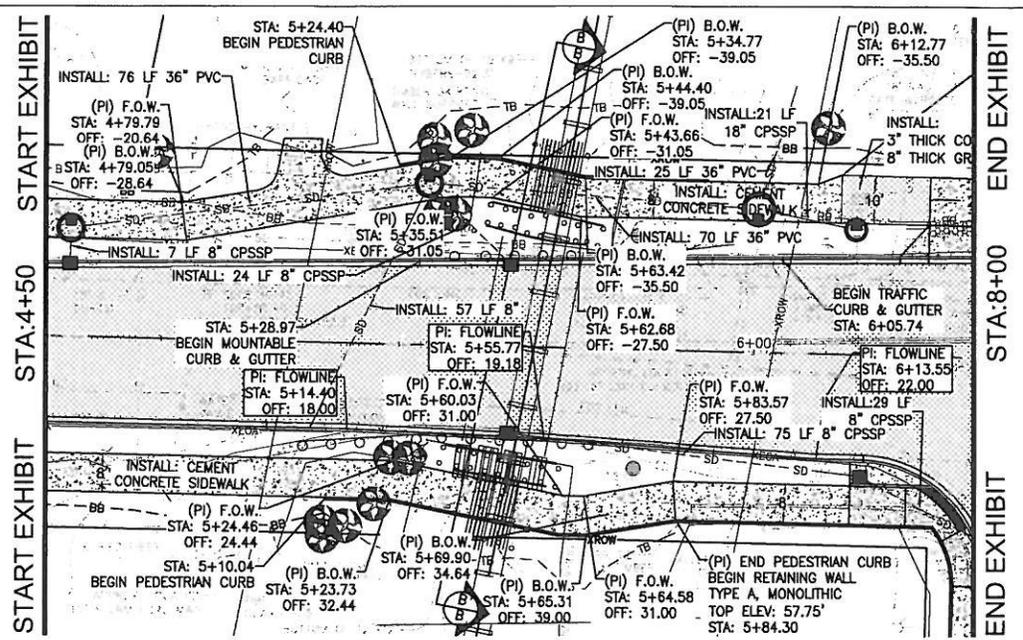
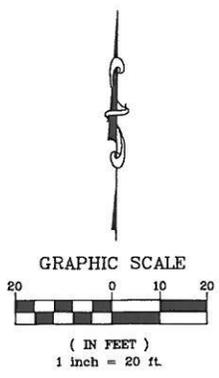
  
CITY CLERK

Approved as to form:

