

AGREEMENT covering construction  
of dike on Railroad's Seattle  
Main Line right of way, MP 6.17,  
Peninsula Junction, Portland,  
Multnomah County, Oregon  
PLD 303-0-6.11

Dept. No. 32442

EXHIBIT "A"

THIS AGREEMENT is made as of the \_\_\_\_\_ day of \_\_\_\_\_, 197\_\_, by and between the OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, an Oregon corporation, and its lessee, UNION PACIFIC RAILROAD COMPANY, a Utah corporation (hereinafter collectively called "Railroad"), and the CITY OF PORTLAND, an Oregon municipal corporation (hereinafter called "City").

RECITALS:

The City has undertaken as the City's project the construction of a sewage sludge lagoon in the former Triangle Lake area north of the Columbia Slough and between the rights of way of the Railroad and Burlington Northern Inc. east of North Portland Road in the City of Portland, Multnomah County, Oregon. As a part of said project, the City desires to build a dike parallel to said Columbia Slough to protect said sludge lagoon against a 100-year flood.

The City has requested permission from the Railroad to extend said dike across the Railroad's right of way and to tie said dike into the Railroad's fill. The Railroad is willing to grant the City the permission requested, subject to the terms and conditions hereinafter set forth.

NOW, THEREFORE, IT IS AGREED by and between the parties as follows:

Section 1. LICENSE AND PERMISSION GRANTED.

(a) So far as the Railroad lawfully may do so, but subject to each and all of the terms, provisions, conditions, covenants, reservations and exceptions contained in this agreement, the Railroad hereby grants to the City license and permission to construct, maintain and operate a dike, together with one 30-inch corrugated metal pipe for drainage purposes, to extend under the dike and onto the Railroad's right of way not farther than 80 feet from the foot of the dike, on and along the Railroad's Seattle main line right of way near railroad milepost 6.17, Peninsula Junction, in Portland, Multnomah County, Oregon, in the location shown colored red

on print R-1055 dated June 1, 1978, revised October 11, 1978, attached hereto, marked Exhibit "A", and by this reference made a part hereof. As used herein, the term "dike" shall include said drainage pipe.

(b) The consideration for the license and permission granted herein is the City's covenant to do, keep, observe and perform each and all of the terms, provisions and conditions of this agreement, and said license and permission are granted without monetary consideration.

(c) Said license and permission are granted only for the purposes aforesaid, and no other, and are granted only insofar as the Railroad lawfully may grant the same; and the Railroad makes no covenant or warranty of title, for quiet possession or against encumbrances. Said license and permission extend only to the Railroad's property identified in paragraph (a) of this section, and no other property; and the City, by virtue hereof, shall not encroach upon, occupy or use any other property of the Railroad, and shall not permit others acting under the City's authority to encroach upon, occupy or use any other property of the Railroad. The City's use of said property shall be subject to the safety measures set forth in Section 3 of this agreement.

(d) The City acknowledges that the Railroad's right of way was not constructed for or intended to be used as a dike, and that the subsurface and embankment materials are not suitable for such purpose; and the City hereby agrees that any use made of the Railroad's right of way as a dike is solely at the risk of the City.

(e) The license and permission hereby granted are subject to any and all encumbrances and rights (whether public or private), irrespective of whether or not they are recorded, existing at the time of granting this license and permission, and also to any and all extensions and renewals of said existing encumbrances and rights. The City shall not damage, destroy or interfere with the property or rights of nonparties in, upon or relating to the Railroad's said property, unless the City, at the City's own expense, settles with and obtains release from such nonparties on mutually satisfactory terms.

(f) The Railroad reserves the right to use and to grant to other parties the right to use the Railroad's said property for any and all purposes not inconsistent with the rights hereby granted. Said purposes include, but not by way of limitation, the right to construct, reconstruct,

maintain, operate, repair, alter, renew and replace existing and additional wire lines, pipelines, roads, tracks, facilities and appurtenances, located or to be located either wholly or partly within said property, and the right to use, occupy, cross and operate across said property.

