

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

IN THE MATTER OF BLACK HILLS
NEBRASKA GAS, LLC d/b/a BLACK
HILLS ENERGY PROVIDING NOTICE
REQUIRED BY NEB. REV. STAT. §
66-1863, AS AMENDED, THAT IT
INTENDS TO EXTEND OR ENLARGE
ITS SERVICE AREA OR EXTEND A
GAS MAIN.

APPLICATION No. P-12.32

**REPLY AND OPPOSITION TO
MOTION TO DISMISS**

RECEIVED

By Deena Ackerman at 3:36 pm, Mar 09, 2021

Pursuant to Neb. Admin. Code, tit. 291, ch. 9, § 003.02, Black Hills Nebraska Gas, LLC d/b/a Black Hills Energy (“Black Hills Energy”) hereby submits its Reply and Opposition to the Metropolitan Utilities District’s (“M.U.D.”) Protest and Motion to Dismiss. Black Hills Energy states as follows:

1. Black Hills Energy’s proposed main to serve OPPD’s new natural gas generation facilities in the area of 168th Street and Fairview Road in Sarpy County (“OPPD’s Papillion Site”) is in the public interest under the public interest factors.

Economic Feasibility

2. The proposed main is economically feasible for Black Hills Energy to extend. OPPD will pay the entire cost of the main, including materials, land rights, construction, installation, operation, and ongoing maintenance. As a public power district, OPPD is credit worthy. The proposed main is Black Hills Energy’s preferred, most direct, most efficient, and least disruptive route and

extends approximately one mile of 10 inch main along Fairview Road from the Northern Natural Gas Company's interstate pipeline to OPPD's Papillion Site.

Impact on Existing and Future Ratepayers

3. Because the cost of the proposed main will be borne by OPPD, there is no cost to other customers of Black Hills Energy for the extension of the proposed main. OPPD's volume requirements will be subject to contract negotiations because OPPD's transportation service across the line will qualify OPPD as a High Volume customer under Neb. Rev. Stat. §§ 66-1802(9) and 66-1810(1). The level of service anticipated to be used by OPPD will ultimately benefit all other existing regulated customers of Black Hills Energy as costs are allocated fairly between customers. Conversely, service by M.U.D. will negatively impact customers. Black Hills Energy customers, who are subject to Commission-approved tariffs, would miss out on the growth of the distribution system in Sarpy County created by OPPD. In addition, Black Hills Energy's customers could bear additional costs arising out of customer confusion relating to location, leaks, and other safety and related problems with a gas line in the area owned and operated by a different utility.

Orderly Development of Natural Gas Infrastructure

4. Black Hills Energy's proposed main will contribute to the orderly development of natural gas infrastructure as a whole. "The orderly development requirement is not limited to scrutiny of whether a particular extension would be part of orderly growth of a particular natural gas utility; rather, the legislature

requires consideration of orderly development of natural gas utility infrastructure as whole.” *In the Matter of the Application of Metropolitan Utilities Dist. of Omaha, seeking resolution of a dispute under Neb. Rev. Stat. Sec. 57-1306*, App. No. P-0005, 2002 WL 35077477, at *7 (Neb. P.S.C. July 9, 2002). OPPD’s Papillion Site is entirely within Papillion’s extraterritorial zoning jurisdiction. Black Hills Energy provides natural gas services to Papillion and its extraterritorial zoning jurisdiction under a franchise agreement with Papillion. As Papillion grows, Black Hills Energy will expand its services to provide service to customers in the area. Black Hills Energy already has natural gas main in the area, as indicated by the orange line on the attached Exhibit C. Black Hills Energy purchases the Renewable Natural Gas from the Sarpy County landfill, which is directly adjacent to OPPD’s Papillion Site. The existing natural gas main that extends, in part, from the landfill in Fairview Road along the north side of OPPD’s Papillion Site and then turns north along 168th Street (the “RNG Line”) supplies Renewable Natural Gas to customers in several Sarpy County communities, including Papillion, La Vista, Bellevue, and Gretna. As the territory around the RNG Line is developed, Black Hills Energy can use the RNG Line to provide Renewable Natural Gas to additional customers in the surrounding area.

5. OPPD has inquired about Black Hills Energy providing Renewable Natural Gas to OPPD’s Papillion Site, in addition to the natural gas supplied from an interstate pipeline transporter.

