EXCHANGE AGREEMENT

THIS EXCHANGE AGREEMENT ("**Agreement**") is made to be effective as of October _____, 2010 ("**Effective Date**") between the **CITY OF LINCOLN, NEBRASKA**, a Nebraska municipal corporation ("**City**"), and **BNSF RAILWAY COMPANY**, a Delaware corporation ("**BNSF**"). City and BNSF, respectively, are sometimes referred to in this Agreement each as a "**Party**" and collectively, as the "**Parties**".

RECITALS

A. City and BNSF have entered into that certain Master Development Agreement (the "**Master Agreement**") and certain Construction and Maintenance Agreement ("**C&M Agreement**"), both of even date herewith. In connection with certain economic development objectives of City as set forth in the Master Agreement, City desires to acquire the Replacement City Property (defined below) from BNSF in exchange for the Replacement BNSF Property (defined below) and Cash Payment (defined below). All capitalized terms not defined herein shall have the same meaning as in the Master Agreement.

B. BNSF owns or controls certain real property and related improvements (collectively, the "**Existing BNSF Property**") located in the City of Lincoln, Lancaster County, Nebraska, and depicted on **Exhibit B** attached hereto and incorporated herein by reference. The Existing BNSF Property consists of (i) the "**Retained BNSF Property**" as depicted on **Exhibit B-1** attached hereto and incorporated herein by reference, and (ii) the "**Transferred BNSF Property**" as depicted on **Exhibit B-1** attached hereto).

C. BNSF owns or controls that certain bridge over Salt Creek (the "**BNSF Bridge**") located in the City of Lincoln, Lancaster County, Nebraska, and depicted on **Exhibit C** attached hereto and incorporated herein by reference.

D. BNSF holds certain ordinance rights, licenses, easements, and/or other interests (collectively "**BNSF Reversionary Interests**") over that certain real property depicted on **Exhibit J** and over certain other City streets and alleys immediately abutting the Project Area ("**Other BNSF Reversionary Interests**") as shown on **Exhibit S** attached hereto and incorporated herein by reference.

E. For purposes of this Agreement, the Transferred BNSF Property, the BNSF Bridge, the BNSF Reversionary Interests and the Other BNSF Reversionary Interests shall be referred to collectively herein as the "**Replacement City Property**".

F. City desires to acquire certain real property and related improvements ("**UP/Replacement BNSF Property**") located in the City of Lincoln, Lancaster County, Nebraska, from Union Pacific Railroad Company ("**UP**"), as depicted on **Exhibit E-1** attached hereto and incorporated herein by reference.

G. City desires to acquire certain real property and related improvements located in the City of Lincoln, Lancaster County, Nebraska, from certain additional third parties ("**Third Party/Replacement BNSF Property**"), as depicted on **Exhibit F-1** attached hereto and incorporated herein by reference.

H. City desires to vacate those streets and alleys (the "**Vacated Right of Way/Replacement BNSF Property**") as depicted on **Exhibit D-1** attached hereto and incorporated herein by reference, and to promptly cause all reversionary interests in the Vacated Right of Way/Replacement BNSF Property to be transferred to BNSF.

I. For purposes of this Agreement, the Vacated Right of Way/Replacement BNSF Property, UP/Replacement BNSF Property, and the Third Party/Replacement BNSF Property shall be referred to collectively herein as the "**Replacement BNSF Property**".

J. The Replacement City Property and the Replacement BNSF Property may be collectively referred to hereinafter as the "**Exchange Properties**" or individually as an "**Exchange Property**". As used

in this Agreement, "**Transferor**" refers to the Party that will be quitclaiming the respective Exchange Property, and "**Transferee**" refers to the Party to which the respective Exchange Property will be quitclaimed.

AGREEMENTS

In consideration of the mutual promises and covenants hereinafter set forth, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

Section 1. City Initial Acquisition of UP/Replacement BNSF Property and Third Party/ Replacement BNSF Property.

1.1 On or before the First Closing (defined below), City shall acquire, at its sole cost and expense, the UP/Replacement BNSF Property from UP. BNSF shall have no obligation to pay for or assist in the acquisition of the UP/Replacement BNSF Property.

1.2 On or before the First Closing, City shall acquire, at its sole cost and expense, the applicable Third Party/Replacement BNSF Property from Noohznik L.P. and the Lower Platte South Natural Resources District. BNSF shall have no obligation to pay for or assist in the acquisition of the Third Party/Replacement BNSF Property from such parties.

1.3 On or before the Second BNSF Closing (defined below), City shall acquire, at its sole cost and expense, the applicable Third Party/Replacement BNSF Property from N Street Company, LLC. BNSF shall have no obligation to pay for or assist in the acquisition of the Third Party/Replacement BNSF Property.

1.4 City's acquisition of the UP/Replacement BNSF Property and Third Party/Replacement BNSF Property are collectively the "**Initial Acquisitions**".

Section 2. Exchange Consideration; Bargain Sale.

2.1 Subject to the terms and conditions set forth in this Agreement (i) BNSF agrees to convey its interest in the Replacement City Property to City; (ii) BNSF agrees to convey the Rights of Entry (as defined in the Master Agreement); (iii) City agrees to convey its interest in the Replacement BNSF Property to BNSF; (iv) City agrees to pay to BNSF the Cash Payment; and (v) City agrees to cooperate with BNSF to substantiate the Charitable Donation.

2.2 City will convey its interest in the Replacement BNSF Property to BNSF by quitclaim deeds at the BNSF Closings (defined below) as set forth below, free and clear of all Encumbrances (defined below) except the Permitted Encumbrances (defined below). For purposes of this Agreement, all references to a quitclaim deed for the Replacement BNSF Property shall include an easement instead of a quitclaim deed for any parcel over which BNSF elects to receive an easement interest instead of fee simple ownership (as provided for in **Section 9.1** below); provided, however, that any easement interests in the Replacement BNSF Property which are conveyed in lieu of fee simple title shall be quitclaimed to BNSF.

2.3 City hereby advises BNSF that City has immediate need for the Replacement City Property for incorporation into City's development project and should BNSF not agree to exchange the Replacement City Property to City under the terms and conditions of this Agreement, City's staff intends to recommend to its governing body that City immediately initiate the process to exercise its power of eminent domain to acquire the Replacement City Property in accordance with applicable law. In order to avoid the expense and delay of such a condemnation action by City, BNSF is willing to convey the Replacement City Property to City in lieu of such condemnation action on the terms and conditions set forth in this Agreement.

2.4 BNSF will convey its interest in the Replacement City Property to City by quitclaim deeds and deliver the Rights of Entry agreements at the City Closings (defined below) as set forth below.

2.5 In addition to the conveyance to BNSF of the Replacement BNSF Property, City shall also pay to BNSF the sum of One Million and no/100 Dollars ($1,000,000.00) ("**Cash Payment**") as additional consideration for the Replacement City Property at the First Closing.

2.6 BNSF intends to make a charitable donation to City ("**Charitable Donation**") for the amount equal to the fair market value of the Replacement City Property (less the Cash Payment) minus the fair market value of the Replacement BNSF Property (the "**Donation Amount**"). To the extent permitted by law, City agrees to cooperate with BNSF to execute the Donee Acknowledgment Section of Internal Revenue Service Form 8283 and a charitable contribution receipt ("**Charitable Contribution Receipt**") for the Donation Amount. To establish the respective fair market values of the Replacement City Property and Replacement BNSF Property, BNSF, at its sole cost and expense and using an appraiser of BNSF's choice, shall obtain appraisals of each conveyed parcel for the Replacement City Property and Replacement BNSF Property, each such appraisal to be conducted within sixty (60) days prior to the Closing conveying each applicable parcel. BNSF agrees to provide City with copies of such appraisals. The Charitable Donation shall be allocated among the properties included in the City Closings as reasonably determined by BNSF and in compliance with applicable Internal Revenue Service regulations (the "**Donation Allocation**").

Section 3. <u>Existing Information</u>.

3.1 As of the Effective Date, the City has taken reasonable efforts to provide BNSF with copies of (i) any environmental assessments and reports, (ii) any contracts or agreements, (iii) any soil or engineering reports, and (iv) any written notices from any governmental authority relating to the Replacement BNSF Property and in the possession or direct control of the City's designated document custodian (collectively, the "**City Existing Information**"). If during the term of this Agreement and subsequent to such initial delivery, City obtains additional or updated materials that would have been included in the City Existing Information, City shall promptly deliver such additional or updated materials to BNSF.

3.2 As of the Effective Date, BNSF has taken reasonable efforts to provide City with copies of (i) any environmental assessments and reports, (ii) any contracts or agreements (including without limitation known existing licenses and easements to be assigned to City pursuant to the provisions of **Section 4.7.1** below), (iii) any soil or engineering reports, and (iv) any written notices from any governmental authority relating to the Replacement City Property to be conveyed to City and in the possession or direct control of BNSF's designated document custodian (collectively, the "**BNSF Existing Information**"). If during the term of this Agreement and subsequent to such initial delivery, BNSF obtains additional or updated materials that would have been included in the BNSF Existing Information, BNSF shall promptly deliver such additional or updated materials to City.

3.3 Any information provided by the Transferor for each Exchange Property ("**Information**") has been provided without any representation or warranty as to the completeness or accuracy of the data other information contained therein, and all such Information is furnished to the Transferee solely as a courtesy, and the Party delivering such Information has neither verified the accuracy or any statements or other information therein contained, the method used to compile such Information nor the qualifications of the persons preparing such Information. The Information is provided on an **AS-IS, WHERE-IS BASIS, AND EACH TRANSFEREE EXPRESSLY ACKNOWLEDGES THAT THE TRANSFEROR MAKES NO REPRESENTATION, EXPRESS OR IMPLIED, OR ARISING BY OPERATION OF LAW, INCLUDING, BUT IN NO WAY LIMITED TO, ANY WARRANTY OF QUANTITY, QUALITY, CONDITION, MERCHANTABILITY, SUITABILITY OR FITNESS FOR A PARTICULAR PURPOSE AS TO THE INFORMATION.**

Section 4. <u>Title Insurance, Surveys and Other Matters</u>.

4.1 <u>Title Commitments</u>. City will obtain an ALTA Owner's Policy Title Insurance Commitments ("**Title Insurance Commitments**") from Chicago Title Insurance Company through its agent Nebraska Title Company ("**Title Company**") during the City Due Diligence Period (defined below) covering the

Replacement City Property. City has also obtained Title Insurance Commitments from the Title Company dated May 11, 2010 (with file numbers BNSF001 and BNSF002) covering the Replacement BNSF Property. City has caused the Title Insurance Commitments to be separated into parcels corresponding to each Closing (defined below) and Property Survey prior to the applicable Closing. Prior to each Closing, City, at City's sole cost and expense, shall update the applicable Title Insurance Commitments to the dates of the applicable Closings (defined below) (such title commitments, as updated, are respectively the "**Replacement City Property Commitments**" and the "**Replacement BNSF Property Commitments**"). The Replacement City Property Commitments and the Replacement BNSF Property Commitments shall be referred to collectively herein as the "**Title Commitments**". BNSF has been provided with a copy of the initial form of the Replacement BNSF Property Commitment.