(g) If any property or rights other than the rights hereby granted are necessary for the construction, maintenance and use of the dike and its appurtenances, or for the performance of any work contemplated by this agreement, the City will acquire all such other property and rights at the City's own expense and without expense to the Railroad.

## Section 2. WORK TO BE DONE BY CITY.

(a) The City, at the City's own expense, will apply for and obtain all public authority required by law, ordinance, rule or regulation for all work contemplated by this agreement, and each and every part thereof. Upon request, the City shall furnish the Railroad with satisfactory evidence that such authority has been obtained. All construction work by or on behalf of the City shall be performed in accordance with the terms and conditions imposed by said public authority in granting its approval and in accordance with this agreement.

(b) The City, at the City's own expense and without expense to the Railroad, will furnish all labor, material and equipment necessary for, and shall and will construct and complete all work contemplated by this agreement. Upon completion of the original construction, and thereafter upon completion of any work of maintaining, repairing, renewing or restoring the dike or any appurtenances thereof, the City shall remove from the Railroad's property all temporary structures and falsework, and will leave said property in a condition satisfactory to the Railroad. As used in this agreement, "appurtenances" shall include, without limitation, all necessary and proper drainage facilities.

(c) The Railroad will receive no ascertainable benefit from the construction of the project, and shall not be required to pay or contribute any part of the cost thereof. The City shall and will keep and maintain the dike and all appurtenances thereof in good condition and repair so as not to jeopardize, damage or interfere with the Railroad's property, facilities or operations.

(d) All work contemplated by this agreement by or on behalf of the City shall be performed and completed in a manner satisfactory to the Chief Engineer of the Railroad or

his authorized representative, and in accordance with detailed plans and specifications prepared by or on behalf of the City and approved by the Railroad's Chief Engineer or his authorized representative.

(e) The acceptance of the City's plans or specifications, the approval of any subsequent plans or additions thereto, the Railroad's collaboration in the performance of any work, the presence at the work site of the Railroad's representatives, or compliance by the City with any requests or recommendations made by such representatives, shall not be deemed an acceptance of the adequacy of the City's plans by the Railroad; and the City specifically assumes full responsibility for the adequacy and integrity of the same, and for the safe conduct and adequate policing and supervision of the project.

(f) All original construction work of the City shall be performed diligently and completed within a reasonable time, and, in any event, within six months from the effective date of this agreement, or within such further period of time as may be specified in writing by the Railroad's General Manager. No part of said work shall be suspended, discontinued or unduly delayed without the Railroad's written consent, and subject to such reasonable conditions as the Railroad may specify. It is understood that the Railroad's tracks at and in the vicinity of the work will be in constant or frequent use during progress of the work, and that movement or stoppage of trains, engines or cars may cause delays in the work of the City and the City's contractors. The City, for itself and its contractors, hereby assumes the risk of any and all such delays and agrees that no claims for damage shall be made against the Railroad because thereof.

(g) If the City shall fail, refuse or neglect to do, keep, observe and perform each and all of the terms, provisions, conditions and covenants of this agreement, the Railroad, in addition to any other rights and remedies the Railroad may have, may perform any work which in the judgment of the Railroad is necessary to place said dike in such condition as will not menace, endanger or interfere with the Railroad's facilities or operations or jeopardize the Railroad's employees; and the City will reimburse the Railroad for the expense thereof.

Section 3. SAFETY MEASURES. All work of the City contemplated by this agreement shall be performed and accomplished without interruption to or delay of operations of the Railroad or of others lawfully occupying or using the Railroad's property or facilities, and without interruption to or delay of continuous

railroad traffic. It is understood and recognized that safety and continuity of the Railroad's operations and communications are of the utmost importance, and in order that the same may be adequately safeguarded, protected and assured and in order that accidents may be prevented and avoided, it is agreed with respect to all of said work of the City that:

(a) All references in this section to the City and the City's work shall include, besides the City, the City's contractors, subcontractors, officers, agents and employees, and others acting under its or their authority; and all references in this section to work of the City shall include such work, not only within the Railroad's property, but also in the vicinity thereof, but outside of the Railroad's property.