6. M.U.D. cannot provide Renewable Natural Gas from the Sarpy County landfill. If M.U.D. were to provide service to OPPD's Papillion Site, OPPD would either not be able to obtain Renewable Natural Gas sourced from an existing natural gas main and an immediately adjacent landfill or would obtain natural gas from two separate utilities at the same location.

7. In addition, M.U.D. has not indicated that it has any existing facilities in the area, nor has M.U.D. indicated where it may extend natural gas main to serve OPPD's Papillion Site. Service by M.U.D. may result in parallel mains by different utilities in Fairview Road, which raises public safety concerns in the event of a leak or other emergency response situations.

Duplicative or Redundant Infrastructure

8. Black Hills Energy's proposed main will not result in duplicative or redundant infrastructure. As discussed above, Black Hills Energy already has natural gas main in the area that could provide partial service to OPPD's Papillion Site. M.U.D. did not provide a map regarding the location of any facilities in the area.

Non-Discriminatory Manner

9. The proposed main is being extended in a non-discriminatory manner. Black Hills Energy has negotiated and is negotiating with OPPD regarding the proposed main to provide service to OPPD's Papillion Site in a commercially reasonable fashion.

Response to M.U.D.'s Arguments

10. M.U.D.'s sole argument is based on the joint application presented by Black Hills Energy and M.U.D. in April 2010 attaching maps that defined Black Hills Energy's and M.U.D.'s general understanding of which utility would serve in a given area.

11. M.U.D. contends that because no protest was filed and the Commission issued an order closing the docket stating the proposed enlargement or extension is presumed to be in the public interest, M.U.D. has been awarded a service territory and service by M.U.D. is "conclusively presumed" to be in the public interest.

12. In the nearly 11 years since P-0014 was filed, to Black Hills Energy's knowledge, M.U.D. has not served any customers in the area of OPPD's Papillion Site. Because M.U.D. did not attach a map of its facilities to its Protest, Black Hills Energy presumes that M.U.D. does not have any natural gas main in the area of OPPD's Papillion Site. Circumstances have changed since April 2010.

13. Black Hills Energy and M.U.D. understood that as circumstances changed, the utility that served an area depicted on the map may need to change, and Black Hills Energy and M.U.D. have made adjustments as needed.

14. Whether or not an extension by Black Hills Energy or M.U.D. to serve OPPD's Papillion Site is in the public interest must be evaluated based on the public interest factors and circumstances as they currently exist. In *In re Peoples Natural Gas*, 2004 WL 726828 (Neb. Ct. App. Apr. 6, 2004), the Nebraska

Court of Appeals affirmed a finding that a proposed extension by M.U.D. was not in the public interest and thus that M.U.D. was not entitled to serve the Highway Crossing development and had to transfer service of the development to Aquila (now known as Black Hills Energy). The Court of Appeals reversed a Commission determination that M.U.D. could not re-establish service to the development in the future, stating that “[b]ased on the facts before it, the Commission could not determine whether MUD would fail to meet the public interest test in the future.” *Id.* at *6. The Court noted that if MUD were invited in the future to provide service to the municipality encompassing the Highway Crossing development and MUD proposed an extension, “the public interest test is operative at that time, not now.” *Id.* The same rationale applies to this situation.

15. Nebraska law does provide for exclusive service territories for natural gas utilities. M.U.D. is attempting to convert an unopposed 2010 proceeding that did not involve any submission of evidence to or any hearing by the Commission into a grant of exclusive territory.

16. The circumstances that exist in 2021 are not the same as the circumstances in 2010. In their Notice of Proposed Extension of Service or Gas Main (No. P-0014), Black Hills Energy and M.U.D. stated: “[T]he parties have discussed this matter with representatives of Gretna, LaVista, Papillion, Springfield, Bellevue and Sarpy County. This proposed filing has received the support of these governmental entities.”

17. Approximately six years later, litigation ensued between the City of Papillion and the City of Springfield relating to boundaries and the location of anticipated future growth of the cities. In resolution of that litigation, the City of Papillion and the City of Springfield entered into an Interlocal Cooperation Agreement in 2016 that established that the area of 168th Street and Fairview Road would be within the City of Papillion's boundaries, not the City of Springfield's. See Exhibit D.

18. Because of growth since 2016, OPPD's Papillion Site is now within the extraterritorial zoning jurisdiction of the City of Papillion.

19. Black Hills Energy serves Papillion and its extraterritorial jurisdiction under a current and valid natural gas franchise. Pursuant to Neb. Rev. Stat § 66-1861(2), service by Black Hills Energy to OPPD's Papillion Site is in the public interest.

