



City of Grand Island

Tuesday, September 13, 2011

Council Session

Item G27

**#2011-252 - Approving Water Main Extension Agreement with the
Union Pacific Railroad Company**

Staff Contact: Tim Luchsinger

Council Agenda Memo

From: Timothy Luchsinger, Utilities Director

Meeting: September 13, 2011

Subject: Water Main Extension Agreement with the Union Pacific Railroad Company

Item #'s: G-27

Presenter(s): Timothy Luchsinger, Utilities Director

Background

The former Nebraska Solvents Company operated a facility located at Stuhr Road and Highway 30 on property owned by the Union Pacific Railroad Company. The operation of that facility resulted in the release of tetrachloroethylene, commonly used in dry cleaning or as a degreaser, to the area groundwater. The tetrachloroethylene has now migrated several miles to the east into Merrick County, and contaminated private wells in several subdivisions around the Gunbarrel and Fort Kearney Road area. UP has enrolled in a voluntary remediation program administered by the Nebraska Department of Environmental Quality to develop a corrective plan. The remediation action being recommended is to replace the private wells in that area by extending the City's water system. The UP would reimburse the City for the engineering, material, and construction costs associated with that extension.

Discussion

The attached agreement was negotiated with the UP by staff from the City's Utilities and Legal Departments. The structure of the agreement is that the Utilities Department will proceed with the design and construction of the water main in accordance with their normal procedures and standards with reimbursement by the UP as costs are incurred. The UP is provided the following approval points in the process.

- Selection of design firm
- Completion of design and cost estimate
- Selection of installation contractor

Approval at these points by the UP is required for the project to continue. Upon completion of the project, the water mains become the property of the City and the

operation and maintenance are the responsibility of the City. Property owners in this area have six months after the installation of the mains to be connected at the expense of the UP, after which it will be done at the property owners' expense. Water usage will be paid by the property owners in accordance with the City's water rates.

Alternatives

It appears that the Council has the following alternatives concerning the issue at hand. The Council may:

1. Move to approve
2. Refer the issue to a Committee
3. Postpone the issue to future date
4. Take no action on the issue

Recommendation

City Administration recommends that the Council approve the Water Main Extension Agreement with the Union Pacific Railroad Company.

Sample Motion

Move to approve the Water Main Extension Agreement with the Union Pacific Railroad Company.

WATER MAIN EXTENSION AGREEMENT

THIS WATER MAIN EXTENSION AGREEMENT (this "Agreement") is entered into by and between Union Pacific Railroad Company, a Delaware corporation ("UP") and the City of Grand Island, Hall County, Nebraska, a political subdivision duly organized and existing under the Constitution and laws of the State of Nebraska (the "City"). The "Effective Date" of this Agreement shall be the date this Agreement is fully executed by the last of UP and the City to sign.

WITNESSETH:

WHEREAS, UP is the owner of certain real property located at 1200 Highway 30 East, Grand Island, Hall County, Nebraska (the "UP Property");

WHEREAS, elevated levels of hazardous substances are present in the groundwater beneath the residential properties near the UP Property, as depicted on Exhibit "A" attached hereto and incorporated herein by this reference (the "Residences");

WHEREAS, UP has agreed to facilitate the extension of water mains as part of an environmental remedy approved by the Nebraska Department of Environmental Quality ("NDEQ") under RAPMA #36-336-4923 by providing funding to the City; and

WHEREAS, the City has agreed to extend its water mains to provide potable water to the Residences, subject to reimbursement from UP, pursuant to the terms and conditions of this Agreement.