4.2 Surveys and Legal Descriptions. City, at its sole cost and expense, has obtained and delivered or caused to be delivered to BNSF surveys of the Replacement BNSF Property dated May 28, 2010 and the Replacement City Property dated May 22, 2009, pursuant to current on-the-ground staked surveys performed by Daniel A. Thomson of Olsson Associates ("**Surveyor**"); provided, however, such surveys shall be updated during the BNSF Due Diligence Period (defined below) and City Due Diligence Period as reasonably requested by the Parties so that they (i) are certified to City, BNSF and Title Company, (ii) reflect the actual dimensions of and the total number of gross and net acres within the land described therein, (iii) identify any rights-of-way, easements, or other Encumbrances by applicable recording reference, (iv) show the location of all improvements (including, but not limited to, railroad tracks), (v) are conducted in accordance with the Minimum Detail Requirements and Standards for Land Title Surveys of the American Title Association and American Congress on Surveying and Mapping, (vi) provide a recordable legal description for each parcel of the Replacement City Property and the Replacement BNSF Property, which legal descriptions will be attached to the applicable deed or easement at the applicable Closing, and (vii) include the Surveyor's registered number, seal, and the date of the survey (such surveys, as updated are respectively the "**Replacement BNSF Property Surveys**" and "**Replacement City Property Surveys**"). For purposes of this Agreement, the Replacement BNSF Property Surveys and the Replacement City Property Surveys shall be referred to collectively herein as the "**Property Surveys**".

4.3 Replacement BNSF Property. If the Replacement BNSF Property Commitments or the Replacement BNSF Property Surveys disclose any Encumbrances or other matters that are not acceptable to BNSF, then BNSF may give City written notice thereof during the BNSF Due Diligence Period, specifying BNSF's objections ("**BNSF Objections**"), if any. If BNSF Objections are made, City will use reasonable efforts to, but is not obligated to, cure any BNSF Objections. If BNSF gives notice of BNSF Objections to City and City is unable or unwilling to cure the BNSF Objections or cause the Title Company to insure BNSF, at City's sole cost and expense and to the extent acceptable to BNSF in BNSF's sole discretion, against loss or damage that may be occasioned by such Encumbrances within the twenty (20) day period following receipt of the notice ("**City Cure Period**"), then BNSF may either (i) terminate this Agreement by giving written notice thereof to City within ten (10) days after the expiration of such City Cure Period ("**BNSF Title Termination Deadline**"), and, upon such termination, neither Party will have any further rights or obligations under this Agreement, or (ii) waive the BNSF Objections and consummate the conveyance of the Replacement BNSF Property subject to the BNSF Objections (which will be deemed to be Permitted Encumbrances). If BNSF does not terminate this Agreement prior to the BNSF Title Termination Deadline, then BNSF shall have no further right to terminate this Agreement for matters disclosed in the Replacement BNSF Property Commitments or the Replacement BNSF Property Surveys, except to the extent permitted as part of the BNSF Pre-Conveyance Review as described in **Section 11.1.2** and **11.1.3**.

4.4 Replacement City Property. The "**City Due Diligence Period**" shall commence upon the Effective Date and continue until the date that is 60 days after the date upon which the City receives the Replacement City Property Commitments and the last of the BNSF Existing Information, environmental reports, and any other deliverables from BNSF, and has been granted access to the Replacement BNSF Property for such evaluation and inspection purposes (but in no event less than 60 days after the Effective Date), except as otherwise waived in writing. If the Replacement City Property Commitments or the Replacement City Property Surveys disclose any Encumbrances or other matters that are not acceptable to City, then City may give BNSF written notice thereof within the City Due Diligence Period specifying City's objections ("**City Objections**"), if any. If City Objections are made, BNSF may, but is not obligated to, cure

any City Objections, but in any case BNSF will not be required to incur any expense or liability to cure such City Objections. If City gives notice of City Objections to BNSF and BNSF is unable or unwilling to cure the City Objections or cause the Title Company to insure City, to the extent acceptable to City in City's sole discretion, against loss or damage that may be occasioned by such Encumbrances within the twenty (20) day period following receipt of the notice ("**BNSF Cure Period**"), then City may either (i) terminate this Agreement by giving written notice thereof to BNSF within ten (10) days after the expiration of the BNSF Cure Period ("**City Title Termination Deadline**"), and, upon such termination, neither Party will have any further rights or obligations under this Agreement, or (ii) waive the City Objections and consummate the quitclaim of the Replacement City Property subject to the City Objections (which will be deemed to be Permitted Encumbrances). If City does not terminate this Agreement prior to the City Title Termination Deadline, then City shall have no further right to terminate this Agreement for matters disclosed in the Replacement City Property Commitments or the Replacement City Property Surveys, except to the extent permitted as part of the City Pre-Conveyance Review as described in **Section 11.2.2**.

4.5 No Monetary Encumbrances. Notwithstanding the above, except as set forth in **Section 4.6** below, in no event will any liens or other monetary Encumbrances affecting the Exchange Properties be Permitted Encumbrances.

4.6 Exception. Notwithstanding the foregoing or anything to the contrary contained herein:

4.6.1 if any portion of the Replacement City Property is encumbered by liens of one or more mortgages of BNSF (or its predecessors), BNSF, at its expense, shall deliver to City good and sufficient releases of such liens that are applicable to the Replacement City Property within one hundred eighty (180) days after the first meeting of BNSF's Board of Directors held after the applicable Closing;

4.6.2 any judgment against BNSF that may appear of record as a lien against the Replacement City Property shall be settled and satisfied by BNSF and a release filed of record if and when it is judicially determined to be valid, and BNSF hereby indemnifies City for any losses or costs arising out of BNSF's failure to have such a valid judgment lien so settled and satisfied, including attorneys' fees; and

4.6.3 the releases, settlements or satisfaction by BNSF of such liens referred to in **Sections 4.6.1** or **4.6.2** above shall be deemed an acceptable cure of such items for purposes of this **Section 4**. The provisions in **Sections 4.6.1** and **4.6.2** shall survive each applicable Closing, shall be binding on the Parties' successors and assigns, and shall not merge into the quitclaim deeds to the Replacement City Property or any Closing documents.

4.7 For purposes of this Agreement, "**Encumbrances**" shall be defined as all liens, claims, easements, right-of-ways, reservations, restrictions, encroachments, tenancies, leases, licenses and any other encumbrances of whatsoever nature affecting the Exchange Properties. "**Permitted Encumbrances**" shall be defined as all the Encumbrances appearing in the Title Commitments for the Exchange Properties that are either not objected to, insured by the Title Company in a form acceptable to the Parties, or are objected to but not cured and that are subsequently waived pursuant to this **Section 4**.

4.7.1 Permitted Encumbrances – Replacement City Property.

4.7.1.1 The Parties agree that with respect to the Replacement City Property, Permitted Encumbrances shall also be deemed to include, without limitation:

4.7.1.1.1 All existing longitudinal easements and licenses with third parties and all easements and licenses that cross multiple properties (collectively, "**Longitudinal Agreements**") that would not materially interfere with the use of the Replacement City Property for its intended uses under the West Haymarket Redevelopment Plan as determined by the City at the City's sole discretion and that extend beyond the limits of the Replacement City Property for pipelines, telecommunications

(including without limitation, fiber optic cables or lines, communications equipment, control systems and various types of cables), power, water or other utilities; and

4.7.1.1.2 All other existing easements and licenses with third parties (collectively, the "**Non-Longitudinal Agreements**"); provided, however, that BNSF agrees to assign (to the extent assignable), and City to accept, all Non-Longitudinal Agreements to City at the applicable Closings, each such assignment to be substantially in the form attached hereto as **Exhibit SS** for complete assignments and as **Exhibit SS-1** for partial assignments, both incorporated herein by reference (each a "**License Assignment**" and collectively, "**License Assignments**"). BNSF does not represent or warrant that the Non-Longitudinal Agreements to be assigned (to the extent assignable) or other information contained in the Non-Longitudinal Agreements or License Assignments constitute all of the agreements affecting the Replacement City Property.

4.7.1.2 Upon completion of the Fiber Optics Work (defined in the Master Agreement), BNSF will use reasonable efforts to, but will have no obligation to, secure or obtain written releases from the Fiber Optic Companies (defined in the Master Agreement) for any easements and licenses for fiber optic lines that were relocated from the Replacement City Property to the Future BNSF Corridor. BNSF shall have no obligation to incur any costs or expenses with regards to obtaining such releases.

4.7.2 Permitted Encumbrances – Replacement BNSF Property. The Parties agree that with respect to the Replacement BNSF Property, Permitted Encumbrances shall also be deemed to include the following UP/Replacement BNSF Property encumbrances contained in the Purchase and Sale Agreement between UP and the City of Lincoln approved by Executive Order No. 83205, dated June 15, 2010 ("**UP/City PSA**"): (i) all mineral rights reserved in Section 5(a)(i) of the UP/City PSA, (ii) all leases and licenses referred to in Section 6(a) of the UP/City PSA, and (iii) the restriction on the use set forth in Section 8 of the UP/City PSA, subject to City's indemnity obligations under Section 10.1.1.5 of the Master Agreement and Section 3.6.1(v) of the C&M Agreement.

Section 5. Additional Agreements. Except as otherwise set forth in this Agreement, neither Party shall (a) enter into or agree to enter into any lease, easement, license or other agreement concerning occupancy or use of any of the Replacement BNSF Property or Replacement City Property; (b) enter into, or consent in writing to, any easement, encumbrance, covenant, condition, restriction or right-of-way affecting the Replacement BNSF Property or Replacement City Property; or (c) cause or permit to arise any matter affecting title to any of the Replacement BNSF Property or Replacement City Property, without first obtaining the other Party's prior written consent, which consent may not be unreasonably withheld, conditioned or delayed. City and BNSF shall each pay in full prior to the date of each of the applicable Closings for all labor, material and services required to be provided by such Party or otherwise contracted for by or on behalf of such Party. At each Closing, Transferor will represent to Transferee and to the Title Company that there are no outstanding unpaid bills for labor, material, or utilities furnished on behalf of Transferor with respect to the Exchange Property, and will agree to indemnify and hold harmless Transferee and Title Company against all payments and expenses, including court costs and attorneys' fees, if the above representation proves to be inaccurate in whole or in part.