20. M.U.D. does not possess a current and valid franchise to serve within Papillion. Pursuant to Neb. Rev. Stat. § 66-1858, M.U.D. may not solicit a franchise from Papillion.

21. M.U.D. contends that it reached an arrangement with Black Hills Energy and that the Commission's 2010 order approved the joint submission and thus governs. As a result, M.U.D. contends that it already has the authority to extend natural gas main to serve OPPD's Papillion Site. Under Nebraska law, "[a] party cannot, by contractual agreement with another party, obtain the power to do something that state law forbids." *Rath v. City of Sutton*, 267 Neb. 265,

287, 673 N.W.2d 869, 889 (2004) (citation omitted); *Sanford v. Clear Channel broadcasting, Inc.*, 14 Neb. App. 908, 915, 719 N.W.2d 312, 319 (2006) (“If an act is prohibited by statute, an agreement in violation of the statute is void.” (citation omitted)).

22. The Commission is free to reject M.U.D.’s argument regarding the 2010 map because the Commission has the power to revise its prior orders, findings, or conclusions of law that are no longer in the public interest. *Canada v. Peake, Inc.*, 184 Neb. 52, 165 N.W.2d 587 (1969) (“An order of the Nebraska State Railway Commission granting or denying application for a certificate of public convenience and necessity is the act of the commission and not of the court. It would seem clear that the commission has continuing jurisdiction over its orders and the right to modify, annul, and vacate them thereafter.”). Given the revised facts and legal consequences of the boundary dispute between the Cities of Papillion and Springfield, Nebraska, that occurred years after the P-0014 order, the State Natural Gas Regulation Act requires an evaluation of the public interest factors in connection with an extension to OPPD’s Papillion Site.

23. Any extension by M.U.D. to serve OPPD’s Papillion Site would not be in the public interest.

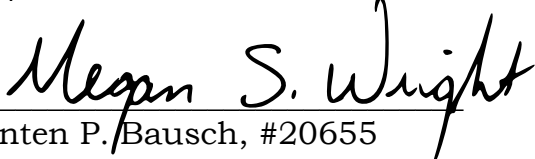
24. Black Hills Energy denies each and every assertion in M.U.D.’s Protest and Motion to Dismiss that is not expressly admitted.

WHEREFORE, Black Hills Energy respectfully requests the denial of M.U.D.’s Motion to Dismiss and prays for an order determining that the proposed

extension by Black Hills Energy to serve OPPD's Papillion Site is in the public interest and that a proposed extension by M.U.D. is not in the public interest.

Respectfully submitted this 9th day of March, 2021.

BLACK HILLS NEBRASKA GAS, LLC
d/b/a BLACK HILLS ENERGY,

By: 

