CITY OF MILLWOOD

RESOLUTION # 16-12 **October 11, 2016**

A RESOLUTION OF THE COUNCIL OF THE CITY OF MILLWOOD, WASHINGTON APPROVING AN AGREEMENT BETWEEN THE CITY AND WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION REGARDING THE INSTALLATION AND PARTIAL FUNDING OF IMPROVEMENTS AND UPGRADES TO THE RAILWAY CROSSING AT MARGUERITE STREET AND PROVIDING FOR OTHER MATTERS PROPERLY RELATING THERETO

WHEREAS, the City of Millwood, Washington (the "City") is a code city duly organized and existing under and by virtue of the Constitution and the laws of the state of Washington (the "State"); and

WHEREAS, the Council of the City (the "Council") may adopt and enforce resolutions of all kinds relating to and regulating its local or municipal affairs and appropriate to the good government of the City; and

WHEREAS, the City applied for and was awarded a grant from the Grade Crossing Protective Fund (the "Grant") of the Washington Utilities and Transportation Commission (the "WUTC") to partially fund installation of certain improvements and upgrades to the current railway crossing at Marguerite Street (the "Project"), all as more fully described in the Project Agreement - Grade Crossing Protective Fund, between the City and WUTC, dated September 19, 2016 (the "Agreement") attached hereto as Exhibit "A" and by this reference incorporated herein; and

WHEREAS, the Council believes it is in the best interests of the citizens of the City to approve the Agreement and complete the Project.

NOW THEREFORE, BE IT RESOLVED by the City Council of the City of Millwood as follows:

Section 1. Approval of Agreement: The Council hereby approves the Agreement and authorizes the Mayor to sign the Agreement in substantially the form attached hereto as Exhibit "A."

Section 2. Severability: If any section, sentence, clause, or phrase of this resolution should be held to be invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconditionally shall not affect the validity or constitutionality of any other section, sentence, clause or phrase of this resolution.

Section 3. Repealer: All resolutions, laws, and regulations, or parts thereof in conflict with this resolution are, to the extent of said conflict, hereby repealed.

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Section 4. **Effect:** This resolution shall be in full force and effect from and after its adoption.

PASSED BY THE COUNCIL OF THE CITY OF MILLWOOD THIS 11th DAY OF October, 2016.

KEVIN FREEMAN, MAYOR

Attest:

THOMAS G. RICHARDSON,
CITY CLERK

Attachment: Exhibit "A" - Project Agreement - Grade Crossing Protective Fund

EXHIBIT "A"

Project Agreement - Grade Crossing Protective Fund

PROJECT AGREEMENT
GRADE CROSSING PROTECTIVE FUND

Docket No.: TR-161023
Commission Approval Date: September 19, 2016

A. PARTIES OF THE AGREEMENT
This project grant agreement (agreement) is entered into between the Washington Utilities and Transportation Commission (UTC), P.O. Box 47250, Olympia, Washington 98504-7250, and the City of Millwood (City), 9103 E. Frederick Avenue, Millwood, WA 99206, and shall be binding upon the agents and all persons acting by or through the parties.

B. PURPOSE OF THE AGREEMENT
This agreement sets out the terms and conditions by which grants are made from the Grade Crossing Protective Fund (GCPF). These grants are administered by the UTC to the grantee for Docket No. TR-161023, identified above.

C. DESCRIPTION OF PROJECT
TR-161023 involves installation of shoulder-mounted flashing LED lights and gates, replacement of the existing concrete crossing surface and installation of additional crossing panels, installation of curb and gutter, and construction of an Americans with Disabilities Act-accessible five-foot-wide sidewalk on the west side of the Marguerite Street crossing in Millwood. The crossing is identified as USDOT 662513B. Specific information about the project is contained in the City's GCPF application.

D. PERIOD OF PERFORMANCE
The project reimbursement period shall begin on September 19, 2016, and end June 15, 2017. No expenditure made before or after this period is eligible for reimbursement unless incorporated by written amendment into this agreement.

E. PROJECT FUNDING
Total grant funding awarded by the UTC for this project shall not exceed $254,333 which is the cost of installing the active warning devices. The total approximate cost of the project is $445,810. The grantee shall be responsible for all additional costs.

F. RIGHTS AND OBLIGATIONS
All rights and obligations of the parties to this agreement are subject to this agreement and its attachments, including the grantee's application, Commission orders, and the general provisions, all of which are attached and incorporated into this agreement.

Except as provided, no alteration of any of the terms or conditions of this agreement will be effective unless provided in writing. All alterations must be signed by both parties.

The grantee has read, fully understands and agrees to be bound by all terms and conditions in these documents.

