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November 18, 2015

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**VIA FEDERAL EXPRESS**

Cynthia Brown  
Surface Transportation Board  
395 E Street, SW  
Washington, DC 20024

ENTERED  
Office of Proceedings  
November 19, 2015  
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Public Record

Re: STB Docket No. FD35977

Dear Cynthia:

Enclosed is the 1 original and 10 copies of the Northwestern Pacific Railroad Company Petition for Declaratory Order. I'm also enclosing a check in the amount of \$1,400.00 made payable to the Surface Transportation Board and a CD of the twenty-one exhibits for convenience of downloading in your office. Lastly, I'm enclosing a self-addressed envelope for the return of the first-page marked with your receipt/endorsement of receipt for our files.

I thank you for all of your assistance in getting this prepared properly for this service.

Sincerely,

A handwritten signature in black ink that reads "Peggy A. Sanchez". The signature is fluid and cursive.

Peggy A. Sanchez  
Legal Secretary

PAS/se  
Enclosures  
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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

STB Docket No. FD35977

**NORTHWESTERN PACIFIC RAILROAD COMPANY**

**PETITION FOR DECLARATORY ORDER**

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**EXPEDITED CONSIDERATION REQUESTED**

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Dated: November 18, 2015

**ORIGINAL**

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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

STB Docket No. FD35977

**NORTHWESTERN PACIFIC RAILROAD COMPANY  
PETITION FOR DECLARATORY ORDER**

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**I.**

**INTRODUCTION**

This Petition seeks an expedited Declaratory Order that the California Environmental Quality Act (CEQA) may not be employed to regulate and suspend the operations of the Northwestern Pacific Railroad Company (NWPCo), an interstate carrier certified by the Surface Transportation Board (Board). In particular, NWPCo seeks a Declaratory Order that the Interstate Commerce Termination Act (ICCTA) preempts application of CEQA to NWPCo's ongoing rail operations.

On August 30, 2007, the Board authorized NWPCo to conduct freight operations on the 142-mile Russian River Division of the Northwestern Pacific Railroad Line (the Line), which is owned in part by the Sonoma Marin Area Rail Transit Authority (SMART) and in part by the North Coast Railroad Authority (NCRA), each a public entity. By agreement between these entities and mutual easements, SMART has the exclusive right to operate passenger commuter and excursion service and NCRA the exclusive right to operate freight and passenger excursion service over the other's ownership, using the same tracks. In September 2006, the NCRA Board of Directors contracted with NWPCo to assume all aspects of the freight and passenger excursion

operation. On June 15, 2011 the SMART Board of Directors approved NWPCo as the designated freight operator. NWPCo received the Board's certification in 2007 and immediately began repair operations and acquisition of equipment. It has served shippers and receivers in interstate commerce since June 2011.

On July 20, 2011 NWPCo was sued in California Superior Court by Friends of the Eel River and Citizens for Alternatives to Toxics (collectively, "CEQA litigants"). CEQA litigants seek a permanent injunction restraining NWPCo from implementing or constructing "the Project," defined as "to allow freight traffic from Willits to Lombard." Ex. 1 at STB 2, 4 (Excerpts of FOER's Petition for Writ of Mandate); see Ex. 2 at STB 6, 7-8 (Excerpts of CATS' Petition for Writ of Mandate). This comprises the entire Russian River Division, which is the only part of the railroad to be operated in the foreseeable future. If granted, the relief sought could shut down NWPCo's operation pending CEQA compliance by NCRA. CEQA compliance is a time consuming and expensive process that could result in a myriad of CEQA mitigation measures that would regulate NWPCo's operation and maintenance of the railroad. The CEQA litigants' case was dismissed in the Marin County Superior Court and the dismissal affirmed by the California First District Court of Appeal. A consolidated appeal is now pending in the California Supreme Court (Case Number S222472). The appeal focuses on the preemptive effect of ICCTA and the possible nullification thereof by a novel application of the "market participant" doctrine.

The need for a declaratory order is ripe because 1) there is an actual controversy; 2) the remedy CEQA litigants seek could suspend Board authorized rail operations; and 3) the remedy would result in the state regulating railroad operations that are exclusively within the Board's

jurisdiction. Expedited relief is appropriate so the Board's decision will be available prior to any hearing or decision by the California Supreme Court.

## **II. BACKGROUND**

### **A. Overview**

NCRA and SMART are separate public entities established by the California legislature to operate freight and passenger service respectively. They share the same main line track under mutual easements and an Operating and Coordination Agreement, the most recent version of which was entered into in June 2011. By statute, NCRA is authorized to select a franchisee to provide freight service. In 2006, after a public solicitation for bids, the NCRA Board of Directors selected NWPCo as its franchisee. On September 13, 2006, NCRA and NWPCo entered into an Agreement for the Resurrection of Operations Upon the Northwestern Pacific Railroad Line and Lease (the "Operations Agreement"), granting NWPCo long-term, exclusive operating rights over the Russian River Division. In 2007, NWPCo received the Board's certification. At the time, the entire railroad was shut down by the Federal Railroad Administration EO 21, due to storm damage. NCRA and NWPCo jointly began the task of repairing the Line, each contributing substantial public and private funds, respectively. After successful repairs, FRA EO 21 was lifted in June 2011. On June 15, 2011 the SMART Board of Directors approved an Operating and Coordination Agreement for the Northwestern Pacific Line. This Agreement included a specific provision approving NWPCo as the freight operator on the Line. NWPCo immediately began serving shippers and receivers.

Under the California Environmental Quality Act (CEQA), public agencies that exercise discretionary or approval authority over projects that may have a significant effect on the environment are required to evaluate these effects prior to making a decision to approve the

project. "Project" is defined broadly in CEQA and includes the act of entering into transactions, such as leases or agreements.<sup>1</sup> Within CEQA's short statute of limitations period, any citizen may file a writ in superior court challenging the adequacy of a public agency's compliance with CEQA (including the failure to conduct any CEQA review). No party challenged the 2006 NCRA Board action approving the Lease with NWPCo or the 2011 SMART Board approval of the Operating and Coordination Agreement naming NWPCo as the authorized freight carrier. These approvals and the Board's certification permitted NWPCo to operate freight rail on the Line; thus no other official action was required or sought by NWPCo prior to operating.

From 2006 to 2010, NCRA received funding from the State of California for stabilization of the railway, primarily roadbed, signal and track repair. The state required compliance with CEQA, which NCRA achieved to the satisfaction of the state by properly filing statutory and categorical exemptions. The work requiring CEQA compliance was completed by NCRA in 2010. For reasons that are unclear, NCRA mistakenly believed it was obligated by law to prepare an environmental impact report (EIR) for railroad operations even though the state funding agency did not require one. The NCRA Board certified this EIR on June 20, 2011. On July 20, 2011, CEQA litigants sued NWPCo as a "real party in interest" in a CEQA action challenging the adequacy of NCRA's EIR.

NWPCo defends against the CEQA suit on a number of grounds, including the fact that it was not seeking any approval from NCRA for which an EIR would be required and that any application of CEQA to its operations is preempted by the Interstate Commerce Commission Termination Act of 1995 (ICCTA). Recognizing the EIR was not required and could have no

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<sup>1</sup> The September 2006 Lease was conditioned on "NCRA having complied with the California Environmental Quality Act ("CEQA") as it may apply to this transaction." Agreement for the Resurrection of Operations Along the Northwestern Pacific Railroad Line and Lease, Section IV.C

effect on NWPCo, the NCRA Board rescinded its 2011 resolution purporting to approve resumed operations on April 10, 2013. This action made clear that NCRA understood that the EIR being challenged was not in fact required or relied on for NWPCo's authorized operations.

**B. History Of The Line And Its Ownership**

The 314-mile Northwestern Pacific Railroad Line extends from the City of Arcata, California in the north to Lombard, near the City of Napa in the south. Ex. 3 at STB 11 (North Coast Rail Authority, Request for Proposals for an Operator of NWP Line). The City of Willits is the center of the Line and the tracks north of Willits are known as the Eel River Division, and those to the south the Russian River Division. There are no current plans to operate the Eel River Division as the tracks are in disrepair and the estimated cost of putting this Division back into operation is two to five hundred million dollars. *See* Ex. 4 at STB 25 (report titled "2003 Long Term Financial and Economic Feasibility of Line" notes state of extreme disrepair of the Eel River Division).

The railroad was established by private parties in the early 1870's to connect the timber-rich regions of the north with the rapidly developing City of San Francisco. By 1888 the privately-owned track extended from Tiburon on the San Francisco Bay to Ukiah, and by 1914 the rails extended to Humboldt Bay, connecting Eureka in the north to Sausalito in the south, with ferry service to San Francisco. The Line was purchased and jointly operated by the Santa Fe and Southern Pacific Railroads until 1929, when the Southern Pacific assumed full ownership. Ex. 3 at STB 12.

During the 1980s, it became clear that the Southern Pacific intended to abandon the Line, probably due to a decline in forest products emanating from the north. The Southern Pacific sold the Eel River Division to the Eureka Southern Railroad in 1984. An undercapitalized start-up, the

Eureka Southern went bankrupt after just two years of operation. Ex. 3 at STB 11. This prompted public officials along the Line to take steps to save the right of way for freight and passenger use. *See* Ex. 5 at STB 33 (“NCRA was formed April 1992 to ensure continuation of railroad service in Northern California.”). In 1989, the Legislature established a “local agency” known as NCRA to acquire and operate the Line. Cal. Gov’t Code § 93000 *et seq.* The statute establishing NCRA provides it “may acquire, own, lease, and operate railroad lines and equipment, including, but not limited to, real and personal property, tracks, rights-of-way, equipment and facilities.” Cal. Gov’t Code § 93021. The statute envisions that NCRA would cede the operation of the Line to a private franchisee. The statute states NCRA may “[e]valuate alternative plans from the private sector to acquire, finance, and operate a railroad system in a manner which achieves the purposes specified in Section 93003.” Cal. Gov’t Code § 93023(b) (citing § 93003, which describes general benefits of preserving the rail line). NCRA also may “[s]elect a franchisee to acquire, finance, and operate the railroad system.” Cal. Gov’t Code § 93023(d). It is empowered “[t]o select a franchisee, which may be a public or private entity, to acquire or operate a rail transportation system within the area of the authority’s jurisdiction.” *Id.*

The legislation distances the State of California from involvement in rail operations: “The authority may prepare a plan for the acquisition and operation of any railroad line specified in Section 93001, at *no expense to the state*, to achieve the purposes set forth in Section 93003.” Cal. Gov’t Code § 93022 (referencing the Eureka Southern Railroad line and the Northwestern Pacific Railroad line, which were eventually acquired by NCRA, and the California Western line, which was not) (emphasis added). The final provision of the legislation provides “the state is not liable for any contracts, debts, or other obligations of the authority.” Cal. Gov’t Code

§ 93025. The statute's emphasis on selecting a private franchisee to operate the rail indicates the state had no intent to operate the Line itself.

In 1992, NCRA purchased the Eel River Division from the bankruptcy trustee, using \$5.2 million in state Proposition 116 funds. Ex. 5 at STB 33. NCRA then formed a joint powers entity with the County of Marin and the Golden Gate Bridge District called the Northwestern Pacific Railroad Authority (NWPRRA), which purchased the Russian River Division in 1996 for \$28.5 million. Ex. 6 at STB 37–41 (Purchase and Sale Agreement between Southern Pacific and NCRA); see *North Coast Railroad Authority—Lease and Operation Exemption—California Northern Railroad Company*, 61 Fed. Reg. 189, 50902 (Sept. 27, 1996) (“*NCRA Lease and Operation Exemption*”). Ninety percent of the purchase funds were federal grants and loans, and the balance state bonds. Acquisition of the right of way was thus primarily a federal project with lesser amounts of state funds. See Ex. 21 at STB 173–74 (Joint Powers Agreement states NCRA to maximize use of federal “Q” funds and other federal funding to acquire the line).

In 2003, as interest in building a passenger commuter system developed, the Legislature created yet another local entity, the Sonoma Marin Area Rail Transit District (SMART). NWPRRA was dissolved that same year and the ownership of the Line was divided between NCRA and SMART. Ex. 3 at STB 11. The right of way north of Healdsburg was granted to NCRA and the portion south of Healdsburg to SMART. *Id.* NCRA and SMART were each granted exclusive easements to use the other's right of way and railroad track and facilities for freight and passenger service, respectively. See *id.* Each was also entitled to run passenger excursion trains. *Id.* The grant of easements was dependent on NCRA and SMART maintaining an Operating and Coordination Agreement, the most recent version of which was approved by the respective governing boards in June 2011. Part of this agreement included SMART's specific

approval of NWPCo as the Line's freight carrier. Ex. 7 at STB 45 (Operating and Coordination Agreement for the Line).

**C. NCRA Obtains Board Certification, Selects A Franchisee To Operate The Line, Addresses Line Damage Caused By A Series Of Storms, And Selects Another Operator**

In 1992, after NCRA purchased the Line, it obtained Board authorization and commenced rail operations. NCRA did not perform any CEQA analysis as a condition for preclearance to operate the Line. It received no funds from the state for operations and operations were largely unprofitable. Consequently, the NCRA governing board decided to turn the rail operations over to a private franchisee, as authorized by NCRA's enabling statute. In 1997, NCRA issued a Request for Proposal for operation and maintenance of the Line. See Ex. 3 at STB 12. A Colorado company, the Northwestern Pacific Railway Company LLC (NWPY) was awarded the operations contract. Ex. 5 at STB 34. NCRA did not perform any CEQA analysis before authorizing NWPY to begin its operations.

During the winter of 1998, a series of storms struck the north coast of California, causing severe damage to the Line. The Federal Railroad Administration issued Emergency Order 21, closing the entire Line. *See Federal Railroad Administration Emergency Order No. 21*, 63 Fed. Reg. 236, 67976-79 (Dec. 9, 1998). In 2000, California enacted the Traffic Congestion Relief Act (TCRA), a statewide program under which NCRA was granted \$60 million, to cover payment of past public and private debt, TCRA program administrative expenses, project environmental clearance, and track stabilization, which would help to repair some of the damage caused by the 1998 storms. *See generally* Ex. 8 at STB 47-63 (2001 Master Agreement for State Funded Projects). None of these funds were authorized or used for railroad operations. *See* Ex. 9 at STB 63-73 (TCRA Application and Resolution TFP 06-25). After some repairs, the Order was

partially lifted from February until September 2001; however, NWPY went bankrupt in 2001. Ex. 3 at STB 12–13.

Anticipating the reopening of the Line after making additional repairs of the track and signals, yet lacking funds to operate the Line, the NCRA governing board once again sought a private franchisee to perform and finance operations. NCRA published and circulated a Request for Proposal (RFP) on January 17, 2006. Ex. 3 at STB 9–13. This was a detailed solicitation for a private franchisee to assume and finance operations, equipment, routine maintenance, improvements, business development, insurance, regulatory compliance, and other functions.

On May 10, 2006, NCRA selected NWPCo out of a field of five private-sector candidates. After negotiations, NCRA and NWPCo entered into the Operations Agreement on September 13, 2006. Ex. 10 at STB 74–92. Seven days later, NWPCo made its first monthly lease payment to NCRA under the Operations Agreement and has continued to this day to meet all of its obligations under the Operations Agreement.

The Operations Agreement grants NWPCo all freight operating rights to the Russian River Division for an initial term of five years. Ex. 10 at STB 80. The Agreement also granted NWPCo the right to build, repair, and modify the tracks. Ex. 10 at STB 88. By exercise of options, NWPCo could extend the term for an additional 99 years. Ex. 10 at STB 81. The Operations Agreement requires NWPCo's compliance with applicable local, state, and federal law, explicitly subject to the preemptive jurisdiction of the Interstate Commerce Commission Termination Act of 1995:

In using the Premises, and in constructing, maintaining, operating and using the Track and Track Support Structures, NWP shall comply with any and all requirements imposed by federal or state statutes, or by ordinances, orders or regulations or any government body having jurisdiction, including, but not limited to, building and zoning ordinances requiring the occupancy, use or enjoyment of the Premises of regulating the character, dimensions or location of any Track and

Track Support Structures on the Premises, *subject to such exemptions from jurisdiction as may be set forth in the Interstate Commerce Commission Termination Act of 1995, 49 USC 10500 et seq.* Nothing herein shall diminish by this Agreement any rights under law or regulation to which NWP is entitled as a railroad providing common carrier service on any portion of the NWP Line.

Ex. 10 at STB 92 (emphasis added). In negotiating the Operations Agreement, the parties recognized that railroad construction and operations came within the jurisdiction of the Board, and included the above provisions to make it clear that the parties intended to honor the preemptive effect of federal law.

The Operations Agreement is conditioned on “NCRA having complied with the California Environmental Quality Act (‘CEQA’) *as it may apply to this transaction.*” Ex. 10 at STB 79 (emphasis added). Because a public agency entering into a transaction can trigger CEQA compliance, this clause was included to make it clear to NWPCo that NCRA may have to review the Operations Agreement under CEQA before signing it if NCRA determined CEQA applied. As it turned out, NCRA concluded CEQA was not required and no party challenged the Operations Agreement transaction within the CEQA statutory period so this condition was met.

**D. The Board Certifies NWPCo As A Rail Carrier And Rejects Challenges to NWPCo’s Exemption, Including a Challenge by Petitioner FOER Raising Environmental Impact Concerns**

In 2007, NWPCo obtained the Board’s certification as a carrier by filing a notice of an exemption with the Board. *Northwestern Pacific Railroad Company—Change in Operators Exemption—North Coast Railroad Authority, Sonoma-Marín Area Rail Transit District and Northwestern Pacific Railway Co., LLC*, 72 Fed. Reg. 168, 50161 (Aug. 30, 2007). In its notice to the Board, NWPCo noted that the resumption of rail service was exempt from environmental review under Code of Federal Regulations, title 49, sections 11506(b)(4) and (c)(1). The Board agreed and approved NWPCo as a rail carrier under the ICCTA. 49 U.S.C. § 10102(5). As a

result of the Board's decision, NWPCo has a mandatory duty to provide common carrier freight rail service on the Russian River Division. § 11101.

Two parties challenged NWPCo's August 2007 exemption from environmental review. First, Mendocino Railway filed a challenge with the Board seeking to stay the effectiveness of NWPCo's exemption. *Northwestern Pacific Railroad Company—Change in Operators Exemption—North Coast Railroad Authority, Sonoma-Marin Area Rail Transit District and Northwestern Pacific Railway Co., LLC*, STB Finance Docket No. 35073, 2007 WL 2571417 at \*1 (STB Served Sept. 7, 2007) (“*Mendocino Decision*”). Among other things, Mendocino Railway argued that the exemption was misleading by stating that no environmental document would be required. *Id.* at \*2.

In addition, Friends of the Eel River (FOER) filed a petition with the Board on October 1, 2007. *Northwestern Pacific Railroad Company—Change in Operators Exemption—North Coast Railroad Authority, Sonoma-Marin Area Rail Transit District and Northwestern Pacific Railway Co., LLC*, STB Finance Docket No. 35073, 2008 WL 275698 at \*1 (STB Served Feb. 1, 2008) (“*FOER Decision*”). FOER's stated concern was “the environmental impacts associated with NWPCo's restart of operation of the line.” *Id.* FOER asked the Board to revoke the exemption because it wanted environmental review before the resumption of rail services. *Id.* To support its argument, FOER submitted to the Board a copy of NCRA's publication of a Notice of Preparation (NOP) of an EIR regarding resumed operations on a portion of the Line and a copy of NCRA's initial study prepared pursuant to CEQA. *See id.* at \*2 & n.6. According to FOER, the NOP not only evidenced that environmental review was required, but NWPCo's exemption was flawed for failing to note the alleged significant environmental impacts that a resumption of nonexistent current operations would cause. *Id.*

On September 7, 2007, the Board rejected Mendocino Railway's challenge. *Mendocino Decision*, 2007 WL 2571417 at \*2. The Board also rejected FOER's challenges. *FOER Decision*, 2008 WL 275698 at \*3. The Board rejected FOER's demand for "revocation of the exemption because the Board did not conduct a review of the environmental effects of the resumption of train operations on the line," because it found NWPCo's operations "will not significantly affect either the quality of the human environment or the conservation of energy resources." *Id.* at \*2. FOER or Mendocino could have appealed the Board's decision to the U.S Court of Appeals (*see* 8 U.S.C. § 2321), but they did not and the Board's decision is final.

**E. NCRA And NWPCo Further Repair Segments Of The Russian River Division To Class II Freight Standards, But A Challenge By The City Of Novato Delays Completion Of Repairs**

NCRA's grant from the TCRA, which was administered by the California Transportation Commission (CTC), included \$31 million for "long term stabilization projects." Cal. Gov't Code § 14556.50(i). In November 2006, after extensive collaboration with CTC staff, NCRA began using TCRA funds for track and signal repair and replacement within the original Russian River Division right of way. Ex. 9 at STB 66–67. The authorized work included flood control projects in Humboldt and Marin Counties, and development of a wildlife restoration/flood control project in Napa in conjunction with the State Department of Fish and Game. All of these projects required CEQA clearance, under provisions of Master Agreement No. 64A0045 (the "Master Agreement"), by and between the CTC and NCRA. Ex. 8 at STB 63. Under the Master Agreement, the CTC could not authorize the expenditure of funds except for feasibility or planning studies "unless such a request is accompanied by an environmental impact report [if] mandated by the California Environmental Quality Act (CEQA)." *Id.* The Master Agreement recognizes reasons, such as a CEQA exemption, that would make an EIR unnecessary. For example, the Master Agreement states, "California Public Resources Code Section 21080(b)(10)

[a section of CEQA] does provide an exemption for [a] passenger rail [p]roject which institutes or increases passenger or commuter services on rail or highway rights-of-way already in use.” *Id.* Because the NCRA projects qualified for CEQA statutory and categorical exemptions, NCRA determined that an EIR for the repair work was not necessary. The agency properly filed with the California Office of Planning and Research and each of the affected counties four “Notices of Exemption” publicly announcing it would conduct repair work without performing CEQA review.<sup>2</sup> The CTC disbursed the TCRA grant money without requiring an EIR.