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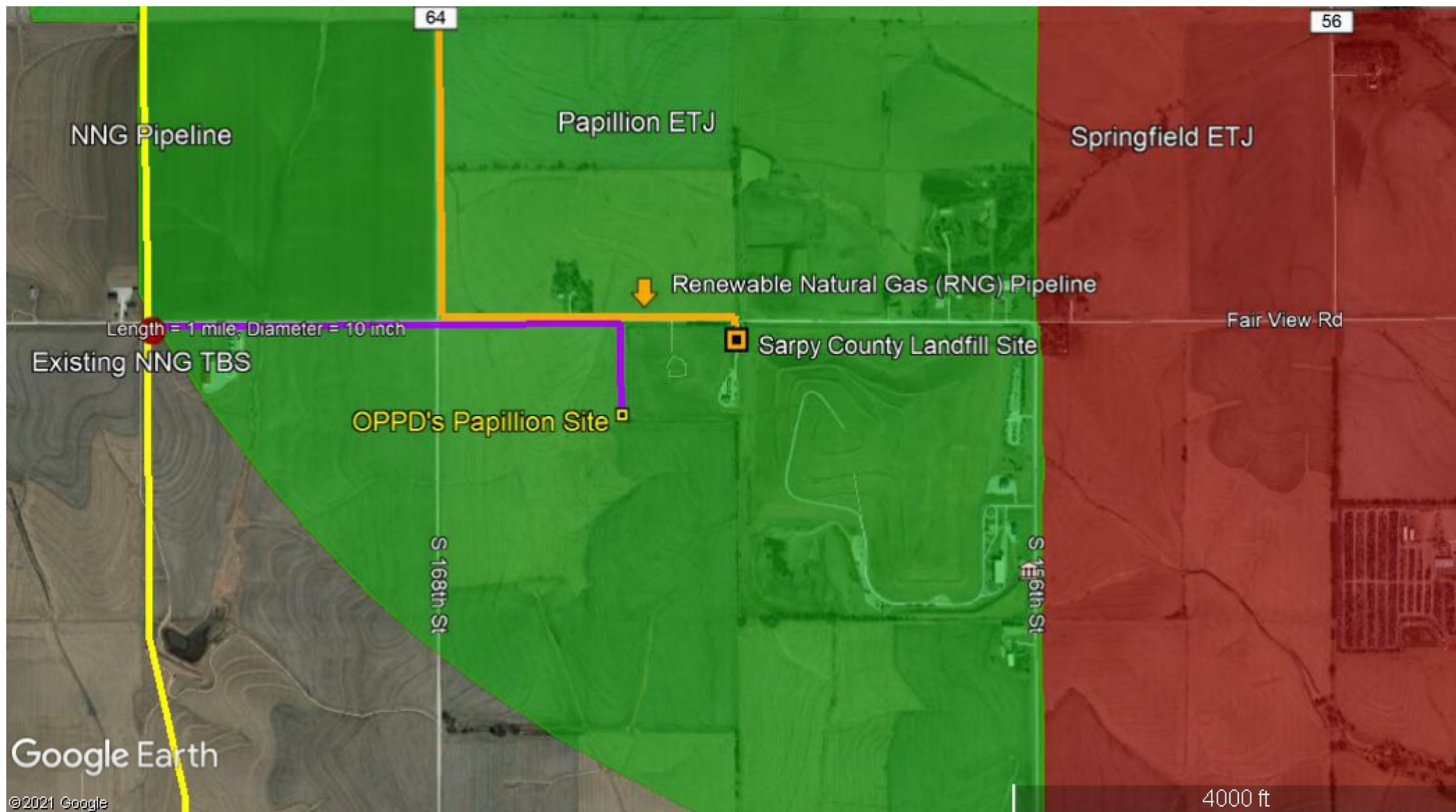
dlaw@blackhillscorp.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served by e-mail and U.S. Mail, sufficient postage prepaid on the 9th day of March, 2021 upon the following individuals:

Nichole Mulcahy Natural Gas Director Nebraska Public Service Commission 300 The Atrium, 1200 N Street P.O. Box 94927 Lincoln, NE 68509-4927 Nichole.mulcahy@nebraska.gov	Mark Mendenhall General Counsel Metropolitan Utilities District 7350 World Communications Dr. Omaha, NE 68122 Mark_Mendenhall@mudnebr.com
Sallie Dietrich Attorney Nebraska Public Service Commission 300 The Atrium, 1200 N Street P.O. Box 94927 Lincoln, NE 68509-4927 sallie.dietrich@nebraska.gov	Marc Willis Attorney Metropolitan Utilities District 7350 World Communications Dr. Omaha, NE 68122 Marc_Willis@mudnebr.com
Deena Ackerman Consumer Affairs Advocate Nebraska Public Service Commission 300 The Atrium, 1200 N Street P.O. Box 94927 Lincoln, NE 68509-4927 Denna.ackerman@nebraska.gov E-filing: psc.naturalgas@nebraska.gov	Andy S. Pollock Rembolt Ludtke LLP 3 Landmark Centre 1128 Lincoln Mall, Suite 300 Lincoln, NE 68508 apollock@rembolt.awfirm.com

By: Megan S. Wright



INTERLOCAL COOPERATION AGREEMENT

THIS INTERLOCAL COOPERATION AGREEMENT made and entered into this 4th day of October, 2016, (the "Effective Date") by and between the City of Papillion, Sarpy County, Nebraska ("Papillion"), the City of Springfield, Sarpy County, Nebraska ("Springfield"), and the County of Sarpy, Nebraska ("Sarpy") (each a "Party" and, collectively, the "Parties").