Section 6. Representations and Warranties. Each Party represents and warrants to the other Party as of the date of this Agreement and as of the date of each of the applicable Closings hereunder that:

6.1 It has all necessary power and authority to enter into and consummate the transactions contemplated herein, and the person executing this Agreement on behalf of the Party is duly authorized to do so.

6.2. Except as disclosed to the Transferee in the studies or other materials delivered to the Transferee, to the Transferor's knowledge:

6.2.1 No actions, suits, proceedings, orders, inquiries, or investigations are pending or are threatened against, involving, or affecting the Exchange Property, at law or in equity, or before or by any federal, state, municipal, or other governmental department, court, commission, board, bureau, agency, or instrumentality, alleging the violation of any federal, state, or local law, statute, ordinance, rule, regulation, decree, order, and/or permit relating to Environmental Matters (defined below) or the release of any Hazardous Substances (defined below).

6.2.2 Except as provided for in **Section 2.3** above and **Section 6.2.3** below, no actions, suits, or proceedings are pending, threatened or asserted against the Exchange Property or against Transferor in connection with the Exchange Property, before or by any federal, state, municipal, or other governmental department, court, commission, board, bureau, agency, or instrumentality.

6.2.3 Except as provided for in **Section 2.3** above, and except as to the Third Party/BNSF Replacement Property owned by N. Street Company LLC, no pending or threatened condemnation actions exist with respect to the Exchange Property.

6.2.4 Transferor has not received any notice that any ordinance, regulation, law, or statute of any governmental agency pertaining to the Exchange Property has been violated.

6.2.5 No permission, approval, or consent by third parties or governmental authorities is required for Transferor to consummate this transaction.

6.3 The term "knowledge" as used in this Agreement, including without limitation this **Section 6**, refers to the actual, present knowledge of: (i) David P. Schneider, General Director – Land Revenue Management for BNSF, and (ii) Ernest R. Peo, III, Chief Assistant City Attorney for City (each, the respective Party's "**Information Representative**"), as of the Effective Date of this Agreement, without any duty of investigation or inquiry of any kind or nature whatsoever.

Section 7. **Amtrak.** City acknowledges that the Replacement City Property is subject to that certain agreement between National Rail Passenger Service Corporation ("**Amtrak**") and Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company, dated September 1, 1996, as amended ("**Operating Agreement**"). City also acknowledges that BNSF is obligated to provide property in the City of Lincoln for intercity rail passenger use under the terms of the federal Rail Passenger Service Act (Title 49 United States Code Section 24308(a)). On or prior to the First Closing: (i) City shall enter into an agreement with Amtrak for a new station lease ("**Station Lease**") for City to provide an intercity railroad passenger station facility for Lincoln, Nebraska for Amtrak on the Replacement City Property (or on other equitable replacement property), on terms and conditions mutually acceptable to City and Amtrak. City does not guarantee that Amtrak will enter into the Station Lease. The new Station Lease shall be binding upon and inure to the benefit of City and Amtrak, and their respective successors and assigns. BNSF agrees to use commercially reasonable efforts to enter into the Amtrak/BNSF Lease (as defined in the Master Agreement) with Amtrak. BNSF does not guarantee that Amtrak will enter into the Amtrak/BNSF Lease.

Section 8. **Closing Conditions.**

8.1 Notwithstanding anything herein to the contrary, the obligations of each Party to consummate the transactions under this Agreement shall be subject to the fulfillment on or before each applicable Closing Date (defined below) of all of the applicable conditions contained in **Sections 8.2** through **8.13**, any or all of which may be waived only by the benefitted Party by written notice to the other Party. In the event any of such applicable conditions are not satisfied or waived by the benefitted Party prior to or at the applicable Closing then either Party may extend the applicable Closing Date by delivering notice to the other Party prior to or on the applicable Closing Date in which case the applicable Closing Date shall be extended to give additional time to satisfy the foregoing conditions and the Parties shall proceed with the terms of this Agreement. Subsequent Closings shall be suspended during any such extension period. If any Closing Date is extended or suspended for more than eighteen (18) months, either Party shall have the right to terminate this Agreement and following any such termination neither Party will have any further rights or obligations under

this Agreement except for those rights and obligations that expressly survive termination of this Agreement. Notwithstanding anything herein to the contrary, if the Master Agreement is terminated prior to the completion of all Closings, this Agreement shall terminate and neither Party shall have any further rights or obligations under this Agreement except for those rights and obligations that expressly survive termination of this Agreement.

8.2 City's obligations to close on the First Closing are contingent upon the satisfaction of the following conditions precedent prior to the First Closing:

8.2.1 The City Council for City and/or the Board of Representatives for JPA (defined below) approving the necessary agreements, resolutions and ordinances for the implementation of the activities contemplated herein;

8.2.2 City obtaining any necessary consents and approvals authorizing the transactions contemplated by this Agreement;

8.2.3 All Initial Acquisitions have taken place, or City has obtained the necessary authority to complete the Initial Acquisitions, including by condemnation if necessary, on a schedule that would satisfy the dates in the Timeline (as defined in the Master Agreement);

8.2.4 BNSF and Amtrak have entered into the Amtrak/BNSF Lease;

8.2.5 The City Due Diligence Period and the City Title Termination Deadline have both expired, or all City Objections have been waived;

8.2.6 The applicable City Pre-Conveyance Review has been completed to City's satisfaction, or all City Pre-Conveyance Review Objections have been waived;

8.2.7 The Master Agreement is in full force and effect, and neither Party is in default under the Master Agreement beyond applicable grace and cure periods;

8.2.8 All contingencies under **Section 22.1** of the Master Agreement have been satisfied;

8.2.9 The Parties have agreed to the terms and conditions of the Rights of Entry;

8.2.10 City and Amtrak have entered into the Station Lease; and

8.2.11 Title Company has committed to issue the Replacement City Property Owner Policy (defined below) for the First City Closing Property (defined below) in a form acceptable to City.

8.3 BNSF's obligations to close on the First Closing are contingent upon the satisfaction of the following conditions precedent prior to the First Closing:

8.3.1 BNSF obtaining any necessary consents and approvals authorizing the transactions contemplated by this Agreement;

8.3.2 BNSF and Amtrak have entered into the Amtrak/BNSF Lease;

8.3.3 The BNSF Due Diligence Period and the BNSF Title Termination Deadline have both expired, or all BNSF Objections have been waived;

8.3.4 The applicable BNSF Pre-Conveyance Review is completed to BNSF's satisfaction, or all BNSF Pre-Conveyance Review Objections have been waived;

8.3.5 All Initial Acquisitions have taken place, or City has obtained the necessary authority to complete the Initial Acquisitions, including by condemnation if necessary, on a schedule that would satisfy the dates in the Timeline;

8.3.6 City and Amtrak have entered into the Station Lease;

8.3.7 Title Company has committed to issue the Replacement BNSF Property Owner Policy (defined below) for the First BNSF Closing Property (defined below) in a form acceptable to BNSF;

8.3.8 The Parties have agreed to the terms and conditions of the Rights of Entry;

8.3.9 The Master Agreement is in full force and effect, and neither Party is in default under the Master Agreement beyond applicable grace and cure periods; and

8.3.10 All contingencies under **Section 22.2** of the Master Agreement have been satisfied.

8.4 City's obligations to close on the Second BNSF Closing are contingent upon the satisfaction of the following conditions precedent prior to the Second BNSF Closing:

8.4.1 All Initial Acquisitions have taken place;

8.4.2 The First Closing has taken place; and

8.4.3 The Master Agreement is in full force and effect, and neither Party is in default under the Master Agreement beyond applicable grace and cure periods.

8.5 BNSF's obligations to close on the Second BNSF Closing are contingent upon the satisfaction of the following conditions precedent prior to the Second BNSF Closing:

8.5.1 All Initial Acquisitions have taken place;

8.5.2 The First Closing has taken place;

8.5.3 The applicable BNSF Pre-Conveyance Review has been completed to BNSF's satisfaction, or all BNSF Pre-Conveyance Review Objections (defined below) have been waived;

8.5.4 The cleanup obligations of City with respect to the Alter Parcel, such obligations being more particularly described in **Section 11.1.1.2(c)** and **Exhibit F-2** attached hereto and incorporated by this reference, have been completed (or BNSF has agreed in writing to waive the requirement that such cleanup obligations be completed before the Second BNSF Closing as set forth in, and subject to the conditions of, **Section 11.1.1.2(c)**);

8.5.5 The Master Agreement is in full force and effect, and neither Party is in default under the Master Agreement beyond applicable grace and cure periods; and

8.5.6 Title Company has committed to issue the Replacement BNSF Property Owner Policy for the Second BNSF Closing Property (defined below) in a form acceptable to BNSF.

8.6 City's obligations to close on the Second City Closing are contingent upon the satisfaction of the following conditions precedent prior to the Second City Closing:

8.6.1 The First Closing has taken place;

8.6.2 The Master Agreement is in full force and effect, and neither Party is in default under the Master Agreement beyond applicable grace and cure periods;

8.6.3 The applicable City Pre-Conveyance Review has been completed to City's satisfaction, or all City Pre-Conveyance Review Objections (defined below) have been waived; and

8.6.4 Title Company has committed to issue the Replacement City Property Owner Policy for the Second City Closing Property in a form acceptable to City.

8.7 BNSF's obligations to close on the Second City Closing are contingent upon the satisfaction of the following conditions precedent prior to the Second City Closing:

8.7.1 The First Closing and the Second BNSF Closing have taken place; and

8.7.2 The Master Agreement is in full force and effect, and neither Party is in default under the Master Agreement beyond applicable grace and cure periods.

8.8 City's obligations to close on the Third City Closing are contingent upon the satisfaction of the following conditions precedent prior to the Third City Closing:

8.8.1 The Second City Closing has taken place;

8.8.2 The applicable City Pre-Conveyance Review has been completed to City's satisfaction, or all City Pre-Conveyance Review Objections have been waived;

8.8.3 The Master Agreement is in full force and effect, and neither Party is in default under the Master Agreement beyond applicable grace and cure periods; and

8.8.4 Title Company has committed to issue the Replacement City Property Owner Policy for the Third City Closing Property (defined below) in a form acceptable to City.

8.9 BNSF's obligations to close on the Third City Closing are contingent upon the satisfaction of the following conditions precedent prior to the Third City Closing:

8.9.1 The Second City Closing has taken place; and

8.9.2 The Master Agreement is in full force and effect, and neither Party is in default under the Master Agreement beyond applicable grace and cure periods.