On October 4, 2007, the City of Novato brought a CEQA action against NCRA based on its track repair work within city limits, naming NWPCo, the California Department of Transportation, CTC, and others as real parties in interest. *See* Ex. 13 at STB 96 (Consent Decree, *City of Novato v. NCRA*). Novato claimed that NCRA had improperly “segmented” the track repair work for the Russian River Division from the work that would be needed to reopen the Eel River Division when determining the work was exempt from CEQA. Novato sought injunctive relief that would stop work until such time as a full EIR encompassing the entire 314-mile right of way was prepared. *Id.* After a series of adverse rulings in the Marin County Superior Court denying ICCTA preemption and statute of limitations motions, NCRA, NWPCo, and the State of California parties settled with Novato. The settlement agreement required NCRA to weld tracks in Novato, install quiet zones, establish a noise abatement fund, and provide landscaping and fencing. NWPCo was required to use low emission engines when operating

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<sup>2</sup> On August 22, 2006, NCRA filed a statutory exemption that covered work related to storm damage debris removal and present and future flood control with the California Office of Planning and Research, as required by CEQA. Ex. 11 at STB 93 (August 2006 Notice of Exemption). On February 6, 2007, NCRA filed a notice of a categorical exemption for repairs within the 142-mile Russian River Division right of way. On June 4, 2007, that exemption was amended to reduce the project scope to 62.9 miles, given the lack of funds to extend farther. Ex. 12 at STB 94 (June 2007 Notice of Exemption). On October 6, 2007, NCRA filed a notice of a categorical exemption for flood control and wildlife habitat work.

within the Novato city limits. *Id.* at STB 103–4. The parties also agreed that CEQA clearance would be achieved for these projects if required. *Id.* at STB 107. The track welding and quiet zones were subsequently performed under categorical exemptions and no CEQA clearance was required for the other tasks.

**G. NWPCo and NCRA Complete The Repair Of Part Of The Russian River Division And Operations Finally Resume Along That Portion Of The Line**

The nine-month delay caused by the Novato CEQA suit and other factors caused the NCRA to run out of TCRA funds for repair of the Russian River Division before the railroad was ready for the FRA inspection required to finally lift of Emergency Order 21. To fill the gap, NWPCo obligated itself for a \$3.18 million dollar loan under the Federal Railroad Rehabilitation and Improvement Financing program. These funds and an additional \$3,495,676 million in private funds paid by NWPCo were used to finish the track and signal rehabilitation on the majority of the Russian River Division in 2010. *See Ex. 14 at STB 109–10 (March 2010 NCRA Staff Report).*

In May 2011, FRA conducted an investigation of the completed rehabilitation work and lifted Emergency Order 21 for part of the Russian River Division. *Northwestern Pacific Railroad Co.; Notice of Partial Relief from Emergency Order No. 21*, 76 Fed. Reg. 90, 27171–72 (May 10, 2011). In June 2011, the SMART board approved the Operating and Coordination Agreement, including approval of NWPCo as freight operator. The Operating and Coordination Agreement did not contain any requirement that NWPCo or NCRA comply with CEQA. NWPCo commenced operation immediately after the lifting of Emergency Order 21 and SMART authorization, and has continuously served shippers and receivers since then.

## **F. NCRA Conducts CEQA Review Of Railroad Operation**

When it commenced the TCRA-funded repair project, NCRA expected to expend over \$4 million for environmental clearance for the work planned along the Eel River Division. The \$4 million included the funds requested by NCRA and appropriated by the CTC for a geologic study and an EIR and Environmental Impact Statement (EIS) for the Eel River Division. NCRA anticipated that the Eel River Division would require an EIS under the National Environmental Policy Act (NEPA) because it required approval of federal agencies with jurisdiction over the Eel River and surrounding land. *See* Ex. 9 at STB 67.

As mentioned above, the delay caused by the Novato lawsuit and resulting shortfalls in funding for the Russian River Division repairs made an Eel River Division EIR/EIS unnecessary because no funds remained for repairs in that division. NCRA then faced a dilemma as to what to do with the TCRA funds allocated for an EIR/EIS and the technical reports that it had already commissioned in anticipation of preparing such a document. NCRA decided to use the funds to prepare an EIR that NCRA mistakenly believed would be required for operations on the Russian River Division. Ex. 15 at STB 113.

The June 20, 2011 NCRA certification of an EIR that covered operations of the railroad drew NCRA and NWPCo into the present CEQA litigation, which challenges the adequacy of NCRA's EIR. Recognizing that the EIR was not required by law as NCRA previously believed, the NCRA governing board rescinded Resolution 2011-02 on April 10, 2013. Ex. 17 at STB 116-21.<sup>3</sup>

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<sup>3</sup> California case law holds that a public entity that prepares an EIR in the mistaken belief the EIR is necessary is not estopped from later defending against a CEQA challenge by contending that no EIR was legally required in the first place. *Del Cerro Mobile Estates v City of Placentia*, 127 Cal. Rptr. 3d 413 (Cal. Ct. App. 2011).

## **G. Overview Of The State-Law-Based CEQA Writ**

Although no EIR was ever legally required, CEQA litigants filed a Petition for a Writ of Mandate on July 20, 2011, alleging violations of CEQA and seeking to enjoin NWPCO's operation of the Russian River Division pending additional CEQA review. Ex. 1 at STB 2, 4; *see* Ex. 2 at STB 6–8. The Marin County Superior Court heard the case on the merits and issued an order denying the petitions, concluding that the ICCTA preempted CEQA litigants' CEQA claims. Ex. 19 at STB 130–38. The court noted the case was essentially an attempt to enforce a contract between the NCRA and the State of California, and rejected this on the grounds that no contract claim was pled, and CEQA litigants were not parties to the contract. *Id.* at STB 138.

CEQA litigants appealed, and in an opinion filed September 29, 2014 (as modified on October 17, 2014), the Court of Appeal affirmed the decision of the trial court. *Friends of Eel River v. N. Coast R.R. Auth.*, 178 Cal. Rptr. 3d 752, 783 (Cal. Ct. App. 2014), *rev. granted*, California Supreme Court, Case No. S222472. The Court of Appeal decision was published after *Town of Atherton v. California High-Speed Rail Authority*, 175 Cal. Rptr. 3d 145 (Cal. Ct. App. 2014), a separate decision by a different Division of the Court of Appeal that concerned the preemption of CEQA by the ICCTA. *Friends of Eel River* disagreed with *Town of Atherton's* analysis of the market participant doctrine thereby creating a split of authority between different divisions of the state's intermediate appellate courts. *Friends of Eel River*, 178 Cal. Rptr. 3d at 777–78. Based on this split, CEQA litigants sought California Supreme Court review of *Friends of Eel River*. On December 10, 2014, review was granted and the matter is currently pending before the California Supreme Court. *Friends of Eel River v. North Coast Rail Authority*, California Supreme Court, Case No. S222472.

### III.

#### ARGUMENT

Declaratory relief is appropriate to prevent interference with NWPCo's authorized rail operations and to clarify the preemptive effect of the ICCTA in light of the conflicting holdings of *Town of Atherton* and *Friends of Eel River*. Due to those conflicts, the California Supreme Court (Case No. S222472) is now poised to decide whether the ICCTA preempts the application of CEQA to a state agency's regulation of a publicly owned, privately operated rail line, and whether the market participation doctrine can be used by outside parties who are not privy to any contract or agreement to defeat ICCTA preemption.

The Board is uniquely qualified to decide these issues. In fact, the Board has already considered similar issues in *California High-Speed Rail Authority—Petition for Declaratory Order*, STB Finance Docket No. 35861, 2014 WL 7149612 (STB Served Dec. 12, 2014) (“*HSRA Order*”). And the same reasons that supported the Board issuing the *HSRA Order* support the issuance of an order here. Namely, the “issue is ripe for a decision,” “uncertainty regarding the preemption issue could impact” NWPCo's right to ongoing operation of the Line, and a decision would “inform interested parties and the California Supreme Court of [the Board's] views on federal preemption of CEQA and the market participant doctrine as they relate to this matter involving railroad transportation within the Board's jurisdiction under § 10501(b).” *See, HSRA Order*, 2014 WL 7149612 at \*4.

Indeed, the facts here are even more compelling than they were in the *HSRA* matter because NWPCo is a private operator conducting freight rail operations pursuant to STB approval and is in the classic position of rail operators nationwide who would otherwise be

subject to the patchwork of state regulations absent uniform application of the ICCTA, ensured through its broad preemptive force.

**A. A Declaratory Order Is Appropriate And Necessary To Bring Clarity To Issues Under The Board’s Exclusive Jurisdiction**

The Board has discretion to issue declaratory orders to eliminate controversy and remove uncertainty over matters within its jurisdiction. 5 U.S.C. § 554(e); 49 U.S.C. § 721. The Board has used its discretion to issue declaratory orders in cases where there is a question regarding the scope of ICCTA preemption. See, e.g., *HSRA Order*, 2014 WL 7149612 at \*3; *Soo Line Railroad Company–Petition for Declaratory Order*, STB Finance Docket No. 35850, 2014 WL 7330097 (STB Served Dec. 23, 2014) (“*Soo Line*”); *Grafton & Upton R.R. Co.–Petition for Declaratory Order*, STB Finance Docket No. 35779, 2014 WL 292442 at \*2 (STB Served Jan. 27, 2014); *DesertXpress Enterprises, LLC–Petition for Declaratory Order*, STB Finance Docket No. 34914, 2007 WL 1833521 at \*2 (STB Served June 27, 2007) (“*DesertXpress*”); *Cities of Auburn & Kent, WA–Petition/or Declaratory Order–Burlington Northern Railroad Company–Stampede Pass Line*, 2 S.T.B. 330, 1997 WL 362017 (STB Served July 2, 1997), *aff’d*, *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998).

Here, there is a live controversy in California about whether the ICCTA preempts CEQA, which creates uncertainty regarding NWPCo’s ability to continue operating the Russian River Division. *Friends of Eel River v. North Coast Rail Authority*, California Supreme Court, Case No. S222472. Any intrusions into the Russian River Division’s operations ordered by a court are within this Board’s jurisdiction, since the Board has exclusive jurisdiction over:

- (1) transportation by rail carriers, and the remedies provided in this part with respect to . . . rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State.

49 U.S.C. § 10501(b); *see also King County, WA–Petition for Declaratory Order–Burlington Northern R.R.–Stampede Pass Line*, 1 S.T.B. 731, 734 (STB Served Sept. 25, 1996) (“*King County*”) (“The power to authorize the construction of rail lines and the power to authorize railroads to operate over them has been vested exclusively in the Board by section 10901 of the ICCTA.”).

Section 10501(b) “is intended to prevent a patchwork of local regulation from unreasonably interfering with interstate commerce.” *HSRA Order*, 2014 WL 7149612, at \* 5. Accordingly, the remedies provided under 49 U.S.C. § 10501 “with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” 49 U.S.C. § 10501(b); *see King County*, 1 S.T.B. 731 at 736 (“Indeed, Congress in the ICCTA has confirmed that the jurisdiction of the Board over transportation by rail carriers . . . is exclusive and preempts the remedies provided under federal or state law.”). Thus the Board has exclusive jurisdiction over the Russian River Division’s maintenance and operation, and its jurisdiction preempts remedies for any perceived infraction under CEQA. Because the Board is “‘uniquely qualified’ to determine the preemption question,” a declaratory order is appropriate to end the uncertainty about the rail line’s continued operations and prevent undue interference with interstate commerce. *See HSRA Order*, 2014 WL 7149612, at \*4.

**B. The Board Should Affirm Its Finding That the ICCTA Preempts CEQA, Even As To A State Agency’s “Proprietary” Acts With Respect To A State-Owned And Funded Rail Line**

In interpreting the reach of ICCTA preemption, “the Board and the courts have found that it prevents states or localities from intruding into matters that are directly regulated by the Board

(e.g., rail carrier rates, services, construction, and abandonment).” *HSRA Order*, 2014 WL 7149612, at \*6. For example, ICCTA preemption “prevents states and localities from imposing requirements that, by their nature, could be used to deny a rail carrier’s ability to conduct rail operations,” such as “state or local permitting or preclearance requirements, including environmental permitting or preclearance requirements.” *Id.*, citing *Green Mountain v. Vermont*, 404 F.3d 638, 643 (2d Cir. 2005) and *City of Auburn v. United States*, 154 F.3d 1025, 1027–31 (9th Cir. 1998); see *Soo Line*, 2014 WL 7330097, at \*5 (holding “the environmental and wetlands review and permitting requirements of the State and the City are categorically preempted by § 10501(b)”). CEQA is just such “a state preclearance requirement that, by its very nature, could be used to deny or significantly delay an entity’s right to construct a line that the Board has specifically authorized, thus impinging upon the Board’s exclusive jurisdiction over rail transportation.” *HSRA Order*, 2014 WL 7149612, at \*7. For this reason, the Board has more than once held that the ICCTA preempts CEQA with respect to the construction and operation of a rail line subject to the Board’s jurisdiction. See *id.* at \*7 (“the Board concludes that CEQA is categorically preempted by § 10501(b)”); *DesertXpress*, STB Finance Docket No. 34914, at \*4 (Board found that it had exclusive jurisdiction over “the planned new track, facilities and operations” and that CEQA was thus preempted.).

Here, there is no reason for the Board to stray from its prior decisions. To the contrary, the Board authorized the repair and operation of the Russian River Division by NCRA and NWPCo. *NCRA Lease and Operation Exemption*, 61 Fed. Reg. 189, 50902 (Sept. 27, 1996); *Northwestern Pacific Railroad Company—Change in Operators Exemption—North Coast Railroad Authority, Sonoma-Marín Area Rail Transit District and Northwestern Pacific Railway Co., LLC*, 72 Fed. Reg. 168, 50161 (Aug. 30, 2007). Thus, like the CEQA enforcement suit at

issue in the *HSRA Order*, “a CEQA enforcement suit in this context attempts to regulate a project that is directly regulated by the Board.” *HSRA Order*, 2014 WL 7149612, at \* 7. Since “[s]ection 10501(b) expressly preempts any state law attempts to regulate rail construction projects” or any rail operations, as they are under the Board’s exclusive jurisdiction, CEQA must be preempted by the ICCTA. *Id.*

As in the *HSRA Order*, the above conclusion is not altered by the fact that NCRA is a public entity because the ICCTA preempts CEQA even when the rail line is owned and funded by a public entity or state. *See id.*, 2014 WL 7149612 at \*7 (finding that CEQA is preempted as to the construction of a California-owned line); *North San Diego County Transit Dev. Bd—Petition for Declaratory Order*, STB Finance Docket No. 34111, 2002 WL 1924265, at \*6 (STB served Aug. 21, 2002) (finding the state-law claims under CEQA were preempted by the ICCTA as to a line owned and operated by a public entity because state or local laws that set up processes that could defeat railroad operations would impinge on federal regulation of interstate commerce). Applying ICCTA preemption equally to private and public entities serves the purpose of preemption, which is to secure uniformity of the rules and regulations that apply to rail transportation, and is supported by U.S. Supreme Court decisions regarding rail transportation. *See Hilton v. South Carolina Public Railways Comm’n*, 502 U.S. 197, 203 (1991) (in Federal Employer’s Liability Act case, Court declined to “throw into doubt” prior U.S. Supreme Court decisions “holding that the entire federal scheme of railroad regulation applies to state-owned railroads.”); *California v. Taylor*, 353 U.S. 553, 566–67 (1957) (Congress intended Railway Labor Act “to apply to any common carrier by railroad engaged in interstate transportation, whether or not owned or operated by a State.”). In sum, even though the Line is

owned by NCRA, a public entity, the ICCTA nonetheless preempts CEQA as it might otherwise apply to operations on the Line.

This case presents a more compelling case for federal preemption than HSRA because the NCRA is the owner of the rail, but in 2006 exercised its authority explicitly granted to it by statute to turn railroad operations over to a private entity, NWPCo. Ex. 10 at STB 75–76. If NCRA can impose CEQA regulation on NWPCo in this context, just because NCRA itself was created under state law, it effectively nullifies the preemptive effect of the ICCTA. No principled application of federal preemption would lead to a result whereby NWPCo has lost the ability to operate on an equal footing with other private rail carriers both within and outside of California solely because the rail line it operates is owned by a public entity.

**C. The Market Participant Doctrine Is Not An Exception To ICCTA Preemption Of CEQA That Can Be Asserted By Third Parties**

CEQA litigants claim immunity from federal preemption under the so-called “market participant” or “market participation” doctrine, which arises from the dormant Commerce Clause jurisprudence of the U.S. Supreme Court. Ex. 20 at STB 143–54. The market participation doctrine permits the state to procure goods and services, acting on its own account and without regulatory intent, in the same manner as private parties, i.e. exempt from federal preemption. CEQA litigants have taken the doctrine a step further by claiming outside parties without contractual privity or any connection to the alleged market participation by the state have the right to step into the shoes of the state and impose an exemption from federal preemption, even when the state itself is claiming preemption applies. Ex. 20 at STB 154–57.

In its HSRA Declaratory Order, the Board has already found good reason not to apply the market participant doctrine in a matter where the state was at least ostensibly in the market for planning and construction of a new railroad. *HSRA, supra*, 2014 WL 7149612, at \*10. The

market participant cases cited by CEQA litigants all have as common elements a state's active involvement in a marketplace and a litigant allegedly harmed by that active involvement. *Building & Constr. Trades Council v. Associated Builders and Contractors*, 507 U.S. 218, 231 (1993) (“*Boston Harbor*”) (non-union labor sued state agency for requiring labor union as part of its bid specification for an ongoing construction project); *Reeves, Inc. v. Stake*, 447 U.S. 429, 440 (1980) (out-of-state buyer of cement sued state cement plant based on injury suffered after plant instituted policy to sell cement to residents first to prevent shortages); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806–09 (1976) (state subsidizing instate scrap dealers as part of state vehicle recycle effort and denial of subsidy to non-state dealer); *Engine Manufacturers Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031, 1043 (9th Cir. 2007) (California's decision to purchase vehicles with high fuel-efficiency standards for its fleets).

Here, there is no such active involvement by the state in the market that could be the subject of CEQA litigants' action. Any state “proprietary” involvement in the marketplace for rail operations occurred prior to the instant action and did not involve the CEQA litigants. NCRA issued a Request for Proposals to operate the railroad in 2006. NCRA's entry into the Operations Agreement with NWPCo occurred that same year. The state's allocation of TCRA money for rail repair did not include funds for operation and, in any event, occurred in 2000, with the repair work completed in 2010.

CEQA litigants attempt to get around the various bars to their litigation by artificially constructing a situation whereby the State of California is actively in the marketplace to secure railroad operations. To the contrary, from the outset the state distanced itself from any obligation to pay for railroad operations along the Line. The Legislature, when creating NCRA, stated that “[t]he authority may prepare a plan for the acquisition and operation of any railroad line

specified in Section 93001, at *no expense to the state*, to achieve the purposes set forth in Section 93003.” Cal. Gov’t Code § 93022 (emphasis added).

CEQA litigants also attempt to create a market transaction by claiming NCRA entered the market for rail operations when it decided to study such operations in an EIR. But NCRA’s admittedly mistaken decision to prepare an EIR for resumed railroad operations did not put it back into the marketplace for an operator. It had already entered and exited the market for rail operators long before it commissioned the EIR. Once NCRA signed the Operations Agreement, it was no longer acting as a “market participant” and had no unilateral power to change its contractual agreement with NWPCo.

Despite CEQA litigants’ attempt to portray NCRA as taking a proprietary role in the marketplace, regulatory compliance under CEQA is not “market participation,” but rather a classic example of state regulation. *See* Cal. Pub. Res. Code §§ 21000 (titled “State agencies shall *regulate* to prevent environmental damage” (emphasis added)), 21000(g) (“It is the intent of the Legislature that all agencies of the state government . . . shall *regulate* such activities so that major consideration is given to preventing environmental damage” (emphasis added)). When CEQA is required, it is mandatory, and would never be described as voluntary participation in a market. *See* 14 Cal. Code Regs. § 15064(a)(1) (“If there is substantial evidence . . . that a project may have a significant effect on the environment, the agency *shall* prepare a draft EIR” (emphasis added)). For these and manifold other reasons, the Board should affirm its recent decision “that the market participation doctrine does not apply in the context of a CEQA enforcement suit for a railroad project under our jurisdiction.” *HSRA Order*, 2014 WL 7149612, at \*10.

Even if this case concerned a “market transaction” for rail operations, the market participant doctrine would be inapplicable. Nevertheless, as in the litigation that led to the *HSRA Order*, CEQA litigants here rely on *Town of Atherton* to claim CEQA applies because of the market participation “exception” to preemption. This claim fails for the reasons explained below.

1. The Market Participation Doctrine Does Not Apply If Preemption Is Express

As explained above, the ICCTA expressly preempts CEQA, particularly the use of CEQA to regulate NWPCo’s operations. For this reason, the market participant doctrine does not apply. *See, e.g., Boston Harbor*, 507 U.S. at 231 (“A threshold question when applying the market participation doctrine is whether the federal regulation in question contains “any express or implied indication by Congress that the presumption embodied by the market participant doctrine should not apply.”).

The market participant doctrine is sometimes called an exception to preemption, but really works as a rebuttable presumption that “pre-emption doctrines apply only to state regulation,” and not to states acting as proprietors of goods and services. *Id.* at 227. This presumption arises because “[t]here is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market.” *Reeves*, 447 U.S. at 436–37 (internal citation omitted). Accordingly, courts are to presume that “[i]n the absence of any *express or implied* indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, *and where analogous private conduct would be permitted*,” Congress did not mean to restrict state conduct. *Boston Harbor*, 507 U.S. at 231–32 (emphasis added); *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031, 1042 (9th Cir. 1980) (“Because the market participant doctrine is not a wholly freestanding doctrine, but rather a presumption about congressional intent,” a court must consider whether the relevant federal act

contains “any express or implied indication by Congress that the presumption embodied by the market participant doctrine should not apply.”). If the federal act contains such an express or implied indication, the market participation does not apply. *Id.*

The Board has considered the preemption clause in the ICCTA and found that it categorically preempts CEQA. *HSRA Order*, 2014 WL 7149612, at \*7. Accordingly, the presumption about congressional intent as it relates to rail construction and operation under the Board’s jurisdiction has been rebutted and the market participation doctrine cannot be used to defeat the ICCTA’s preemption of CEQA. The conclusion that the ICCTA expressly preempts CEQA for rail construction and operation should be the end of the inquiry for the purposes of the market participation doctrine.

2. CEQA Lawsuits Are Regulatory And Therefore Not Covered By The Market Participation Doctrine

Assuming *arguendo* that the ICCTA does not expressly preempt the open-ended regulatory process embodied by CEQA, and therefore the presumption that underlies the market participation doctrine has not been rebutted, the next step in the analysis would be to determine whether the challenged state program is regulatory or proprietary. *See, e.g., White v. Mass. Council of Const. Employ., Inc.* 460 U.S. 204, 208 (1983) (“single inquiry” is limited to ascertaining “whether the challenged program constituted direct state participation in the market” or is instead a regulatory program). To determine whether a state program is regulation or market participation, courts ask two questions: (1) “does the challenged action essentially reflect the entity’s own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances,” and (2) “does the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem.” *Cardinal*

*Towing v. City of Bedford*, 180 F.3d 686, 693 (5th Cir.1999) (“*Cardinal Towing*”). The questions are in the alternative, and the goal is to determine whether the challenged government interaction with the market is “so narrowly focused, and so in keeping with the ordinary behavior of private parties, that a regulatory impulse can be safely ruled out.” *Id.*

Examining NCRA’s interaction with the market for rail, it is clear that CEQA compliance and remedies are regulatory and outside the ordinary behavior of private parties. CEQA is the quintessential environmental pre-clearance law that is expressly preempted by ICCTA. *See* Cal. Pub. Res. Code §§ 21081, § 21168.9 (CEQA’s substantive mandates and remedial provisions); *see also County of Orange v. Superior Court*, 6 Cal. Rptr. 3d 286, 291–92 (Cal. Ct. App. 2003) (recognizing project delay may result even from unsuccessful CEQA litigation). CEQA requires a “lead agency” (the government) to use its discretion to determine potential environmental impacts and then, in connection with any permit to be issued, ensure compliance with enforceable mitigation measures. *See, e.g.,* Cal. Pub. Res. Code § 21081.6(b) (“[a] public agency shall provide that measures to mitigate or avoid significant effects on the environment are fully enforceable through permit conditions”); *see also Citizens Opposing a Dangerous Env’t v. Cnty. of Kern*, 174 Cal. Rptr. 3d 683, 698–99 (Cal. Ct. App. 2014) (citing Cal. Pub. Res. Code § 21001). Such universal, state-imposed requirements are not so focused and in keeping with the ordinary behavior of private parties that a regulatory impulse can be safely ruled out.