NOW, THEREFORE, for and in consideration of One Dollar (\$1.00) and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties do hereby grant, covenant and agree as of the Effective Date as follows:

1. Extension of Water Mains.

a. Designer. The City shall select a design firm with sufficient expertise and experience for the work contemplated herein. The design firm shall hold the appropriate licenses and/or certifications required by the State of Nebraska to perform such work. City's choice of any designer shall be subject to the approval of UP, which approval shall not be unreasonably withheld. If UP does not disapprove of City's selection of a designer within ten (10) days after the date UP receives City's notice of the same, City's choice shall be deemed approved by UP. UP anticipates that the contract with the designer will be on a fixed fee basis. Such contract shall be subject to UP's approval.

b. Submission of Plans. The City shall submit to UP the design, plans and specifications, including a cost estimate (the "Water Main Extension Cost Estimate"), for the extension of the water mains for UP's approval. UP shall provide its approval, or reasons for disapproval, of the Water Main Extension Plans within fifteen (15) days after receipt of the same from the City. If UP does not disapprove of City's selection of the plans within fifteen (15) days after the date UP receives City's notice of the same, City's plans shall be deemed approved by UP. The water main extension will be designed to provide potable water and fire protection supply to the Residences in accordance with Nebraska Health and Human Services and Grand Island Utilities Department standards and with good engineering practices for large municipal water distribution systems. The

trunk water main extension shall follow substantially the same route as identified on Exhibit "A", which route is anticipated to follow the existing City right of way. The City shall obtain UP's prior written approval before acquiring any additional property rights that may become necessary for the installation of the trunk water main extension.

c. Approved Plans. No significant deviation from the approved Water Main Extension Plans shall be permitted unless approval of such deviation is specifically agreed to in writing by UP. Notwithstanding anything to the contrary contained herein, UP's approval of any plans and specifications submitted by the City pursuant to this Section or otherwise is not intended and shall not be deemed to constitute a representation, warranty or assurance of any kind that such plans and specifications comply with any applicable codes or requirements or that the water main extension is adequate for the purpose for which it is designed or installed. The City shall be solely responsible for the compliance of the design, plans and specifications and for the quality and structural integrity of any work completed by the City.

d. Contractor. The City shall select a contractor with sufficient expertise and experience for the work contemplated herein. The contractor shall hold the appropriate licenses and/or certifications required by the State of Nebraska to perform such work. City's choice of any contractor or subcontractor shall be subject to the approval of UP, which approval shall not be unreasonably withheld. If UP does not disapprove of City's selection of a contractor within ten (10) days after the date UP receives City's notice of the same, City's choice shall be deemed approved by UP. UP anticipates that the contract with the contractor will be on a fixed fee basis and will require contractor to carry liability insurance, in amounts and from an insurance company acceptable to the City and UP, listing the City and UP as additional insureds. Such contracts shall be subject to UP's approval.

e. Completion of Extension. Upon receipt of UP's approval of the Water Main Extension contractor, the City shall commence work to extend the water mains and shall work diligently on such extension until completion. The City shall use its best efforts to complete the work to extend the water mains so that the mains are operational on or before November 1, 2012. The work contemplated hereunder shall be performed in a first-class, good and workmanlike manner.

f. Reimbursement. UP shall reimburse City for reasonable costs paid by the City to the design firm and contractor for the design and construction of the water main extension. UP shall reimburse any administrative or management costs incurred internally by the City. Reimbursement shall be made to the City within thirty (30) days after UP's receipt of an invoice from the City documenting the actual costs paid by the City; provided, however, progress payments shall not exceed the amounts on the schedule set forth below:

- | | | |
|------|----------------------|--------------------------------------------------------------------------------------|
| i. | Designer selected | 50% of design fee |
| ii. | UP approval of plans | 50% of design fee |
| iii. | Construction | Progress Payments
(amounts not to exceed percentage
of completed construction) |

Progress payments shall be made no more frequently than once every thirty (30) days. In the event the costs of the work exceed the initial fixed price amount of the contract, UP shall have the right to approve such additional costs.