WHEREAS, Papillion, Springfield, and Sarpy are political subdivisions duly authorized and existing under the laws of the State of Nebraska; and

WHEREAS, the Interlocal Cooperation Act, Neb. Rev. Stat. § 13-801 et seq. (the "Act"), authorizes cities and counties to cooperate on the basis of mutual advantage to thereby provide for services and facilities, in a manner and pursuant to forms of governmental organization that will accord with the geographic, economic, population and other factors influencing the needs and development of the local communities; and

WHEREAS, the Parties desire to make more efficient use of their powers by cooperating to the mutual advantage of both cities and Sarpy in the elimination of duplication of public costs resulting from the overlapping exercise of planning, inspection, permits, and enforcement of all other aspects of the exercise of overlapping jurisdictional authority over the same land; and

WHEREAS, the Parties deem it to be in the best interests of both cities and Sarpy that an agreement be reached with respect to present and future land use, planning, zoning, and annexation related matters; and

WHEREAS, on January 31, 1995, pursuant to the Nebraska County Industrial Sewer Construction Act, Neb. Rev. Stat. §23-3601 et. seq., Sarpy adopted a map delineating the areas of future growth and development for Papillion and Springfield; and

WHEREAS, the Parties are parties to two lawsuits in the District Court of Sarpy County, Nebraska, the first being the City of Springfield, Nebraska v. the City of Papillion, Nebraska and Sarpy County, Nebraska, Case Number CI15-1025, and the second being the City of Springfield, Nebraska v. the City of Papillion, Nebraska and Sarpy County, Nebraska, Case Number CI16-1484, in which Springfield disputes, among other things, the boundaries of the extra-territorial zoning jurisdiction of Papillion; and

WHEREAS, as part of their cooperation and agreement on such jurisdictional matters, Papillion and Springfield are requesting that Sarpy take certain actions set forth herein; and

WHEREAS, Sarpy is agreeing to take such actions, and other actions set forth herein and agreed to by the Parties.

WHEREFORE, it is mutually agreed by and between Papillion, Springfield, and Sarpy as follows:

1. Purpose. The purpose hereof is to cooperate with each other to provide services and facilities in a manner and pursuant to forms of governmental organization that will accord best with geographic, economic, population, and other factors influencing the needs and development of the respective communities.

2. Boundary Map. The agreed upon Papillion/Springfield boundary between the two (2) cities shall be as designated and delineated on Exhibit “A”- City of Papillion and City of Springfield Boundary Map (the “Boundary Map”), attached hereto and incorporated herein by reference.
3. Exercise of Jurisdiction. Papillion and Springfield hereby agree that neither Party shall exercise any land use, planning, and zoning jurisdiction, nor annex any real estate across the blue boundary lines designated in the Boundary Map, unless the Party wishing to exercise such jurisdiction first obtains the consent of the affected Party’s governing body by formal action to exercise such jurisdiction or annexation across said dividing line.
4. Duration. This Agreement shall be effective upon approval by the governing bodies of all of the Parties. This Agreement may only be terminated by mutual agreement of Papillion and Springfield, as evidenced by a resolution adopted by their respective governing bodies.
5. Responsibilities of Parties. In consideration of entering into the Agreement, the Parties agree to the following terms:
 - a. Upon approval of this Agreement by the governing bodies of all of the Parties and proper execution of the Agreement by the appropriate officials, Springfield shall immediately dismiss its Complaints for cases CI15-1025 and CI16-1484 with prejudice, which it filed in the District Court of Sarpy County, Nebraska.
 - b. Springfield hereby supports any requests made by Papillion to Sarpy for current and future ceding and transfer of land which are within one-half mile of Springfield’s extraterritorial jurisdiction and which comply with the Boundary Map. Springfield’s approval of this Agreement shall be deemed to be the resolution passed in support of any such cedings to Papillion as is required pursuant to Neb. Rev. Stat. § 13-327.
 - c. Papillion hereby supports any requests made by Springfield to Sarpy for current and future ceding and transfer of land which are within one-half mile of Papillion’s extraterritorial jurisdiction and which comply with the Boundary Map. Papillion’s approval of this Agreement shall be deemed to be the resolution passed in support of any such cedings to Springfield as is required pursuant to Neb. Rev. Stat. § 13-327.
 - d. Papillion and Springfield mutually agree to Sarpy’s amendment of the 1995 County Industrial Sewer Construction Act Future Growth and Development Area Map (the “1995 Map”) as depicted and set forth in Exhibit “B” – 2016 County Industrial Sewer Act Future Growth and Development Area Map (the “2016 Map”).
 - e. Sarpy shall amend the 1995 Map as depicted and set forth in the 2016 Map by separate resolution to its County Commissioners on October 4, 2016, which resolution shall be contingent upon the execution of this Agreement by all of the Parties.
 - f. Each Party shall furnish the other Parties with a certified copy of the Resolution of its governing body authorizing the execution, implementation, or reaffirmation of this Agreement.
 - g. The Parties contemplate that a simultaneous adoption of this Agreement by their

respective governing bodies will occur on October 4, 2016.