G. COMPLIANCE WITH APPLICABLE STATUTES, RULES, AND UTC POLICIES
This agreement is governed by, and the grantee shall comply with, all applicable state and federal laws and regulations, including RCW 81.53.281, the published agency rules in 480-62 WAC, and the Commission's order in this matter which are incorporated by this reference as if fully set forth.

H. PROJECT GRANT AGREEMENT REPRESENTATIVE
All written communications sent to the grantee under this agreement will be addressed and delivered to:

City of Millwood
Paul Allen
9103 E. Frederick Avenue
Millwood, WA 99206

Utilities and Transportation Commission
Kathy Hunter
1300 S. Evergreen Park Drive SW
P.O. Box 47250
Olympia, WA 98504-7250

These addresses shall be effective until receipt by one party from the other of a written notice of any change.

I. ENTIRE AGREEMENT
This agreement, along with all attachments, constitutes the entire agreement of the articles. No other understandings, oral or otherwise, regarding this agreement shall exist or bind any of the parties.

J. EFFECTIVE DATE
This agreement shall be effective upon signing by all parties.

State of Washington
Utilities and Transportation Commission

By: _____ Date: 9/14/16
(Executive Director and Secretary)

City of Millwood

By: _____ Date: 9/21/16

Title: Public Works Director

By: _____

Title: Mayor

Approved as to form:

By: /s/
Assistant Attorney General

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SECTION 1. HEADINGS AND DEFINITIONS

A. Headings used in this agreement are for reference purposes only and shall not be considered a substantive part of this agreement.

B. Definitions. As used throughout this agreement, the following terms shall have the meaning set forth below:

Agreement - The accord accepted by all parties to the present transaction; the agreement, any supplemental agreement, and any intergovernmental agreement between the WUTC and a grantee.

Applicant - Any agency or organization that meets the qualifying standards, including deadlines, for submission of an application soliciting a grant of funds from the WUTC.

Application - The forms and support documents approved by the WUTC or its Secretary for use by applicants in soliciting project funds administered by WUTC.

Contractor - shall mean one not in the employment of the grantee who is performing all or part of the eligible activities for this projects under a separate agreement with the grantee. The term "Contractor" and "Contractors" means Contractor(s) in any tier.

Secretary - The WUTC Secretary or the Secretary's designee.

Grantee - The applicant who has been awarded a grant of funds and is bound by this executed agreement; includes its officers, employees and agents.

Milestone – Important date(s) tracked in the agreement for monitoring the project status.

Period of Performance - The time period specified in the agreement, under Section D, Period of Performance.

Project - The undertaking that is the subject of this agreement and that is, or may be, funded in whole or in part with funds administered by the WUTC.

WUTC – Washington Utilities and Transportation Commission created under Title 80 RCW.

SECTION 2. PERFORMANCE BY GRANTEE

The grantee shall undertake the project as described in this agreement, Commission order, the grantee's application, and in accordance with the grantee's proposed goals and objectives described in the application or documents submitted with the application, all as finally approved by the WUTC. All submitted documents are incorporated by this reference as if fully set forth herein. The Order of Precedence is covered in Section 17.

Timely completion of the project is important. Failure to do so, as set out in this agreement, is a material breach of the agreement.

SECTION 3. ASSIGNMENT

Neither this agreement, nor any claim arising under this agreement, shall be transferred or assigned by the grantee without prior written consent of the WUTC.

SECTION 4. RESPONSIBILITY FOR PROJECT

While the WUTC undertakes to assist the grantee with the project by providing a grant pursuant to this agreement, the project itself remains the sole responsibility of the grantee. The WUTC undertakes no responsibilities to the grantee, or to any third party, other than as is expressly set out in this agreement. The responsibility for the implementation of the project, as those phases are applicable to this project, is solely that of the grantee, as is responsibility for any claim or suit of any nature by any third party related in any way to the project.

SECTION 5. INDEMNIFICATION

To the fullest extent permitted by the law, the grantee expressly agrees to and shall indemnify, defend and hold harmless the state and its agencies, officials, agents and employees from and against all claims, actions, costs, damages, or expenses of any nature arising out of or incident to the grantee's or any contractor's performance or failure to perform the agreement. Grantee's obligation to indemnify, defend and hold harmless also includes any claim by grantee's agents, employees, representatives or any contractor or its employees. Grantee's obligation to defend includes payment of any costs or attorneys' fees. Grantee's obligation shall not include such claims that may be caused by the sole negligence of the state and its agencies, officials, agents, and employees. If the claims or damages are caused by or result from the concurrent negligence of (a) the state, its agents or employees and (b) the grantee, its contractors, agents, or employees, this indemnity provision shall be valid and enforceable only to the extent of the negligence of the Grantee or its contractors, agents, or employees. The grantee expressly agrees to waive his/her immunity under Title 51 RCW to the extent required to indemnify, defend, and hold harmless the state and its agencies, officials, agents or employees.