Again, it is noteworthy that unlike the HSRA, NCRA is not a state entity acting only on its own behalf. Rather, should NCRA be forced, by application of state law, to impose CEQA requirements on NWPCo, this would constitute the classic preemption scenario where a public agency imposes state regulations on a private party. *See* Ex. 10 at 5.

Moreover, as the Board has recognized, even if a state agency's choice to comply with CEQA "can be viewed as 'proprietary' and the initial decision to prepare the EIR a component of this proprietary action," CEQA's standing provisions, which allow any member of the public to bring a writ proceeding "challenging the adequacy of the review under CEQA is not part of this proprietary action." *HSRA Order*, 2014 WL 7149612, at \*10 (internal quotation marks omitted). This is true for at least two reasons.

First, as the Board correctly noted, "when a state invokes the market participation doctrine, it usually does so 'defensively' to protect its actions from federal preemption." *Id.* When third-party petitioners claim to have standing to bring a CEQA lawsuit based on the market participation doctrine, however, "petitioners seek to stand the market participation doctrine on its head and use it to avoid the preemptive effect of a federal statute the state entity is seeking to invoke." *Id.* (alteration and internal quotation marks omitted). Indeed, before the ill-conceived holding in *Town of Atherton*, there were no "cases involving market participation [that] use the doctrine in this context, and such a use would be antithetical to the purpose underlying the doctrine." *Id.*

Second, by imposing CEQA as though they themselves were market participants, CEQA litigants face an irreconcilable conundrum. Their defeat of federal preemption depends on CEQA being proprietary and not regulatory. Yet, standing to bring their writ action derives from the legal authority to assume the role of the Attorney General to enforce a public right that is regulatory in nature.

As *Rialto Citizens for Responsible Growth v. City of Rialto*, 146 Cal. Rptr. 3d 12, 22–23 (Cal. Ct. App. 2012) ("*Rialto*") explains, citizens have standing to enforce CEQA "under the 'public interest exception' to the general rule that a party must be beneficially interested in the

issuance of a writ in order to petition for the writ.” “As a general rule, legal standing to petition for a writ of mandate requires the petitioner to have a beneficial interest in the writ’s issuance.” *Id.* But “[a] petitioner who is not beneficially interested in a writ may nevertheless have ‘citizen standing’ or ‘public interest standing’ to bring the writ petition under the ‘public interest exception’ to the beneficial interest requirement.” *Id.* at 23.

The purpose of the public interest exception to otherwise applicable standing requirements is to guarantee “citizens the opportunity to ensure that no governmental body impairs or defeats the purpose of legislation establishing a *public right*.” *Id.* (citations and internal quotation marks omitted) (emphasis added). In other words, the general public can sue to enforce CEQA rights because they are regulatory in nature. The public interest exception to general rules regarding standing allows citizens to perform the regulatory duty of the attorney general to enforce a public duty imposed by state regulation, such as CEQA.<sup>4</sup> Since the market participation doctrine can be invoked only when the state acts as a market participant with no interest in setting policy, i.e., when a state seeks to secure services it needs and does not attempt to protect society as a whole by regulating others (*Cardinal Towing*, 180 F.3d at 691), that doctrine does not support allowing citizens to act as regulators by bringing CEQA lawsuits (*see, e.g., Rialto*, 146 Cal. Rptr. 3d at 23).

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<sup>4</sup> The regulatory role of public interest standing to enforce laws is underscored by California Code of Civil Procedure section § 1021.5, which “codifies the private attorney general doctrine” under which petitioners who successfully enforce the law may be entitled to recover reasonable attorneys’ fees. *Healdsburg Citizens for Sustainable Solutions v. City of Healdsburg*, 142 Cal. Rptr. 3d 250, 252–53 (Cal. Ct. App. 2012). Successful petitioners with public interest standing in CEQA cases are routinely awarded attorneys’ fees under section 1021.5 because, by enforcing CEQA, petitioners conferred a significant benefit on a large segment of the public. *See, e.g., id.; Building a Better Redondo, Inc. v. City of Redondo Beach*, 137 Cal. Rptr. 3d 622 (Cal. Ct. App. 2012).

As in the *HSRA Order*, “the relevant regulatory actions are not the procurement of goods or services for the Line, but rather the third-party enforcement suits filed against” NCRA. *HSRA Order*, 2014 WL 7149612, at \*10, n.23. And therefore, this case is equally “analogous to the so-called *Grupp* cases discussed in *Eel River*, in which the courts held that when a third party ‘relies on a state law of general application to challenge a state proprietary action, that challenge operates as a regulation, rather than a part of the proprietary action being challenged.’” *Id.* (quoting *Friends of Eel River*, 178 Cal. Rptr. 3d at 776–77).

In sum, “[t]he aspect of CEQA that allows a citizen’s group to challenge the adequacy of an EIR when CEQA compliance is required is clearly regulatory in nature, as a lawsuit against a governmental entity cannot be viewed as part of its proprietary action, even if the lawsuit challenges that proprietary action.” *Id.* at \*10. Accordingly, the market participation “exception” to preemption does not apply.

**D. Neither NCRA Nor NWPCo Agreed To Be Regulated Under CEQA, But Even If They Had, The ICCTA Preempts CEQA**

With the exception of its voluntary agreement with Novato to deploy low emission locomotives within city limits, NWPCo, as a private rail operator, never voluntarily (or involuntarily) agreed to submit to CEQA regulation by any state actor in operating its railroad. The binding contracts affecting NWPCo (the Operations Agreement and Operating and Coordination Agreement) do not require NWPCo compliance with CEQA. Instead, NWPCo has consistently asserted the ICCTA preempts state environmental review of its operations. *See Ex. 10 at STB 92.* Moreover, as explained in the facts section above, the decision by NCRA to prepare an EIR for operations of the railroad was gratuitous and not required by the TCRA program or California law. Public entities that mistakenly believe they are required to prepare an

EIR, or do so under no legal obligation, are not required to defend their unnecessary EIR. *See Del Cerro Mobile Estates*, 127 Cal. Rptr. 3d at 418–21.

Despite no evidence in the record to support CEQA litigants' voluntary agreement argument, throughout the litigation briefing, CEQA litigants have asserted that NCRA agreed to prepare an EIR for railroad operations in exchange for state TCRA funding. This assertion is incorrect. TCRA did impose CEQA compliance for specific repair work funded under the program and NCRA met those requirements to the satisfaction of the CTC by preparing categorical exemptions from CEQA. The TCRA funding did not extend to operation of the railroad, which was already under contract to NWPCo. Thus, no CEQA compliance, much less an EIR, was required for railroad operations.

CEQA litigants' fiction that the NCRA EIR was required for operations appears to be a purposeful means to obfuscate the fact that their instant action does not challenge CEQA compliance for the TCRA repair work as it would be time-barred if it did. They also failed to seek a writ to invoke CEQA for rail operations when the NCRA entered into a binding transaction for that purpose, or to challenge the 2011 Operating and Coordination Agreement between NCRA and SMART that specifically designated NWPCo as freight rail operator. The result is the instant attempt to manufacture a claim by cherry-picking elements from CEQA, contract, and market participation theories to overcome the obvious bar of federal preemption and CEQA's statute of limitations.

CEQA litigants' case rises and falls on a contract theory because at their core, their claims are an attempt to enforce their interpretation of contracts to which they are not parties. Their attempt fails for a number of reasons.

First and most fundamentally, their attempt fails because they neither pled nor attempted to prove they had any rights to enforce NCRA's or NWPCo's contracts. They pled and pursued their claims as CEQA writ claims enforcing California environmental regulation. Indeed, they affirmatively disavow that they seek to enforce these contracts even while relying on their interpretation of contract terms as the basis to overcome preemption of their writ claims. *See Friends of Eel River*, 178 Cal. Rptr. 3d at 773. Accordingly, to the extent NCRA is contractually committed to conduct environmental review under CEQA or NWPCo "agreed" to such regulation, CEQA litigants lack standing to enforce those contracts. *See, e.g., Jenkins v. JPMorgan Chase Bank, NA*, 156 Cal.Rptr.3d 912, 927 (Cal. Ct. App. 2013) ("an unrelated third party . . . lacks standing to enforce any agreements").

Second, had they alleged contract theories, CEQA litigants would have been obligated to plead the contract or contracts they seek to enforce, to assert their standing to enforce the contracts, and prove their interpretation over the objection of the actual parties to the contracts. Under California law, the first rule of contract interpretation is that "[a] contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." Cal. Civ. Code § 1636. CEQA litigants would require admissible evidence to contradict the contracting parties' own interpretation of their contracts. None of that was even attempted, much less accomplished.

Third, even if the CEQA litigants had pled and proved a contract requiring NWPCo to submit to the state environmental regulation under CEQA, the CEQA litigants would then have to establish that the contract, as so interpreted, would itself survive ICCTA preemption. CEQA litigants failed to do so. As the Board well knows, the Board typically allows enforcement of a rail contract's voluntary agreement because they are presumed to reflect "the carrier's own

determination and admission that the agreements would not unreasonably interfere with interstate commerce.” *Atherton*, 175 Cal.Rptr.3d 145 at 167. But as the Board has recognized, voluntary agreements to be regulated by CEQA are preempted by the ICCTA because, despite what a carrier may think, they are an unreasonable interference with the Board’s jurisdiction over railroad operations. *HSRA Order*, 2014 WL 7149612, at \*8.

Here, the Board’s jurisdiction extends to the Line because it is operated, as it has been for more than 100 years, as part of the interstate rail network. *Id.* As discussed above, the Board specifically authorized NCRA’s repair and NWPCo’s operations on the rail line. *NCRA Lease and Operation Exemption*, 61 Fed. Reg. 189, 50902 (Sept. 27, 1996); *Northwestern Pacific Railroad Company—Change in Operators Exemption—North Coast Railroad Authority, Sonoma-Marín Area Rail Transit District and Northwestern Pacific Railway Co., LLC*, 72 Fed. Reg. 168, 50161 (Aug. 30, 2007). Nevertheless, the Line has been embroiled in CEQA litigation for several years, and will not be clear of litigation unless the California Supreme Court decides the case in NCRA and NWPCo’s favor. If CEQA litigants were successful before the California Supreme Court, they could then seek to permanently or temporarily halt operations on the Russian River Division, creating a direct conflict with the Board’s express authorization of those operations. Because “this conflict with [the Board’s exclusive] jurisdiction runs contrary to Congress’s intent” and “unreasonably interferes with interstate commerce,” it is preempted by the ICCTA. *HSRA Order*, 2014 WL 7149612, at \*8. Thus, the voluntary agreements as alleged by CEQA litigants would be preempted by § 10501(b). *Id.*

In sum, CEQA litigants have no ability to frame their traditional CEQA writ claims—which seek to enforce California state regulation on a freight rail operator—as though they are simply enforcing a contract. They are not enforcing a contract; they are pursuing writ relief and

depend on their status as citizens seeking to enforce state law as the basis for their standing to pursue these claims. Their claims are tantamount to regulation and are thus preempted.

**IV.**

**CONCLUSION AND REQUEST FOR EXPEDITED CONSIDERATION**

NWPCo respectfully requests the Board issue a Declaratory Order affirming NWPCo's right to operate under the Board's authorization and that, as applied to NWPCo's operations on the Russian River Division, CEQA is preempted. Expedited consideration is requested so that the Board's decision on this matter can be presented to the California Supreme Court prior to the Court issuing its decision.

Dated: November 18, 2015

Respectfully submitted,

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

Andrew B. Sabey  
Cox, Castle & Nicholson LLP  
50 California Street, Suite 3200  
San Francisco, CA 94111

*Counsel for Northwestern Pacific Railroad  
Company*

**CERTIFICATE OF SERVICE  
DECLARATION OF SERVICE BY MAIL**

**Before the Surface Transportation Board: Northwestern Pacific Railroad Company**

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is 50 California Street, Suite 3200, San Francisco, California 94111.

On **November 18, 2015**, I served the foregoing documents described as:

**1) PETITION FOR DECLARATORY ORDER**

in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

**SEE ATTACHED SERVICE LIST**

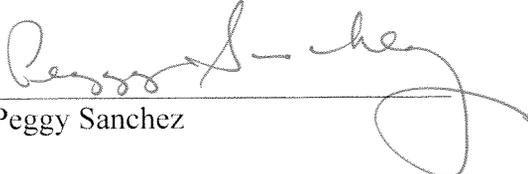
On the above date:

<input checked="" type="checkbox"/>	<b><u>BY U.S. MAIL:</u></b> The sealed envelope with postage thereon fully prepaid was placed for collection and mailing following ordinary business practices. I am aware that on motion of the party served, service is presumed invalid if the postage cancellation date or postage meter date on the envelope is more than one day after the date of deposit for mailing set forth in this declaration. I am readily familiar with Cox, Castle & Nicholson LLP's practice for collection and processing of documents for mailing with the United States Postal Service and that the documents are deposited with the United States Postal Service the same day as the day of collection in the ordinary course of business.
<input type="checkbox"/>	<b><u>BY ELECTRONIC MAIL DELIVERY:</u></b> By causing a true copy of the within documents to be mailed electronically to the offices of the addressees set forth below, on the date set forth above.

I hereby certify that I have served all Parties of record in this proceeding with this document by United States mail.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on **November 18, 2015**, at San Francisco, California.

  
\_\_\_\_\_  
Peggy Sanchez

**SERVICE LIST**

**Before the Surface Transportation Board: Northwestern Pacific Railroad Company**

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--	---

**Courtesy Copies**

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<p><b><u>Californians for Alternatives to Toxics</u></b> Deborah A. Sivas Environment Law Clinic Mills Legal Clinic at Stanford Law School 559 Nathan Abbott Way Stanford, California 94305 <i>Telephone: 650-723-0325</i> <i>Facsimile: 650-723-4426</i> <i>E-mail: dsivas@stanford.edu</i></p>	

# **EXHIBIT 1**

# **EXHIBIT 1**

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6 Attorneys for  
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8  
9

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
11 COUNTY OF MARIN

12 FRIENDS OF THE EEL RIVER,  
13  
14 Petitioner,

15 v.

16 NORTH COAST RAILROAD  
17 AUTHORITY, BOARD OF DIRECTORS  
18 OF NORTH COAST RAILROAD  
19 AUTHORITY, and DOES 1-10,

20 Respondents.

21 NORTHWESTERN PACIFIC RAILROAD  
22 COMPANY, SONOMA-MARIN AREA  
23 RAIL TRANSIT DISTRICT, and DOES 11-  
24 50,

25 Real Parties in Interest.  
26  
27  
28

**FILED**

**JUL 20 2011**

**KIM TURNER**  
Court Executive Officer  
**MARIN COUNTY SUPERIOR COURT**  
By: C. Lucchesi, Deputy

Case No. *CIV 1103605*

**VERIFIED PETITION FOR WRIT OF  
MANDATE**

[CCP § 1085 (§ 1094.5); California  
Environmental Quality Act "CEQA"]

**BY FAX**

VERIFIED PETITION FOR WRIT OF MANDATE  
CASE NO.

*No* **SUMMONS ISSUED**

1 **INTRODUCTION**

2 1. On June 20, 2011, the North Coast Railroad Authority (“NCRA”) approved the  
3 resumption of operations of the North Coast Pacific Railroad (“the Railroad”) to allow freight  
4 traffic from Willits to Lombard, California (“the Project”). The Railroad, which formerly  
5 operated from Lombard north through to Humboldt Bay, was closed in 2001 due to storm  
6 damage and NCRA’s inability to maintain the line. Since that time NCRA has embarked on a  
7 campaign to reopen the Railroad, including the approval of contracts and the initiation of repairs  
8 and construction on the Railroad, much of which occurred without any review under the  
9 California Environmental Quality Act (“CEQA”), Public Resources Code section 21000 et seq.  
10 When it finally completed an environmental impact report (“EIR”), NCRA failed to evaluate the  
11 full scope of the project. For example, it limited its review of the environmental impacts of re-  
12 opening the Railroad to those impacts associated only with re-opening the Russian River  
13 Division of the Railroad. NCRA did this despite years of evidence indicating that that it intends  
14 to re-open the entire Railroad, and in fact, that re-opening of the Russian River Division is not  
15 economically viable unless the entire Railroad is re-opened through the Eel River Canyon. As a  
16 result, NCRA has done what thirty years of case law says a public agency absolutely may not  
17 do: it has chopped the larger project into bite-sized pieces for the purpose of avoiding  
18 environmental review. Therefore, Friends of the Eel River respectfully requests that approval of  
19 the Project and certification of the EIR be set aside as detailed below.

20 **PARTIES**

21 2. Petitioner Friends of the Eel River is a grass-roots, non-profit, 501(c)(3)  
22 corporation organized pursuant to the laws of the state of California. FOER has more than 2,500  
23 members, working to restore the Eel River and its tributaries to a state of natural abundance.  
24 Friends of the Eel River has worked to curtail water diversions and other practices harming the  
25 Eel River watershed and its threatened salmon and steelhead fisheries. Friends of the Eel River  
26 is especially concerned with environmental degradation that could result from reopening the  
27 Northwestern Pacific Railroad through the Eel River Canyon, including a proposal to open a  
28 massive quarry adjacent to the rail line at Island Mountain. For many years, Friends of the Eel

1 River has worked to maintain a neutral stance on the railroad, while simultaneously attempting  
2 to ensure that any proposal to revive the railroad will be protective of the Eel River and the  
3 natural environment. Respondent's failure to comply with CEQA has deprived Friends of the  
4 Eel River and its members of their ability to analyze and comment on the environmental impacts  
5 of, and possible alternatives to, reopening the Northwestern Pacific Railroad.

6 3. Respondent North Coast Railroad Authority (NCRA) was formed in 1989 by the  
7 California Legislature under the North Coast Railroad Authority Act, Government Code  
8 Sections 93000, et seq. As set forth on its website, NCRA's mission is to provide a unified rail  
9 infrastructure to facilitate freight transportation. The seven-member Board of Directors of  
10 NCRA is composed of 2 members each from Sonoma and Marin Counties, one member each  
11 from Humboldt and Mendocino Counties and a member who represents the cities in NCRA's  
12 jurisdiction. NCRA and its Board of Directors are responsible for compliance with the  
13 requirements of CEQA.

14 4. Real Party in Interest Northwestern Pacific Railroad Company ("NWP Co.") was  
15 incorporated in California in 2006 to lease, manage, and operate trains on the NWP line. On  
16 September 13, 2006, NWP Co. entered into the lease agreement governing its contractual  
17 relationship with NCRA to provide train service. This agreement has an initial term of 5 years  
18 with options to extend the term under the same terms and conditions. NWP Co. is the operator  
19 of freight service on the Railroad and is the beneficiary of NCRA's decision to resume  
20 operations of the Railroad.

21 5. Real Party in Interest Sonoma-Marin Area Rail Transit District ("SMART") is a  
22 joint powers authority that has an ownership interest in the Healdsburg and Lombard segments  
23 of the Railroad. Pursuant to an operating agreement between SMART's predecessor in interest  
24 and NCRA, NCRA has an easement for freight service over the Healdsburg and Lombard  
25 segments of the Railroad. SMART has also acquired an easement for passenger service over the  
26 Willits segment of the Railroad. FOER is informed and believed and on that basis alleges that  
27 SMART has an interest in the reopening of the Railroad that may be affected by this litigation.

28

1 **PRAYER FOR RELIEF**

2 WHEREFORE, Petitioner prays for judgment as follows:

3 a. For alternative and peremptory writs of mandate directing Respondents to  
4 vacate and set aside their certification of the EIR, and approval of the Project;

5 b. For alternative and peremptory writs of mandate directing Respondents to  
6 comply with CEQA and the CEQA Guidelines, and to take any other action as required by  
7 Public Resources Code section 21168.9;

8 c. For a temporary stay, temporary restraining order, and preliminary and  
9 permanent injunctions restraining Respondents and their agents, servants, and employees, and  
10 all others acting in concert with Respondents on their behalf, from taking any action to  
11 implement, or further approve, or construct the Project, pending full compliance with the  
12 requirements of CEQA and the CEQA Guidelines;

13 d. For a temporary stay, temporary restraining order, and preliminary and  
14 permanent injunctions restraining Real Parties in Interest and their agents, servants, and  
15 employees, and all others acting in concert with Real Parties in Interest on their behalf, from  
16 taking any action to implement or construct the Project, pending full compliance with the  
17 requirements of CEQA and the CEQA Guidelines;

18 e. For costs of the suit;

19 f. For attorneys' fees as authorized by Code of Civil Procedure section 1021.5  
20 and other provisions of law; and

21 g. For such other and future relief as the Court deems just and proper.

22 DATED: July 20, 2011

SHUTE, MIHALY & WEINBERGER LLP

23  
24 By:   
25 AMYJ. BRICKER

26 Attorneys for  
27 FRIENDS OF THE EEL RIVER

28 P:\FOER\RAIL\CEQA Petition\final petition.doc

## **EXHIBIT 2**

## **EXHIBIT 2**

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13 *Attorney for Petitioner*

FILED

JUL 20 2011

KIM TURNER, Court Executive Officer  
MARIN COUNTY SUPERIOR COURT  
By: D. Taylor, Deputy

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
10 IN AND FOR THE COUNTY OF MARIN

11 CALIFORNIANS FOR ALTERNATIVES TO TOXICS, a  
12 California Non-Profit Corporation,

13 Petitioner,

14 vs.

15 NORTH COAST RAILROAD AUTHORITY; BOARD OF  
16 DIRECTORS OF NORTH COAST RAILROAD  
17 AUTHORITY; and DOES 1-20,

18 Respondents

19 NORTHWESTERN PACIFIC RAILROAD COMPANY, a  
20 California corporation; SONOMA MARIN AREA RAIL  
21 TRANSIT; and DOES 21-50.