g. Indemnity. City shall indemnify, defend and hold UP, its officers, employees and agents harmless from and against (i) any and all liabilities, penalties, losses, damages, costs and expenses, demands, causes of action, claims or judgments for personal injury to any person or persons (including, without limitation, any employee of City or City's contractor or subcontractors), or any damage to any property arising from or in any manner connected with the completion of the work contemplated herein, and (ii) from and against all legal costs and charges, including attorneys' fees, incurred in connection with any such matters and the defense of any action arising out of the same. Except for UP's obligations to reimburse City for payments made to the design firm and contractor as provided above, City, for its self and its officers, employees, agents, licensees, contractors or invitees, hereby releases and discharges UP, its officers, employees and agents, from and against any and all claims arising out of City's completion of the work. The indemnity and release in this Section shall survive the expiration or termination of this Agreement.

2. Extension of Service Lines. UP anticipates that it will offer the owners of the Residences the opportunity to connect to the City's trunk water main at UP's cost and expense on terms proposed by UP; provided that such owners agree to connect to the water main within six (6) months after completion of the water main extension. City agrees to waive any and all tap or other connection fees for the connection of the Residences to the water main extension within such six (6) month period. After the expiration of such six (6) month period, UP expects to have no further responsibility of any kind for any connections between any Residences and the water main, and any connection to the water main extension shall be at the homeowner's expense. The terms of agreement between UP and the owners of the Residences with regard to connection to the water main shall be made pursuant to separate contracts, copies of which shall be provided to City for purposes of confirming the tap or other connection fee waiver. If UP should pay for the connection of the Residences that choose to connect within the six (6) month period, UP would pay for connection only and shall in no way be responsible for any ongoing maintenance, repairs, replacements or any water services charges for such Residences.

3. Ownership and Maintenance.

a. Ownership. City shall be the sole owner of the newly constructed water main and all associated equipment and improvements, including, but not limited to, pipes, fire hydrants, all valves, thrust restraints, and all appurtenances (the "Water Line"). UP does not have nor will it have an ownership interest in any portion of the newly constructed water main. UP's responsibilities under this agreement are limited only to reimbursement of the City's costs for design and installation of the water main extension as specifically set forth herein.

b. Operation and Maintenance. City shall, at City's sole cost and expense, perform all operation and maintenance of the Water Line. These tasks may include, but are not limited to, pipe flushing, chlorination, pressure regulation, pressure testing, replacement and repairs.

c. Water Use Charges. Collection of any fees and water use charges shall be the responsibility of the City. UP will not act as an agent for the City in the collection of any fees from residents.

4. Notices. Any notice or other communication required or permitted to be given under this Agreement (“Notices”) shall be in writing and shall be (i) personally delivered; (ii) delivered by a reputable overnight courier; or (iii) delivered by certified mail, return receipt requested and deposited in the U.S. Mail, postage prepaid. Notices shall be deemed received at the earlier of actual receipt or (i) one (1) business day after deposit with an overnight courier as evidenced by a receipt of deposit; or (ii) three (3) business days following deposit in the U.S. Mail, as evidenced by a return receipt. Notices shall be directed to the parties at their respective addresses shown below, or such other address as either party may, from time to time, specify in writing to the other in the manner described above:

If to UP: Union Pacific Railroad Company
1400 Douglas Street – Stop 1030
Omaha, NE 68179
Attn: Jeff McDermott
Telephone: (402) 544-3675

If to the City: The City of Grand Island
100 East First Street
Grand Island, NE 68801
Attn: Tim Luchsinger, Utilities Director
Telephone: (308) 385-5444 X280

5. Miscellaneous.

a. Recitals. The Recitals set forth above constitute an integral part of this Agreement and are incorporated herein by this reference with the same force and effect as if set forth herein as agreements of the parties.

b. Choice of Law. This Agreement shall be governed by the laws of the State of Nebraska.

c. Severability. In the event that any of the provisions of this Agreement, or portions or applications hereof are held to be unenforceable for any reason, or shall be held by any court or competent jurisdiction to be illegal, null or void, against public policy, or otherwise unenforceable, the remaining paragraphs, sections, sentences, clauses or phrases contained in this Agreement shall remain in full force and effect.