SECTION 6. INDEPENDENT CAPACITY OF THE GRANTEE

The grantee and its employees or agents performing under this agreement are not employees or agents of the WUTC. The grantee will not hold itself out as nor claim to be an officer or employee of WUTC or of the state of Washington by reason hereof, nor will the grantee make any claim of right, privilege or benefit which would accrue to an employee under Chapters 41.06 or 28B.16 RCW.

The grantee is responsible for withholding and/or paying employment taxes, insurance, or deductions of any kind required by federal, state, and/or local laws.

SECTION 7. CONFLICT OF INTEREST

Notwithstanding any determination by the Executive Ethics Board or other tribunal, the WUTC may, in its sole discretion, by written notice to the grantee terminate this agreement if it is found after due notice and examination by WUTC that there is a violation of the Ethics in Public Service Act, Chapter 42.52 RCW; or any similar statute involving the grantee in the procurement of, or performance under this agreement. In the event this agreement is terminated as provided above, WUTC shall be entitled to pursue the same remedies against the grantee as it could pursue in the event of a breach of the agreement by the grantee. The rights and remedies of WUTC provided for in this clause shall not be exclusive and are in addition to any other rights and remedies provided by

law. The existence of facts upon which the WUTC makes any determination under this clause shall be an issue and may be reviewed as provided in the "Dispute Resolution" clause of this agreement.

SECTION 8. CONSTRUCTION, OPERATION, USE AND MAINTENANCE

Grantees must ensure that properties or facilities assisted with WUTC funds, are built, operated, used, and maintained:

A. According to applicable federal, state, and local laws and regulations, including public health standards and building codes.
B. In a reasonably safe condition for the project's intended use.
C. Throughout its estimated life so as to prevent undue deterioration.
D. In compliance with all federal and state nondiscrimination laws, regulations and policies.

SECTION 9. ACKNOWLEDGMENT

The grantee shall include language which acknowledges the funding contribution of the program to this project in any publication developed or modified for, or referring to, the project.

SECTION 10. COMPLIANCE WITH APPLICABLE LAW

The grantee will implement the agreement in accordance with applicable federal, state, and local laws and regulations.

The grantee shall comply with, and WUTC is not responsible for determining compliance with, any and all applicable federal, state, and local laws, regulations, and/or policies, including, but not limited to, State Environmental Policy Act; Industrial Insurance Coverage; Architectural Barriers Act; Chapter 39.12 RCW – Prevailing Wages on Public Works; permits (shoreline, Hydraulics Project Approval, demolition); land use regulations (comprehensive areas ordinances, Growth Management Act); federal and state safety and health regulations (Occupational Safety and Health Administration/Washington Industrial Safety and Health Act); and Buy American Act.

The grantee shall comply with all applicable federal, state, and local nondiscrimination laws and/or policies, including but not limited to, the Americans with Disabilities Act; Civil Rights Act; and the Age Discrimination Act. In the event of the grantee's noncompliance or refusal to comply with any nondiscrimination law or policy, the agreement may be rescinded, cancelled, or terminated in whole or in part, and the grantee may be declared ineligible for further grant awards from WUTC. The grantee is responsible for any and all costs or liability arising from the grantee's failure to so comply with applicable law.

No part of any funds provided under this grant shall be used, other than for normal and recognized executive-legislative relationships, for publicity or propaganda purposes, or for the preparation, distribution, or use of any kit, pamphlet, booklet, publication, radio,

television, or video presentation designed to support or defeat legislation pending before the U.S. Congress or any state legislature.
No part of any funds provided under this grant shall be used to pay the salary or expenses of any grantee, or agent acting for such grantee, related to any activity designed to influence legislation or appropriations pending before the U.S. Congress or any state legislature.

SECTION 11. RECORDS MAINTENANCE

The grantee shall maintain books, records, documents, data and other evidence relating to this agreement and performance of the services described herein, including but not limited to accounting procedures and practices which sufficiently and properly reflect all direct and indirect costs of any nature expended in the performance of this agreement. Grantee shall retain such records for a period of six years following the date of final payment. At no additional cost, these records, including materials generated under the agreement, shall be subject at all reasonable times to inspection, review or audit by WUTC, personnel duly authorized by WUTC, the Office of the State Auditor, and federal and state officials so authorized by law, regulation or agreement.