  
CITY ATTORNEY

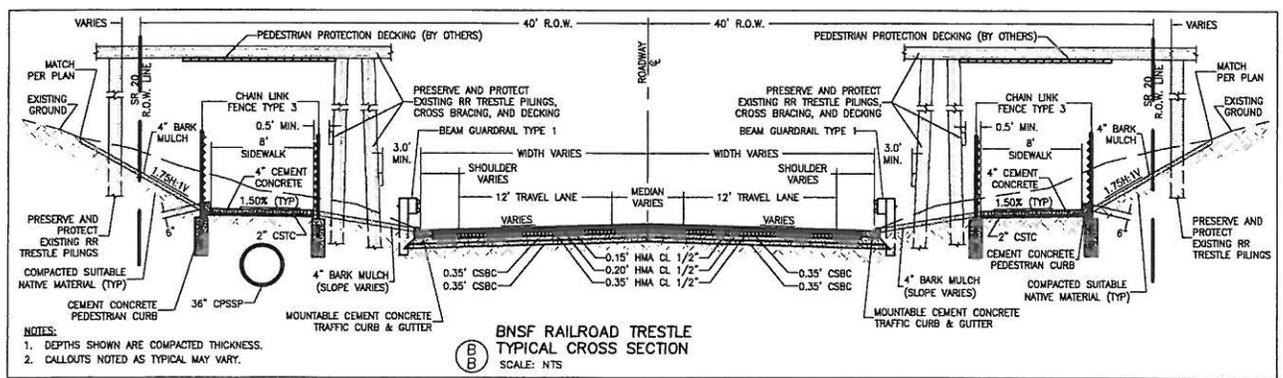
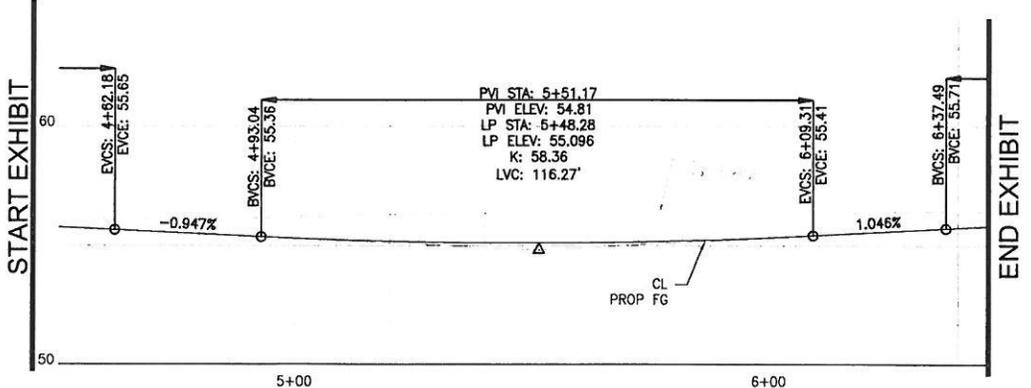
**Exhibit A**

**Insert plan sheet for road work**



PROPOSED FINISHED GRADE FLOWLINE - NORTH

PROPOSED FINISHED GRADE CENTER LINE - SR 20



**R&E** REICHHARDT & EBE  
ENGINEERING, INC.  
813 Metcalf Street, Sedro-Woolley, WA 98284  
Phone 360-855-1713 FAX 360-855-1164

**BNSF**  
**EXHIBIT A**  
**SEDRO-WOOLLEY, WA**

07/08/11

09022.2

Exhibit B (Intentionally left blank)

**Exhibit C**

**OVERPASS/UNDERPASS EXHIBIT "C-1"**

**Agreement  
Between  
BNSF RAILWAY COMPANY  
and the  
CONTRACTOR**

**BNSF RAILWAY COMPANY  
Attention: Manager Public Projects**

**Railway File: 085099X**

**Agency Project: \_\_\_\_\_**

Gentlemen:

The undersigned (hereinafter called, the "Contractor"), has entered into a contract (the "Contract") dated \_\_\_\_\_, 20\_\_ with the City of Sedro-Woolley for the performance of certain work in connection with the following project: Moore Street SR 20 Underpass Project. Performance of such work will necessarily require contractor to enter **BNSF RAILWAY COMPANY** ("Railway") right of way and property ("Railway Property"). The Contract provides that no work will be commenced within Railway Property until the Contractor employed in connection with said work for the City of Sedro-Woolley (i) executes and delivers to Railway an Agreement in the form hereof, and (ii) provides insurance of the coverage and limits specified in such Agreement and Section 3 herein. If this Agreement is executed by a party who is not the Owner, General Partner, President or Vice President of Contractor, Contractor must furnish evidence to Railway certifying that the signatory is empowered to execute this Agreement on behalf of Contractor.

Accordingly, in consideration of Railway granting permission to Contractor to enter upon Railway Property and as an inducement for such entry, Contractor, effective on the date of the Contract, has agreed and does hereby agree with Railway as follows:

**Section 1. RELEASE OF LIABILITY AND INDEMNITY**

Contractor hereby waives, releases, indemnifies, defends and holds harmless Railway for all judgments, awards, claims, demands, and expenses (including attorneys' fees), for injury or death to all persons, including Railway's and Contractor's officers and employees, and for loss and damage to property belonging to any person, arising in any manner from Contractor's or any of Contractor's subcontractors' acts or omissions or any work performed on or about Railway's property or right-of-way.