6. **Financing.** No separate financing is necessary to implement this Agreement. Each of the Parties shall separately budget and defray the cost of services rendered and facilities constructed within their own jurisdiction as hereby established, except as may otherwise be mutually agreed upon by a separate interlocal agreement by the Parties in respect to specific projects.
7. **Powers and Responsibilities.** Each of the Parties hereto shall perform their respective powers and responsibilities herein provided for through their respective governing bodies and customary procedures. The Parties anticipate that the effective administration of this cooperative effort undertaken hereby will not require an administrator or joint board.
8. **Real Property.** Each Party shall acquire, hold and dispose of real and personal property used by them in this cooperative undertaking in their separate corporate capacities and not jointly, except as may otherwise be mutually agreed by a separate interlocal agreement by the governing bodies of the Parties.
9. **Personal Interest.** The Parties hereby declare and affirm that no officer, party or employee, and no party of their governing bodies, and no other public official or parties who exercise any functions or responsibilities in the review or approval of the undertaking described in this Agreement, or the performing of either Parties' obligations pursuant to this Agreement which affects his or her personal interests, or any partnership or association which he or she directly or indirectly is interested, nor shall any employee, nor any party of their governing bodies, have any interest, direct or indirect, in this Agreement or the proceeds thereof.
10. **Miscellaneous.**
 - a. **Separate Legal Entities.** This Agreement shall not be construed to have created a spate legal or administrative entity.
 - b. **Governmental Subdivision.** Except as provided herein, each Party shall maintain its autonomy and indebtedness as a governmental subdivision. This Agreement shall not relieve any Party of any obligations or responsibility imposed upon it by law except to the extent of actual and timely performance by the Agency as provided under this Agreement, which performance may be offered in satisfaction of the obligation or responsibility.
 - c. **Modifications.** That no modification, termination or amendment of this Agreement may be made except by written agreement signed by all of the Parties; provided, however, any future modifications to this Agreement, which do not impact the actions of Sarpy, do not require Sarpy to be a party to the amendment. Copies of any such amendments shall be provided to Sarpy after the approval by the governing bodies of Papillion and Springfield.
 - d. **Notice.**
 - i. **Papillion:**

City of Papillion

City Clerk
122 East Third St.
Papillion, NE 68046

ii. Springfield:

City of Springfield
City Administrator
170 N. 3rd Street
P.O. Box 189
Springfield, NE 68059

iii. Sarpy:

The County of Sarpy, Nebraska
County Clerk
1210 Golden Gate Plaza
Papillion, NE 68046

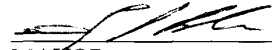
- e. Severability. In case one or more of the provisions contained in this Agreement is held to be invalid, illegal, or unenforceable for any reason in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision hereof, and this Agreement shall be construed as if such invalid, illegal, or unenforceable provisions had never been contained herein.
- f. Forum Selection and Personal Jurisdiction. Any dispute arising from this contractual relationship shall be solely and exclusively filed in, conducted in, and decided by the courts located in Sarpy County, Nebraska. Accordingly, the Parties agree to exclusive personal jurisdiction in the courts located in Sarpy County, Nebraska.
- g. Governing Law. The Parties shall conform to all existing and applicable ordinances, resolutions, state and federal laws, and all existing and applicable rules and regulations. Any dispute arising from this contractual relationship shall be governed solely and exclusively by Nebraska law except to the extent such provisions may be superseded by applicable federal law, in which case the latter shall apply.
- h. Incorporation. The recitals are incorporated herein by this reference.
- i. Entire Agreement. This Agreement contains the entire understanding of the parties hereto with respect to the transactions contemplated hereby. No representations, warranties, undertakings, or promises, whether oral, implied, written, or otherwise have been made by either party hereto to the other unless expressly stated in this Agreement, or unless mutually agreed to in writing between the parties hereto after the date hereof, and neither party has relied upon any verbal representations, agreements or understandings not expressly set forth herein.
- j. Assignment. This Agreement, or any benefit, interest, obligation, or responsibility of any Party under this Agreement, may not be assigned by any Party without express written consent of all of the Parties.

- k. Counterparts. This Agreement may be executed in one or more counterparts, each and all of which shall constitute an original and all of which when taken together shall constitute the same agreement.
- l. Remedies. All remedies under this Agreement shall be cumulative and not restrictive of other remedies. The Parties agree that any Party shall have the right to exercise any remedies available to it at law or in equity, including without limitation, specific performance.