8.10 City's obligations to close on the Fourth City Closing are contingent upon the satisfaction of the following conditions precedent prior to the Fourth City Closing:

8.10.1 The Third City Closing has taken place;

8.10.2 The applicable City Pre-Conveyance Review has been completed to City's satisfaction, or all City Pre-Conveyance Review Objections have been waived;

8.10.3 The Master Agreement is in full force and effect, and neither Party is in default under the Master Agreement beyond applicable grace and cure periods;

8.10.4 Passenger Track No. 2 is removed from service, as determined by BNSF in BNSF's sole and absolute discretion; and

8.10.5 Title Company has committed to issue the Replacement City Property Owner Policy for the Fourth City Closing Property in a form acceptable to City.

8.11 BNSF's obligations to close on the Fourth City Closing are contingent upon the satisfaction of the following conditions precedent prior to the Fourth City Closing:

8.11.1 The Third City Closing has taken place;

8.11.2 Passenger Track No. 2 is removed from service, as determined by BNSF in BNSF's sole and absolute discretion; and

8.11.3 The Master Agreement is in full force and effect, and neither Party is in default under the Master Agreement beyond applicable grace and cure periods.

8.12 City's obligations to close on the Fifth City Closing are contingent upon the satisfaction of the following conditions precedent prior to the Fifth City Closing:

8.12.1 The Fourth City Closing has taken place;

8.12.2 The applicable City Pre-Conveyance Review has been completed to City's satisfaction, or all City Pre-Conveyance Review Objections have been waived;

8.12.3 The Master Agreement is in full force and effect, and neither Party is in default under the Master Agreement beyond applicable grace and cure periods;

8.12.4 Passenger Track No. 1 is removed from service, as determined by BNSF in BNSF's sole and absolute discretion; and

8.12.5 Title Company has committed to issue the Replacement City Property Owner Policy for the Fifth City Closing Property (defined below) in a form acceptable to City.

8.13 BNSF's obligations to close on the Fifth City Closing are contingent upon the satisfaction of the following conditions precedent prior to the Fifth City Closing:

8.13.1 The Fourth City Closing has taken place;

8.13.2 Passenger Track No. 1 is removed from service, as determined by BNSF in BNSF's sole and absolute discretion; and

8.13.3 The Master Agreement is in full force and effect, and neither Party is in default under the Master Agreement beyond applicable grace and cure periods.

Section 9. **Closings.** The BNSF Closings and the City Closings are referred to individually herein as a "**Closing**" and collectively as the "**Closings**." The "**First Closing**" shall consist of a conveyance of certain property from City to BNSF as described in **Section 9.1.1** below, and a simultaneous quitclaim of certain property from BNSF to City as described in **Section 9.2.1** below. Each Closing shall occur at the offices of Title Company, on the date for such Closing set forth in the Timeline (each such date to be referred to herein individually as a "**Closing Date**" and collectively as the "**Closing Dates**"). City shall be responsible for all costs associated with the Closings, including, without limitation, escrow fees, documentary stamps and other recording costs, any state, county, or local excise taxes, and costs of all surveys and title policies.

9.1 The "**BNSF Closings**" shall include the First Closing and the Second BNSF Closing. At least two (2) days before each of the BNSF Closings, BNSF shall deliver to City written notice of BNSF's decision as to whether each parcel is to be conveyed to BNSF via an easement or by quitclaim deed.

9.1.1 First Closing. At the First Closing, City shall, at its sole cost and expense, vacate the existing public at-grade crossing at 2nd and "J" Street, and vacate that portion of the Vacated Right of Way/Replacement BNSF Property abutting the UP/Replacement BNSF Property, Third Party/Replacement BNSF Property owned by Noohznik L.P., Third Party Replacement BNSF Property owned by Lower Platte South Natural Resources District, and Retained BNSF Property generally shown on **Exhibit G** (BNSF shall have no obligation to pay for or assist in the vacation of the Vacated Right of Way/Replacement BNSF Property and/or the transfer of the Vacated Right of

Way/Replacement BNSF Property), and shall convey to BNSF that portion of the Replacement BNSF Property generally shown on **Exhibit G** attached hereto and incorporated herein by this reference, including any remaining improvements located on any such land (collectively, the "**First BNSF Closing Property**").

9.1.2 Second BNSF Closing. At the Second BNSF Closing, City shall, at its sole cost and expense, vacate the Vacated Right of Way/Replacement BNSF Property abutting the remaining Third Party/Replacement BNSF Property as generally shown on **Exhibit G-1** (BNSF shall have no obligation to pay for or assist in the vacation of the Vacated Right of Way/Replacement BNSF Property and/or the transfer of the Vacated Right of Way/Replacement BNSF Property), and shall convey to BNSF all remaining Replacement BNSF Property as generally shown on **Exhibit G-1** attached hereto and incorporated herein by this reference, including any remaining improvements located on any such land (collectively, the "**Second BNSF Closing Property**").

9.2 At each Closing, City shall deliver, or cause to be delivered, to BNSF the following items with respect to the applicable portion of the Replacement BNSF Property:

9.2.1 With respect to the BNSF Closings, a quitclaim deed ("**Replacement BNSF Property Deed**") in the form attached to this Agreement as **Exhibit QQ**, attached hereto and incorporated herein by this reference, with the applicable legal description prepared pursuant to **Section 4.2** attached thereto, fully executed and acknowledged by City, to be countersigned and accepted by BNSF at the applicable Closing, conveying to BNSF the City's interest in the Replacement BNSF Property for the applicable BNSF Closing, subject only to the Permitted Encumbrances (provided, however, that for all properties for which BNSF elects to receive an easement in lieu of fee ownership, City shall deliver an easement ["**Replacement BNSF Property Easement**"] in the form attached hereto as **Exhibit QQ-1**, incorporated herein by this reference, with the applicable legal description prepared pursuant to **Section 4.2** attached thereto, fully executed and acknowledged by City, granting to BNSF an easement for the Replacement BNSF Property for the applicable BNSF Closing, subject only to the Permitted Encumbrances).

9.2.1.1 For any properties in which BNSF elects to receive an easement in lieu of fee ownership, BNSF will quitclaim to City BNSF's interest, if any, in the vacated streets and alleys comprising any part of the properties for which BNSF elects to receive an easement in lieu of fee ownership, subject to BNSF's reservation of an easement back to BNSF over such vacated streets and alleys as part of and under the terms of the Replacement BNSF Property Easement, all as more particularly described in **Exhibit QQ-1**.

9.2.1.2 Subsequent to the BNSF Closing(s), BNSF has the right, but not the obligation, to require City to convey, for no additional consideration, fee simple to any parcel of Replacement Property in which BNSF originally accepted an easement interest, all as more particularly described in **Exhibit QQ-1**.

9.2.2 With respect to the First Closing, reasonable documentation of City's and Amtrak's execution of the Station Lease.

9.2.3 At all applicable Closings and in accordance with the Donation Allocation, City shall, to the extent permitted by law, deliver to BNSF any and all documentation necessary to complete and establish the Charitable Donation.

9.2.4 With respect to the First Closing, City shall deliver to BNSF the Cash Payment.

9.2.5 License Assignments, as applicable.

9.2.6 Rights of Entry agreements, as applicable.

9.2.7 Such other and further documents as may be reasonably required to consummate the transactions contemplated by this Agreement and for Title Company to issue the Replacement BNSF Property Owner Policy (defined below) in accordance with this Agreement.

9.2.8 Possession of the Replacement BNSF Property as required under this Agreement.

9.3 In addition to the foregoing, for each BNSF Closing, City shall cause Title Company to issue to BNSF an ALTA Owner's Extended Coverage Policy of Title Insurance ("**Replacement BNSF Property Owner Policy**") in the amount equal to the fair market value of the parcel of Replacement BNSF Property conveyed at such Closing (as determined by appraisal pursuant to the provisions of **Section 2.6**), insuring such parcel of Replacement BNSF Property conveyed to BNSF at the applicable BNSF Closing free and clear of all matters except the Permitted Encumbrances applicable to such parcel of Replacement BNSF Property.

9.4 The "**City Closings**" shall include the First Closing, the Second City Closing, the Third City Closing, the Fourth City Closing, and the Fifth City Closing (each as defined below).

9.4.1 First Closing. At the First Closing, BNSF shall convey to City BNSF's interest in (a) that portion of the Replacement City Property generally shown on **Exhibit J-1** attached hereto and incorporated herein by this reference, (b) any and all BNSF Reversionary Interests as generally shown on **Exhibit J-1** attached hereto and (c) any and all Other BNSF Reversionary Interests as generally shown on **Exhibit S** attached hereto, including any remaining improvements located on any such land (collectively, the "**First City Closing Property**").

9.4.2 Second City Closing. At the "**Second City Closing**", BNSF shall convey to City BNSF's interest in (a) that portion of the Replacement City Property generally shown on **Exhibit J-2** attached hereto and incorporated herein by this reference (the "**Holes in the Donut**"), and (b) any and all BNSF Reversionary Interests to the streets and alleys abutting the Holes in the Donut as generally shown on **Exhibit J-2** attached hereto, including any remaining improvements located on any such land (collectively, the "**Second City Closing Property**").

9.4.3 Third City Closing. At the "**Third City Closing**", BNSF shall convey to City BNSF's interest in (a) that portion of the Replacement City Property generally shown on **Exhibit J-3** attached hereto and incorporated herein by this reference; (b) any and all BNSF Reversionary Interests to the streets and alleys abutting such property and the BNSF Bridge as generally shown on **Exhibit J-3** attached hereto; and (c) the BNSF Bridge, including any remaining improvements located on any such land or the BNSF Bridge (collectively, the "**Third City Closing Property**").

9.4.4 Fourth City Closing. At the "**Fourth City Closing**", BNSF shall convey to City BNSF's interest in (a) the Replacement City Property generally shown on **Exhibit J-4**, attached hereto and incorporated herein by this reference, and (b) any and all BNSF Reversionary Interests to the streets and alleys abutting such property, including any remaining improvements located on any such land as generally shown on **Exhibit J-4** attached hereto (collectively, the "**Fourth City Closing Property**").

9.4.5 Fifth City Closing. At the "**Fifth City Closing**", BNSF shall convey to City BNSF's interest in (a) all Replacement City Property not previously conveyed to City in the previous Closings, as generally shown on **Exhibit J-5**, attached hereto and incorporated herein by this reference, and (b) any and all BNSF Reversionary Interests not previously conveyed to City in the previous Closings (collectively, the "**Fifth City Closing Property**").

9.4.6 The First City Closing Property, Second City Closing Property, Third City Closing Property, Fourth City Closing Property, and the Fifth City Closing Property shall be referred to collectively herein as the "**City Closing Properties**".