**This obligation shall not include such claims, costs, damages, or expenses which may be caused by the sole negligence of Railway or its contractors, agents or employees; Provided, that if the claims or damages are caused by or result from the concurrent negligence or other acts or omissions of (a) Railway, its contractors, agents or employees and (b) Contractor, its subcontractors, agents or employees, this provision shall be valid and enforceable only to the extent of the negligence of the Contractor, its subcontractors, agents or employees.**

It is mutually negotiated between the parties that the indemnification obligation shall include all claims brought by Contractor's employees against Railway, its agents, servants, employees or otherwise, and Contractor expressly waives its immunity under the industrial insurance act (RCW Title 51) and assumes potential liability for all actions brought by its employees.

**THE INDEMNIFICATION OBLIGATION ASSUMED BY CONTRACTOR INCLUDES ANY CLAIMS, SUITS OR JUDGMENTS BROUGHT AGAINST RAILWAY UNDER THE FEDERAL EMPLOYEE'S LIABILITY ACT, INCLUDING CLAIMS FOR STRICT LIABILITY UNDER THE SAFETY APPLIANCE ACT OR THE LOCOMOTIVE INSPECTION ACT, WHENEVER SO CLAIMED.**

Contractor further agrees, at its expense, in the name and on behalf of Railway, that it will adjust and settle all claims made against Railway, and will, at Railway's discretion, appear and defend any suits or actions of law or in equity brought against Railway on any claim or cause of action arising or growing out of or in any manner connected with any liability assumed by Contractor under this Agreement for which Railway is liable or is alleged to be liable. Railway will give notice to Contractor, in writing, of the receipt or dependency of such claims and thereupon Contractor must proceed to adjust and handle to a conclusion such claims, and in the event of a suit being brought against Railway, Railway may forward summons and complaint or other process in connection therewith to Contractor, and Contractor, at Railway's discretion, must defend, adjust, or settle such suits and protect, indemnify, and save harmless Railway from and against all damages, judgments, decrees, attorney's fees, costs, and expenses growing out of or resulting from or incident to any such claims or suits.

In addition to any other provision of this Agreement, in the event that all or any portion of this Article shall be deemed to be inapplicable for any reason, including without limitation as a result of a decision of an applicable court, legislative enactment or regulatory order, the parties agree that this Article shall be interpreted as requiring Contractor to indemnify Railroad to the fullest extent permitted by applicable law.

It is mutually understood and agreed that the assumption of liabilities and indemnification provided for in this Agreement survive any termination of this Agreement.

## **Section 2. TERM**

This Agreement is effective from the date of the Contract until (i) the completion of the project set forth herein, and (ii) full and complete payment to Railway of any and all sums or other amounts owing and due hereunder.

### Section 3. INSURANCE

Contractor must, at its sole cost and expense, procure and maintain during the life of this Agreement the following insurance coverage:

A. Commercial General Liability insurance. This insurance shall contain broad form contractual liability with a combined single limit of a minimum of \$5,000,000 each occurrence and an aggregate limit of at least \$10,000,000 but in no event less than the amount otherwise carried by the contractor. Coverage must be purchased on a post 1998 ISO occurrence form or equivalent and include coverage for, but not limit to the following:

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

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

- ◆ The definition of insured contract must be amended to remove any exclusion or other limitation for any work being done within 50 feet of railroad property.
- ◆ Waiver of subrogation in favor of and acceptable to Railroad.
- ◆ Additional insured endorsement in favor of and acceptable to Railroad.
- ◆ Separation of insureds.
- ◆ The policy shall be primary and non-contributing with respect to any insurance carried by Railroad.

It is agreed that any workers' compensation exclusion does not apply to *Railroad* payments related to the Federal Employers Liability Act or a *Railroad* Wage Continuation Program or similar programs and any payments made are deemed not to be either payments made or obligations assumed under any Workers Compensation, disability benefits, or unemployment compensation law or similar law.