d. Amendment. This Agreement may not be modified or omitted except by an instrument in writing signed by both parties.

e. Counterparts. This Agreement may be executed in any number of counterparts and in separate counterparts, each of which shall be deemed an original. The exchange of copies of this Agreement and the signature pages by facsimile transmission shall constitute effective execution and delivery of this Agreement. As to the parties, it may be used in lieu of the original Agreement for all purposes. Signatures of the parties transmitted by facsimile shall be deemed to be their original signatures for all purposes.

f. Binding Effect. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.

g. No Waiver. Acceptance may be expressly provided; otherwise in this Agreement, no failure on the part of either party or any of its agents to exercise, and no course of dealing with respect to, and no delay in exercising, any right, power or remedy hereunder or thereunder shall operate as a waiver thereof; nor shall any single or partial exercise for either party or any of its agents have any right, power or remedy hereunder or thereunder preclude any other or future exercise thereof with the exercise of any other right, power or remedy.

h. Representation on Authority of Parties/Signatories. Each party signing this Agreement represents and warrants that he or she is duly authorized and has legal capacity to execute and deliver this Agreement on behalf of the parties. Each party represents and warrants to the other that the execution and delivery of this Agreement and the performance of such parties' obligations hereunder have been duly authorized and that this Agreement is a valid and legal agreement binding on such party and enforceable in accordance with its terms.

IN WITNESS WHEREOF, the parties hereby affirm this Conveyance and Indemnification Agreement as their true act and deed as of the day and year first above written.

UNION PACIFIC RAILROAD COMPANY

By: _____

Name: _____

Title: _____

Date: _____, 2011

THE CITY OF GRAND ISLAND, HALL
COUNTY, NEBRASKA

By: _____

Name: _____

Title: _____

Date: _____, 2011

STATE OF NEBRASKA)
) ss.
COUNTY OF DOUGLAS)

The foregoing instrument was acknowledged before me this ____ day of _____, 2011, by _____ as _____ of Union Pacific Railroad Company.

Notary Public

My Commission expires: _____

STATE OF NEBRASKA)
) ss.
COUNTY OF HALL)

The foregoing instrument was acknowledged before me this ____ day of _____, 2011, by _____ as _____ of the City of Grand Island, Hall County, Nebraska.

Notary Public

My Commission expires: _____

EXHIBIT "A"

**DEPICTION/DESCRIPTION OF RESIDENCES
AND PUBLIC RIGHT-OF-WAY**

RESOLUTION 2011-252

WHEREAS, the former Nebraska Solvents Company operated a facility located at Stuhr Road and Highway 30 on property now owned by the Union Pacific Railroad Company; and

WHEREAS, the operation of that facility resulted in the release of tetrachloroethylene to the area groundwater; and

WHEREAS, the tetrachloroethylene has now migrated several miles to the east into Merrick County and contaminated private wells in several subdivisions around the Gunbarrel and Ft. Kearney Road area, and

WHEREAS, Union Pacific Railroad has enrolled in a voluntary remediation program administered by the Nebraska Department of Environmental Quality to develop a corrective plan; and

WHEREAS, the remediation action being recommended is to replace the private wells in that area by extending the City's water system; and

WHEREAS, the Railroad would reimburse the City for the engineering, material, and construction costs associated with that extension.

NOW, THEREFORE, BE IT RESOLVED BY THE MAYOR AND COUNCIL OF THE CITY OF GRAND ISLAND, NEBRASKA, that the Water Main Extension Agreement with the Union Pacific Railroad Company, is hereby approved.

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Adopted by the City Council of the City of Grand Island, Nebraska, September 13, 2011

Jay Vavricek, Mayor

Attest:

RaNae Edwards, City Clerk

Approved as to Form ☐ _____
September 8, 2011 ☐ City Attorney