If any litigation, claim or audit is started before the expiration of the six (6) year period, the records shall be retained until all litigation, claims, or audit findings involving the records have been resolved.

SECTION 12. RIGHT OF INSPECTION

The grantee shall provide right of access to its facilities to WUTC or any of its officers, or to any other authorized agent or official of the state of Washington or the federal government, at all reasonable times, in order to monitor and evaluate performance, compliance, and/or quality assurance under this agreement.

SECTION 13. PROJECT FUNDING

A. Additional Amounts. WUTC shall not be obligated to pay any amount beyond the dollar amount as identified in this agreement, unless an additional amount has been approved in advance by WUTC or the Secretary and incorporated by written amendment into this agreement.

B. Before the agreement. No expenditure made, or obligation incurred, by the grantee before the effective date of this agreement shall be eligible for grant funds, in whole or in part, unless specifically provided for by WUTC policy. The dollar amounts identified in this agreement may be reduced as necessary to exclude any such expenditure from reimbursement.

C. After the Period of Performance. No expenditure made, or obligation incurred, following the period of performance shall be eligible, in whole or in part, for grant funds hereunder. In addition to any remedy the WUTC may have under this agreement, the amounts identified in this agreement shall be reduced to exclude any such expenditure from participation.

SECTION 14. PROJECT REIMBURSEMENTS

A. Compliance and Payment. The obligation of WUTC to pay any amount(s) under this agreement is expressly conditioned upon strict compliance with the terms of this agreement by the grantee.

B. The grantee will submit an invoice for full payment when the project is completed. WUTC Staff will inspect the project and process payment. A project is considered "complete" when:

   1. all approved or required activities outlined in the agreement are complete;
   2. a grantee's final request for reimbursement is submitted to the WUTC;
   3. the completed project has been approved by WUTC;
   4. final amendments have been processed; and
   5. fiscal transactions are complete.

C. Advance payments are not allowable.

SECTION 15. RECOVERY OF PAYMENTS

In the event that the grantee fails to expend funds under this agreement in accordance with state and federal laws, and/or the provisions of the agreement, WUTC reserves the right to recover grant award funds in the amount equivalent to the extent of noncompliance in addition to any other remedies available at law or in equity.

The grantee shall reimburse WUTC for any overpayment or erroneous payments made under the agreement. Repayment by the grantee of such funds under this recovery provision shall occur within 30 days of demand by WUTC. Interest shall accrue at the rate of twelve percent (12%) per annum from the time that payment becomes due and owing.

SECTION 16. COVENANT AGAINST CONTINGENT FEES

The grantee warrants that no person or selling agent has been employed or retained to solicit or secure this agreement upon an agreement or understanding for a Commission, percentage, brokerage or contingent fee, excepting bona fide employees or bona fide established agents maintained by the grantee for the purpose of securing business. WUTC shall have the right, in the event of breach of this clause by the grantee, to annul this agreement without liability or, in its discretion, to deduct from the agreement price or consideration or recover by other means the full amount of such Commission, percentage, brokerage or contingent fee.

SECTION 17. ORDER OF PRECEDENCE

This agreement is entered into, pursuant to, and under the authority granted by applicable state law. The provisions of the agreement shall be construed to conform to that law. In the event of an inconsistency in the terms of this agreement, or between its terms and any applicable statute, rule, or policy or procedure, the inconsistency shall be resolved by giving precedence in the following order:

A. Applicable statutes, orders, or policy and interpretive statements;

B. Project agreement including attachments;
C. Additional provisions or modifications of General Provisions;
D. General Provisions.

SECTION 18. AMENDMENTS

This agreement may be amended by mutual agreement of the parties. Such amendments shall not be binding unless they are in writing and signed by personnel authorized to bind each of the parties.

SECTION 19. LIMITATION OF AUTHORITY

Only WUTC or WUTC's delegate by writing (delegation to be made prior to action) shall have the express, implied, or apparent authority to alter, amend, modify, or waive any clause or condition of this agreement. Furthermore, any alteration, amendment, modification, or waiver or any clause or condition of this agreement is not effective or binding unless made in writing and signed by the WUTC.

SECTION 20. WAIVER OF DEFAULT

Waiver of any default shall not be deemed to be a waiver of any subsequent default. Waiver of breach of any provision of the agreement shall not be deemed to be a waiver of any other or subsequent breach and shall not be construed to be a modification of the terms of the agreement unless stated to be such in writing, signed by the Executive Secretary, or the Executive Secretary's designee, and attached to the original agreement.