22 Real Parties in Interest.

CASE NO. CV 1103591

VERIFIED PETITION FOR  
WRIT OF MANDATE AND  
INJUNCTIVE RELIEF

[CCP §§ 526, 1085, 1094.5; PRC  
§§21168, 21168.6, 21168.9]

23 Petitioner, CALIFORNIANS FOR ALTERNATIVES TO TOXICS ("CATs" or  
24 "Petitioner") alleges as follows:

25 I. INTRODUCTION

26 1. This case challenges an attempt to reopen a dilapidated, outdated and long  
27 dormant rail line in Northern California, in the absence of a keen understanding and evaluation of  
28 the core steps necessary to resume train operations in a manner which is environmentally and  
fiscally sound. Petitioner challenges and seeks to set aside the Respondent North Coast Railroad

1 Authority's June 20, 2011 approvals for the "Russian River Division Freight Rail Project"  
2 ("RRD Project" or "Project"), intended to resume operations on 142 miles of Northwestern  
3 Pacific Railroad Line from Marin County to Mendocino County. This challenge is brought in the  
4 public interest, to protect unique and significant natural and environmental resources and  
5 preserve the public fisc.

6 2. The RRD Project's railroad corridor extends from Lombard near San Pablo Bay  
7 and along Sonoma Creek and the San Antonio Creek to central Marin County, then follows  
8 Highway 101 north along the Petaluma River, skirting the Laguna de Santa Rosa, crossing Santa  
9 Rosa Creek into the City of Santa Rosa, then Mark West Creek, Franz Creek, then north along  
10 the Russian River, crossing tributaries, wetlands, seeps, springs and creeks of the Russian River  
11 to the Project's terminus at Outlet Creek, a tributary to the Eel River. The whole of the Project's  
12 entire environmental setting and the impacts or harm that may be the result from resurrecting and  
13 reopening this railroad corridor is significant. Yet no one part exceeds the potential for negative  
14 impacts as does that on water. Californians enjoy the many benefits of surface and ground water  
15 in the Project area and the ecosystems it supports; the railroad passes through and along water  
16 throughout its entire stretch, and the Project area is coastal, wet and vulnerable to harm if not  
17 carefully tended. Water and other resources in much of the RRD Project rail corridor have  
18 already been significantly impacted by past operations of the railroad.

19 3. The NCRA has failed to evaluate these and other conditions and the exacerbated  
20 impacts which will occur if NCRA is allowed to proceed with its RRD Project. To implement  
21 the RRD Project, the NCRA must first rehabilitate and repair existing conditions, disturbing and  
22 release toxic materials and constituents into the environment. And to commence the freight  
23 operations as proposed under the RRD Project, the NCRA will reintroduce more toxic and  
24 hazardous materials. The NCRA failed to conduct a considered analysis of these activities, as  
25 required under the California Environmental Quality Act.

## 26 II. PARTIES

27 4. Petitioner CALIFORNIANS FOR ALTERNATIVES TO TOXICS ("CATs") is a  
28 non-profit public interest corporation, which has advocated for thirty years on behalf of its

1 proposed projects. These changes significantly altered the scope of the Project's impacts without  
2 providing effective mitigation.

3 104. NCRA prejudicially abused its discretion and failed to proceed according to law  
4 by changing the RRD Project without recirculating the November DEIR and FEIR.

5 WHEREFORE, Petitioner prays or relief as hereinafter set forth.

6 **ELEVENTH CAUSE OF ACTION**

7 **(Injunctive Relief)**

8 105. Petitioner incorporates by reference all the allegations contained in the previous  
9 paragraphs as though fully set forth herein.

10 106. The RRD Project as approved by NCRA will cause irreparable injury and harm to  
11 natural resources, including fish and other biological resources, water and soil resources, to  
12 Petitioner and to the public at large. Its significant environmental impacts have not been  
13 adequately evaluated, much less mitigated to a less than significant level, and feasible and  
14 reasonable alternatives have not been properly evaluated by NCRA.

15 107. The errors and prejudicial abuse of discretion by NCRA constitute the basis for  
16 injunctive relief to prevent this irreparable injury pursuant to Code of Civil Procedure §526.

17 WHEREFORE, Petitioner prays for relief as hereinafter set forth.

18 **PRAYER FOR RELIEF**

19 WHEREFORE, Petitioner prays for judgment and further relief as follows:

20 1. For a Writ of Mandate ordering Respondent North Coast Railroad Authority to vacate  
21 and set aside all of its approvals for the Russian River Division Freight Rail Project, including all  
22 approvals made on June 20, 2011, the certification of the Final Environmental Impact Report and  
23 all related findings and approvals, and to follow California regulations and statutes, including the  
24 California Environmental Quality Act, in any review of and new decision for the Russian River  
25 Division Freight Rail Project;

26 2. For interlocutory and permanent injunctive relief enjoining Respondents and Real  
27 Parties in Interest, and each of them, from engaging in any activity pursuant to the Russian River  
28

1 Division Freight Rail Project until the Project complies with all applicable California regulations and  
2 statutes, including requirements of the California Environmental Quality Act;

3 3. For interlocutory and permanent injunctive relief restraining Respondents and Real  
4 Parties in Interest, and each of them, from approving and implementing any actions to carry out the  
5 Russian River Division Freight Rail Project pending, and following, the hearing of this matter;

6 4. For reasonable attorneys' fees under California Code of Civil Procedure §1021.5 or  
7 other appropriate provision of law;

8 5. For costs of suit under California Code of Civil Procedure §§ 1032 and 1033.5; and

9 6. For such other and further equitable or legal relief as the Court deems proper.

10  
11 DATED: July 20, 2011

12 **SHARON E. DUGGAN**

13 By \_\_\_\_\_

14 SHARON E. DUGGAN  
15 WILLIAM VERICK  
16 *Attorneys for Petitioner*

## **EXHIBIT 3**

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# REQUEST FOR PROPOSALS

FOR AN OPERATOR OF RAIL FREIGHT  
SERVICE  
AND EXCURSION SERVICE ON THE  
NORTHWESTERN PACIFIC LINE



**NORTH COAST RAILROAD AUTHORITY**

January 17, 2006

# REQUEST FOR PROPOSALS

## I. INTRODUCTION

### A. North Coast Railroad Authority.

The NORTH COAST RAILROAD AUTHORITY ("NCRA") was created by the California Legislature in 1989 by the North Coast Railroad Authority Act, Government Code §§93000-93110 for the purpose of maintaining railroad service to the North Coast of California.

The NCRA Board of Directors consists of two members appointed by the Boards of Supervisors of the Counties of Humboldt, Sonoma and Mendocino and a City representative selected by the cities served by the Northwestern Pacific Rail Line. The Chairman of the Board is Allan Hemphill, a Sonoma County businessman; and the Vice-Chairman is Hal Wagenet, member of the Board of Supervisors of Mendocino County. Also serving as directors are: John Woolley, member of the Board of Supervisors of Humboldt County; Paul Kelley, member of the Board of Supervisors of Sonoma County; Charles Ollivier, a commissioner of the Humboldt Bay Recreation and Harbor District; Peter La Vallee, Mayor of the City of Eureka; and Bob Simonson, a retired locomotive engineer for Northwestern Pacific Railroad.

The purpose of this Request for Proposals ("RFP") is to solicit proposals from operationally and financially qualified firms to provide rail freight service and/or excursion service on the Northwestern Pacific Line.

### B. Private-Public Partnership.

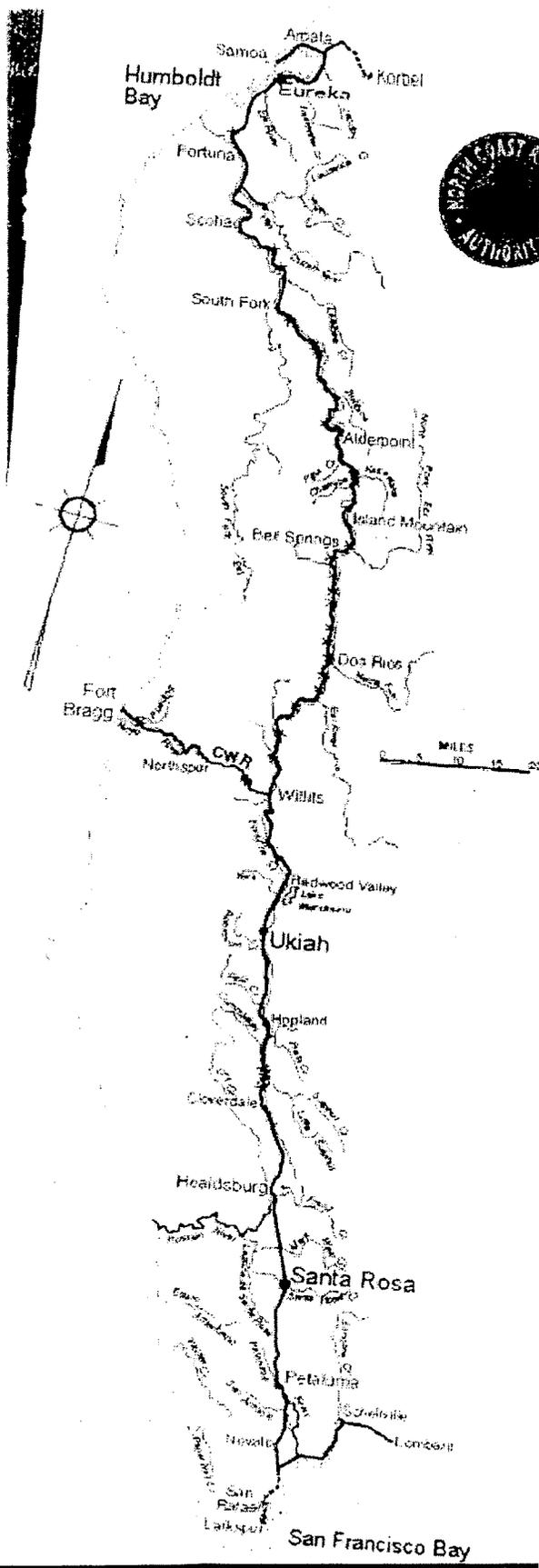
NCRA envisions a private-public partnership for reopening the NWP Line. Although the public as a matter of policy funded acquisition of the line to preserve rail service, and continues to dedicate public resources to capital improvement of the line, a private operator was always envisioned. This RFP is issued against the backdrop of emerging demand for rail service for products such as rock, solid waste, and the need to connect North Coast ports to the national rail system, supplementary to the traditional emphasis of the railroad on forest products, and passenger services, including commuter and excursion.

Hence, this RFP solicits the creativity of the private marketplace to connect the dots between public capital, private capital and the emerging new economic justification for this railroad. No restrictions are imposed by this RFP upon the structure for proposals.

Proposals may include either freight service, excursion service or both. Proposals may be for the entire line from Samoa to Lombard, or any portions thereof. Proposers may submit multiple proposals or alternate proposals. Proposers may cobble together a series of joint ventures, or propose a single entity approach.

### C. Description of Rail Line.

The Northwestern Pacific Railroad is viewed by the Board of Directors and by the public as one railroad extending from the City of Arcata in Humboldt County (MP 292.5) and Samoa in the North, to the Ignacio Wye at MP 25.8 near the City of Novato in Marin County (MP 26.96) in the South, and Lombard, near the City of Napa in the East. (See Figure 1).



NCRA owns the rail line from Healdsburg, California (MP 68.22) to the North in Arcata, either in fee or by easement.

The rail line south of MP 68.22 is owned by the Sonoma-Marín Area Rail Transit District ("SMART"), a regional transit district created by the California Legislature in 2003 to oversee the development and implementation of passenger rail service in Sonoma and Marin Counties. SMART is governed by a twelve-member Board of Directors consisting of elected government officials: two county supervisors from Marin and Sonoma County; three City Council members from each County; and two representatives from the Golden Gate Bridge, Highway and Transportation District.

NCRA holds an exclusive freight easement over that portion of the rail line owned by SMART and limited excursion rights. Likewise, SMART holds an inter-city passenger easement over the rail line owned by NCRA.

Willits, located at MP 139.5 is the geographical center of the railroad and interchange point with California Western Railroad, an excursion operator operating under the firm name and style of The Skunk Train (the "Skunk"). As such, Willits has traditionally been viewed by NCRA and former operators of the NWP as the division point between the Northern Division (also known as the Eel River Division) and the Southern Division. The Northern Division being all points north of MP 142.5 at the northern limit of the Willits Yard, and the Southern Division (also known as the Russian River Division).

Figure 1 (NWP Line)

SMART proposes to institute commuter transit service from Cloverdale (MP 84.7) south to Larkspur (MP 15.9) through a separate RFP in the future. On November 21, 2005, SMART released its draft Environmental Impact Report ~~in November 2005~~ which is available online at [www.sonomamarintrain.org](http://www.sonomamarintrain.org).

#### D. History of Rail Service.

Rail service on the NWP Line dates back to the 1870s, with the railroad being established from Marin County to Ukiah in Mendocino County in the 1870s, extended to Willits in 1904, and extended to Eureka in 1914. Designated the Northwestern Pacific Railroad ("NWP"), it was jointly owned by Sante Fe Railroad and Southern Pacific Railroad and operated independently as a joint venture until 1929, when Southern Pacific assumed exclusive operating rights. Southern Pacific operated the rail line as a Division known as the Northwestern Pacific Railroad.

The NWP was the only viable means of transportation within the corridor prior to completion of Highway 101, and remained the sole source of substantial freight movement for decades. Southern Pacific sold the Northern Division in 1984 to a start-up rail operator, which operated until December 1986, when it declared bankruptcy. A federally appointed bankruptcy trustee managed the railroad consisting of the Northern Division until 1992. In 1992, Southern Pacific contracted operation of the Southern Division to California Northern Railroad, now Rail America. Also in 1992, NCRA purchased the Northern Division in the Bankruptcy Court proceedings.

In 1996, NCRA and SMART's predecessor acting in concert purchased the Southern Division of the NWP Rail Line from Southern Pacific, with NCRA acquiring ownership of the portion from Willits to Healdsburg, and SMART's predecessor acquiring ownership of the portion south of Healdsburg.

Between 1992 and 1998, NCRA operated freight service across the Northern Division owned by it and the Southern Division pursuant to its freight easement and an Operating Agreement by and between SMART's predecessor (Northwestern Pacific Railroad Authority "NWPRRA") and NCRA.

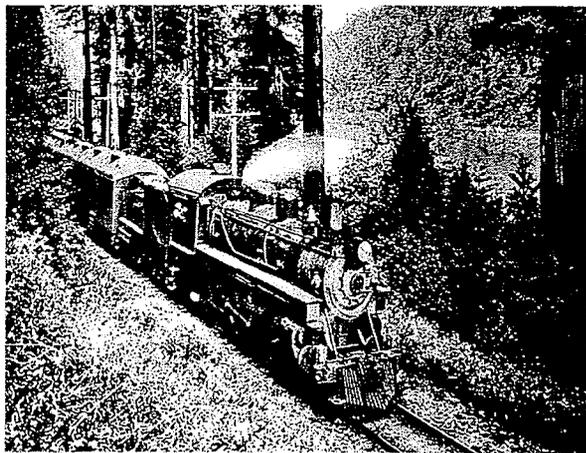


Figure 2 (Locomotive on Eel River, 1914)

In 1997, the Board issued a Request for Proposals for operation and maintenance of the railroad. Northwestern Pacific Railway Company, LLC, a Colorado limited liability company ("NWPY") was chosen as NCRA's contract operator. Within weeks of reaching this agreement, the El Nino storms of 1998 closed the entire rail line. The Southern Division was reopened in May 1998 by NWPY, which operated freight service until the Federal Railroad Administration through Emergency Order No. 21 closed the entire railroad in November 1998, primarily due to the condition of the signal equipment on the Russian River Division.

NWPY obtained partial relief from Emergency Order No. 21 in 2001 and resumed limited service over 41 miles from Lombard to Penngrove (MP 42) near the City of Petaluma until NWPY ceased operations in September 2001.

In 2002, NCRA entered into an agreement with NWPY reinstating the defaulted Operating Agreement conditioned upon NCRA's approval of a Reopening Plan with demonstrated capitalization. On June 30, 2005 the Operating Agreement with NWPY was terminated. The Agreement with NWPY provides:

"In the event the [Operating] Agreement is terminated as stated above, the parties are mutually released from any further obligations with regard to the Operating Agreement as of the Termination Date. Upon Termination, the Companies hereby authorize NCRA to record Quitclaim Deeds now held by it to all leasehold interests now held by the Companies as of the Effective Date of the Termination and shall file forthwith at the demand of NCRA all necessary documents to terminate the common carrier privilege and liability in NWP Line so as to substitute in the place and stead NCRA, or its nominee, and in addition to any residual common carrier right as owner of the NWP Line. In such regard, NCRA may designate whomsoever it chooses as the common carrier with full power of substitution."

#### **E. Resources Available for Operation of Northwestern Pacific Rail Line.**

**1. Roadbed Assets.** The Operator will have access to any open portion of the Northern Division by direct grant from NCRA to MP 68.22. From MP 68.22, the contract operator will operate pursuant to NCRA's exclusive freight easement and assignment of NCRA's Operating Agreement with SMART. The assignment of the Operating Agreement will require approval of SMART.

**2. Real Property Assets.** Beyond the railbed itself, NCRA owns real estate assets which are also available in connection with this RFP.

Eureka Station. Located at 4 West Second Street, Eureka, previously utilized as an administrative center.



**Figure 3** (Ukiah Depot)

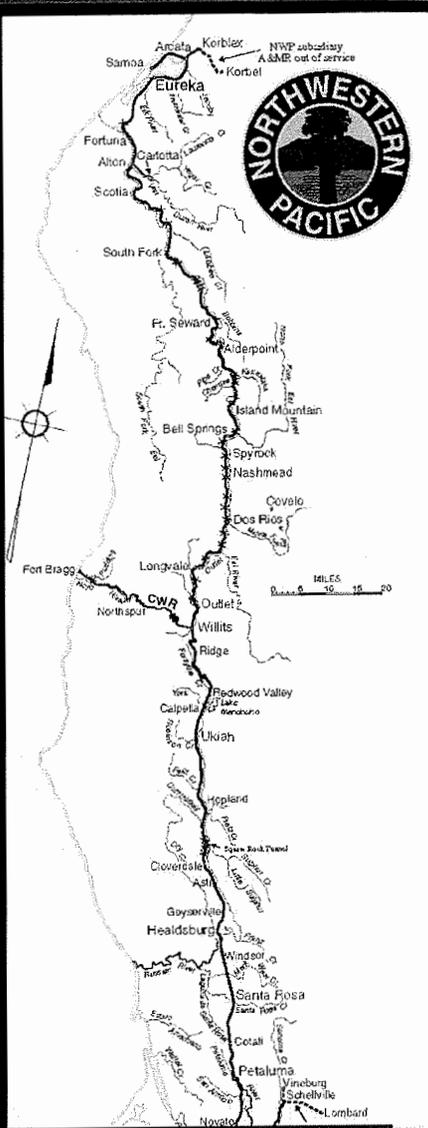
Island Mountain Yard. Includes approximately 15% of the Island Mountain Quarry.

Dos Rios. Approximately 20 acres of rock deposit north of Dos Rios (near MP 166.5).

Willits Yard. With associated buildings. (Although NCRA purchased the property in fee, it accepted only a surface easement until Union Pacific meets its contractual obligation to remediate environmental contamination at the site. Improved industrial property is available for sale or lease adjacent to the East of the Willits Yard).

## **EXHIBIT 4**

## **EXHIBIT 4**



# The Long Term Financial and Economic Feasibility of the Northwestern Pacific Railroad

## FINAL

Humboldt Bay Harbor, Recreation and Conservation District

**PB Ports & Marine**  
Parsons Brinckerhoff Quade & Douglas, Inc.

In Association with  
**BST Associates**

**January 2003**



1. PROVIDED BY THE U.S. DEPARTMENT OF TRANSPORTATION  
2. THE U.S. DEPARTMENT OF TRANSPORTATION HAS REVIEWED THIS REPORT AND HAS DETERMINED THAT IT COMPLIES WITH THE REQUIREMENTS OF THE NATIONAL ENVIRONMENTAL POLICY ACT AND EXECUTIVE ORDER 11768  
3. THE U.S. DEPARTMENT OF TRANSPORTATION HAS REVIEWED THIS REPORT AND HAS DETERMINED THAT IT COMPLIES WITH THE REQUIREMENTS OF THE NATIONAL ENVIRONMENTAL POLICY ACT AND EXECUTIVE ORDER 11768  
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## **1.0 INTRODUCTION AND BACKGROUND**

### **1.1 Introduction**

The North Coast Railroad Authority (NCRA) and the Humboldt Bay Harbor, Recreation and Conservation District (Port) operate in a unique, interdependent relationship on California's north coast, between the Bay Area and Eureka/Arcata. While the Port views the rail line as vital to its long-term success as a maritime center, the NCRA views the Port as a key potential market for its operation as well. With Port volumes in decline and the rail line currently out of service, both agencies are interested in identifying market and operating scenarios that will enable them to restore service for the benefit of the region.

As a result, two companion studies have been commissioned to evaluate feasible scenarios for revitalizing each operation: the *Port of Humboldt Bay Harbor Revitalization Plan*, which will be completed in February 2003, and this study, the *Long Term Financial and Economic Feasibility of the Northwestern Pacific Railroad*. The Humboldt Bay Harbor, Recreation and Conservation District is the contracting agency for the two studies; however, numerous other funding agencies and stakeholders are participating in the two study efforts.

The Port along with the City of Eureka, HCOAG, MCOAG and the County of Humboldt, with grant funding from Caltrans commissioned this analysis to determine the current and potential market demand for and revenue generating capacity of rail services on the Northwestern Pacific Railroad. All serve on a Technical Advisory Committee (TAC) guiding the rail feasibility study, with the NCRA serving as TAC leader. A complete list of TAC members can be found in Appendix F.

This study serves as one element, in a broader business plan the NCRA is preparing. Other studies being conducted by the NCRA address the physical condition and capital improvement plan for the rail line, an environmental analysis, as well as a search for a new operator. In directing this financial feasibility analysis, the goal of the TAC has been to provide a realistic assessment of the rail line's financial feasibility, suitable for use in a business plan or investment-banking proposal.

The following report is a summary of the findings of this analysis and provides a 25-year financial horizon for the reestablishment of freight and passenger rail service to Humboldt, Mendocino and Sonoma Counties.

### **1.2 Background**

The following information is taken from the North Coast Railroad Authority's Strategic Plan for Resumption of Viable Rail Service for California's North Coast (April, 2001):

Rail service on the North Coast dates well back into the 19<sup>th</sup> century. Completion of the connection between Eureka and San Francisco was attained in 1914.

Designated the Northwestern Pacific Railroad (NWP), it was jointly owned by Santa Fe and Southern Pacific and operated independently until 1929 when it became exclusively part of Southern Pacific.

The NWP was the only means of transportation within the corridor prior to completion of Highway 101 and remained the sole means of substantial freight movement for decades. It is worthy of note that the railroad has survived many natural disasters and was restored much sooner than State Highway 101 after the devastating and record setting storm of December 1964.