[End of Agreement]

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorized officers on the date and year first above written.

CITY OF PAPILLION, NEBRASKA
A municipal corporation,


MAYOR

ATTEST:



City Clerk (SEAL)



CITY OF SPRINGFIELD, NEBRASKA
A municipal corporation,


MAYOR

ATTEST:


City Clerk (SEAL)

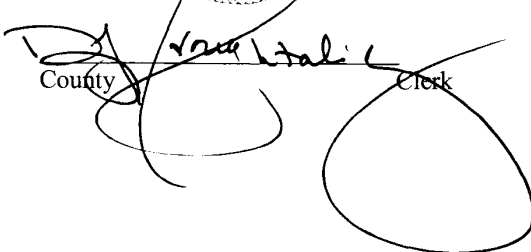


SARPY COUNTY, NEBRASKA


Chairman of Board of Commissioners

10-4-16

Attest:


County Clerk

(SEAL)

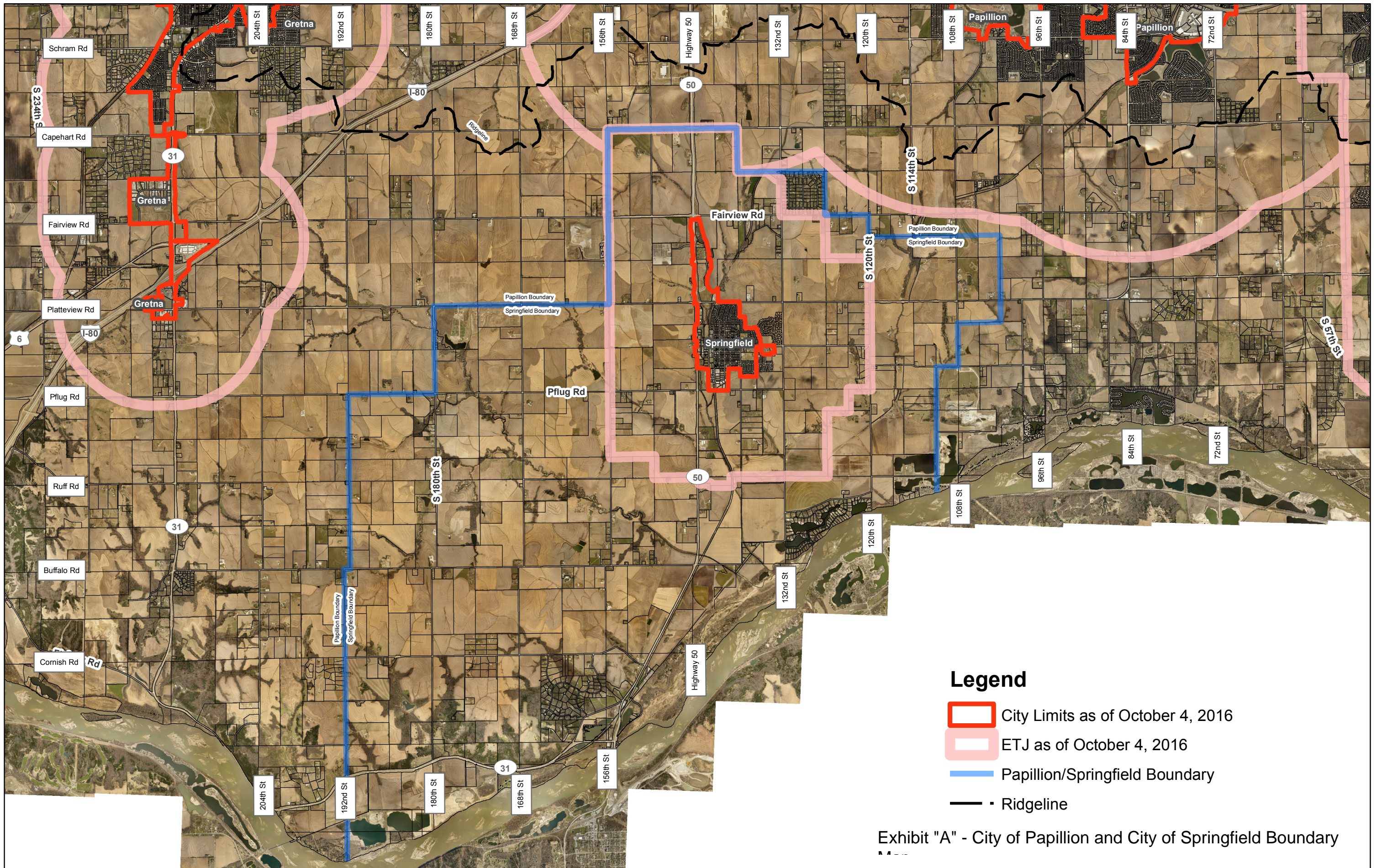
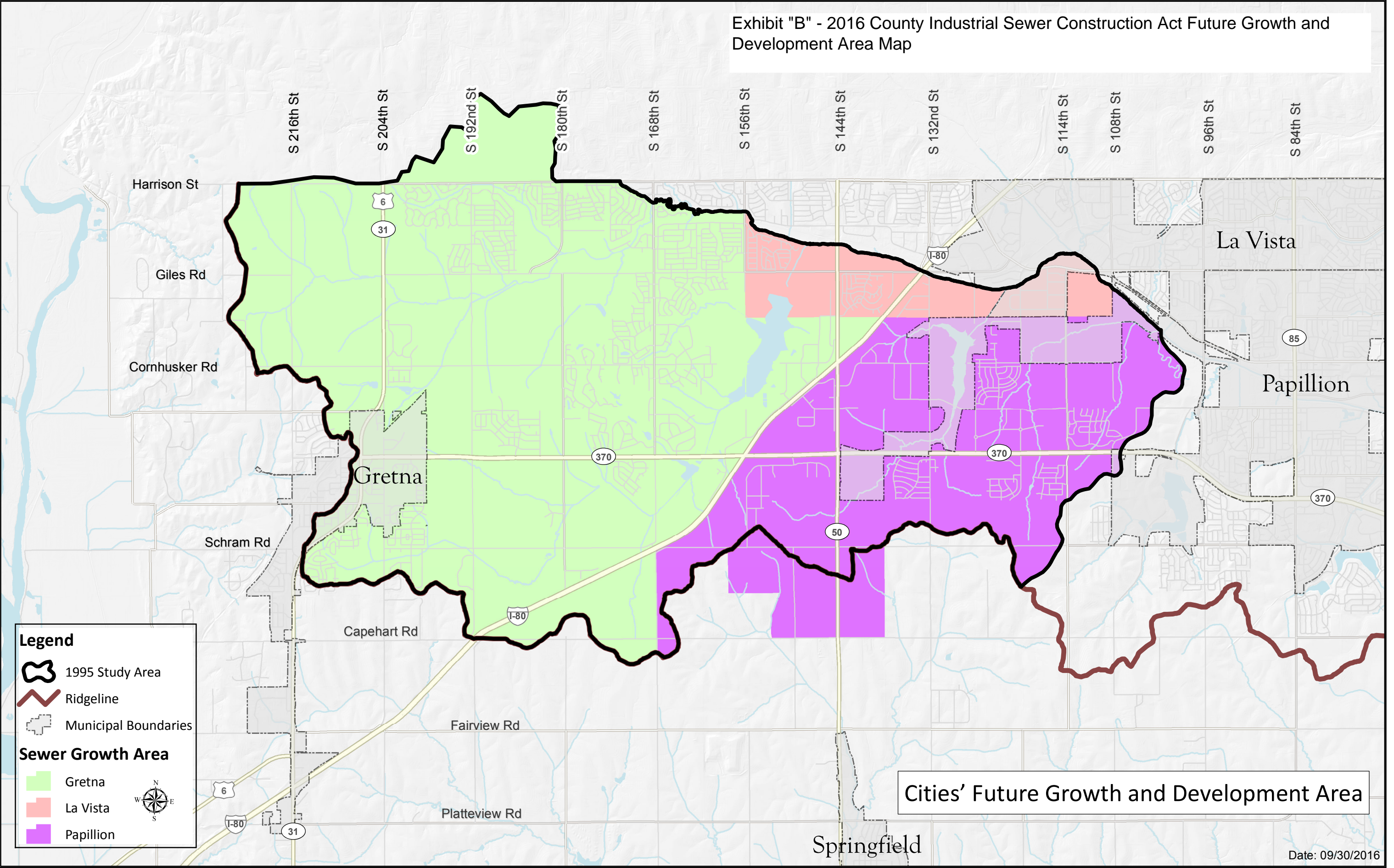


Exhibit "B" - 2016 County Industrial Sewer Construction Act Future Growth and Development Area Map



Date: 09/30/2016