(b) The City shall not do, suffer or permit anything which will or may obstruct, endanger, interfere with, hinder or delay maintenance or operation of the Railroad's tracks or facilities or any communication or signal lines, installations or appurtenances of any thereof. The City shall shelter and protect the Railroad's said property as required by the Railroad.

(c) The City, at the City's own expense, shall adequately police and supervise all work to be performed by the City; shall regulate the conduct thereof in such manner that the prosecution thereof will not endanger, interfere with, hinder or delay operations of the Railroad or of others lawfully using or occupying the Railroad's property or facilities; and shall not inflict injury to persons or damage to property for the safety of whom or of which the Railroad or such others may be responsible, or to property of the Railroad or such others.

(d) If at any time the City's engineers and the Chief Engineer of the Railroad or their respective representatives shall be of the opinion that any work of the City is being or is about to be done or prosecuted without due regard and precaution for safety and security, the City shall cause such work to be suspended until suitable, adequate and proper protective measures are adopted and provided.

(e) The City shall not cause, suffer or permit material or debris to be deposited or cast upon, or to slide or fall upon any property or facilities of the Railroad in connection with or as a result of the project or any work contemplated by this agreement; and any such material and debris shall be promptly removed from the Railroad's property by the City at the City's own expense or by the Railroad at the expense of the City, and any damage caused thereby shall be promptly

restored and repaired by the City at the City's own expense, or by the Railroad at the expense of the City.

(f) The City shall not discharge any explosives on or in the vicinity of the Railroad's property.

(g) The City shall not place any combustible material upon or about the property of the Railroad, nor erect any structure thereon (except as herein otherwise provided), nor cause or permit the view along the tracks of the Railroad to be obstructed.

(h) If the City shall excavate from existing slopes adjacent to the tracks of the Railroad or create new slopes in the performance of any work contemplated hereby, the City shall so excavate from existing slopes and construct new slopes that the pitch of same shall not be excessive, nor create undue hazards of slides or falling rock, nor impair or endanger the clearance between said existing or new slopes and the tracks of the Railroad.

(i) The City, at the City's own expense, shall provide and maintain suitable drainage facilities, and shall not suffer or permit drainage water to collect upon the property of the Railroad. The City, at the City's own expense, shall provide adequate drainage facilities so that waters may not because of any facilities or work of the City be impeded, obstructed, diverted or caused to back up, overflow or damage the property of the Railroad or any part thereof, or property of others.

(j) Before commencing any construction or other substantial work contemplated by this agreement, the City shall notify the Superintendent of the Railroad of the time when such work shall commence. Said notice shall be given not less than forty-eight (48) hours, exclusive of weekends and holidays, prior to the time work is to commence. The City shall cooperate with the Railroad in every reasonable way for the adequate protection of the Railroad's facilities and operations during progress of the work.

(k) The City shall not do or cause to be done in the performance of any work contemplated hereby, anything which will or may disturb the stability of any area so as to adversely affect the tracks or facilities of the Railroad.

(l) The City, at the City's own expense, shall and will install and maintain adequate shoring and cribbing for all excavation and/or trenching performed by the City in connection with construction, maintenance or other work of any kind

contemplated by this agreement. Said shoring or cribbing shall be constructed and maintained with such materials and in such manner as to withstand all stresses likely to be encountered, including, but not by way of limitation, any stresses resulting from vibration caused by the Railroad's operations at or in the vicinity of such work; and such shoring and cribbing shall be installed and maintained in a manner satisfactory to the Chief Engineer of the Railroad or his authorized representative.

(m) The Railroad may, in the Railroad's discretion, assign an engineering inspector to the project; and the City will give due consideration to suggestions and recommendations made by such inspector for the safety and protection of the Railroad's property and operations. The City shall, upon being billed therefor, promptly reimburse the Railroad for the cost and expense of said engineering inspector, including that portion of said inspector's wages, transportation, equipment rental, and labor additives allocated to the project. Labor additives shall include charges for vacation allowances, paid holidays, health and welfare, railroad retirement and unemployment, public liability, property damage and workmen's compensation, and accounting and billing.