No other endorsements limiting coverage as respects obligations under this Agreement may be included on the policy with regard to the work being performed under this agreement.

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

- ◆ Bodily injury and property damage

- ◆ Any and all vehicles owned, used or hired

The policy shall also contain the following endorsements or language, which shall be indicated on the certificate of insurance:

- ◆ Waiver of subrogation in favor of and acceptable to Railroad.
- ◆ Additional insured endorsement in favor of and acceptable to Railroad.
- ◆ Separation of insureds.
- ◆ The policy shall be primary and non-contributing with respect to any insurance carried by Railroad.

C. Workers Compensation and Employers Liability insurance including coverage for, but not limited to:

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

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

- ◆ Waiver of subrogation in favor of and acceptable to Railroad.

D. Railroad Protective Liability insurance naming only the **Railroad** as the Insured with coverage of at least \$5,000,000 per occurrence and \$10,000,000 in the aggregate. The policy Must be issued on a standard ISO form CG 00 35 10 93 and include the following:

- ◆ Endorsed to include the Pollution Exclusion Amendment (ISO form CG 28 31 10 93)
- ◆ Endorsed to include the Limited Seepage and Pollution Endorsement.
- ◆ Endorsed to remove any exclusion for punitive damages.
- ◆ No other endorsements restricting coverage may be added.
- ◆ The original policy must be provided to the **Railroad** prior to performing any work or services under this Agreement

In lieu of providing a Railroad Protective Liability Policy, Licensee may participate in Licensor's Blanket Railroad Protective Liability Insurance Policy available to contractor.

#### **Other Requirements:**

All policies (applying to coverage listed above) must not contain an exclusion for punitive damages and certificates of insurance must reflect that no exclusion exists.

Contractor agrees to waive its right of recovery against **Railroad** for all claims and suits against **Railroad**. In addition, its insurers, through the terms of the policy or policy endorsement, waive their right of subrogation against **Railroad** for all claims and suits. The certificate of insurance must reflect the waiver of subrogation endorsement. Contractor further waives its right of recovery, and its insurers also waive their right of subrogation against **Railroad** for loss of its owned or leased property or property under contractor's care, custody or control.

Contractor is not allowed to self-insure without the prior written consent of **Railroad**. If granted by **Railroad**, any deductible, self-insured retention or other financial responsibility for claims must be covered directly by contractor in lieu of insurance. Any and all **Railroad** liabilities that would otherwise, in accordance with the provisions of this **Agreement**, be covered by contractor's insurance will be covered as if contractor elected not to include a deductible, self-insured retention or other financial responsibility for claims.

Prior to commencing the Work, contractor must furnish to **Railroad** an acceptable certificate(s) of insurance including an original signature of the authorized representative evidencing the required coverage, endorsements, and amendments and referencing the contract audit/folder number if available. The policy(ies) must contain a provision that obligates the insurance company(ies) issuing such policy(ies) to notify **Railroad** in writing at least 30 days prior to any cancellation, non-renewal, substitution or material alteration. This cancellation provision must be indicated on the certificate of insurance. Upon request from **Railroad**, a certified duplicate original of any required policy must be furnished. Contractor should send the certificate(s) to the following address:

Ebix BPO  
PO Box 12010-BN  
Hemet, CA 92546-8010  
Fax number: 951-652-2882  
Email: bnsf@ebix.com

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

Contractor represents that this **Agreement** has been thoroughly reviewed by contractor's insurance agent(s)/broker(s), who have been instructed by contractor to procure the insurance coverage required by this **Agreement**. Allocated Loss Expense must be in addition to all policy limits for coverages referenced above. Not more frequently than once every five years, **Railroad** may reasonably modify the required insurance coverage to reflect then-current risk management practices in the railroad industry and underwriting practices in the insurance industry.

If any portion of the operation is to be subcontracted by contractor, contractor must require that the subcontractor provide and maintain the insurance coverages set forth herein, naming **Railroad** as an additional insured, and requiring that the subcontractor release, defend and indemnify **Railroad** to the same extent and under the same terms and conditions as contractor is required to release, defend and indemnify **Railroad** herein.