9.5 At each Closing, BNSF shall deliver, or cause to be delivered, to City the following items with respect to the applicable portion of the Replacement City Property:

9.5.1 A quitclaim deed ("**Replacement City Property Deed**") in the form attached to this Agreement as **Exhibit RR**, attached hereto and incorporated herein by this reference, fully executed and acknowledged by BNSF, to be countersigned and accepted by City at the applicable Closing, conveying to City BNSF's interest in the Replacement City Property for the applicable City Closing;

9.5.2 A quitclaim bill of sale ("**Bill of Sale**") in the form attached to this Agreement as **Exhibit PP**, attached hereto and incorporated herein by this reference, fully executed by BNSF, to be countersigned and accepted by City at Closing, conveying to City any remaining improvements located on the Replacement City Property for the applicable City Closing (other than remaining improvements necessary for BNSF's railroad operations as described in **Section 11.2.7.1** below), the cost of which is included in the Cash Payment;

9.5.3 With respect to the First Closing, (i) a bill of sale quitclaiming to City the excavated fill described in **Section 11.2.4** below, the cost of which is included in the Cash Payment, and (ii) reasonable documentation of BNSF's and Amtrak's execution of the Amtrak/BNSF Lease.

9.5.4 With respect to the Third City Closing, a bill of sale ("**Bridge Bill of Sale**") in the form attached hereto as **Exhibit PP-1** and incorporated herein by reference, fully executed and acknowledged by BNSF, quitclaiming to City the BNSF Bridge, the cost of which is included in the Cash Payment.

9.5.5 License Assignments, as applicable.

9.5.6 Rights of Entry agreements, as applicable.

9.5.7 Such other and further documents as may be reasonably required to consummate the transactions contemplated by this Agreement and for Title Company to issue the Replacement City Property Owner Policy in accordance with this Agreement, including delivery to Title Company of an Assistant Secretary's Certificate and documentation that BNSF, a corporation of the State of Delaware, is in good standing according to the Secretary of State, State of Delaware; and

9.5.8 Possession of the Replacement City Property as required under this Agreement.

9.6 BNSF acknowledges and agrees that City may, at City's sole cost and expense, obtain, to the extent obtainable, an ALTA Owner's Extended Coverage Policy of Title Insurance ("Replacement City Property Owner Policy") for all or any portion of the Replacement City Property conveyed at such City Closing insuring such parcel of Replacement City Property conveyed to City at the applicable City Closing, free and clear of all matters except the Permitted Encumbrances applicable to such parcel of Replacement City Property.

Section 10. Taxes.

10.1 City Replacement Property.

10.1.1 Locally Assessed Taxes. BNSF shall pay on or before each City Closing Date all locally assessed (i.e., not centrally assessed) real estate taxes, personal property taxes, and special tax assessments ("**Taxes**") levied or assessed against the applicable Replacement City Property that are due and payable on or before such City Closing Date. City shall pay, without proration, all locally assessed real estate taxes and special tax assessments (but not personal property taxes) levied or assessed against the applicable Replacement City Property that are not yet due and payable as of each City Closing Date. BNSF shall pay all locally assessed personal property taxes levied against existing improvements of BNSF remaining on the applicable City Replacement Property that are not yet due and payable as of each City Closing Date.

10.1.2 Centrally Assessed Taxes. BNSF shall pay all real estate and personal property taxes centrally assessed against the Replacement City Property for the year of Closing and all prior years.

10.2 BNSF Replacement Property.

10.2.1 Locally Assessed Taxes. City shall pay on or before each BNSF Closing Date all locally assessed Taxes against the applicable Replacement BNSF Property that are due and payable on such BNSF Closing Date. Locally assessed Taxes levied and/or assessed against the BNSF Replacement Property that are not due and payable as of such BNSF Closing Date shall be prorated to the date of Closing at the prior year tax rate and assessed value.

10.2.2 Centrally Assessed Taxes. City shall pay or cause UP to pay all taxes centrally assessed against the UP/Replacement BNSF Property for the year of Closing and all prior years.

Section 11. Due Diligence Period; Condition of Exchange Properties; Release and Indemnity.

11.1 Replacement BNSF Property.

11.1.1 BNSF shall be allowed to conduct Tests (defined below) and evaluate and inspect the Replacement BNSF Property, City Existing Information, and other information related to the Replacement BNSF Property for the "**BNSF Due Diligence Period**" described herein. The BNSF Due Diligence Period shall commence upon the Effective Date and continue until the date that is 60 days after the date upon which BNSF receives the last of the City Existing Information, Title Insurance Commitments, Replacement BNSF Property Surveys, environmental reports, and any other deliverables from City, and has been granted access to the Replacement BNSF Property (except for N Street Company LLC parcel) for such evaluation and inspection purposes (but in no event less than 60 days after the Effective Date), except as otherwise waived in writing. To the extent City has not completed the Initial Acquisitions, City will reasonably cooperate with BNSF and obtain rights from the underlying landowners as necessary to facilitate BNSF's due diligence investigations and evaluations.

11.1.1.1 During the BNSF Due Diligence Period, BNSF will determine whether BNSF is willing to accept the physical, title, and environmental conditions of each parcel comprising the Replacement BNSF Property. BNSF shall perform investigations of the Replacement BNSF Property as it deems necessary to determine the condition of the Replacement BNSF Property, including without limitation the physical condition, the environmental condition, and the condition of title.

11.1.1.2 BNSF may, at its sole option and discretion, waive its rights to conduct Tests and evaluate and inspect the Replacement BNSF Property during the BNSF Due Diligence Period. If BNSF elects to so waive its rights under the BNSF Due Diligence Period, such waiver shall be subject to and conditioned on all of the following:

(a) BNSF's delivery of written notice to City of BNSF's intent to waive its rights to conduct Tests and inspect the Replacement BNSF Property during the BNSF Due Diligence Period.

(b) City shall promptly perform, or cause to be performed, at City's sole cost and expense, clean up of the Replacement BNSF Property: (i) in accordance with a workplan submitted to BNSF for review and consented to in writing by BNSF, (ii) in accordance with the requirements and standards set forth on **Exhibit F-2** ("**Cleanup Standards**") attached hereto and incorporated herein by this reference, (iii) in accordance with all terms and conditions of the C&M Agreement applicable to the performance of City C&M Work, including without limitation all provisions of Article III of the C&M Agreement concerning City Obligations, (iv) in compliance

with all applicable Environmental Laws and (v) in a manner that minimizes interference, as determined by BNSF in its sole discretion, with rail operations. Review and consent by BNSF to the workplan shall not constitute approval of the sufficiency or effectiveness of such workplan.

(c) The parties intend that the obligations of City described in **Section 11.1.1.2(b)** above and **Exhibit F-2** are to be completed on or before the Second BNSF Closing. Notwithstanding the foregoing, however, if City cannot reasonably complete such obligations on or before the Second BNSF Closing because of events that are beyond City's reasonable control, City shall so notify BNSF in writing at least fifteen (15) days before the Second BNSF Closing is scheduled to occur. BNSF has the right, at its option, to elect to either: (i) extend the Second BNSF Closing until such obligations are completed or (ii) proceed to Closing, in which case City's obligations hereunder shall survive the Closing and shall not merge with the Replacement City Property Deed or any Closing documents. All costs and expenses incurred by the parties that are caused by or arise from BNSF's agreement to extend the Second BNSF Closing or proceed to Closing, including without limitation all costs and expenses resulting from delays in the performance in the BNSF Work, shall be deemed to be Additional City Cost Work.

(d) To the extent Hazardous Substances or contaminants: (i) remain in place and/or (ii) are discovered after the (1) termination of this Agreement, (2) occurrence of any or all Closings hereunder, and/or (3) the completion of the clean up described in **Section 11.1.1.2(b)** above, City shall continue to bear the responsibility for any incremental costs caused by or arising from construction activities, excavation, soil handling or management on the Replacement BNSF Property. BNSF has the right, in its sole discretion, to either: (1) remove, remediate, cure or otherwise address such Hazardous Substances or contaminants and present City with an invoice for the incremental costs, which City agrees to pay to BNSF within thirty (30) days after receipt of the invoice, or (2) notify City of such Hazardous Substances or contaminants, whereupon City shall, at City's sole cost and expense, promptly remove, remediate, cure or otherwise address such Hazardous Substances or contaminants: (i) in accordance with a workplan submitted to BNSF for review and consented to in writing by BNSF, (ii) in compliance with all applicable Environmental Laws and (iii) in a manner and in accordance with a schedule that minimizes interference, as determined by BNSF in its sole discretion, with rail operations. Review and consent by BNSF to the workplan shall not constitute approval of the sufficiency or effectiveness of such workplan.

(e) City's obligations under this Section **11.1.1.2** are in addition to, and not in limitation of, any other obligations of City (including without limitation all indemnification obligations) under the C&M Agreement (including but not limited to obligations under the SMP as defined therein), Master Agreement, this Exchange Agreement and all Rights of Entry.

(f) All rights of BNSF under the provisions of this **Section 11.1.1.2** shall survive any termination of this Agreement and all Closings hereunder.

11.1.2 In addition to BNSF's rights during the BNSF Due Diligence Period, BNSF shall have the right to perform a final walk-through inspection, and to review the applicable Title Commitments and any additional or updated Existing City Information during the week prior to each of the First Closing and the BNSF Second Closing (collectively, the "**BNSF Pre-Conveyance Reviews**" and each individually a "**BNSF Pre-Conveyance Review**") to confirm there have been no material changes to the Replacement BNSF Property or to the title thereof.

11.1.2.1 If the BNSF Pre-Conveyance Review conducted before the First Closing reveals material changes to the Replacement BNSF Property or to the title thereof that did not exist as of the expiration of the BNSF Due Diligence Period and the BNSF Title Termination Deadline, that are not acceptable to BNSF, then BNSF shall deliver to City written notice specifying BNSF's objections ("**BNSF Pre-Conveyance Review Objections**") prior to the First Closing. If BNSF Pre-Conveyance Review Objections are made, City will use reasonable efforts to, but is not obligated to, cure any BNSF Pre-Conveyance Review Objections within thirty (30) days from the receipt of the notice and in any event prior to the First Closing. If such changes are not cured by City within such time period, then BNSF may either (i) terminate this Agreement by giving written notice thereof to City prior to the First Closing, and, upon such termination, neither Party will have any further rights or obligations under this Agreement, or (ii) waive any objections and proceed to the First Closing.