#### Section 5. INDEMNIFICATION.

(a) If the City or the City's contractors, subcontractors, officers, agents or employees, or others acting under its or their authority, in the performance of any work contemplated by this agreement or by the failure to do or perform anything for which the City is responsible under the provisions of this agreement, shall cause damage, dislocation or settlement in the Railroad's roadbed, track structure or other railroad facilities or appurtenances, or shall otherwise injure, damage or destroy any property of the Railroad or of any other corporation, person or firm lawfully occupying or using the property of the Railroad, such damage shall be restored by the City at the City's own expense, or, at the option of the Railroad, the City shall reimburse the Railroad for all costs and expenses required to repair or restore said damage.

(b) Insofar as the City lawfully may do so, the City assumes the risk of and shall indemnify and save harmless the Railroad from all loss (other than loss caused by the sole negligence of the Railroad):

(1) from the liability imposed upon the Railroad by law for damages for bodily injuries (including death at any time resulting therefrom, and including care and loss of services) suffered or alleged to have been suffered by any person or persons (including, but not limited to, employees of the Railroad); and

(2) from and liability for damage to or loss or destruction of property and loss of use thereof (including, but not limited to, property owned, leased, occupied or used by, or in the care, custody and control of the Railroad or any employees of the Railroad);

caused by, resulting from or in any manner connected with the existence of the City's dike on the Railroad's property, the prosecution of any work contemplated by this agreement, or the failure to perform anything for which the City is responsible under the provisions of this agreement.

#### Section 6. LIABILITY INSURANCE.

(a) Before construction of said dike is begun, the City, without expense to the Railroad, shall require each of the City's contractors to furnish and deliver to the Railroad a public liability and property damage insurance policy or policies in favor of the Railroad; and the City, without expense to the Railroad, at all times during the progress of and until final completion of the project, shall cause such policy or policies to remain in full force and effect.

(b) Said insurance shall provide for a maximum limit of not less than FIVE HUNDRED THOUSAND DOLLARS (\$500,000) for all damages arising out of bodily injuries to or death of one person, and, subject to that limit for each person, a total maximum limit of ONE MILLION DOLLARS (\$1,000,000) for all damages arising out of bodily injuries to or death of more than one person in any one occurrence. Said insurance shall provide for a maximum limit of not less than FIVE HUNDRED THOUSAND DOLLARS (\$500,000) for all damages arising out of damage to or destruction of property in any one occurrence, and, subject to that limit, a total (or aggregate) maximum limit of ONE MILLION DOLLARS (\$1,000,000) for all damages arising out of damage to or destruction of property during the period of construction.



(c) Each such insurance policy shall be issued by a reliable insurer satisfactory to the Railroad and authorized to do business in the State of Oregon, and each such policy shall be in form and substance satisfactory to the Railroad. The original and one true and complete copy of said policy or policies shall be delivered to and remain in the possession of the Railroad.

Section 7. CLAIMS AND LIENS FOR LABOR AND MATERIAL AND TAXES.

(a) The City shall fully pay for all materials joined or affixed to and labor performed upon said property of the Railroad in connection with the construction, maintenance, repair, renewal or reconstruction of the dike, and shall not permit or suffer any mechanic's or materialman's lien of any kind or nature to be enforced against said property for any work done or materials furnished thereon at the instance or request or on behalf of the City; and the City shall indemnify and hold harmless the Licensor against and from any and all liens, claims, demands, costs and expenses of whatsoever nature in any way connected with or growing out of such work done, labor performed or materials furnished.

(b) The City shall promptly pay or discharge all taxes, charges and assessments levied upon, in respect to, or on account of the dike, to prevent the same from becoming a charge or lien upon the Railroad's property, and so that the taxes, charges and assessments levied upon or in respect to said property of the Railroad shall not be increased because of the location, construction or maintenance of the dike or any improvement, appliance or fixture connected therewith placed upon said property, or on account of the City's interest therein. Where such tax, charge or assessment may not be separately made or assessed to the City, but shall be included in the assessment of the property of the Railroad, then the City shall pay to the Railroad an equitable proportion of such taxes determined by the value of the City's property upon said property as compared with the entire value of said property.