Southern Pacific sold the portion of the railroad north of Willits in 1984. Named the Eureka Southern, it operated until December 1986 when it declared bankruptcy. A Federally appointed bankruptcy trustee managed the railroad until 1992. Southern Pacific continued to operate the NWP south of Willits through an operating agreement with the California Northern Railroad.

In 1989 the California Legislature created the North Coast Railroad Authority (NCRA). Utilizing State provided funding this new authority acquired the former Eureka Southern out of bankruptcy in 1992. The NCRA acquired that portion of the NWP between Willits and Healdsburg from Southern Pacific in 1996.

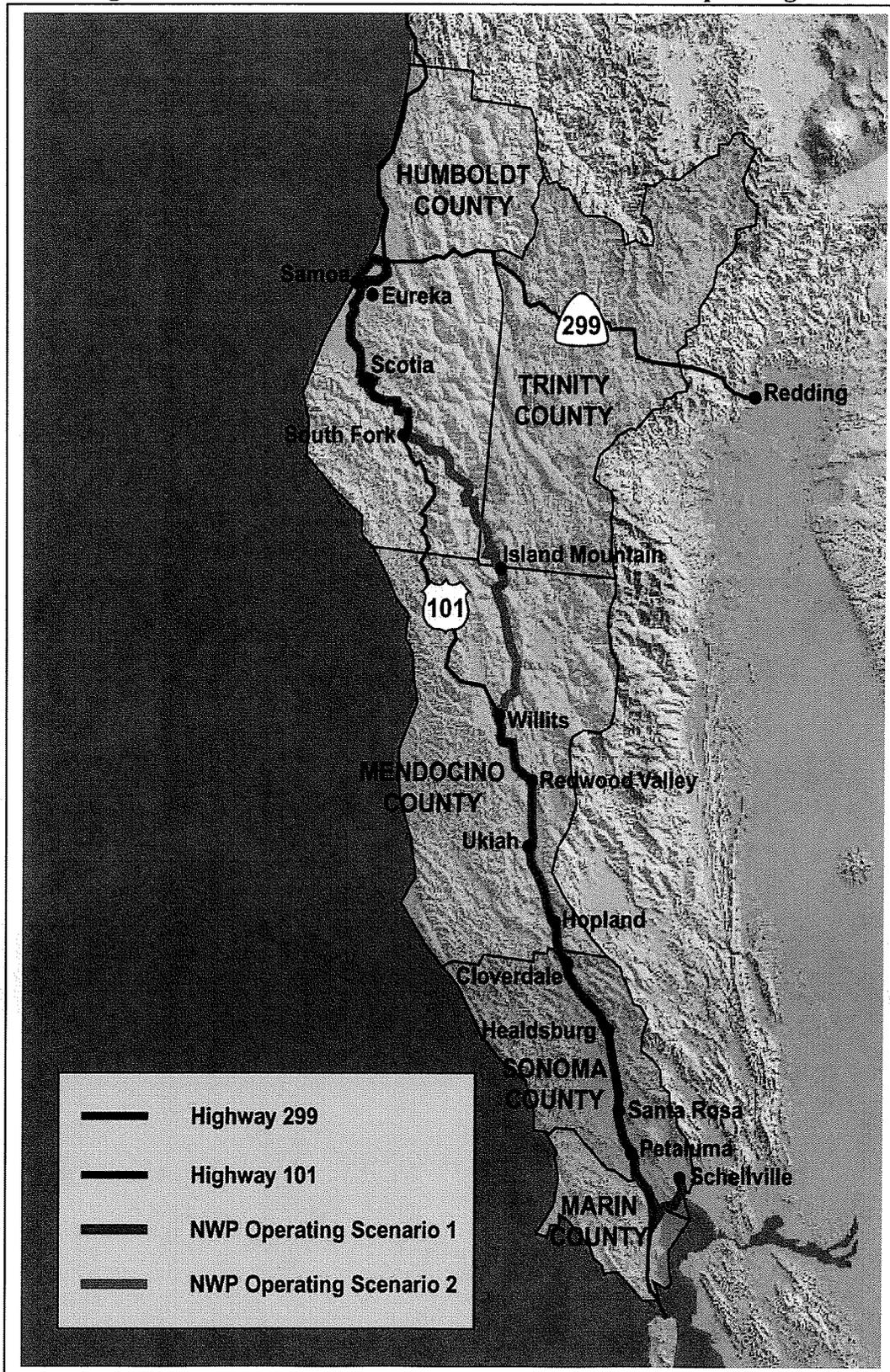
The remaining portion of the NWP south of Healdsburg is now owned by the Northwestern Pacific Railroad Authority (NWPRA), a joint powers agency comprised of NCRA, the Golden Gate Bridge, Highway, and Transportation District, and the County of Marin. Freight service and related maintenance of this portion of the railroad is the responsibility of NCRA under an agreement with NWPRA.

In 1997 the NCRA Board chose to seek a private sector agreement to provide the freight service operations and maintenance of the railroad. Proposals were received and Rail-Ways, Inc. of Elgin, IL was as for the operator. Within weeks of reaching an agreement the El Nino storms of 1998 closed the railroad north of Willits with a series of major landslides. Decades of deferred maintenance left the railroad in a serious state of disrepair. Rail-Ways operated freight service south of Willits until the Federal Railroad Administration (FRA) issued Emergency Order 21, which closed the entire railroad in November 1998 for their failure to meet federal standards.

With the exception of sporadic service provided through 2001 on the southern end of the railroad between Penngrove and Schellville, there has not been significant freight activity along the corridor since 1997.

Since operations ceased along the upper portion of the railroad in 1998 and the lower portion in 2001, the NCRA has been assessing the capital and operating feasibility of reopening segments of the railroad to freight service. Humboldt Bay's economy was historically based on natural resources and the port. Both of these economic elements were connected and dependent on rail service. Given this history, this railroad has been studied or evaluated almost every two years since the Southern Pacific attempted to abandon it in 1982.

Figure 1.2.1 – The Northwestern Pacific Railroad and Operating Scenarios



## **2.0 REVIEW OF PAST STUDIES**

Approximately 15 previous studies relating to rail transportation and related economic condition on the North Coast were reviewed as a part of this study effort. The nine most salient reports for this feasibility analysis are reviewed below. Some of these reports provided important background information regarding past activity on the railroad and also provided valuable demographic and statistical information for market analysis. However, they were primarily used as background material. In fact, given the age of these reports, it is important to note that some of the following background information may be dated especially if related to financial or market information. If a report was used specifically in the market or financial analysis for this study, it has been noted accordingly.

### **Prosperity! The North Coast Strategy**

Humboldt Economic Development Forum, 1999/2000

This plan was written in order to qualify for federal funds. It is Humboldt County's Comprehensive Economic Development Strategy (CEDs).

The plan contains the following elements: economic and demographic data, the identification of strategies for economic development, and a list of projects essential to accomplish these strategies.

The *Prosperity* strategy uses an industry cluster model of the economy as a framework for analysis, planning and implementation. Nine clusters have been identified: lumber and wood products; education and research; tourism; dairy and dairy processing; fisheries, processing and aquaculture; specialty agriculture horticulture; manufacturing, arts and culture; and information and technology. Key issues, future opportunities, industry needs and industry specific products were identified for each industry cluster. They were reviewed to determine if any of the information was transportation related.

The discussion on the Lumber and Wood Products notes that transportation availability and cost is a "key element for competitive positioning of local lumber products." The report specifically cites the tractor-trailer length restrictions and lack of dependable rail service as problems. The report predicts that transportation will become an even greater problem when the timber harvest reaches its peak in 10-15 years. The report does not identify specific opportunities or projects to alleviate these problems.

The discussion on the tourism industry cluster makes many references to transportation. It identifies as key issues that many foreign flag cruise ships are restricted from docking in Humboldt Bay (due to restrictions in consecutive port calls) and that much of Humboldt County is not pedestrian friendly. It does not specifically identify rail service as a future opportunity, industry need or industry specific project. However, many of the items listed in this section could possibly be extended to rail service, such as tours of manufacturing facilities and festivals.

The Small Manufacturing profile states that Humboldt County's distance from urban centers poses challenges for transportation. The discussion notes that entities with the greatest success include those that pass on the extra transportation cost in the high value of the manufactured goods. Key issues include challenges in getting employees to work due to lack of public transportation and the low concentration of workers throughout the County. It also notes that transportation is expensive and difficult to arrange.

The report notes that a system for maximizing truck transportation is needed.

The remaining profiles on education and research; dairy and dairy processing; fisheries, processing and aquaculture; specialty agriculture horticulture; arts and culture; and information and technology do not identify transportation as either a key issue or an opportunity.

### **2000-2 Regional Transportation Plan for Humboldt County**

Humboldt Association of Governments, Adopted August 30, 2001

The Regional Transportation Plan (RTP) describes Humboldt County's existing transportation systems and future needs for short-term (0-10 years) and long-term (11-20 years) horizons. The horizon year for this RTP is 2025.

The RTP contains five elements: Needs Assessment (identifies existing operations and deficiencies), Policy (makes recommendations for implementing 10-year and 20-year objectives and includes program level performance measures), Action (recommends specific improvements for short-range and long-range capital programs, cost estimates and responsible agencies), Financial (gives an inventory of existing and potential transportation funding sources and shortfalls and lists financially constrained and unfunded projects), and Environmental (describes environmental impacts and compliance).

Rail transportation is addressed in each element. In the Needs Assessment section, the RTP describes rail service in the NWP corridor prior to the 1998 FRA Emergency Order. This section also notes that there are economic development opportunities associated with the rail line, and that operation of the rail line could keep truck volumes on Highway 101 and State Route 299 from producing undesirable congestion.

In terms of passenger rail, the RTP notes that the North Coast Logging Interpretive Association has plans to operate a steam-powered excursion train.

The RTP identifies the following sources of future funding to the NCRA:

- Rehabilitation: about \$8.6 million (ISTEA);
- Grant funds: \$120,000 (California Department of Fish and Game);
- Rehabilitation: \$35 million (Governor's Transportation Congestion Relief Program); and

- Grade crossing improvements: (amounts not specified in RTP) (Humboldt and Mendocino Counties).

In the Policy Element, the RTP defines three policies associated with rail transport:

1. Support re-establishment of rail service (Policy 5.04)
2. Encourage modernized rail for improved freight and passenger service (Policy 5.05)
3. Support NCRA efforts to maintain safe rail crossings (Policy 5.06)

The RTP also identifies the development of recreational travel within the region as a goal and specifies development of excursion rail as a policy to support this goal (Policy 6.04).

The Action Element of the RTP identifies short-term and long-term improvements for addressing the existing deficiencies of the County's transportation system and to meet future demand. The report notes that damage repair for the NWP corridor in Humboldt County has been identified as a need for the transportation system but that the \$52.5 million required for this project is unfunded. However, the RTP also acknowledges that \$35 million has been allocated to NCRA for corridor rehabilitation.

Study of excursion rail service around the Bay is identified in the RTP as a recommended short-term action. An update of the NCRA Master Plan and completion of improvements to the NWP tracks between Willits and Eureka have also been defined as short-term actions.

Finally, the Financial Element of the RTP identifies potential funding sources for resumption of rail service in the NWP corridor. Public subsidy and operating revenue is expected to fund the railroad for the first five years, after which the subsidy will be phased out. The public subsidy is to be provided by California Assembly Bill 2782 (1998). It provided \$2 million to the California Transportation Commission (CTC) for the NCRA. AB 2782 identifies some projects that would be eligible for this funding including an accounting system, payment to contractors and vendors and actions necessary to meet the requirements of the FRA compliance order. Other projects may also be eligible. The NCRA's Five-Year Plan and Strategic Plan notes other goals that would require funding such as:

- Assessment of entire line;
- Reopening South of Willits to FRA Class 1 Standards;
- Reopening Willits to Arcata to FRA Class 1 Standards;
- Upgrade to FRA Class 2 and 3 and stabilization South of Willits;
- Upgrade to FRA Class 2 and 3 and track structure stabilization North of Willits; and
- Future additional stabilization.

The RTP lists other potential funding sources but it is not likely that any of these could be used for rail service.

The Environmental Element of the RTP focuses on the environmental documentation required for the RTP and coordination with the North Coast Unified Air Quality Management District. It does not address specific projects.

**Tourist Travel Triangle Feasibility Study**

Prepared for the City of Fort Bragg, May 1995

This report was prepared to determine if it would be possible to expand tourism opportunities in the cities of Fort Bragg, Willits and Eureka (the "Tourist Travel Triangle") using a variety of transportation services including the California Western "Skunk Train," the revival of passenger rail service in the Northwestern Pacific Rail corridor, a sea link between Fort Bragg and Eureka, and the state highway system connecting the cities.

The preferred scenario consists of three phases using these elements:

Phase 1 has a short-term horizon of zero to three years. Passenger service would be reestablished originating in Eureka and terminating in Willits and would be coordinated with the Skunk Train service. The trip between Eureka and Willits is assumed to take eight hours (one-way). An optional one-way bus trip between Eureka and Willits is also part of this phase.

Phase 2 would occur in a four to six years timeframe. The Eureka to Willits service would be supplemented with a return rail trip. Sea link service between Fort Bragg and Eureka would commence.

Phase 3 would occur in the seven to ten year timeframe. Skunk Train service and two-way rail service between Eureka and Willits would continue and may be extended to the Bay Area. Sea link service would be expanded to include stops at San Francisco and along the Oregon coast.

A preliminary business plan for the new rail element (Eureka to Willits) is included in this study. The plan acknowledges that car renovations, track repair and maintenance are critical to initiating and sustaining passenger rail service in this corridor. Several potential state and federal funding sources were identified but none of these funds were committed to this project at the time of the report. The report states that \$1,992,500 would be needed to start up service and about \$16 million would be needed to maintain service (\$14,500,000 was estimated to be needed to do long-term track work and overall general maintenance).

For this business plan, the first full year of operation was assumed to be 1996. Service would consist of one northbound train and one southbound train over the weekend. Riders would have the option of buying one-way tickets. For the 1996 season, total revenue from fares and other sources would be about \$33,000. Total costs (operating and other) were estimated to be about \$25,500. Therefore, the profit per weekend would be \$7,500. The highest operating costs were identified as expendables (\$1,500/day);

insurance (\$675/day); and catering (\$5,000/weekend). The locomotive operating cost was estimated at \$100/day.

Over a maximum 15-weekend season, the service was estimated to result in a revenue of \$495,000, total costs of \$383,000 and profits of \$112,000.

### **Northwestern Pacific Railroad Business Plan**

North Coast Railroad Authority, August 1996

This report outlines the various capital expenses that are required to make the railroad operational. It identifies just over \$10 million for the rehabilitation of the railroad.

It also outlines specific long-term goals for the operation of the railroad with a variety of freight options. Specifically, the report identifies the following potential markets:

- Lumber
- Railroad Crossties
- Unit Trains
- Sand, Gravel and Riprap
- Scrap Metal and Paper
- Coil and Plate Steel
- Food Products (Wine and Beer)
- Roofing Materials
- Automotive Parts
- Solid Waste – Garbage
- Fertilizer
- Heavy Equipment
- Feed Grains

These markets would equate to approximately 104 cars a day along the railroad. However, the business plan states that three quarters of the cars have roughly a 55% probability of occurring (the remaining quarter being solid orders).

The Business Plan noted that freight tariff effective July 1, 1996 was implemented for lumber products. It also included an organizational chart for the Northwestern Pacific Railroad Company.

### **The North Coast Railroad Authority and the New Northwestern Pacific Railroad – A Public-Private Partnership**

North Coast Railroad Authority, October 1998

This business plan is focused on the separation of the operating entity and the capital element, which is considered more of a “public good.” The plan introduces Rail-Ways, Inc., as the potential operator of the railroad, with the NCRA maintaining control of the right-of-way. It outlines many of the financial liabilities that the NCRA are still responsible for and it identifies possible sources to cover those capital needs.

The business plan also included various commitments (letters of commitment) from shippers that would use the rail line. Shippers with signed contracts or exempt quotations for local freight service include:

ECDC Environmental, L.C. (Humboldt County Waste Authority)  
Shamrock Materials, Inc.  
Parnum Paving, Inc.

Other shippers using exempt quotes, circulars and/or interline transportation contracts (presently held by Union Pacific Railroad), and using the NWP, include:

Blue Lake Forest Products	Mead Clark Lumber
Dairyman's Feed & Supply Co-op.	Pacific Lumber Co.
Dairyman's Milling	Schmidbauer Lumber Co.
Eel River Saw Mills	Sierra Pacific Industries
Georgia Pacific Corp.	Simpson Timber
Hunt & Behrens	Skip Gibbs Rail Bridges
Louisiana Pacific Corp.	Standard Structures, Inc.
Masonite Corp.	

Appendix F of the business plan is the business plan for Rail-Ways operation of the Northwestern Pacific. This plan has interesting information regarding the proposed service for the railroad, the forecasted revenues and expenses for "year-one" operation and a list of possible shippers that would use the service.

Appendix H of the business plan is an independent analysis of the Rail-Ways Business Plan, performed by Professor Gregory Bereskin of St. Ambrose University. He found that the assumptions used for the Rail-Ways business plan were reasonable and that overall, the "...plan is reasonably well developed." However, he did express some disappointment in the fact that the plan only addressed the year-one analysis and did not address the future year forecasts.

**North Coast Rail Authority: The Five-Year Plan**  
North Coast Railroad Authority, July 1, 1999

This plan is an update of the 1998 plan. It addresses the critical condition of the railroad infrastructure and its inability to reinvent itself because of the accounting requirements for the disbursement of state and federal funds.

It outlines the continued efforts of Rail-Ways, Inc. and the NCRA staff to ready the line for use, however the over-riding issues regarding capital funding for the project are the biggest issue in this report.

The appendices of the report hold letters of support from government, business and convention and visitor bureaus.

**Draft Route Concept Report: Route 101 Corridor**

Caltrans District 1, February 2002

This report gives an overview of Highway 101 from Hopland to the Oregon border. What is of particular relevance to the rail study are the future projections of traffic on certain segments that parallel the NWP corridor. The Highway 101 corridor is severely constrained by the topography and the environmental conditions that the route traverses. There are very limited opportunities for expansion of the Highway throughout the corridor, and in locations where expansion is possible, it will be very costly. Over the 20-year horizon certain segments of the Highway will experience low (D and F) levels of service. The railroad is mentioned in the report, however there is little detail regarding the interaction between the highway and the railroad.

**Evaluation of the North Coast Railroad: Contributions to the Regional Economy and to the Transportation Network**

Transportation Planning Program of Caltrans, August 1, 1995

This study looked at the economic impact of NWP non-operation in the North Coast. It found that there would be a net increase in costs to travelers on the Highway 101 corridor of approximately \$345,000. At the time of writing the report, the NWP had 43 employees, which represented less than 1% of the regional work force. It notes that any loss of jobs in the railroad shipping of lumber would be made up in the trucking sector.

Additionally it notes that the net impact on the cost of lumber for the consumer is barely affected by the lack of rail access. It would have a net impact of one cent per board foot from that region.

The report concludes that the NWP has no substantial positive or negative economic impact on the North Coast region.

**Overview of the Northwestern Pacific Railroad**

California Public Utilities Commission, October 1, 1997

This document addresses the history of public expenditure on the line. It also describes the economic impacts of the closure of the NWP. The report states that 100 jobs directly related to the Railroad would be lost and that there would be other ramifications to other companies along the corridor as a result of the loss of inexpensive transportation. Specifically, it mentions Masonite Corp. in Ukiah that was "critically dependent on rail" as a primary victim (the Masonite factory closed in 2001).

### **3.0 CAPITAL OVERVIEW**

The Northwestern Pacific Railroad is one of the most difficult railroads in the United States to maintain. When the Southern Pacific Railroad entered the abandonment

proceedings in 1982, they estimated that the Northwestern Pacific cost them 2 to 3 times their normalized maintenance costs for all other Southern Pacific railroads across the country. Over the ensuing 20 years there was no evidence that the railroad became any less expensive to maintain. In fact, given the deferred maintenance on much of the line, the capital and maintenance costs that are currently being developed by the NCRA will reflect higher capital and maintenance costs. The high cost of capital and maintenance of this railroad can be attributed to the following characteristics:

- Remoteness of the railroad;
- The physical characteristics of the railroad;
- The number of tunnels (40) and structures (206); and
- The construction methods that will have to be employed in order to be compliant with environmental regulations.

The eighty miles of the Eel River Canyon present the most difficult section of the railroad to maintain. In December 1964, the NWP experienced the worst flooding of the Eel River in its history. This 1,000-year storm virtually wiped out one hundred miles of track and bridges requiring an almost complete rebuild from Dos Rios to Fortuna.

Most recently the “El Niño Storms” in 1998 caused the closing of the NWP from Dos Rios north due to extensive washouts, landslides and embankment erosion. As a result, the railroad today remains impassable to train traffic in this area.<sup>3</sup>

### **3.1 Recent History of Freight Service on the Northwestern Pacific Railroad**

Given the recent state of disrepair, the Northwestern Pacific Railroad has had a very difficult time keeping the line open and providing consistent freight service. In the last few years of operation of the complete 300-mile line (Samoa to Shellville), the railroad handled approximately 6,800 cars<sup>4</sup>. The service was considered to be unreliable and slow. In fact, when the storms in 1998 hit, several customers’ shipments were trapped on the railroad, never making it to market.

In addition to the operating difficulties, the railroad had difficulties with its accounting practices and there are very few audited accounting records for the railroad and those that do exist do not outline, in any detail, the expenses related to the operation of the railroad.

The poor condition of the physical plant had a direct impact on the operations of the railroad. The degraded track speeds and uncoordinated operations occasionally forced crews to “outlaw”, meaning that they exceeded the FRA work rules regulation governing hours per day that crews can operate. As a result, train operations would be stopped until new crews were available or existing crews got sufficient rest.