11.1.2.2 If the BNSF Pre-Conveyance Review conducted for the Second BNSF Closing, reveals material changes to the Replacement BNSF Property not conveyed to BNSF at the First Closing or to the title thereof that did not exist as of the expiration of the BNSF Due Diligence Period and the BNSF Title Termination Deadline that are not acceptable to BNSF, then City shall cure such changes within thirty (30) days and indemnify BNSF from any BNSF Losses (defined below) arising out of such changes. BNSF shall have no obligation to consummate the Second BNSF Closing until City has complied with the provisions of this **Section 11.1.2.2** to BNSF's satisfaction.

11.1.3 BNSF represents and warrants to City that BNSF has not relied and will not rely on, and City is not liable for or bound by, any warranties, guaranties, statements, representations or information pertaining to the Replacement BNSF Property or relating thereto (including specifically, without limitation, any City Existing Information related to the Replacement BNSF Property) made or furnished by City or any agent representing or purporting to represent City, to whomever made or given, directly or indirectly, orally or in writing. **EXCEPT WITH RESPECT TO ENVIRONMENTAL MATTERS, ENVIRONMENTAL CONDITION AND AS OTHERWISE PROVIDED IN THIS AGREEMENT, BNSF IS ACCEPTING THE REPLACEMENT BNSF PROPERTY ON AN "AS-IS WITH ALL FAULTS" BASIS**.

11.1.4 Prior to City's quitclaim of the Replacement BNSF Property to BNSF, City shall, at its sole cost and expense, remove all debris, rubbish, litter, refuse, and other materials and improvements as directed by BNSF from the Replacement BNSF Property. Except with respect to Environmental Matters, environmental condition and as otherwise provided in this Agreement, City shall have no obligations with respect to any improvements remaining on the Replacement BNSF Property following the applicable Closing.

11.2 Replacement City Property.

11.2.1 City acknowledges and agrees that it has been allowed to perform an inspection of the Replacement City Property pursuant to the provisions of (i) that certain License for Environmental Access between BNSF and HWS Consulting Group, Inc. (as the inspecting agent for City) dated June 11, 2008, and as modified by that certain Supplemental Agreement dated December 17, 2008, (ii) that certain Temporary Access License for Survey/Geotech/Environmental

Activities/Advance Construction between BNSF and City, dated October ____, 2010, permitting City and its Personnel, at its election and expense, to perform certain surveying, geotechnical, environmental and engineering explorations as more particularly described therein on those portions of the Replacement City Property that will be quitclaimed to City in the Second BNSF Closing, and (iii) this **Section 11.2**.

11.2.2 In addition to its previous inspection, City shall have the right to perform a final walk-through inspection, and to review any Title Commitments during the week prior to the applicable Closing (collectively, the "**City Pre-Conveyance Reviews**" and each individually a "**City Pre-Conveyance Review**") to confirm there have been no material changes to the applicable Replacement City Property. Any entry by City onto the Replacement City Property prior to Closing shall be subject to the terms and conditions of the Entry Agreement.

11.2.2.1 If a City Pre-Conveyance Review conducted before the First Closing reveals material changes to the First City Closing Property or to the title thereof that did not exist as of the expiration of the City Due Diligence Period and the City Title Termination Deadline, that are not acceptable to the City, then the City shall personally deliver to BNSF written notice specifying the City's Objections ("**City Pre-Conveyance Review Objections**") prior to or on the date of Closing. If the City Pre-Conveyance Review Objections are made, BNSF will use reasonable efforts to, but is not obligated to, cure any City Pre-Conveyance Review Objections within thirty (30) days from the receipt of the notice and in any event prior to the First Closing. If such changes are not cured by BNSF within such time period, then City may either (i) terminate this Agreement by giving written notice thereof to BNSF prior to the First Closing, and, upon such termination, neither Party will have any further rights or obligations under this Agreement except as expressly survive termination, or (ii) waive objections and proceed to the First Closing.

11.2.2.2 If a City Pre-Conveyance Review conducted for the other City Closings reveals material changes to the Replacement City Property or to the title thereof that did not exist as of the expiration of the City Due Diligence Period and the City Title Termination Deadline for the remaining City Closings, and if such changes (i) are not acceptable to City, (ii) are a direct result of the negligence or intentional misconduct of BNSF, and (iii) are not covered by City's indemnification obligation under **Section 11.4** below, then BNSF shall cure such changes within thirty (30) days or indemnify from any City Losses (defined below) arising out of such changes. City shall have no obligation to consummate the remaining City Closings until BNSF has complied with the provisions of this **Section 11.2.2.2** to City's satisfaction.

11.2.3 **CITY IS ACCEPTING THE REPLACEMENT CITY PROPERTY ON AN "AS-IS WITH ALL FAULTS" BASIS WITH ANY AND ALL PATENT AND LATENT DEFECTS, INCLUDING THOSE RELATING TO THE ENVIRONMENTAL CONDITION OF THE REPLACEMENT CITY PROPERTY, AND IS NOT RELYING ON ANY REPRESENTATION OR WARRANTIES, EXPRESS OR IMPLIED, OF ANY KIND WHATSOEVER FROM BNSF AS TO ANY MATTERS CONCERNING THE REPLACEMENT CITY PROPERTY**, including, but not limited to, the physical condition of the Replacement City Property; zoning status; tax consequences of this transaction; utilities; operating history or projections or valuation; compliance by the Replacement City Property with Environmental Laws (defined below) or other laws, statutes, ordinances, decrees, regulations and other requirements applicable to the Replacement City Property; the presence of any Hazardous Substances (defined below), wetlands, asbestos, lead, lead-based paint or other lead containing structures, urea formaldehyde, or other environmentally sensitive building materials in, on, under, or in proximity to the Replacement City Property; the condition or existence of any above ground or underground structures or improvements, including tanks and transformers in, on or under the Replacement City Property; the condition of title to the Replacement City Property, and the existence of any leases, easements, permits, orders, licenses, or other agreements, affecting the Replacement City Property (collectively, the "**Replacement City Property Conditions**").

11.2.4 City acknowledges that portions of the Replacement City Property are subject to certain environmental remediation under applicable laws and regulations administered and enforced by the Nebraska Department of Environmental Quality (NDEQ Files #062076; UG #07116-MBS-1100). BNSF understands and acknowledges that under applicable NDEQ laws and regulations, BNSF is deemed the responsible party and that it retains responsibility for this on-going environmental remediation as between BNSF and the NDEQ. However, as between City and BNSF, City shall be solely responsible for all such environmental remediation, and City agrees to assume and perform such environmental remediation, provided that BNSF agrees as the party responsible to NDEQ to: (i) designate City (or at City's discretion, City's contractor) as BNSF's designated representative; (ii) allow City to submit a more aggressive remedial action work plan (prepared by City or City's contractor) for completing BNSF's environmental obligations, subject to the review and approval of NDEQ; (iii) allow City or City's contractor to carry out such remedial action work plan as proposed and approved; (iv) allow City or City's contractor, as BNSF's designated representative, to submit requests for and receive direct reimbursement for the approved remedial actions from NDEQ Title 200 funds, or other such available funds; and (v) following completion of such remedial actions, provide City the NDEQ-issued "No Further Action" letter for the property. If NDEQ Title 200 funds are unavailable or insufficient for any reason to complete all remediation, City shall nevertheless be solely responsible for all costs of remediation as between City and BNSF, and City's release and indemnity obligations set forth herein shall include such remediation and any funding shortfalls. Following completion of remediation, City shall cooperate with BNSF to cause NDEQ to look solely to City thereafter. City further acknowledges that BNSF plans to excavate materials from Exchange Properties and to quitclaim such fill materials to City by quitclaim bill of sale at the First Closing. City shall be responsible for testing, managing, and transporting such material to Replacement BNSF Property for stockpiling and future usage, including any necessary treatment and disposal, and City's foregoing release and indemnity expressly includes such excavated materials.

11.2.5 City represents and warrants to BNSF that City has not relied and will not rely on, and BNSF is not liable for or bound by, any warranties, guaranties, statements, representations or information pertaining to the Replacement City Property or relating thereto (including specifically, without limitation, any BNSF Existing Information related to the Replacement City Property) made or furnished by BNSF or any agent representing or purporting to represent BNSF, to whomever made or given, directly or indirectly, orally or in writing.

11.2.6 Subject to **Section 11.2.7**, BNSF shall have the right, but not the obligation, to remove all or any portion of improvements from the Replacement City Property prior to BNSF's quitclaim of the Replacement City Property to City; provided, however, that BNSF shall not have the right or the obligation to remove the BNSF Bridge. BNSF shall have no obligations with respect to any improvements or other materials remaining on the Replacement City Property on or after BNSF's quitclaim of the Replacement City Property to City. Notwithstanding the foregoing, BNSF will pull up all tracks and ties from tracks 204, 205, 309, 310, 320, 321, 322, and 323, and a portion consisting of eight hundred (800) feet of track 324 (collectively, the "**Removed Tracks & Ties**") within ten (10) days after the applicable Closing, stockpile such Removed Tracks & Ties, and load such Removed Tracks & Ties onto cars supplied by BNSF for shipment to and disposal at an appropriate disposal site. BNSF's costs of pulling up, stockpiling and loading the Removed Tracks & Ties onto cars shall be treated as BNSF Additional City Cost Work (as defined in the Master Agreement). BNSF's right to enter upon the Replacement City Property to pull up, stockpile and load the Removed Tracks & Ties onto cars, and all obligations of City under the provisions of this **Section 11.2.6,** shall survive all Closings hereunder. Except with respect to the Removed Tracks & Ties, BNSF shall not be responsible for removal or disposal of tracks or ties, or any costs of track and tie removal or disposal, for or from any Replacement City Property.

11.2.7 If, after the applicable Closing, improvements belonging to BNSF or third parties that are not covered by Longitudinal Agreements and were not assigned to City pursuant to a License Assignment are discovered on Replacement City Property, then the Party discovering such improvements shall promptly notify the other Party in writing thereof.

11.2.7.1 If such improvements are necessary for BNSF's railroad operations or otherwise, as determined by BNSF in BNSF's sole discretion and the remaining improvements do not materially interfere with City's intended use of the Replacement City Property, as determined by City in City's sole discretion, then BNSF may request that City, at City's election, to either (i) permit BNSF to enter upon the Replacement City Property, upon notice to City, to remove and relocate such improvements to a location off of the Replacement City Property, such removal and relocation to be at City's sole cost and expense, or (ii) promptly obtain and for no monetary consideration, a permanent easement from City to BNSF in form and substance acceptable to BNSF for the Operation (as defined in the Master Agreement) of such improvements. If BNSF elects to remove and relocate such improvements, then BNSF shall have a reasonable amount of time for the Operation of such improvements prior to such removal and relocation.