Section 8. MODIFICATION OF DIKE. The rights herein granted are subject to the needs and requirements of the Railroad in the operation of the Railroad and the improvements and use of the Railroad's property; and the City, at the City's sole expense, shall make any and all modifications or changes in said dike as the Railroad may designate, whenever, in the furtherance of such needs and requirements, the Railroad shall find such action necessary or desirable.

Section 9. OTHER RAILROADS. All protective and indemnifying provisions of this agreement shall inure to the benefit of the Railroad and any other railroad company or companies at any time lawfully using the Railroad's property or facilities.

Section 10. EFFECTIVE DATE; TERM. This agreement shall become effective as of the date first herein written, or as of the date on which work on the said project was commenced, whichever is earlier, and shall continue in full force and effect subject to the terms and conditions hereof.

Section 11. AGREEMENT NOT TO BE ASSIGNED. The City shall not assign this agreement, or any interest therein, without the written consent of the Railroad.

Section 12. SUCCESSORS AND ASSIGNS. Subject to the provisions of Section 11 hereof, this agreement shall be binding upon and inure to the benefit of the parties hereto, their respective successors and assigns.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed, in duplicate, as of the day and year first hereinabove written.

OREGON-WASHINGTON RAILROAD  
& NAVIGATION COMPANY  
UNION PACIFIC RAILROAD COMPANY

By \_\_\_\_\_  
Vice President

ATTEST: (Seal)