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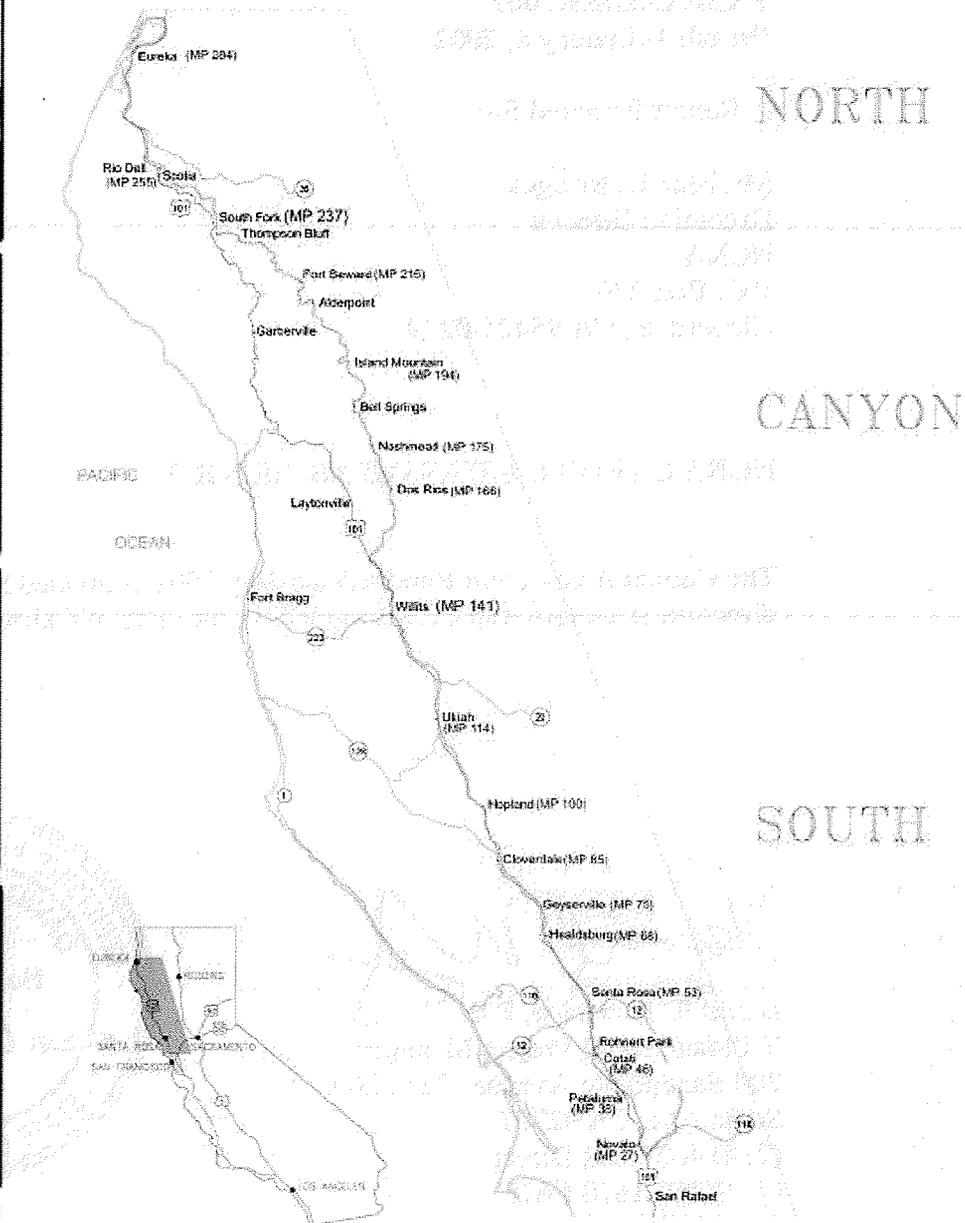
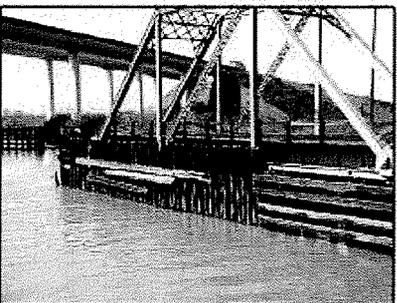
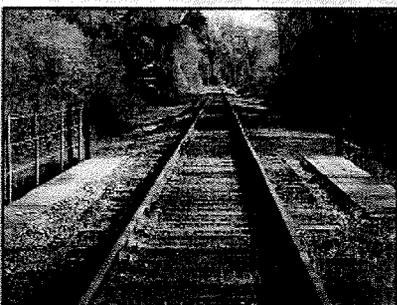
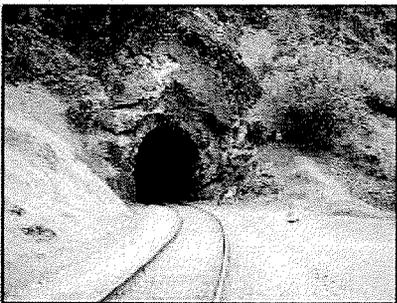
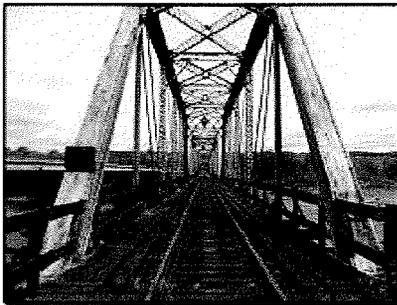
<sup>3</sup> NCRA Capital Assessment Report, Willdan/HNTB, 2002

<sup>4</sup> North Coast Railroad Authority, *The North Coast Railroad Authority and the New Northwestern Pacific Railroad: A Public Private Partnership*, October, 1998.

# **EXHIBIT 5**

# **EXHIBIT 5**

# NCRA Capital Assessment Report



**WILLDAN**  
Serving Public Agencies

**HNTB**

**July 2002**

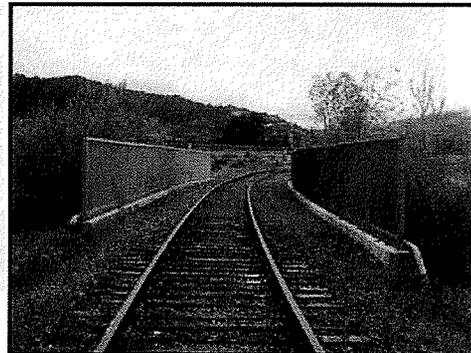
## I. Executive Summary

The purpose of this Capital Assessment Report (CAR) is to provide the North Coast Railroad Authority (NCRA) with a comprehensive condition assessment of the entire Northwestern Pacific Railroad (NWP) between the communities of Lombard and Samoa – a distance of over 300 miles – and make recommendations for improvements and measures that are needed to implement the NCRA’s strategy to commence rail service at the earliest opportunity. The CAR is intended to be an integral part of NCRA’s overall decision-making process to determine the feasibility of providing long-term dependable transportation service to California’s north coast region.



The Willdan/HNTB consultant team performed a focused field reconnaissance effort in Spring 2002. As a result of this effort, the following CAR was developed which documents the methodology, findings and recommendations for future actions to provide the desired railroad service. Despite the rail line being nearly 100 years old and lacking adequate

maintenance efforts for nearly the past two decades, the consultant team found NWP’s 183 bridges, 30 tunnels and nearly one million wooden ties in remarkably good condition. The notable exceptions are the extensive earth movements and landslides in the Eel River Canyon. The CAR recommends that a very feasible 5-year Capital Improvement Program, requiring the investment of \$39.7 million of



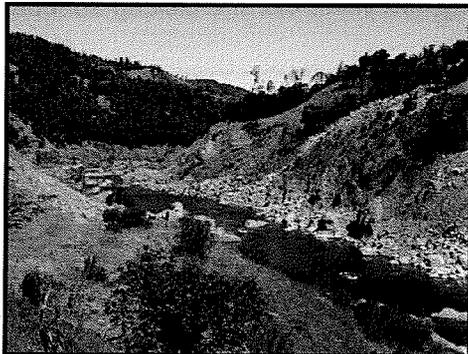
available funds, be adopted by the NCRA. This would provide for service at the minimum of Federal Railroad Administration (FRA) Class 1 operations with much of the rail system capable of providing for FRA Class 2 and 3 operation levels and achieve an overall average track speed of nearly 30 miles per hour. The CAR also recommends that the NCRA begin the process of identifying funding for a long range, 25-year capital investment program requiring nearly \$250 million to continue upgrading and replacing aging and deteriorating facilities.

It is important to note that the proposed improvements would also provide benefit to the operations of the Northwestern Pacific Railroad Authority (NWPRA) and future operations of the proposed Sonoma Marin Area Rail Transit (SMART). The 5-year Capital Improvement Program will result in improvements benefiting NWPRA and SMART



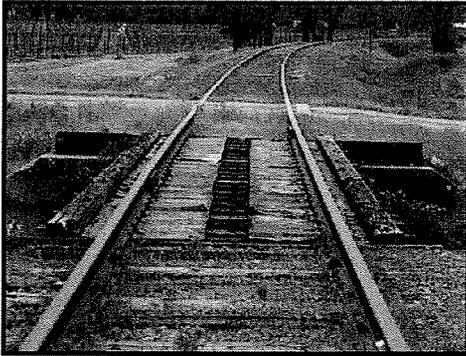
with an estimated cost of \$ 5.7 million. The cost of improvements proposed in the Long Term Capital Program benefiting NWPRA and SMART is estimated at \$81.8 million.

Given the unique geologic and environmental setting surrounding the NWP, the CAR recommends an approach that provides for respect of the environment and embraces the California Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA) principles and processes for making critical decisions. The CAR recommends the pursuit of a combined Environmental Impact Report/Environmental Impact Statement (EIR/EIS) process to address potential impacts created by activities that will commence railroad service reports.



It is anticipated that limited rail service both north and south of the highly environmentally sensitive Eel River Canyon can be established in 2003 with additional railroad service provided spanning the entire length by the year 2006. This can be accomplished by implementing the recommended approach of “living” with the landslides and earth movements using existing state of the art remediation

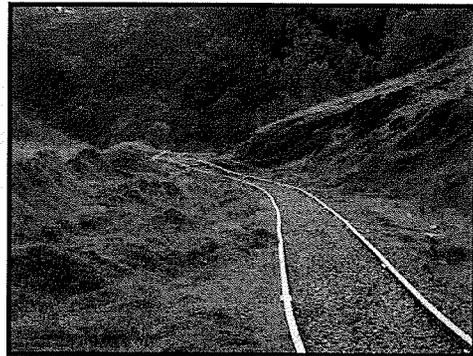
techniques that have proven effective on other railroad properties in the western United States. Rather than attempting to totally abate earth movement, this approach implements a set of measures aimed at slowing the movement to a level that typically can be addressed through maintenance efforts. The result is a lower cost set of solutions that can be readily implemented and have potentially less environmental impact than other methods. Key to the success of this approach is the implementation of a proactive maintenance program which the CAR describes in detail. The program contains recommendations on how to fund the proposed improvements in order to provide continuous and reliable railroad service.



Finally the CAR recognizes that the NCRA entered into a Consent Decree and Stipulated Judgment (Consent Decree) with State of California agencies in 1999 that require certain measures, activities and plans be implemented related to a variety of issues and conditions associated with past actions by the NWP operators'. This includes the removal of hazardous materials, contaminated soil and debris

such as discarded wooden ties as well as remediation of landslides to abate water quality issues. In a separate report entitled "*Environmental Consent Decree Assessment*", dated July 2002, a set of actions is identified to bring the NCRA into compliance with the Consent Decree. The CAR recommends that, to the degree practical, both the Capital Improvement Program and the Consent Decree Compliance Program be addressed jointly to minimize costs and take advantage of opportunities to coordinate activities.

Upon acceptance by NCRA of the CAR including its findings and recommendations, the next step in implementation will be for the NCRA to seek concurrence from Caltrans and the California Transportation Commission (CTC) with their action plan. Upon achieving this concurrence, the NCRA will need to make application and seek approval of the necessary funding from CTC to undertake the following: (1) Program Management activities; (2) Preliminary Engineering; (3) Preliminary right-of-way analysis; (4) a variety of environmental studies, reviews, assessments and preparation of reports to support the CEQA/NEPA review process; (5) adoption of various CEQA/NEPA documents, and (6) secure applicable permits from State and Federal resource agencies.



## II. Statement of Purpose and Authority

The Northwestern Pacific Railroad, owned by the NCRA and Northwestern Pacific Railroad Authority (NWPRA), is in need of a comprehensive Capital Improvement Program to address:

- The cumulative and extensive damage from several winter storms since January 1993.
- The effects of decades of deferred maintenance and years of poor management practices.
- The detrimental time effect of a non-operating railroad north of Willits as a result of the February 1998 El Nino' weather patterns and cessation of service over the remainder of the rail line as a result of FRA's Emergency Order No. 21 (EO21) issued November 27, 1998.
- The need to provide long-term engineering solutions to the geologic and hydrologic hazards that the railroad has struggled with since it was constructed in the early 1900's.
- The mandates outlined in the July 14, 1999 Consent Decree that require the railroad to address several environmental issues that in turn become an integral part of the above issues.

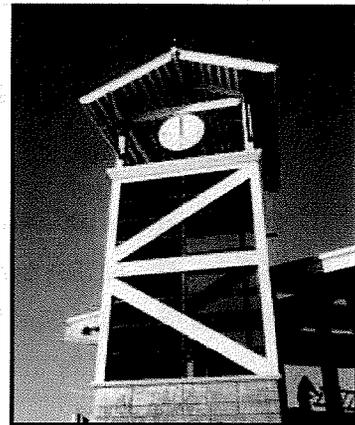


The NCRA is a State of California created Railroad Authority that owns the rail line from Healdsburg Milepost (MP) 68.22 to Samoa MP 300.5 and has the freight and maintenance easement over the remainder of the line from Healdsburg to Lombard (MP 1). They contract the railroad operations and maintenance to a private/contract rail carrier over this entire route.



The NCRA went through an extensive Statement of Qualifications and interview process to select an engineering team to 1) complete a full assessment of the railroad, 2) work with NCRA to establish a phased Capital Improvement Program, and 3) implement the Program in accordance with the railroad's Strategic Plan. On January 7, 2002, the NCRA and the selected Willdan/HNTB Engineering Team entered into a contract. On February 15, 2002, the team was issued Task Order 002 and given a Notice-to-Proceed to complete this comprehensive CAR.

All elements of Task Order 002 are addressed in this comprehensive report with the exception of a few items that were found to need a preliminary engineering analysis or other work effort that is beyond the scope of the assessment. Most notable among these exceptions are: (1) identification and evaluation of on and off site locations of possible ballast and fill materials; (2) pre-application scoping with environmental resource agencies; (3) efforts related to establishing the extent and scope of base line data and listing of task assignments needed to prepare environmental documents; and, (4) environmental field investigation assistance during the assessment phase. As these items rely on preliminary engineering efforts and a comprehensive project description beyond that contained in Task Order 002, it is anticipated that they will be addressed in the next phase of work in conjunction with the preparation of the various necessary environmental studies and document preparation.

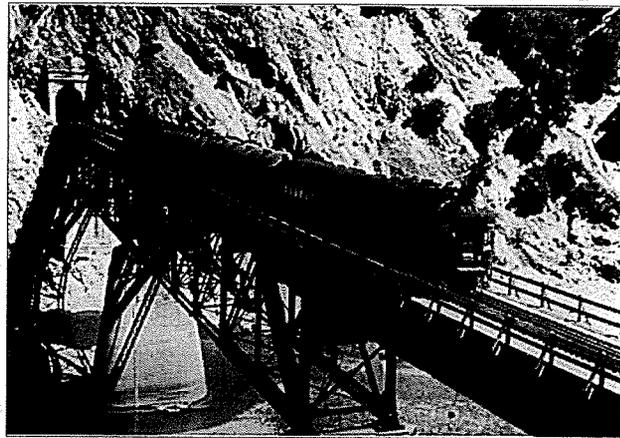


### III. Historical Overview of Northwestern Pacific Railroad

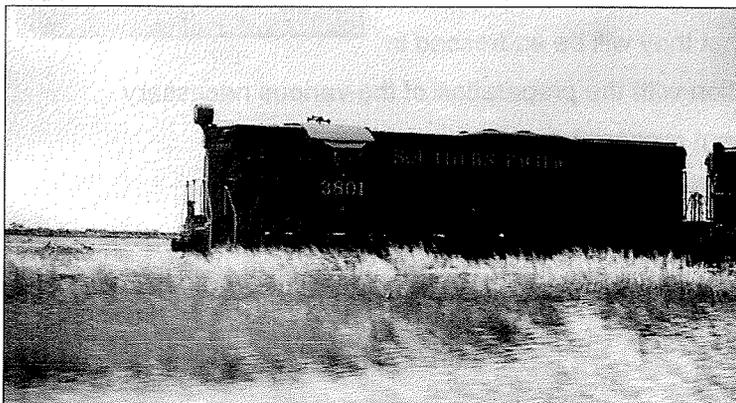
The NWP has a long but troubled background. One of the most scenic rail lines in the nation, it was a staple for moving passengers and goods from Sausalito to Eureka, but in recent years, activity has declined as the following brief history will show.

#### A. History of operation

In 1907, in the wake of consolidation of forty railroad companies, the NWP Railroad was created as a result of the efforts of two railroad giants – the Southern Pacific and the Santa Fe. The construction of the final sections of the NWP Railroad along the Eel River were completed and accepted for operation July 1, 1915 at a cost of about \$15 million<sup>1</sup>.



NWP operates on a line over 300 miles between the Napa Junction and Samoa (MP 300.5). The NCRA owns and operates the portion of the NWP between Healdsburg (MP 68) and Samoa. The NWP operates and maintains the line between Healdsburg and



the Napa Junction. This portion is owned by Northwestern Pacific Railroad Authority, a joint powers authority consisting of the Golden Gate Bridge Highway and Transportation District, County of Marin and the NCRA. The majority of NWP's operations involve the transportation of freight. However, in the past,

<sup>1</sup> The Northwestern Pacific Railroad, Fred A. Stindt, 1964, p. 4.

NWP also conducted passenger service operation between Willits (MP141) and Healdsburg (MP 68) and Willits (MP141) to Eureka (MP 284).

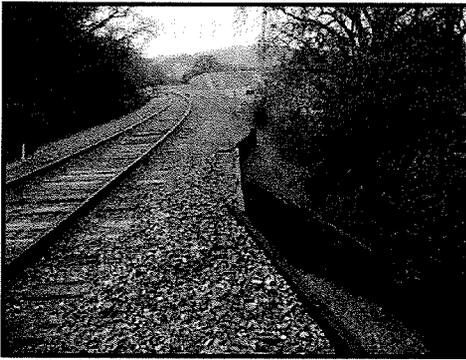
In 1990, the FRA became concerned about the track conditions on the NWP, then known as the Eureka Southern Railroad, between Willits and Eureka. Subsequently, on June 7, 1990, the FRA issued Emergency Order 14 (EO14) prohibiting the Eureka Southern Railroad from carrying passengers until such time when the tracks met FRA Class 1 track standards. Hauling hazardous material was also prohibited until the track either met FRA Class 1 standards or was designated by the railroad as excepted. Due to improved conditions, on October 1, 1990, the FRA lifted EO14 between MPs 142.5 and 145.5, near Willits, and between MPs 216.6 and 284.1 Fort Seward to Eureka.

In 1991, the State of California legislature enacted provisions that established the NCRA. Subsequently the NCRA was formed April 1992 to ensure continuation of railroad service in Northwestern California, and as a part of that charge, acquired the assets of the bankrupt Eureka Southern Railroad Company. The NCRA has experienced financial difficulty to varying degrees since its inception, due to a number of problems:



- Years of deferred maintenance resulting in a deteriorated infrastructure.
- No initial state or federal funding to deal with capital restoration or operating subsidies.
- Poor operating procedures.
- Continuing storm related damage, importantly the 1993 and 1998 severe El Nino winter weather patterns.
- Market decline, most significantly being the timber industry.

In 1997, the FRA in partnership with the California Public Utilities Commission (CPUC), reviewed NWP's compliance with Federal safety statutes and regulations on the section of the line south of Willits. The review revealed widespread noncompliance.



On June 28, 1998, the FRA issued a Compliance Order. In September, October and November 1998, the FRA and the CPUC conducted various safety surveys of the line. As a result, on November 25, 1998, the FRA issued EO21 to suspend the operation on the rail line due to the railroad's inability to comply with the provisions of the June 28, 1998 Compliance Order. The major

items of concern in that Order were the condition of the roadway and signal systems at public grade crossings and the lack of maintenance associated with those critical areas. EO21 documented, in considerable detail, the extent of deterioration and damages along the line. In summary, these included grade crossing signal failures and maintenance problems, defective tracks, washed out track embankments, vegetation on the track, failed drainage facilities, and lack of maintenance programs.

In 1998 the NCRA entered into a contract with Northwest Pacific Railways Company, LLC (NWPY) to provide freight rail service and operate and maintain the railroad. In January 2001, the FRA granted partial relief of the provisions of EO21 between Lombard and Penngrove (MP 43) and the railroad operator (NWPY) began limited freight service on February 14, 2001. Service continued until September 2001 when, for a variety of reasons, the operator ceased operations. The status of the contract between NCRA and NWPY is currently in dispute however NCRA is currently seeking the services of an operator to resume freight service.

**B. Storm damage/Federal Emergency Management Agency (FEMA)/State of California Office of Emergency Safety (OES)**

The northern section of the NWP along the Russian and Eel Rivers, have been plagued by storm damage throughout the life of the



railroad. Mainly, this is a result of adverse geologic and hydrologic conditions that exist in these areas. In December 1964, extensive flooding of the Eel River occurred in the area surrounding the NWP. This 1,000-year storm event virtually wiped out one hundred miles of track and bridges requiring an almost complete rebuild<sup>2</sup> of the rail from Dos Rios to Fortuna.

Most recently, the "El Niño Storms" in 1998 caused the closing of the NWP from Dos Rios north due to extensive washouts, landslides and embankment erosion. As a result, the railroad today remains impassable to train traffic in this area.

### **C. Environmental Consent Decree (ECD)**

For many years, management and work practices at maintenance facilities, rail stations, and along the rail line, were not in compliance with several state environmental regulations. An investigation conducted by the Department of Fish and Game (DFG) in 1997 (Case No. B65335) documented numerous violations of these regulations, including



improper labeling, storage, and treatment of hazardous waste; unlawful disposal of earthen material; and unauthorized discharge of petroleum products to soil, groundwater, and surface water.

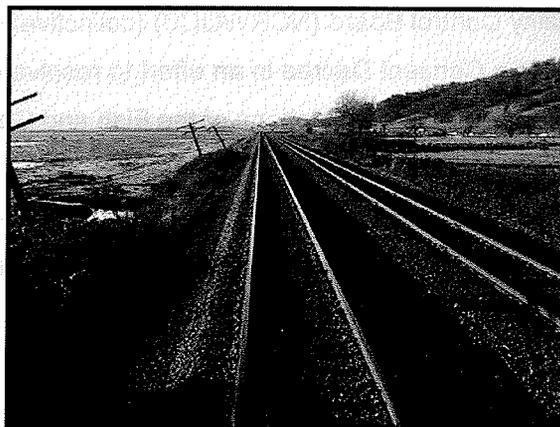
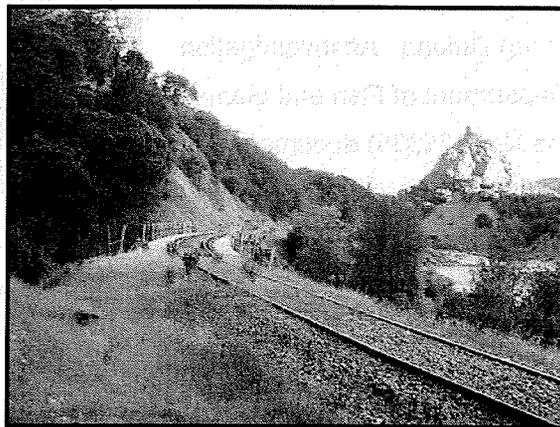
As a result, the DFG, Department of Toxic Substances Control (DTSC), North Coast Regional Water Quality Control Board (NCRWQCB) (collectively, "State Agencies") and the NCRA entered into a Consent Decree in an effort to resolve claims in a complaint filed by the State Agencies alleging violations of the Fish and Game Code, Health and Safety Code, and Water Code. The Consent Decree and Stipulated Judgment, Mendocino County Superior Court Case No. CV80240 ("Consent Decree) was entered into on July 14, 1999. The Consent Decree requires the NCRA to perform a collection of corrective actions in order to provide for appropriate injunctive relief.