11.2.7.2 If such improvements are necessary for BNSF's railroad operations or otherwise, as determined by BNSF in BNSF's sole discretion, and the remaining improvements materially interfere with City's intended use of the Replacement City Property, as determined by City in City's sole discretion, then BNSF shall have the right to enter upon the Replacement City Property, upon notice to City, to remove and relocate such improvements to a location off of the Replacement City Property, such removal and relocation to be at City's sole cost and expense. If BNSF elects to remove and relocate such improvements, then BNSF shall have a reasonable amount of time for the Operation of such improvements prior to such removal and relocation.

11.2.7.3 If such improvements are not necessary or desirable for BNSF's railroad operations or otherwise, as determined by BNSF in BNSF's sole discretion, then BNSF shall quitclaim such improvements to City via a bill of sale in the form attached hereto as **Exhibit PP**, whereupon BNSF shall have no further obligations with respect to such improvements.

11.2.7.4 If such improvements belong to a third party, and BNSF determines it has a known license or similar agreement with such third party, then BNSF agrees, at no cost to BNSF, to assign such license or similar agreement to City; provided, however, if such improvements are not covered by an agreement with BNSF, and/or a license or similar agreement cannot be located by BNSF, then BNSF shall notify City of such in writing. Upon such assignment or notification, BNSF shall have no further obligations with respect to such improvements.

11.2.7.5 All rights of BNSF under the provisions of this **Section 11.2.7** shall survive all Closings hereunder.

11.2.8 Notwithstanding anything in this Agreement to the contrary, City acknowledges and affirms that BNSF may not hold fee simple title to the Replacement City Property and that BNSF's interest in all or part of the Replacement City Property, if any, may rise only to the level of an easement for railroad purposes. City is willing to accept BNSF's interest in the Replacement City Property, if any, on this basis and expressly releases BNSF, its successors and assigns from any claims that City or its successors may have as a result of an abandonment of the line of rail running over or adjacent to any portion of the Replacement City Property. In light of BNSF's disclosure that it may not hold a fee interest in all or part of the Replacement City Property, City agrees to indemnify, defend and hold BNSF harmless from any suit or claim for damages, punitive or otherwise, expenses, attorneys' fees, or civil penalties that may be imposed on BNSF as the result of any person or entity claiming an interest in any portion of the Replacement City Property or claiming that BNSF did not have the right to transfer all or part of the Replacement City Property to City.

11.3 Waiver of Municipal and Sovereign Immunity. To the fullest extent permitted by law, City waives its municipal immunity and its sovereign immunity with respect to BNSF for matters arising out of

the West Haymarket Project (defined in the Master Agreement), the Master Agreement, the C&M Agreement, the Rights of Entry agreements and this Agreement, including, without limitation, (i) for environmental and other conditions of the Replacement BNSF Property that City is conveying to BNSF pursuant to this Agreement and the Master Agreement; (ii) for environmental and other conditions of the Replacement City Property that BNSF is quitclaiming to City and of property related to the West Haymarket Project that was formerly, but not currently, owned by BNSF and BNSF's predecessors-in-interest, including remediation costs beyond NDEQ Title 200 Funding (as defined in the C&M Agreement); (iii) for claims arising out of work performed by City or its contractors pursuant to the provisions of the Master Agreement, the C&M Agreement, the Rights of Entry agreements and this Agreement; and (iv) for claims arising out of continuing rights of City to enter onto property of BNSF, including work performed by City and City's contractors on such property of BNSF. Any lawful waiver of City's sovereign immunity herein shall be in addition to, and not in limitation of, any lawful waiver of City's sovereign immunity pursuant to the terms and provisions of the Master Agreement, the C&M Agreement and the Rights of Entry agreements.

11.4 Release and Indemnity. To the fullest extent permitted by law, City assumes the risk that Hazardous Substances or other adverse matters may affect the Replacement City Property and other land acquired and/or developed by City as part of the West Haymarket Project, and to the fullest extent allowed by law hereby indemnifies, defends and holds harmless and hereby waives, releases and discharges forever BNSF and BNSF's officers, directors, employees and agents (collectively, "**BNSF Indemnitees**") from any and all present or future claims or demands, and any and all damages, losses, injuries, liabilities, causes of actions (including, without limitation, causes of action in tort) costs and expenses (including, without limitation fines, penalties and judgments, and attorneys' fees to the extent permitted by law) of any and every kind or character, known or unknown, arising from or in any way related to Replacement City Property Conditions and the condition of any other land acquired and/or developed by City as part of the West Haymarket Project, including the alleged presence, use, storage, generation, manufacture, transport, release, leak, spill, disposal or other handling of any Hazardous Substances in, on or under the Replacement City Property or such other property (collectively, the "**BNSF Losses**"). "**BNSF Losses**" shall include without limitation (a) the cost of any investigation, removal, remedial or other response action that is required by any Environmental Law, that is required by judicial order or by order of or agreement with any governmental authority, or that is necessary or otherwise is reasonable under the circumstances, (b) capital expenditures necessary to cause BNSF's remaining property or the operations or business of BNSF on its remaining property to be in compliance with the requirements of any Environmental Law, and (c) losses for injury or death of any person, and (d) losses arising under any Environmental Law enacted after transfer. The rights of BNSF under this section shall be in addition to and not in lieu of any other rights or remedies to which it may be entitled under this document or otherwise. This indemnity specifically includes the obligation of City to remove, close, remediate, reimburse or take other actions requested or required by any governmental agency concerning any Hazardous Substances on the Replacement City Property or such other property. **ALL INDEMNITY OBLIGATIONS OF CITY UNDER THIS SECTION 11.4 SHALL INCLUDE BNSF LOSSES CAUSED BY BNSF PRIOR TO THE APPLICABLE CLOSING, INCLUDING WITHOUT LIMITATION ANY NEGLIGENCE OF BNSF**, but shall exclude all cost, liability, or expense actually incurred by BNSF arising out of the condition of such property to the extent such condition is caused, contributed to, exacerbated or aggravated by BNSF after the date of conveyance.

11.5 For purposes of this Agreement:

11.5.1 "**Environmental Law(s)** " means any federal, state or local statute, regulation, code, rule, ordinance, order, judgment, decree, injunction or common law pertaining in any way to the protection of human health or the environment, including without limitation, the Resource Conservation and Recovery Act, the Comprehensive Environmental Response, Compensation and Liability Act, the Toxic Substances Control Act, and any similar or comparable state or local law.

11.5.2 "**Hazardous Substance(s)**" means any hazardous, toxic, radioactive or infectious substance, material or waste as defined, listed or regulated under any Environmental Law, and includes without limitation petroleum oil and any of its fractions.

11.5.3 "**Environmental Matters**" means matters relating to the generation, manufacture, use, storage, handling, transportation and/or disposal of Hazardous Substances, or conditions with

respect to the atmosphere, soil, surface and ground waters, wetlands, stream sediments, vegetation, endangered species and storm water runoff or discharge.

11.6 The provisions of this **Section 11** shall survive the Closing, bind each Party and their respective heirs, successors and assigns, shall be included in each Replacement City Property Deed and each Replacement BNSF Property Deed and shall be covenants running with the land.

Section 12. <u>BNSF Reserved Rights</u>.

12.1 Notwithstanding the provisions of **Section 2.4** above, the Parties acknowledge and agree that the Replacement City Property quitclaimed to City pursuant to this Agreement excludes all rights in and to the BNSF Reserved Rights (defined below), which BNSF Reserved Rights may be exercised by BNSF as deemed necessary or advisable by BNSF and without charge and without notification to City; provided, however, BNSF's exercise of the BNSF Reserved Rights shall not unreasonably interfere with City's and City's successor's and permitted assign's use and occupancy of the Replacement City Property. The BNSF Reserved Rights shall be binding upon City and its successors and assigns.

12.2 BNSF hereby specifically reserves to itself and its successors and assigns the following interests in the Replacement City Property, which are referred to herein collectively as the "**BNSF Reserved Rights**":

12.2.1 The Longitudinal Agreements and rights to the revenues or fees (collectively, "**License Fees**") attributable to any Longitudinal Agreements involving BNSF or the Replacement City Property of whatever nature. The Parties agree that BNSF shall reserve 100% of its rights to License Fees and this Agreement or the transactions contemplated hereunder shall not alter or otherwise affect such rights.

12.2.2 For BNSF improvements described in **Section 11.2.7.1** that BNSF elects to remove and relocate, BNSF has the limited right to enter upon the Replacement City Property to remove and relocate BNSF improvements as described in **Section 11.2.7.1** above. In addition to and not in limitation of the foregoing, BNSF has the right to continue to Operate such BNSF improvements for such time as is reasonably necessary for BNSF to remove and relocate the BNSF improvements or construct replacement improvements.

12.2.3 For BNSF improvements described in **Section 11.2.7.1** that BNSF desires to continue to Operate in place, BNSF has the right to obtain an easement from City for access to the BNSF improvements, and to Operate the BNSF improvements as described in **Section 11.2.7.1** above.

12.2.4 Any improvements constructed or altered on the Replacement City Property after the date BNSF quitclaims its interest to City shall be constructed or altered in such a manner to provide adequate drainage of water away from any of BNSF's railroad tracks on nearby property, except as expressly provided under the Master Agreement with regard to the Storm Water Mitigation Area.

12.3 The provisions of this **Section 12** shall survive the Closing and bind each Party and their respective heirs, successors and assigns. The provisions of **Sections 12.1** and **12.2** shall be included in each Replacement City Property Deed and the Bill of Sale and shall be covenants running with the land benefiting BNSF and BNSF's successors and assigns.

Section 13. *Intentionally Deleted.*

Section 14. <u>Default and Remedies</u>. If either Party fails to perform any of its obligations under this Agreement, and, after written notice is given by the non-defaulting Party to the defaulting Party specifying the default, the defaulting Party fails either to promptly commence to cure the default, or to complete the cure expeditiously but in all events to complete the cure within thirty (30) days after the default notice is given, then the non-defaulting Party may (i) seek specific performance of the unperformed obligations; or

(ii) bring a claim for damages. Additionally, any default by City shall entitle, but not require, BNSF to immediately suspend any further Closings until such default is cured. If BNSF suspends a Closing for more than eighteen (18) months, either Party shall have the right to terminate this Agreement and/or pursue any other remedies available at law or in equity. For purposes of this Agreement, a default in the Master Agreement or any of the Rights of Entry agreements shall be considered a default under this Agreement. The remedies set forth in this **Section 14** shall be in limitation of any other remedies that a Party may have at law or in equity.