Failure to provide evidence as required by this section will entitle, but not require, *Railroad* to terminate this *Agreement* immediately. Acceptance of a certificate that does not comply with this section will not operate as a waiver of contractor's obligations hereunder.

The fact that insurance (including, without limitation, self-insurance) is obtained by contractor will not be deemed to release or diminish the liability of contractor including, without limitation, liability under the indemnity provisions of this *Agreement*. Damages recoverable by *Railroad* will not be limited by the amount of the required insurance coverage.

For purposes of this section, *Railroad* means "Burlington Northern Santa Fe Corporation", "BNSF RAILWAY COMPANY" and the subsidiaries, successors, assigns and affiliates of each.

#### **Section 4. EXHIBIT "C" CONTRACTOR REQUIREMENTS**

The Contractor must observe and comply with all provisions, obligations, requirements and limitations contained in the Contract, and the Contractor Requirements set forth on Exhibit "C" attached to the Contract and this Agreement, , including, but not be limited to, payment of all costs incurred for any damages to Railway roadbed, tracks, and/or appurtenances thereto, resulting from use, occupancy, or presence of its employees, representatives, or agents or subcontractors on or about the construction site.

#### **Section 5. TRAIN DELAY**

Contractor is responsible for and hereby indemnifies and holds harmless Railway (including its affiliated railway companies, and its tenants) for, from and against all damages arising from any unscheduled delay to a freight or passenger train which affects Railway's ability to fully utilize its equipment and to meet customer service and contract obligations. Contractor will be billed, as further provided below, for the economic losses arising from loss of use of equipment, contractual loss of incentive pay and bonuses and contractual penalties resulting from train delays, whether caused by Contractor, or subcontractors, or by the Railway performing work under this Agreement. Railway agrees that it will not perform any act to unnecessarily cause train delay.

For loss of use of equipment, Contractor will be billed the current freight train hour rate per train as determined from Railway's records. Any disruption to train traffic may cause delays to multiple trains at the same time for the same period.

Additionally, the parties acknowledge that passenger, U.S. mail trains and certain other grain, intermodal, coal and freight trains operate under incentive/penalty contracts between Railway and its customer(s). Under these arrangements, if Railway does not meet its contract service commitments, Railway may suffer loss of performance or incentive pay and/or be subject to penalty payments. Contractor is responsible for any train performance and incentive penalties or other contractual economic losses actually incurred by Railway which are attributable to a train delay caused by Contractor or its subcontractors.

The contractual relationship between Railway and its customers is proprietary and confidential. In the event of a train delay covered by this Agreement, Railway will share information relevant to any train delay to the extent consistent with Railway confidentiality obligations. Damages for train delay are currently \$382.20 per hour per incident. **THE RATE THEN IN EFFECT AT THE TIME OF PERFORMANCE BY THE CONTRACTOR HEREUNDER WILL BE USED TO CALCULATE THE ACTUAL COSTS OF TRAIN DELAY PURSUANT TO THIS AGREEMENT.**

**Contractor and its subcontractors must give Railway's representative four weeks advance notice of the times and dates for proposed work windows. Railway and Contractor will establish mutually agreeable work windows for the project. Railway has the right at any time to revise or change the work windows due to train operations or service obligations. Railway will not be responsible for any additional costs or expenses resulting from a change in work windows. Additional costs or expenses resulting from a change in work windows shall be accounted for in Contractor's expenses for the project.**

**Contractor and subcontractors must plan, schedule, coordinate and conduct all Contractor's work so as to not cause any delays to any trains.**

Kindly acknowledge receipt of this letter by signing and returning to the Railway two original copies of this letter, which, upon execution by Railway, will constitute an Agreement between us.

\_\_\_\_\_  
**Contractor**

**BNSF Railway Company**

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

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

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

Name: \_\_\_\_\_  
Manager Public Projects

Title: \_\_\_\_\_

Accepted and effective this \_\_\_ day of 20\_\_.

