

## **INTERMODAL PROJECT FUNDING AGREEMENT**

This Intermodal Project Funding Agreement ("Agreement") is entered into this \_\_\_\_\_ day of \_\_\_\_\_, 2009, by the City of Edgerton, Kansas, a municipal entity ("City"), and BNSF Railway Company, a corporation ("BNSF").

### **RECITALS**

WHEREAS, the City may be requested by the BNSF to consider annexing property for an Intermodal and logistics project (the "Project") through an annexation agreement, to consider approving infrastructure improvements through a project plan and to consider facilitating public financial assistance through a finance plan (collectively, the "Development Documents") within the City, if such Development Documents are approved by the City, the City may be requested to provide such other services and assistance as may be required to implement and administer the Development Plan through its completion; and

WHEREAS, the City does not have a source of funds to finance costs incurred by them, in the form of additional legal, fiscal, planning, transportation and engineering consultants, direct out-of-pocket expenses, and other costs resulting from review, evaluation, processing and consideration of the Development Documents; and

WHEREAS, BNSF is willing to pay one-half (1/2) of the costs of the City, upon the terms and conditions herein, to a maximum amount of Fifty Thousand Dollars (\$50,000.00).

NOW, THEREFORE, in consideration of the premises and the mutual covenants and agreements hereinafter expressed, the parties mutually agree as follows:

### **AGREEMENT**

1. Services to be Performed by the City. The City shall:
  - A. Prepare or consult with the BNSF to timely consider the Development Documents, give all notices, make all publications and hold hearings as required therein or thereby;
  - B. Provide necessary staff, legal, financial, engineering and transportation assistance to prepare and present the Development Documents to the City Council of the City; and
  - C. If the Development Documents are approved and executed, provide the necessary staff and legal assistance to administer the Development Documents.
  
2. Deposit. The City acknowledges receipt of Ten Thousand Dollars (\$10,000.00) (the "Deposit") from the BNSF. The City shall disburse the Deposit as set forth in Section 4 and shall bill the BNSF pursuant to Section 3 to re-establish the Deposit so that there is always a minimum cash balance of Ten Thousand Dollars (\$10,000.00) available, from which additional disbursements may be made as required. The Deposit shall be invested in an interest-bearing account, and the interest shall be reinvested for purposes hereof and added to the Deposit.

Provided, however, that the funds comprising the Deposit shall in all events never exceed the collective sum of Fifty Thousand Dollars (\$50,000.00).

3. Additional Funding.

A. The City shall submit to BNSF an itemized statement for its actual out-of-pocket expenses for the Consultants (hereafter defined) to assist in performing its obligations hereunder (the "City Expenses"). Such statements shall be submitted on a regular periodic basis, but no more often than monthly. The City may reimburse itself one-half (1/2) of the City Expenses from the Deposit.

B. If and when the City Expenses drawn against the Deposit cause the funds in the Deposit to fall below Ten Thousand Dollars (\$10,000.00), the City may request in writing that the BNSF make an additional deposit to replenish the Deposit to Ten Thousand Dollars (\$10,000.00). Such additional deposit shall be paid within thirty (30) days of receipt of such request.

C. The BNSF acknowledges that the City has engaged or will engage Springsted, Inc. ("Springsted") as financial consultant; Patrick Reavey, Esq. ("Reavey") as special legal counsel, Kutak Rock LLP ("Kutak") as bond counsel, Shafer, Kline & Warren ("SKW") as outside engineering consultant, or another equally qualified engineering consultant that has yet to be determined by the City, (the "Consultants"). The respective hourly rates for Springsted, Reavey, Kutak and SKW are attached hereto as Exhibit A.

D. The City hereby understands and agrees that no marketing services or sales activity costs shall be considered City Expenses.

E. Notwithstanding the fact that BNSF has agreed to pay for a portion of the City Expenses, BNSF hereby understands and agrees that the Consultants represent the City and not the BNSF. BNSF further understands and agrees with City that the Consultants are providing their services to the City and solely at the direction of the City. Accordingly, the BNSF shall in no manner be held responsible or accountable to City for the quality of advice or services provided by Consultants or actions taken by the City in reliance upon or pursuant to such advice or services.