Section 15. **Master Agreement.** Notwithstanding anything else herein to the contrary, in the event that, prior to the final Closing hereunder, the Master Agreement is terminated for any reason then either City or BNSF may terminate this Agreement, with respect only to all portions of the Exchange Properties that have not yet closed as contemplated herein, by giving written notice thereof to the other Party, and, upon such termination, neither Party will have any further rights or obligations under this Agreement except for those rights and obligations that expressly survive termination of this Agreement.

Section 16. **Information.** If this Agreement is terminated without the final Closing having occurred, then promptly after such termination: (i) each Party shall deliver to the other Party, with respect solely to the Exchange Properties that have not been conveyed to the Transferee, legible copies of all property examinations, surveys, engineering and other inspections, tests and studies, including without limitation Phase I and Phase II environmental assessments (collectively, "**Tests**"), Property Surveys, studies, reports and other written materials obtained or produced solely with respect to its inspection and due diligence review of the other Party's Exchange Property that have not been conveyed to the Transferee and (ii) all copies of the Existing Information provided to the other Party pursuant to the provisions of **Section 3** above. The Parties agree that the results of any Tests, Property Surveys, studies, reports and other written materials obtained or produced with respect to its inspection and due diligence review of the of the other Party's Exchange Property conducted shall be maintained in absolute confidence, except as otherwise required by law or order of a court with jurisdiction. The obligations under this **Section 16** shall survive the termination of this Agreement.

Section 17. **No Brokers.** The Parties agree that there are no brokers involved in connection with this exchange. EACH PARTY AGREES TO INDEMNIFY AND HOLD THE OTHER HARMLESS FROM AND AGAINST THE CLAIMS, DEMANDS, CAUSES OF ACTION, OR OTHER LIABILITY OF ANY AGENT, BROKER, OR OTHER SIMILAR PARTY ARISING FROM OR PERTAINING TO ANY BROKERAGE COMMISSION, FEE, COST, OR OTHER EXPENSE IN CONNECTION WITH THE EXCHANGE OF THE EXCHANGE PROPERTY, TO THE EXTENT SUCH CLAIMS, DEMANDS, CAUSES OF ACTION, OR OTHER LIABILITY ARISE OUT OF ANY COMMITMENTS OR AGREEMENTS OF THE INDEMNIFYING PARTY.

Section 18. **Tax Effect.** No Party has made or is making any representations to the other concerning any of the tax effects of the transactions provided for in this Agreement. No Party shall be liable for or in any way responsible to any other Party because of any tax effect resulting from the transactions provided for in this Agreement.

Section 19. **Notice.** Any notice required or permitted to be given hereunder by one Party to the other shall be in writing and the same shall be given and shall be deemed to have been served and given if: (i) placed in the United States mail, certified, return receipt requested, or (ii) deposited into the custody of a nationally recognized overnight delivery service, addressed to the Party to be notified at the address for such Party specified below, or to such other address as the Party to be notified may designate by giving the other Party no less than thirty (30) days' advance written notice of such change in address:

If to City: City of Lincoln
555 South 10th Street
Lincoln, Nebraska 68508
Attn: City Attorney
Tel: (402) 441-7281
Fax: (402) 441-8812

If to BNSF: BNSF Railway Company
2500 Lou Menk Drive - AOB-3
Fort Worth, Texas 76131-2830
Attn: Dave Schneider, CRED
Tel: (817) 352-6469
Fax: (817) 352-7115

With a copy to: BNSF Railway Company
2500 Lou Menk Drive - AOB-3
Fort Worth, Texas 76131-2830
Attn: Robert J. Boileau, P.E., Assistant Vice President, Engineering Services
Tel: (817) 352-2118
Fax: (817) 352-7479

Section 20. Miscellaneous.

20.1 Time is of the essence of this Agreement.

20.2 In any action (declaratory or otherwise) brought by any Party in connection with or arising out of the terms of this Agreement, the prevailing Party in such action will be entitled to recover from the non-prevailing Party all actual costs, actual damages, and actual expenses, including, without limitation, reasonable attorneys' fees and charges, to the extent permitted by law.

20.3 This Agreement binds and is for the benefit of both Parties and their permitted successors and assigns. No Party may assign its rights and obligations hereunder without the prior written consent of the other Party. Any permitted assignment shall not terminate the liability of the assigning Party, unless a specific release of such liability in writing is given and signed by the other Party. Notwithstanding any contrary provision herein; City shall have the right to assign this Agreement to the West Haymarket Joint Public Agency, a Nebraska joint public agency ("**JPA**") without further consent of BNSF, provided (i) City delivers prior written notification to BNSF of the assignment, (ii) City and JPA enters into BNSF's then-standard Consent to Assignment form, pursuant to which City will remain jointly and severally liable for all of City's obligations hereunder, including without limitation City's liability and indemnification obligations; provided that BNSF agrees it will first send any claim or notice of default to the JPA and will not pursue any action against City until thirty (30) days after the date of such claim or notice to the JPA, unless failure to pursue action against City during such time would otherwise prejudice BNSF's rights, and (iii) in no event shall this Agreement or any interest herein be assigned unless City's entire interest under the C&M Agreement, the Master Agreement, and all Rights of Entry agreements are assigned at the same time to the same assignee.

20.4 Each Party and its counsel have reviewed and revised this Agreement. The Parties agree that the rule of construction that any ambiguities are to be resolved against the drafting party must not be employed to interpret this Agreement or its amendments or exhibits.

20.5 If any clause or provision of this Agreement is illegal, invalid or unenforceable under present or future laws effective during the term of this Agreement, then and in that event, it is the intention of the Parties that the remainder of this Agreement shall not be affected thereby, and it is also the intention of the Parties that in lieu of each clause or provision of this Agreement that is illegal, invalid or unenforceable, there be added, as a part of this Agreement, a clause or provision as similar in terms to such illegal, invalid or unenforceable clause or provision as may be possible and be legal, valid and enforceable.

20.6 This Agreement, the Master Agreement, the C&M Agreement, and the Rights of Entry agreements contain the entire agreement between BNSF and City with respect to the transactions described herein. Oral statements or prior written matters not specifically incorporated into this Agreement are superseded hereby. No variation, modification, or change to this Agreement shall bind either Party unless set forth in a document signed by both Parties. No failure or delay of either Party in exercising any right, power or privilege hereunder shall operate as a waiver of such Party's right to require strict compliance with any term of this Agreement. The captions next to the section numbers of this Agreement are for reference only and do not modify or affect this Agreement.

20.7 No director, officer, elected or appointed official, or employee of either of the Parties shall be personally liable in the event of any default.

20.8 This Agreement may be executed in more than one counterpart, including facsimile transmissions, each of which shall be deemed an original.

20.9 This Agreement is governed by and must be construed in accordance with the laws of the State of Nebraska.

20.10 To the fullest extent permitted by law any dispute arising under or in connection with this Agreement or related to any subject matter which is the subject of this Agreement shall be subject to the sole and exclusive jurisdiction of the United States District Court for the District of Nebraska. The aforementioned choice of venue is intended by the Parties to be mandatory and not permissive. Each Party hereby irrevocably consents to the jurisdiction of the United States District Court for the District of Nebraska in any such dispute and irrevocably waives, to the fullest extent permitted by law, any objection that it may now have or hereafter have to the laying of venue in such court and that any such dispute which is brought in such court has been brought in an inconvenient forum.

20.11 If a Closing Date or the day for performance of any act required under this Agreement falls on a Saturday, Sunday or legal holiday, then the Closing Date or the day for such performance, as the case may be, shall be the next following regular business day.

20.12 All warranties, representations, covenants, obligations, and agreements contained in or arising out of this Agreement will survive the Closing and conveyance of the Replacement City Property and the Replacement BNSF Property. The indemnity obligations set forth in this Agreement shall survive all Closings under, or earlier termination of, this Agreement.

20.13 If prior to the Fifth City Closing any portion of the Exchange Properties that have not yet closed is the actual or threatened subject of a condemnation or eminent domain action (other than City's notification as detailed in **Section 2.3** above), the Party to which such Exchange Property is to be conveyed shall proceed to Closing and receive an assignment of all condemnation proceeds for the Exchange Property.

20.14 Nothing in this Agreement shall be deemed a submission by BNSF to the jurisdiction of any state or local body or a waiver of the preemptive effect of any state or federal law.

20.15 Each Transferor and Transferee will, whenever it shall be reasonably requested to do so by the other, promptly execute, acknowledge, and deliver, or cause to be executed, acknowledged, or delivered, any and all such reasonable further confirmations, instruments, or further assurances and consents as may be reasonably necessary or proper in order to effectuate the covenants and agreements herein provided. Each Transferor and Transferee shall reasonably cooperate in good faith with the other and shall do any and all other acts and execute, acknowledge and deliver any and all documents so reasonably requested in order to satisfy the conditions set forth herein and carry out the intent and purposes of this Agreement. Notwithstanding anything herein to the contrary, neither Party shall be required pursuant to this **Section 20.15** to incur any additional expense or accept or convey any property interests on terms or conditions that are not acceptable to such Party.

Signature Page - Exchange Agreement

Executed by the Parties as of the date below each Party's signature; to be effective, however, as of the Effective Date above.

CITY OF LINCOLN, NEBRASKA, a Nebraska municipal corporation

By: _____
Chris Beutler, Mayor of Lincoln

Date: _____

BNSF RAILWAY COMPANY, a Delaware corporation

By: _____
David L. Freeman, Vice President – Engineering

Date: _____

Exhibits attached to Exchange Agreement:

Exhibit B:	Existing BNSF Property
Exhibit B-1:	Retained BNSF Property / Transferred BNSF Property
Exhibit C:	BNSF Bridge
Exhibit D-1:	Vacated Right of Way/Replacement BNSF Property
Exhibit E-1:	UP/Replacement BNSF Property
Exhibit F-1:	Third Party/Replacement BNSF Property
Exhibit F-2:	Cleanup Standards
Exhibit G:	First BNSF Closing Property
Exhibit G-1:	Second BNSF Closing Property
Exhibit J:	Replacement City Property
Exhibit J-1:	First City Closing Property
Exhibit J-2:	Second City Closing Property and Holes in the Donut
Exhibit J-3:	Third City Closing Property
Exhibit J-4:	Fourth City Closing Property
Exhibit J-5:	Fifth City Closing Property
Exhibit S:	Other BNSF Reversionary Interests (portion outside project footprint)
Exhibit PP:	Form of Bill of Sale
Exhibit PP-1:	Bridge Bill of Sale
Exhibit QQ:	Form of Replacement BNSF Property Deed
Exhibit QQ-1:	Form of Replacement BNSF Property Easement
Exhibit RR:	Form of Replacement City Property Deed
Exhibit SS:	Form of License Assignment (100% Assigned Permits)
Exhibit SS-1:	Form of License Assignment (Partially Assigned Permits)