CITY OF PORTLAND

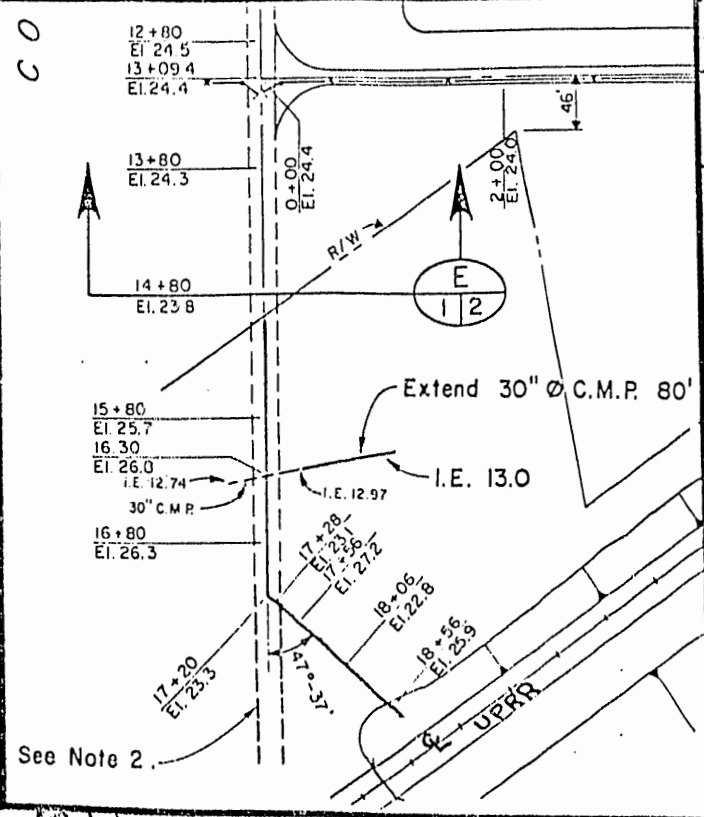
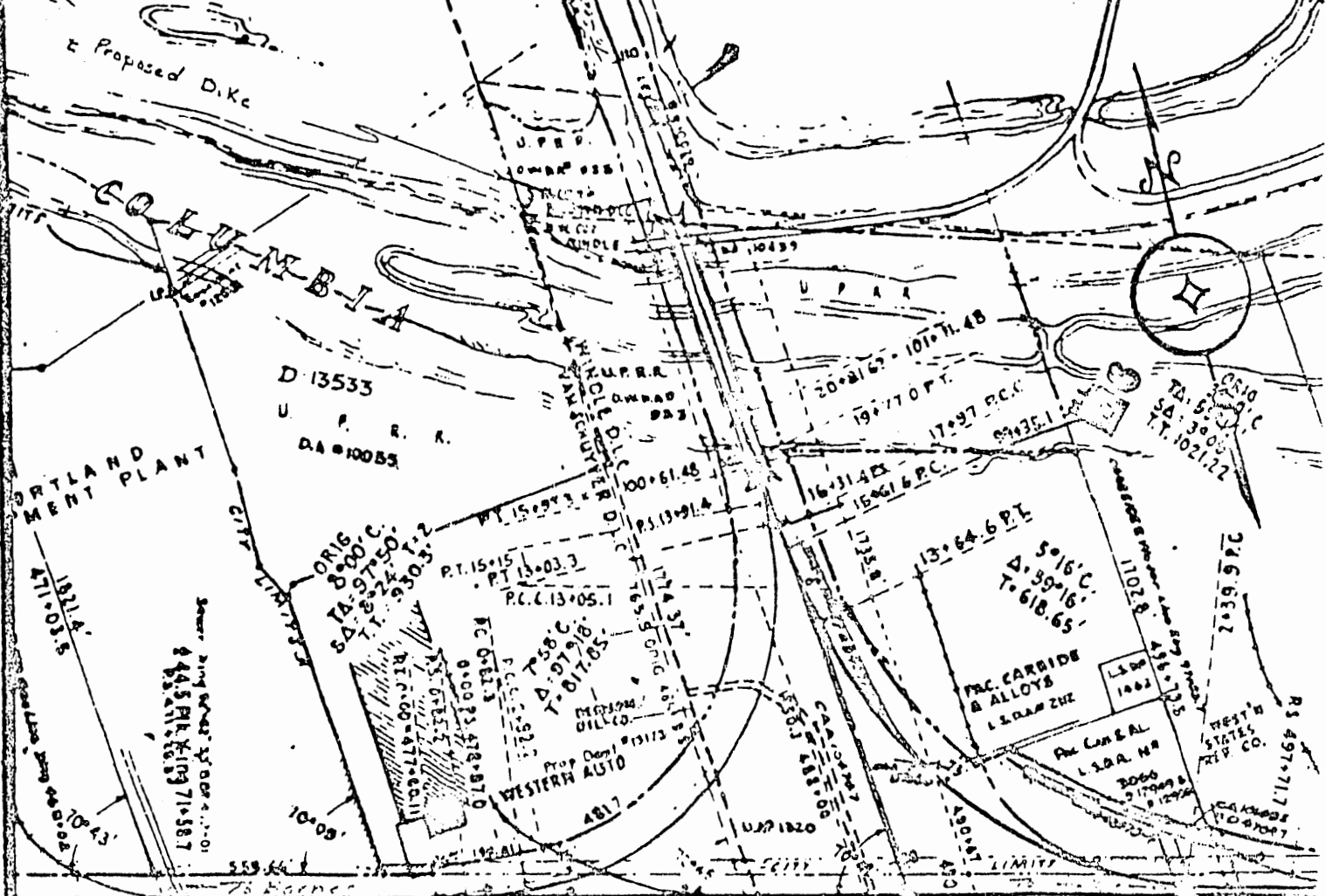
\_\_\_\_\_  
Auditor

By \_\_\_\_\_  
Mayor

Pursuant to Resolution  
passed \_\_\_\_\_  
(attach copy)

149307

R-1055



**EXHIBIT "A"**  
**OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY**  
**UNION PACIFIC RAILROAD COMPANY (LESSEE)**

M.P. 6.17 Portland (near Peninsula Jct.), Or.

SCALE: 1" = 400'

OFFICE OF DISTRICT REAL ESTATE MANAGER  
 Portland, Oregon

June 1, 1978  
 REV. 10/11/78

To accompany agreement with City of Portland,  
 covering dike encroachment.

\* L E G E N D \*

Dike encroachment shown . . . . . RED

Sec. 5, T.1N, R1E, W.M., Multnomah County

See Note 2.