4. Disbursement of Funds. The City shall disburse the funds constituting the Deposit on or before the thirtieth (30th) day of each month for the payment of one-half (1/2) of City Expenses incurred by the City in connection with the performance of its obligations under this Agreement as payment for such expenses become due, and the City shall concurrently distribute a copy of all such disbursements to BNSF. The City shall be responsible for the remaining half of such expenses. Upon reasonable notice, the City shall make its records available for inspection by BNSF with respect to such disbursements. This agreement is retroactive for City Expenses incurred on and after June 22, 2009.

5. Termination.

A. In the event the BNSF fails to perform any of its obligations herein, the City may terminate this Agreement, at its sole discretion if the BNSF fails to cure the default within ten (10) days after written notice to the BNSF of the default. Termination by the City shall also terminate any duties and obligations of the City and BNSF with respect to this Agreement, including, but not limited to, the City's processing of the Development Documents.

B. City may terminate this Agreement, in its sole discretion, at any time by written notice to BNSF. Termination by the City shall also terminate any duties and obligations of the City and BNSF with respect to this Agreement, including, but not limited to, the City's processing of the Development Documents.

C. The parties hereto acknowledge that the BNSF may, in its sole discretion, elect to discontinue pursuit of the Project at any time. Upon written notice by the BNSF to the City, this Agreement shall terminate. Termination by the BNSF shall also terminate any duties and obligations of the City and BNSF with respect to this Agreement, including, but not limited to, the City's processing of the Development Documents.

D. Upon any termination pursuant to paragraph 5.A or 5.C above, the City shall retain the Deposit to the extent necessary to reimburse the City for one-half (1/2) of all City Expenses incurred under this Agreement to the date of termination. After reimbursement to the City, the City shall pay all remaining funds in the Deposit, if any, to the BNSF within thirty (30) days after such termination. In the event the Deposit is insufficient to reimburse the City for the outstanding expenses of the City payable hereunder, the BNSF shall reimburse the City as set forth in paragraph 3 of this Agreement.

E. Upon any termination pursuant to paragraph 5.B above, the City shall reimburse BNSF for all City Expenses BNSF has paid pursuant to this Agreement and pay any balance remaining in the Deposit. Such payments shall be made within thirty (30) days after such termination. Notwithstanding the foregoing, if any of the Consultants recommend to the City, in writing, that approving the Development Documents in the form required by BNSF is illegal or not in the best interest of the City, then City shall not be required to make any reimbursement due to a termination based on such recommendation.

6. Completion. In the event there is a balance remaining in the Deposit after the Consultants' work is completed and paid in full, such balance shall be remitted to BNSF within thirty (30) days after such completion and payment.

7. Notice. Any notice, approval, request or consent required by or asked to be given under this Agreement shall be deemed to be given if in writing and mailed by United States mail, postage prepaid, or delivered by hand, and addressed as follows:

**To the City:**

City Administrator  
City of Edgerton, Kansas  
PO Box 255  
404 E. Nelson Street  
Edgerton, KS 66021

**With a copy to:**

City Attorney  
Patrick G. Reavey  
REAVEY LAW LLC  
Livestock Exchange Bldg.  
1600 Genessee, Suite 303  
Kansas City, Missouri 64102

**To the BNSF:**

BNSF Railway Company  
2500 Lou Menk Drive, AOB-3  
Fort Worth, Texas 76131  
Attention: Mark Ude

**With copies to:**

David Rankin, Esq.  
Senior General Attorney  
BNSF Railway Company  
2500 Lou Menk Drive, AOB-3  
Fort Worth, Texas 76131

And

Lewis A. Heaven, Jr., Esq.  
Lathrop & Gage LLP  
10851 Mastin Blvd., Suite 1000  
Overland Park, Kansas 66219

Each party may specify that notice be addressed to any other person or address by giving to the other party ten (10) days prior written notice thereof.

The parties hereto have caused this Agreement to be executed by their duly authorized representatives the day and year first above written.

**REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK**

**CITY OF EDGERTON, KANSAS**

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

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

Attest:

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

Its: City Clerk

Approved as to form:

\_\_\_\_\_  
City Attorney

**BNSF RAILWAY COMPANY:**

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

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

**EXHIBIT A**  
**Hourly Rates**