Compliance with the Consent Decree is being addressed by the Consent Decree Assessment Team members along with staff of the NCRA. The recently completed

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<sup>2</sup> Ibid. p. 289

Consent Decree Assessment was conducted concurrently and independently with this assessment. During the assessments, the two teams communicated and shared data to ensure that Consent Decree requirements will be addressed in planning and repair of the rail line.



## **EXHIBIT 6**

## **EXHIBIT 6**

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**AMENDED AND RESTATED AGREEMENT OF PURCHASE AND SALE  
HEALDSBURG AND LOMBARD SEGMENTS**

**Dated April 11, 1996**

**between**

**Southern Pacific Transportation Company, as Seller**

**and**

**Northwestern Pacific Railroad Authority, as Purchaser**

## AMENDED AND RESTATED AGREEMENT OF PURCHASE AND SALE

### Healdsburg and Lombard Segments

THIS AGREEMENT, dated April 11, 1996, is by and between SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Delaware corporation ("Seller") and NORTHWESTERN PACIFIC RAILROAD AUTHORITY, a joint powers agency created under California law ("Purchaser").

#### RECITALS

A. Seller owns certain land and improvements comprising that certain line of railroad known as the Northwestern Pacific Railroad line (the "NWP Line") made up in part of certain segments commonly known as the Healdsburg and Lombard Segments, located in Marin County, Sonoma County, and Napa County, California, and further described in Article 1 of this Agreement.

B. Golden Gate Bridge Highway and Transportation District ("GGBHTD") and Seller entered into an Agreement for Purchase and Sale (Healdsburg) dated June 1, 1990 (the "1990 Healdsburg Agreement") and an Agreement for Purchase and Sale (Willits) dated June 1, 1990 (the "1990 Willits Agreement") pursuant to which GGBHTD agreed to buy and Seller agreed to sell certain property more particularly described in each of the 1990 Healdsburg Agreement and the 1990 Willits Agreement. GGBHTD subsequently assigned all of its rights and obligations under the 1990 Agreements to Purchaser and the North Coast Railroad Authority ("NCRA") pursuant to the Agreements of Assignment among GGBHTD, Purchaser and NCRA of even date herewith.

C. Seller and Purchaser now desire to amend and restate the 1990 Healdsburg Agreement in its entirety (and to the extent applicable, the 1990 Willits Agreement) in this

Agreement to provide for the purchase and sale of the property more particularly described herein, subject to the terms and conditions set forth in this Agreement.

D. Purchaser has considered acquiring the Property, as defined below, by eminent domain and is prepared to do so if necessary.

### **AGREEMENT**

**NOW, THEREFORE**, in consideration of the foregoing and the mutual agreements contained herein, Seller and Purchaser hereby agree as follows:

### **ARTICLE 1: PURCHASE AND SALE**

1.1 **Purchase and Sale**. Subject to the terms and conditions of this Agreement, Seller shall sell and convey, and Purchaser shall purchase and pay for, the following described property (all of which is referred to herein collectively as the "Property"), excepting and reserving to Seller the rights and interests described in Article 6 of this Agreement and in any agreements entered into pursuant to this Agreement (the "Retained Rights"):

(a) the following real property (the "Real Estate"):

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(i) **Healdsburg Segment**. All of Seller's right, title and interest in the right-of-way, trackage and structures (including any tracks, rails, ties, switches, crossings, tunnels, bridges, trestles, culverts, buildings, structures, facilities, signals, crossing protection devices, railroad communications systems, and poles) ("Right-of-Way") that are situated on or adjacent to Seller's main line extending from Milepost 26.96 in Novato, California to Milepost 68.22 north of Healdsburg Station at Mill Street in the City of Healdsburg ("Healdsburg Segment"), as more particularly described in Exhibit A;

(ii) **Lombard Segment**. All of Seller's right, title and interest in the Right-of-Way from NWP Milepost 25.57 at Ignacio in the City of Novato, Marin County to Schellville

at NWP Milepost 40.6. and from SP Milepost 63.4 at Lombard in Napa County to Schellville at SP Milepost 72.6 ("Lombard Segment"), as more particularly described in Exhibit B;

(b) All of Seller's interest in any buildings, structures and fixtures now owned by Seller to the extent located on the Real Estate (the "Improvements");

(c) All of Seller's interest in any leases (the "Leases") and any other licenses, permits, easements and agreements (the "Other Agreements") affecting all or any portion of the Real Estate, to the extent affecting the Real Estate, including a partial assignment of that certain Lease Agreement for Northwestern Pacific Line, dated August 27, 1993, (the "Cal Northern Lease"), between Seller and California Northern Railroad Company Limited Partnership ("Cal Northern"), but excluding the Retained Agreements (as defined in Article 6); and

(d) All of Seller's interest in any prepaid rents for periods occurring after the Closing Date and security deposits made by tenants under the Leases and transferable deposits with utility companies, if any, arising out of the operation and maintenance of the Real Estate and Improvements.

~~1.2 Phased Purchase and Sale. Of the Property previously described in Section 1.1~~  
above, those parcels of Real Estate described in Exhibit C, together with the Improvements appurtenant thereto, shall be referred to in this Agreement as the "Phased Closing Property", and the valuation assigned to the fee simple estate in the Phased Closing Property shall be referred to as the "Phased Property Valuation." The purchase and sale of the fee simple estate in the Phased Closing Property shall occur as further provided in Article 5 of this Agreement. Property other than the Phased Closing Property shall be referred to in this Agreement as the "Initial Closing Property." The Initial Closing Property shall also include a surface easement over the Phased Closing Property pursuant to the Surface Easement Agreement, the form of which is attached

hereto as Exhibit D and the assignment of all Leases and Other Agreements affecting the Phased Closing Property.

1.3 Purchase Price. (a) The total purchase price for the Property, including the Phased Closing Property (the "Purchase Price"), is \$21,039,688. Subject to any adjustment provided for in Section 1.4, Purchaser shall pay the Purchase Price to Seller in the following manner:

(i) the sum of \$19,597,438 to Seller by wire transfer of funds or other immediately available funds, at the Initial Closing as further provided in Section 5.3(b)(1); and

(ii) the sum of \$1,442,250 (representing 75% of the Phased Property Valuation for the Phased Closing Properties) to the Escrow Holder by wire transfer of funds or other immediately available funds at the Initial Closing, to be held by said Escrow Holder pursuant to instructions agreed to by the parties. Such instructions shall provide that Purchaser shall be entitled to all interest accruing on the respective amounts deposited for each Phased Closing Property; provided, however, that once Phase II Work shall have commenced for a Phased Closing Property, Seller and Purchaser shall each be entitled to one-half of the interest accruing on the funds allocable to such Phased Closing Property, as such funds are drawn down from time to time.

1.4 Conventional Adjustments and Costs. As to any portion of the Property for which a Closing is occurring, the following prorations, adjustments and cost allocations shall apply as of the applicable Closing:

(a) Property taxes and special assessments shall be prorated with respect to the date or dates of recording falling within the applicable July 1 - June 30 tax year. Property taxes and special assessments attributable to interests, if any, in the Property retained by Seller

shall be borne entirely by Seller. Seller shall report to the State Board of Equalization any assessable interest in the Property retained by it. Purchaser shall request the cancellation of all applicable property taxes and special assessments as required by California Revenue & Taxation Code §§4986 and 5082.1. at the earliest possible date. Seller shall be entitled to receive any refunds or credits of taxes previously paid.

(b) Except for the Retained Agreements (as defined in Section 6.5 below), all rents, common area maintenance charges, other amounts paid or payable by a tenant of the Property, and other income from the Property (including rent) attributable to periods prior to the Closing for it shall be credited to Seller, and all such income attributable to and collected for periods subsequent to the applicable Closing shall be credited to Purchaser. Purchaser shall have no obligation to collect any rents or other charges due but uncollected prior to any such Closing. If Purchaser collects any such delinquent rents or charges, it shall pay to Seller such amounts as it shall collect; provided, however, that all rents collected by Purchaser shall first be applied to all current amounts then due to Purchaser. If rents or charges remain due to Seller and unpaid 120 days after the Closing, Seller may commence an action for the collection of such delinquencies and Purchaser agrees to cooperate in such efforts in all reasonable respects; however, Purchaser shall not be required to terminate any Lease on account of a default occurring prior to any Closing. Prior to the Closing, Seller shall not apply any security deposits to delinquent rents owed by tenants in possession. On the Closing for any parcel of Property, all tenant security deposits related to said Property shall be credited to Purchaser, and Purchaser shall execute a document acknowledging receipt of such deposits and agreeing to hold them in accordance with the terms in the applicable leases.

(c) Purchaser shall pay all closing costs related to each Closing, including the costs of the Title Reports (as defined in Section 2.1(b)) and the prior drafts thereof, owner's CLTA title insurance policies, the extra cost of any endorsements requested by Purchaser, all escrow or other fees of the Title Company for participating in the Closing, and all recording, filing, documentary and similar fees and taxes payable in connection with the transactions contemplated by this Agreement.

(d) Seller and Purchaser shall each pay any costs and expenses (such as attorneys' and consultants' costs and expenses) incurred by such party in connection with the transactions contemplated by this Agreement that are not otherwise adjusted or allocated as set forth in this Section 1.4 or provided for elsewhere in this Agreement.

(e) The foregoing provisions of this Section 1.4 are not intended to prorate revenue or expenses from any rail operations occurring prior to the Closing for the Property.

1.5 Cal Northern Lease. (a) The parties agree that Seller shall partially assign the Cal Northern Lease to Purchaser at the Initial Closing pursuant to the Cal Northern Partial Assignment attached to this Agreement as Exhibit E. Seller has also agreed to partially assign the Cal Northern Lease to the NCRA as provided in the Willits Agreement. The Cal Northern Partial Assignment provides that there shall be a single administrator under the Cal Northern Lease. The Cal Northern Partial Assignment shall grant to Seller the right to require Purchaser, upon reasonable notice, to enforce any provision of the Cal Northern Lease relating to Seller's indemnification obligations in Section 11.4 below, provided that (i) Purchaser shall have no obligation to enforce any such provision and shall have no liability for nonenforcement unless it shall fail to perform within a reasonable time after receiving notice from Seller, (ii) all costs of enforcement shall be at Seller's expense, and (iii) Seller shall indemnify, defend and hold

# **EXHIBIT 7**

# **EXHIBIT 7**

*Please  
date*

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**OPERATING & COORDINATION AGREEMENT  
FOR THE NORTHWESTERN PACIFIC LINE**

THIS OPERATING & COORDINATION AGREEMENT ("Agreement"), dated as of the 20<sup>th</sup> day of June, 2011, by and between SONOMA-MARIN AREA RAIL TRANSIT DISTRICT, created under California law ("SMART"), and NORTH COAST RAILROAD AUTHORITY, created under California law ("NCRA").

**RECITALS:**

WHEREAS, pursuant to the JPA Agreement (defined below) and the Cooperative Agreement and set of Principles of Agreement (each dated as of April 30, 1996), all between NCRA and Northwestern Pacific Railroad Authority ("NWPRRA"), various commitments were made, including (1) that NWPRRA would acquire title to the Healdsburg and Lombard Segments (defined below) and that the NCRA would acquire title to the Willits Segment (defined below), (2) that upon acquisition of the Healdsburg and Lombard Segments NWPRRA would convey a perpetual and exclusive easement for the operation of freight service and grant contract rights for the operation of passenger excursion service over the Healdsburg and Lombard Segments to NCRA, and (3) that upon acquisition of the Willits Segment NCRA would convey to NWPRRA a permanent easement over the Willits Segment for operation of regularly scheduled passenger commuter service and for operation of certain intercity and other passenger service; and

WHEREAS, on April 30, 1996, NWPRRA acquired ownership of the Healdsburg and Lombard Segments and NCRA acquired title to the Willits Segment; and

WHEREAS, NWPRRA conveyed the aforementioned easement to NCRA covering the Healdsburg and Lombard Segments; and

WHEREAS, NCRA conveyed the aforementioned easement to NWPRRA covering the Willits Segment; and

WHEREAS, on August 19, 1996, NWPRRA and NCRA entered into an Operating Agreement for certain portions of the Northwestern Pacific Railroad line (the "Operating Agreement 1996"); and

WHEREAS, the 1996 Operating Agreement was a condition precedent to effectuate the Grant of Easement conveyed by NWPRRA to NCRA and by entering into this new operating agreement, the parties do not intend to, in any way, revoke, rescind or otherwise nullify the effectuation of the Grant of Easements from NWPRRA to NCRA or NCRA to NWPRRA (or its successor, SMART); and

WHEREAS, the 1996 Operating Agreement provided that if NWPRRA undertook to provide passenger commuter operations, the parties would enter into an agreement (referred to therein as the "Coordination Agreement") that described in detail the respective rights and obligations of the parties with respect to maintenance, capital expenditures, dispatching, scheduling of operations, environmental liability, taxes and other matters concerning the joint use of the Healdsburg Segment and the Lombard Segment; that passenger commuter operations would receive operating priority over freight operations, provided that freight service continued

to be provided on the Healdsburg Segment and the Lombard Segment in a manner that meets the needs of the shippers on the line; that passenger operations disrupt NCRA's freight operations to the minimum extent possible; and that the agreement would include provisions that address the issues set forth in Schedule 3.10 to the Operating Agreement 1996; and

WHEREAS, SMART is NWPRA's successor in interest; and

WHEREAS, SMART intends to undertake passenger commuter operations on the Healdsburg Segment and on a portion of the Willits Segment pursuant to its easement thereon (together defined more specifically below as the "Shared Track") and may later expand such operations to include some or all of the Lombard Segment and more or the rest of the Willits Segment covered by its easement thereon; and

WHEREAS, multi-use pathways are part of SMART's enabling legislation and integral to SMART's project and planned use of its property; and

WHEREAS, on September 13, 2006, NCRA and Northwestern Pacific Railroad Company ("NWPCo"), a California corporation, entered into a lease agreement for NWPCo to provide freight and excursion service over (inter alia) the Subject Segments;

WHEREAS, the Parties desire to enter into this Agreement setting forth terms and conditions for the use and management of the Subject Segments, superseding the Operating Agreement 1996 and all prior agreements between the parties relating in any way to the subject matter of the Operating Agreement 1996 (including, without limitation, the JPA Agreement, the Cooperative Agreement and the set of Principles Agreement), it being the express intent of the parties to have this Agreement govern exclusively, and formalizing SMART's consent to designation of NWPCo as NCRA's operator, pursuant to Section 16.04 of the Operating Agreement 1996.

**NOW, THEREFORE**, in consideration of the foregoing and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, NCRA and SMART hereby agree as follows:

#### **ARTICLE I – DEFINITIONS**

In addition to capitalized terms defined in the Agreement, Exhibit 1 (incorporated herein by reference) is a list of additional definitions used in this Agreement.

#### **ARTICLE II – MULTI-USE PATHWAY AND OPERATING RIGHTS**

**SECTION 2.01** NCRA Passenger Excursion Service. In addition to the rights granted pursuant to the aforementioned easements granted to NCRA on the Healdsburg Segment and the Lombard Segment, but subject to the condition set forth in SECTION 7.08, NCRA shall have the right to use the Healdsburg Segment and the Lombard Segment to provide passenger excursion service intended primarily for entertainment and recreation and not primarily for transportation, provided that the service originates and terminates off of the Healdsburg Segment (except at Healdsburg Station, approximately NWP MP 68.00) and the Lombard Segment (except to the extent the Lombard Segment remains not part of the Shared Track) and does not provide

intermediate stops on the Healdsburg Segment (except at Healdsburg Station) or the Lombard Segment (except to the extent the Lombard Segment remains not part of the Shared Track) (the "NCRA Passenger Excursion Service"); provided that NCRA may not use the Healdsburg Segment or the Lombard Segment for any other type of passenger service, except that NCRA may transport officers, employees and freight business invitees of NCRA. NCRA acknowledges that it shall have no right to conduct intercity passenger rail service on the Healdsburg Segment or the Lombard Segment. NCRA shall have no right to appoint more than two (2) Passenger Excursion Service contract operators on any portion of the Shared Track during any twelve (12) month period.

**SECTION 2.02** Industrial Track. NCRA, at its own expense, shall have the exclusive right to manage all existing or later built track on the Healdsburg and Lombard Segments used solely for NCRA Freight Service (the "Industrial Track"). NCRA shall have the right to enter into new industrial track agreements on the Subject Segments that are necessary for NCRA to discharge its exclusive common carrier rail freight responsibilities, provided that all such agreements are subject to (and conterminous with) this Agreement (including but not limited to ARTICLE VI hereof) and, on the Lombard and Healdsburg Segments only, such agreements (i) include the standard agreement provisions provided by SMART and the requirements of SMART's Encroachment Policy adopted April 22, 1996, as may be amended from time to time; and (ii) are approved in advance by SMART (which approval shall not be unreasonably withheld, conditioned or delayed).

**SECTION 2.03** SMART Pathway Rights. Subject to the terms of this Agreement, SMART shall have the right to design and construct Pathways on the portion of the Willits Segment that is part of the Shared Track.

### **ARTICLE III – NWPCO AS NCRA OPERATOR**

SMART hereby consents to NWPCo as NCRA's designated operator. NCRA hereby acknowledges that any agreement it may have with NWPCo or any successor designated operator or any third party operator admitted to the Shared Track or the Lombard Segment (collectively defined herein as, the "Operator") is subject to and conterminous with this Agreement.

### **ARTICLE IV – MAINTENANCE**

**SECTION 4.01** Inspections. Within thirty (30) days after the Execution Date of this Agreement, SMART plans to make an inspection of the Shared Track and the Lombard Segment, the result of which shall be contained in a written report. NCRA shall have the right (but not the obligation) to participate in the inspection and shall be furnished with a copy of the inspection report. No more than thirty (30) days before the commencement of NCRA train operations, NCRA and SMART shall make a joint inspection of that portion of the Shared Track and the Lombard Segment on which NCRA plans to operate to document the actual condition and the FRA classification of such track, the result of which shall be contained in a written report (delineated by FRA track classification), reviewed and approved by both Parties within thirty (30) days after the completion of the inspection. This joint inspection may be waived if the

# **EXHIBIT 8**

# **EXHIBIT 8**

64A0045  
NCRA

# **Master Agreement -- State Funded Transit Projects**



## **California Department Of Transportation**

**MASS TRANSPORTATION PROGRAM  
1120 N STREET, ROOM 3300  
P. O. BOX 942874, MS-39  
SACRAMENTO, CA 94274-0001  
PHONE (916) 654-8811**

*Revised 02/27/01*

**STB 00047**

**STATE OF CALIFORNIA  
DEPARTMENT OF TRANSPORTATION  
MASS TRANSPORTATION PROGRAM**

**MASTER AGREEMENT  
STATE FUNDED TRANSIT PROJECTS**

**EFFECTIVE DATE OF THIS AGREEMENT:** FEBRUARY 21, 2001

**TERMINATION DATE OF THIS AGREEMENT:** FEBRUARY 21, 2010

**RECIPIENT:** NORTH COAST RAILROAD AUTHORITY

**FUNDING SOURCES COVERED BY THIS AGREEMENT AS IDENTIFIED IN EACH  
PROGRAM SUPPLEMENT**

- ◆ PASSENGER RAIL AND CLEAN AIR BOND ACT OF 1990 (PROP. 108),
  - ◆ CLEAN AIR AND TRANSPORTATION IMPROVEMENT ACT OF 1990 (PROP. 116) BOND FUNDS
  - ◆ PUBLIC TRANSPORTATION ACCOUNT FUNDS
  - ◆ STATE HIGHWAY ACCOUNT
  - ◆ TRAFFIC CONGESTION RELIEF FUND (TCR), GC 14556.40
  - ◆ GENERAL FUND
  - ◆ OTHER STATE FUNDING SOURCES
- 

This AGREEMENT, entered into effective as of the date set forth above, is between the public entity identified above, hereinafter referred to as **RECIPIENT**, and the STATE OF CALIFORNIA, acting by and through its Department of Transportation, hereinafter referred to as **STATE**.

**ARTICLE I - PROJECT ADMINISTRATION**

**SECTION 1. PROGRAM SUPPLEMENT**

*A. General*

- (1) This AGREEMENT shall have no force and effect with respect to any PROJECT unless and until a separate PROJECT- specific PROGRAM SUPPLEMENT – STATE FUNDED TRANSIT PROJECT (S), hereinafter referred to as “PROGRAM SUPPLEMENT,” adopting all the terms and conditions of this AGREEMENT, has been fully executed by both STATE and the RECIPIENT.
- (2) RECIPIENT agrees to complete each defined PROJECT, or the identified PROJECT Phase/Component thereof, as described in the PROGRAM SUPPLEMENT, adopting all of the terms and conditions of this AGREEMENT.