SECTION 21. APPLICATION REPRESENTATIONS -- MISREPRESENTATIONS OR INACCURACY OR BREACH

The WUTC relies upon the grantee's application in making its determinations as to eligibility for, selection for, and scope of, funding grants. Any misrepresentation, error or inaccuracy in any part of the application may be deemed a breach of this agreement.

SECTION 22. TERMINATION AND OTHER REMEDIES

WUTC may require strict compliance by the grantee with the terms of this agreement including, but not limited to, the requirements of the applicable statutes, rules and WUTC policies which are incorporated into this agreement, and with the representations of the grantee in its application for a grant as finally approved by WUTC.

WUTC or the Secretary, may suspend, or may terminate, the obligation to provide funding to the grantee under this agreement:

A. In the event of any breach by the grantee of any of the grantee's obligations under this agreement; or
B. If the grantee fails to make progress satisfactory to WUTC or Secretary toward completion of the project by the completion date set out in this agreement.

WUTC may enforce this agreement by the remedy of specific performance, which usually will mean completion of the Project as described in this agreement. However, the remedy of specific performance shall not be the sole or exclusive remedy available to

WUTC. No remedy available to WUTC shall be deemed exclusive. WUTC may elect to exercise any, any combination, or all of the remedies available to it under this agreement, or under any provision of law, common law, or equity.

SECTION 23. TERMINATION FOR CONVENIENCE

Except as otherwise provided in this agreement, WUTC may, by ten (10) days written notice, beginning on the second day after the mailing, terminate this Agreement, in whole or in part. If this agreement is so terminated, WUTC shall be liable only for payment required under the terms of this agreement for project expenses incurred prior to the effective date of termination.

SECTION 24. DISPUTE RESOLUTION

Except as may otherwise be provided in this agreement, when a dispute arises between the grantee and the Staff of the WUTC, which cannot be resolved, either party may request a hearing according to the process set out in this section. Either party's request for a hearing must be in writing and clearly state:

A. The disputed issues;

B. The relative positions of the parties;

C. The grantee's name, address, project title, and the assigned project number.

A request for a hearing under this section by either the WUTC Staff or the grantee shall be delivered or mailed to the other party and to the Secretary of the WUTC. The request shall be delivered or mailed within thirty (30) days of the date the requesting party has received notice of the action or position of the other party which it wishes to dispute.

The WUTC shall treat such a request, when made by a grantee, as an application for an adjudicative proceeding under RCW 34.05.419.

SECTION 25. ATTORNEYS' FEES

If either party brings litigation to enforce any term or condition of this agreement, or as a result of this agreement, the prevailing party shall be awarded its reasonable attorneys' fees together with necessary fees, expenses, and costs incurred for such litigation at both trial and appellate levels, as well as in obtaining execution of judgment. The reasonableness of such costs and attorneys' fees shall be determined by the court and not a jury.

SECTION 26. GOVERNING LAW/VENUE

This agreement shall be construed and interpreted in accordance with the laws of the state of Washington. In the event of a lawsuit involving this agreement, venue shall be proper only in Thurston County Superior Court. The grantee, by execution of this agreement acknowledges the jurisdiction of the courts of the state of Washington.

In the cases where this agreement is between WUTC and a federally recognized Indian tribe, the following Governing Law/Venue applies:

A. The state of Washington agrees that it shall initiate any lawsuit against a federally recognized Indian tribe arising out of or relating to the performance, breach or enforcement of this agreement in Federal Court. Interpretation shall be according to the law of the state of Washington. In the event that the Federal Court determines that it lacks subject matter jurisdiction to resolve the dispute between the state and Tribal Party, then the parties agree to venue in Thurston County Superior Court, but the parties agree that the matter shall not be pursued in superior court unless there is a Federal Court determination that it lacks subject matter jurisdiction.

B. Any judicial award, determination, order, decree or other relief, whether in law or equity or otherwise, resulting from the action shall be binding and enforceable upon the parties. Any money judgment or award against the Tribe, tribal officers and members, or the state of Washington and its officers and employees may not exceed the amount provided for in Section E- Project Funding of the Agreement.

C. The Tribe hereby waives its sovereign immunity as necessary to give effect to this section, and the state of Washington has waived its immunity to suit in state court. These waivers are only for the benefit of the Tribe and state and shall not be enforceable by any third party or by any assignee or delegate of the parties. In any enforcement action, the parties shall bear their own enforcement costs, including attorneys' fees.

SECTION 27. SEVERABILITY

The provisions of this agreement are intended to be severable. If any term or provision is illegal or invalid for any reason whatsoever, such illegality or invalidity shall not affect the validity of the remainder of the agreement.