ORDINANCE NO. 149307

An Ordinance authorizing the City to enter into an agreement with Oregon-Washington Railroad & Navigation Company and its lessee, Union Pacific Railroad Company (hereinafter referred to as Railroad), allowing the City to construct and maintain a dike and drainage facilities on railroad property to protect the City's Triangle Lake sludge lagoon against a 100 year flood, and declaring an emergency.

The City of Portland ordains:

Section 1. The Council finds:

1. The City, in connection with rehabilitation of its Triangle Lake sludge lagoon, proposes to construct a dike and drainage facilities as required to protect said sludge lagoon against a 100 year flood, and that in order for the dike to serve the intended purpose, it is necessary that it extend onto the right of way of the Railroad.
2. That Railroad is willing to enter into an agreement with the City allowing construction and maintenance of the necessary dike and drainage facilities on its right of way, and such agreement should now be authorized.

NOW, THEREFORE, the Council directs:

- a. The Mayor and Auditor are authorized to sign on behalf of the City, duplicate counterparts of an agreement approved as to form by the City Attorney, covering the construction and maintenance by the City of a dike and related drainage facilities on the right of way of the Railroad, said agreement to be substantially in accordance with Exhibit "A" attached to the original only of this Ordinance and by this reference is made a part thereof.
- b. The Auditor is directed to forward the signed agreements to Union Pacific Railroad Company, 628 Pittock Block, Portland, Oregon 97205, Attention: L. James Bergmann, Assistant General Solicitor, for signatures on the part of the Railroad.
- c. That upon receipt by the Auditor of the fully executed agreement, said agreement shall be filed in the appropriate City records.

ORDINANCE No.

Section 2. The Council declares an emergency exists, because there should be no delay in entering into an agreement allowing dike construction to protect City property against a 100 year flood, therefore, this ordinance shall be in force and effect from and after its passage by the Council.

ORDINANCE NO. 149307

ORDINANCE NO. 149307

5/11/80

Section 2. The Council declares an emergency exists, because there should be no delay in entering into an agreement allowing dike construction to protect City property against a 100 year flood, therefore, this ordinance shall be in force and effect from and after its passage by the Council.

ORDINANCE NO. 149307

ORDINANCE NO. 149307

ORDINANCE NO. 149307

Passed by the Council, MAR 19 1980

Commissioner Mike Lindberg  
Carl Short/sg  
February 19, 1980

*Charles W. Brady*  
Mayor of the City of Portland

Attest:

*George J. Gerlach*  
Auditor of the City of Portland

Calendar No. 958

ORDINANCE No. 149307

Title

An Ordinance authorizing the City to enter into an agreement with Oregon-Washington Railroad & Navigation Company and its lessee, Union Pacific Railroad Company (hereinafter referred to as Railroad), allowing the City to construct and maintain a dike and drainage facilities on railroad property to protect the City's Triangle Lake sludge lagoon against a 100 year flood, and declaring an emergency.

THE COMMISSIONERS VOTED AS FOLLOWS:		
	Yeas	Nays
Ivancie		
Jordan		
Lindberg		
Schwab		
McCready		—

FOUR-FIFTHS CALENDAR	
Ivancie	
Jordan	
Lindberg	
Schwab	
McCready	

Filed MAR 14 1980

GEORGE YERKOVICH  
Auditor of the CITY OF PORTLAND

By *Stephen C. ...*  
Deputy

INTRODUCED BY
COMMISSIONER MIKE LINDBERG

NOTED BY THE COMMISSIONER
Affairs
Finance and Administration
Safety
Utilities
Works <i>ML/mgt</i>

BUREAU APPROVAL
Bureau: Sanitary Engineering
Prepared By: <i>CS</i> Date: 2/19/80
Carl Short/sg
Budget Impact Review: <input checked="" type="checkbox"/> Not required
Bureau Head: <i>Joe Niehuser</i> Joe Niehuser

NOTED BY
City Attorney
City Auditor
City Engineer <i>APPROVED:</i> John M. Lang, Acting City Engr. <i>John Lang</i>

149307