Contact Person: \_\_\_\_\_

Address: \_\_\_\_\_

City: \_\_\_\_\_

State: \_\_\_\_\_ Zip: \_\_\_\_\_

Fax: \_\_\_\_\_

Phone: \_\_\_\_\_

E-mail: \_\_\_\_\_

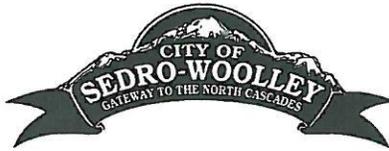
**EXHIBIT D**

**[Insert Cost Estimate for Railroad Work here]**





Exhibit E (Intentionally left blank)



**CITY COUNCIL  
WORKSESSION**

**SEP 07 2011**

**AGENDA ITEM**     **B**    

**Planning Department**  
Sedro-Woolley Municipal Building  
325 Metcalf Street  
Sedro-Woolley, WA 98284  
Phone (360) 855-0771  
Fax (360) 855-0733

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**MEMO:**

**To:** City Council  
Mayor Anderson

**From:** Jack Moore   
Planning Director/ Building Official

**Date:** September 7, 2011

**Subject:** Retaining impact fee and general facility charge credits for buildings that are demolished

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**ISSUE**

Should the Council establish a timeframe wherein impact fees and general facility charges will not be assessed for a new building when an existing building on the same property is demolished?

**PROJECT DESCRIPTION / HISTORY**

There is currently an incentive to keep dilapidated buildings on a property. When applying for a building permit, impact fees are assessed unless there is an existing building on the property that will be replaced. This situation has caused property owners to keep old buildings that they may otherwise choose to demolish. These buildings many times become a nuisance and result in complaints from neighbors.

To correct this situation, the City Council Planning Committee recommended establishing a "credit" so that any subsequent building permit would not be charged impact fees during a 5-year period following the demolition of the existing structure.

During the last council meeting, several aspects were discussed, including:

1. Should the "credit" be acknowledged for a period of 10-years? Should there even be an expiration date?
2. Should our system of requiring payment of monthly sewer bills be suspended when houses are demolished?
3. Should the "credit" be transferrable to another property? Another owner?

**RECOMMENDED ACTIONS**

Provide input and guidance on desired policies. Proposed code amendments will then be drafted for further Council consideration.

SEP 07 2011

***Vision Statement:***

AGENDA ITEM     C    

***Sedro-Woolley is a friendly City that is characterized by City Government and Citizens working together to achieve a prosperous, vibrant and safe Community.***

***OUR MISSION AS A CITY:***

***To provide services and opportunities which create a Community where people choose to live work and play.***

***Critical Goals and Objectives:***

***I. Business, Community & City Partnership.***

- Partner with developers to obtain desired improvements/character.
- Partner with Chamber of Commerce, School District & Hospital.
- Partnership for Recreation.
- Revitalize Northern State Property.
- Expand tourism.
- Partner with other Governments & Tribe.

***II. Image/Public Relations.***

- Improve our image.
- Make City Government more user friendly.
- Educate and inform Citizens about the Goals and Vision.
- Develop predictable processes.
- Market our City.
- Establish a Performing Arts Center.

***III. Infrastructure Investments.***

- Improve traffic mobility & safety through city.
- Repair the downtown buildings.
- Fund & construct SR 20 Corridor Freight Mobility & Revitalization Project.
- Complete SR 9 sidewalk improvements.
- Build Fire Station 2.
- Make infrastructure investments.

***IV. Service Productivity & Innovation.***

- Streamline the permitting processes.
- Expand Fire and Police Services.

***V. Promote Economic Development***

- Complete/implement citywide rezone effort.
- More property North?/East? – Annex UGH Exp.
- Business recruitment.

***VI. Innovative Recreational Development.***

- Expand recreational opportunities – Parks.
- Parks – Northern State Recreation Area – commence improvements.
- Provide youth activities.