- (3) A financial commitment of **STATE** funds will occur only following the execution of this **AGREEMENT** together with the subsequent execution of a detailed and separate **PROGRAM SUPPLEMENT** applicable to that described **PROJECT**.
- (4) **RECIPIENT** further agrees, as a condition to the release and payment of **STATE** funds encumbered for the **PROJECT** described in the **PROGRAM SUPPLEMENT**, to comply with the terms and conditions of this **AGREEMENT** and all the agreed-upon Special Covenants and Conditions attached to, or made a part of, the **PROGRAM SUPPLEMENT**, identifying and defining the nature of that specific **PROJECT**.
- (5) The **PROGRAM SUPPLEMENT** shall generally include: a detailed Scope of Work, including Project Description, Project Schedule, Overall Funding Plan and Project Financial Plan as required by the applicable program guidelines.
  - a. The Scope of Work shall include a detailed description of the **PROJECT** and itemize the major tasks and their estimated costs.
  - b. The Project Schedule shall include major tasks and/or milestones and their associated beginning and ending dates and duration.
  - c. The Overall Funding Plan shall itemize the various **PROJECT** Components, the **STATE** funding program(s) or source(s), the matching funds to be provided by **RECIPIENT** and/or other funding sources, if any. (Project Components include Environmental and Permits; Plans, Specifications and Estimates (PS&E); Right-of-Way (ROW); and Construction (including transit vehicle acquisition).
  - d. The Project Financial Plan shall provide estimated expenditures for each component by funding source.
- (6) Adoption and execution of the **PROGRAM SUPPLEMENT** by **RECIPIENT** and **STATE**, incorporating the terms and conditions of this **AGREEMENT** into the **PROGRAM SUPPLEMENT**, as fully set forth therein, shall be sufficient to bind the **RECIPIENT** to these terms and conditions when performing the **PROJECT**. Unless otherwise expressly delegated in a resolution by the **RECIPIENT'S** governing body, which delegation is expressly assented to and concurred in by **STATE**, the **PROGRAM SUPPLEMENT** shall be managed by the **RECIPIENT'S** governing body.
- (7) The estimated cost and scope of each **PROJECT** will be as described in the applicable **PROGRAM SUPPLEMENT**. **STATE** funding participation for each **PROJECT** is limited to the amounts actually encumbered by **STATE** as evidenced in the **PROGRAM SUPPLEMENT**. A contract awarded by **RECIPIENT** for **PROJECT** work in an amount in excess of said approved estimate may exceed any said **PROGRAM SUPPLEMENT** cost estimate and the limits of **STATE** participation provided:
  - a. **RECIPIENT** provides the necessary additional funding, or

- b. A **PROJECT** cost increase in **STATE** funding is first requested by **RECIPIENT** and that increase is approved by **STATE** in the form of an Allocation Letter comprising the fund encumbrance document.
- (8) **STATE** programmed fund amounts may be increased to cover **PROJECT** cost increases only if :
    - a. Such funds are available,
    - b. **STATE** concurs with that proposed increase, and
    - c. **STATE** issues an approved Allocation Letter, Fund Shift Letter, or Time Extension Letter as stated in the executed amended **PROGRAM SUPPLEMENT**.
  - (9) When additional funds are not available, the **RECIPIENT** agrees that the payment of **STATE** funds will be limited to, and shall not exceed, the amounts already approved in the **PROGRAM SUPPLEMENT** containing **STATE** approved encumbrance documents and that any increases in **PROJECT** costs must be defrayed with non-**STATE** funds.
  - (10) For each approved **PROGRAM SUPPLEMENT**, **RECIPIENT** agrees to contribute at least the statutorily or other required local contribution of matching funds (other than **STATE** funds), if any matching funds are specified within the **PROGRAM SUPPLEMENT**, or any attachment thereto, toward the actual cost of the **PROJECT** or the amount, if any, specified in an executed SB 2800 (Streets and Highways Code Section 164.53) Agreement for local match fund credit, whichever is greater. **RECIPIENT** shall contribute not less than the required match amount toward the cost of the **PROJECT** in accordance with a schedule of payments as shown in a Project Financial Plan prepared by **RECIPIENT** as part of a **PROGRAM SUPPLEMENT**.
  - (11) Upon the stated expiration of this **AGREEMENT**, any **PROGRAM SUPPLEMENTS** executed under this **AGREEMENT** for **PROJECTs** with work yet to be completed shall be deemed to extend the term of this Agreement only to the specific Project termination or completion date contemplated by the applicable **PROGRAM SUPPLEMENT** in force at the time the **PROGRAM SUPPLEMENT** was first executed to allow that uncompleted **PROJECT** to be administered under the terms and conditions of this **AGREEMENT**.

**B. Project Overrun**

- (1) If **RECIPIENT** and **STATE** determine at any time during the performance of a **PROJECT**, that the **PROJECT** budget may be exceeded, **RECIPIENT** shall take the following steps:
  - a. Notify the designated **STATE** representative of the nature and projected extent of the overrun and, within a reasonable period thereafter, identify and quantify potential costs savings or other measures which will bring the Project Budget into balance;

- b. Schedule the projected overrun for discussion at the next Quarterly Review meeting;  
*and*
- c. Identify the source of additional **RECIPIENT** or other funds which can be made available to complete **PROJECT**.

*C. Scope of Work*

- (1) **RECIPIENT** shall be responsible for complete performance of the work described in the approved **PROGRAM SUPPLEMENT** for the **PROJECT** related to the commitment of **STATE** funds. All work shall be accomplished in accordance with the applicable provisions of the Public Utilities Code, the Streets and Highways Code, the Government Code, and other applicable statutes and regulations.
- (2) **RECIPIENT** acknowledges and agrees that **RECIPIENT** is the sole control and manager of each **PROJECT** and its subsequent employment, operation, and repair and maintenance for the benefit of the public. **RECIPIENT** shall be solely responsible for complying with the funding and use restrictions established by statutes from which these funds are derived, the California Transportation Commission (CTC), the **STATE** Treasurer, the Internal Revenue Service, the applicable **PROGRAM SUPPLEMENT**, and this **AGREEMENT**.

*D. Program Supplement Amendments*

**PROGRAM SUPPLEMENT** amendments will be required when there are CTC-approved changes to the cost, scope of work, or delivery schedule of a **PROJECT** from that specified in the original **PROJECT** Application. Any changes to a Scope of Work, Project Description, Project Schedule, Overall Funding Plan, or a Project Financial Plan shall be mutually binding upon the Parties only following the execution of a **PROGRAM SUPPLEMENT** amendment.

**SECTION 2. ALLOWABLE COSTS AND PAYMENTS**

*A. Allowable Costs and Progress Payment Vouchers*

- (1) Not more frequently than once a month, but at least quarterly, **RECIPIENT** will prepare and submit to **STATE** (directed to the attention of the appropriate **STATE** District Transit Representative) signed Progress Payment Vouchers for actual **PROJECT** costs incurred and paid for by **RECIPIENT** consistent with The Scope of Work document in the **PROGRAM SUPPLEMENT**. If no costs were incurred during any given quarter, **RECIPIENT** is exempt from submitting a signed Progress Payment Voucher, however, **RECIPIENT** agrees to still present a progress report at each Quarterly Review.
- (2) **STATE** shall not be required to reimburse more funds, cumulatively, per quarter of any fiscal year, greater than the sums identified and included in the **PROJECT** Financial Plan. However, accelerated reimbursement of **STATE** funds for **PROJECT** in excess

of the amounts indicated in the Project Financial Plan, cumulatively by fiscal year, may be allowed at the sole discretion of **STATE** if such funds are available for encumbrance to fulfill that need.

- (3) Each such voucher will report the total of **PROJECT** expenditures from all sources (including those of **RECIPIENT** and third parties) and will specify the percent of **STATE** reimbursement requested and the fund source. The voucher should also summarize **STATE** money requested by **PROJECT** component or phase (environmental and permits, PS&E, right of way, construction, rolling stock, or--if bond funded--private activity usage) and be accompanied by a report describing the overall work status and progress on **PROJECT** tasks. If applicable, the first voucher shall also be accompanied by a report describing any tasks specified in the **PROGRAM SUPPLEMENT** which were accomplished prior to the Effective Date of this **AGREEMENT** or the **PROGRAM SUPPLEMENT**, and which costs are to be credited toward any required local contribution described in Article II, Section 1 of this Agreement pursuant to any applicable prior executed agreement for Local Match Fund Credit between **RECIPIENT** and **STATE**.

**B. Advance Payments (TCR Projects Only)**

- (1) Advance reimbursement or payments by **STATE** are not allowed except in the case of TCR funded Projects when expressly authorized by CTC.
- (2) For TCR Projects approved for advanced payment allocation by CTC, said advance payment shall be deposited in a prevailing interest rate bearing trust account held by a **STATE** approved FDIC insured financial institution. No interest earned shall be spent on the **PROJECT**. Interest earned shall be recorded and documented from the time the TCR funds are first deposited in **RECIPIENT'S** account until all the approved TCR advance funds have been expended or returned together with accrued interest to **STATE**. Interest earned shall be reported to the **STATE** Project Coordinator on an annual basis and upon final **PROJECT** payment. All interest earned and all unexpended advanced TCR funds shall be returned to **STATE** within 30 days of **PROJECT** completion.
- (3) Advanced payment funds are to be expended only as indicated in the approved TCR Application. **RECIPIENT** must be able to document the expenditures/disbursement of funds advanced to only pay for actual **PROJECT** costs incurred and paid.
- (4) Advance payments by **STATE** are not allowed except in the case of TCR funded Projects when expressly authorized by the CTC. Payments of non-TCR funds and TCR project funds not authorized for advance payment must be based upon reimbursement for actual allowable **PROJECT** costs already incurred and paid for by **RECIPIENT**. Where advance payments are authorized in a **PROGRAM SUPPLEMENT**, **RECIPIENT** must report and document the expenditure/disbursement of funds advanced to pay for actual eligible **PROJECT** costs incurred, at least quarterly, using a Progress Payment Voucher to be approved by the District Project Administrator.

C. *Expedited Payments (Excludes TCR Projects)*

- (1) Should **RECIPIENT** have a valid Memorandum of Understanding (MOU) for "Expedited Payment" on file with **STATE**'s Accounting Service Center, the **RECIPIENT** will, not more frequently than as authorized by that MOU, prepare and submit to **STATE** an Expedited Payment Invoice for reimbursements that are consistent with that MOU and the applicable **PROGRAM SUPPLEMENT**. Expedited Payments are subject to policies established in the Caltrans Accounting Manual (Expedited Payment is not available for TCR funding). One time payments and final payments eligible for expedited pay pursuant to this Section will have ten percent (10%) of each invoice amount withheld pending approval from **STATE** until **STATE** has evaluated **RECIPIENT**'s performance and made a determination that all requirements assumed under this **AGREEMENT** and the relevant **PROGRAM SUPPLEMENT** have been satisfactorily fulfilled by **RECIPIENT**.

D. *Advance Expenditure of Local Funds*

Government Code section 14529.17 (AB 872) allows public agencies to expend their own funds on certain programmed projects prior to CTC allocation of funds, and, upon CTC approval, to then seek reimbursement for those expenditures following execution of a **PROGRAM SUPPLEMENT**. **STATE** will acknowledge and accept these statutorily authorized prior payments as credit for required **RECIPIENT** Match, if any, or as proper **PROJECT** expenditures for reimbursement purposes.

E. *Travel Reimbursement*

Payments to **RECIPIENT** for **PROJECT** related travel and subsistence expenses of **RECIPIENT** forces and its subcontractors claimed for reimbursement or applied as local match credit shall not exceed rates authorized to be paid **STATE** employees under current **STATE** Department of Personnel Administration (DPA) rules. If the rates invoiced by **RECIPIENT** are in excess of those authorized DPA rates, then **RECIPIENT** is responsible for the cost difference and any overpayments inadvertently paid by **STATE** shall be reimbursed to **STATE** by **RECIPIENT** on demand.

F. *Final Invoice*

The **PROGRAM SUPPLEMENT** Termination Date refers to the last date for **RECIPIENT** to incur valid **PROJECT** costs or credits and is the date a **PROGRAM SUPPLEMENT** expires. **RECIPIENT** has 180 days after that Termination Date to make final payment to **PROJECT** contractors or vendors, prepare the **PROJECT** Closeout Report, and submit the final invoice to **STATE** for reimbursement for allowable **PROJECT** costs.

## ARTICLE II – GENERAL PROVISIONS

### SECTION 1. FUNDING

#### A. *Local Match Funds*

Paragraphs “A(1) and A(2)” within this Section 1 to only apply to those funding programmed **PROJECTS** which require a local match. (See individual Program Guidelines for specific funding requirements.)

- (1) Except where allowed by the applicable **PROGRAM SUPPLEMENT**, reimbursement of **STATE** funds and credits for local matching funds will be made or allowed only for work performed after the Effective Date of a **PROGRAM SUPPLEMENT** and prior to the Termination Date, unless permitted as local match **PROJECT** expenditures made prior to the effective date of the **PROGRAM SUPPLEMENT** pursuant to Government Code section 14529.17 or an executed SB 2800 Agreement for Local Match Fund Credit or by.
- (2) **RECIPIENT** agrees to contribute at least the statutorily or other required local contribution of matching funds (other than **STATE** or federal funds), if any is specified within the **PROGRAM SUPPLEMENT** or any attachment thereto, toward the actual cost of the **PROJECT** or the amount, if any, specified in any executed SB 2800 (Streets and Highways Code Section 164.53) Agreement for local match fund credit, whichever is greater. **RECIPIENT** shall contribute not less than its required match amount toward the **PROJECT** cost in accordance with a schedule of payments as shown in the Project Financial Plan prepared by **RECIPIENT** as part of a **PROGRAM SUPPLEMENT**.

#### B. *Funding Contingencies*

Delivery by **STATE** of all funds provided pursuant to this **AGREEMENT** is contingent upon prior budget action by the Legislature, fund allocation by the CTC, and submittal by **RECIPIENT** and approval by **STATE** of all **PROJECT** documentation, including, without limitation, that required by Government Code Section 14085. In the event of the imposition of additional conditions, delays, or and cancellation or reduction in **STATE** funding, as approved by the CTC, **RECIPIENT** shall be excused from meeting the time and expenditure constraints set forth in the Project Financial Plan, and the **PROJECT** Schedule to the extent of such delay, cancellation or reduction and the **PROGRAM SUPPLEMENT** will be amended to reflect the necessary changes in **PROJECT** funding, scope, or scheduling.

#### C. *Funds Movement*

**RECIPIENT** shall notify **STATE** of any proposed changes in any of the four **PROJECT** phase expenditure components -- Environmental and Permits, PS&E, Right-of-Way and Construction (including major equipment acquisitions). **STATE** approval shall be obtained in writing and **STATE** will determine whether the proposed change is significant enough to also warrant CTC review. Specific rules and guidelines regarding this process may be detailed in the applicable

CTC Resolution, including, but not limited to, numbers G-00-20, and G-00-23 or their successors.

## SECTION 2. AUDITS AND REPORTS

### A. *Cost Principles*

- (1) **RECIPIENT** agrees to comply with Office of Management and Budget Circular A-87, Cost Principles for **STATE** and Local Government, and 49 CFR, Part 18, Uniform Administrative Requirements for Grants and Cooperative Agreements to **STATE** and Local Governments.
- (2) **RECIPIENT**'s contractors and subcontractors agree that (a) the Contract Cost Principles and Procedures, 48 CFR, Federal Acquisition Regulations System, Chapter 1, Part 31, et seq., shall be used to determine the allowability of individual Project cost items and (b) they shall comply with Federal administrative procedures in accordance with 49 CFR, Part 18, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and local Governments. Every sub-**RECIPIENT** receiving **PROJECT** funds as a contractor or sub-contractor under this **AGREEMENT**, shall comply with Federal administrative procedures in accordance with 49 CFR, Part 18, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments.
- (3) Any **PROJECT** costs for which **RECIPIENT** has received payment or credit that are determined by subsequent audit to be unallowable under Office of Management and Budget Circular A-87, 48 CFR, Chapter 1, Part 31 or 49 CFR, Part 18, are subject to repayment by **RECIPIENT** to **STATE**. Should **RECIPIENT** fail to reimburse moneys due **STATE** within 30 days of demand, or within such other period as may be agreed between the Parties hereto, **STATE** is authorized to intercept and withhold future payments due **RECIPIENT** from **STATE** or any third-party source, including but not limited to, the State Treasurer, the State Controller and the CTC.
- (4) **RECIPIENT** agrees to include all **PROGRAM SUPPLEMENT**(s) adopting the terms of this **AGREEMENT** in the schedule of projects to be examined in **RECIPIENT**'s annual audit and in the schedule of projects to be examined under its single audit prepared in accordance with Office of Management and Budget Circular A-133.

### B. *Record Retention*

- (1) **RECIPIENT**, its contractors and subcontractors shall establish and maintain an accounting system and records that properly accumulate and segregate incurred **PROJECT** costs and matching funds by line item of the accounting system of **RECIPIENT**, its contractors and all subcontractor's shall conform to Generally Accepted Accounting Principles (GAAP), enable the determination of incurred costs at interim points of completion, and provide support for reimbursement payment vouchers or invoices. All accounting records and other supporting papers of **RECIPIENT**, its

contractors and subcontractors connected with PROJECT performance under this AGREEMENT and each PROGRAM SUPPLEMENT shall be maintained for a minimum of three years from the date of final payment to RECIPIENT under a PROGRAM SUPPLEMENT and shall be held open to inspection and audit by representatives of STATE, the California State Auditor, and the auditors of the Federal government. Copies thereof will be furnished by RECIPIENT, its contractors, and subcontractors upon receipt of any request made by STATE or its agents. In conducting an audit of the costs and match credits claimed under this Agreement, STATE will rely to the maximum extent possible on any prior audit of RECIPIENT pursuant to the provisions of federal and State law. In the absence of such an audit, any acceptable audit work performed by RECIPIENT'S external and internal auditors will be relied upon and used by STATE when planning and conducting additional audits.

- (2) For the purpose of determining compliance with Title 21, California Code of Regulations, Section 2500 et seq., when applicable, and other matters connected with the performance of RECIPIENT's contracts with third parties pursuant to Government Code section 8546.7, RECIPIENT, RECIPIENT'S contractors and subcontractors and STATE shall each maintain all books, documents, papers, accounting records, and other evidence pertaining to the performance of such contracts, including, but not limited to, the costs of administering those various contracts. All of the above referenced parties shall make such AGREEMENT and PROGRAM SUPPLEMENT materials available at their respective offices at all reasonable times during a PROJECT period and for three years from the date of final payment to RECIPIENT under any PROGRAM SUPPLEMENT. STATE, the California State Auditor, the Federal Highway Administration, or any duly authorized representative of the Federal Government, shall each have access to any books, records, and documents that are pertinent to a PROJECT for audits, examinations, excerpts, and transactions, and RECIPIENT shall furnish copies thereof if requested.
- (3) RECIPIENT, its contractors and subcontractors, will permit access to all records of employment, employment advertisements, employment application forms, and other pertinent data and records by the State Fair Employment Practices and Housing Commission, or any other agency of the State of California designated by STATE, for the purpose of any investigation to ascertain compliance with Section 1 of this ARTICLE II.

*C. Quarterly Review*

- (1) Subject to the discretion of STATE, RECIPIENT and STATE agree to conduct, on a quarterly basis, on-site reviews of all aspects of the progress of each PROJECT. RECIPIENT agrees, during each quarterly progress review, to inform STATE regarding:
  - a. Whether the PROJECT is proceeding on schedule and within budget;

- b. Any requested changes to the Project Description, Scope of Work, Project Schedule, Overall Funding Plan, or Project Financial Plan contained in a PROGRAM SUPPLEMENT;
  - c. Major construction accomplishments during the quarter;
  - d. Any actual or anticipated problems which could lead to delays in schedule, increased costs or other difficulties;
  - e. The status of the PROJECT budget; and
  - f. The status of critical elements of PROJECT.
- (2) Quarterly reviews of **RECIPIENT** progress will include consideration of whether activities are within the scope of the PROJECT and in compliance with State laws, regulations, administrative requirements, and implementation of the PROJECT under a PROGRAM SUPPLEMENT.

### SECTION 3. SPECIAL REQUIREMENTS

#### A. *California Transportation Commission (CTC) Resolutions*

- (1) **RECIPIENT** shall adhere to applicable CTC policies on "Timely Use of Funds." Resolutions G-99-25, adopted August 18, 1999, and G-00-20, adopted July 19, 2000, to provide guidance for the use of Proposition 116 and STIP funds, respectively; and Resolution G-00-23 to provide direction on "Timely Use of Funds" addressing the expenditure and reimbursement for TCR funding. These resolutions, and/or successor resolutions in place at the time a PROGRAM SUPPLEMENT is executed, shall be applicable to all non-General Fund money. (These resolutions do not apply to General Fund money).
- (2) **RECIPIENT** shall be bound to the terms and conditions of this AGREEMENT, the PROJECT application contained in the PROGRAM SUPPLEMENT (as applicable), and CTC Resolutions G-99-25, G-00-20, G-00-23 and/or their respective successors in place at the time the PROGRAM SUPPLEMENT is signed (as applicable); and all restrictions, rights, duties and obligations established therein on behalf of **STATE** and CTC shall accrue to the benefit of the CTC and shall thereafter be subject to any necessary enforcement action by CTC or **STATE**. All terms and conditions stated in aforesaid CTC Resolutions and CTC-approved Guidelines in place at the time the PROGRAM SUPPLEMENT is signed (if applicable) shall also be considered to be binding provisions of this AGREEMENT.
- (3) **RECIPIENT** shall conform to any and all environmental obligations established in CTC Resolution G-91-2 and/or its successors in place at the time a PROGRAM SUPPLEMENT is signed, as applicable, at the expense of **RECIPIENT** and/or the responsible party and without further financial contribution or obligation of **STATE** unless a separate PROGRAM SUPPLEMENT expressly provides funding for the specific purpose of hazardous materials remediation.

**B. RECIPIENT Resolution**

- (1) **RECIPIENT** has executed this **AGREEMENT** pursuant to the authorizing blanket **RECIPIENT** resolution, attached as Attachment I to this Master Agreement. This resolution empowers **RECIPIENT** to enter into this **AGREEMENT** and all subsequent **PROGRAM SUPPLEMENTS**.
- (2) If a **RECIPIENT** Resolution is needed for each **PROGRAM SUPPLEMENT**, **RECIPIENT** will provide information as to who the authorized designee is to act on behalf of the **RECIPIENT** to bind **RECIPIENT** and **STATE** with regard to the terms and conditions of said **PROGRAM SUPPLEMENT**.

**C. Termination**

- (1) **STATE** reserves the right to terminate funding for any **PROGRAM SUPPLEMENT** upon written notice to **RECIPIENT** in the event that **RECIPIENT** fails to proceed with **PROJECT** work in accordance with the **PROGRAM SUPPLEMENT**, the bonding requirements, if applicable, or otherwise violates the conditions of this **AGREEMENT** and/or the **PROGRAM SUPPLEMENT** or the funding allocation such that substantial performance is significantly endangered.
- (2) No such termination shall become effective if, within 30 days after receipt of a Notice of Termination, **RECIPIENT** either cures the default involved or, if not reasonably susceptible of cure within said 30-day period, **RECIPIENT** proceeds thereafter to complete the cure in a manner and time line acceptable to **STATE**. Any such termination shall be accomplished by delivery to **RECIPIENT** of a Notice of Termination, which notice shall become effective not less than 30 days after receipt, specifying the reason for the termination, the extent to which funding of work under this **AGREEMENT** is terminated and the date upon which such termination becomes effective, if beyond 30 days after receipt. During the period before the effective termination date, **RECIPIENT** and **STATE** shall meet to attempt to resolve any dispute.
- (3) If **RECIPIENT** fails to expend **GENERAL FUND** monies by June 30 any applicable Fiscal Year that those funds would revert, those funds will be deemed withdrawn unless specifically made available beyond the end of the Fiscal Year through reappropriation or other equivalent action of the Legislature.
- (4) In the event **STATE** terminates a **PROGRAM SUPPLEMENT** for convenience and not for a default on the part of **RECIPIENT** as is contemplated in (1) and (2) above of this Part C of **ARTICLE III**, **RECIPIENT** shall be reimbursed its authorized costs up to **STATE'S** share of allowable **PROJECT** costs incurred prior to the date of termination.

**D. Third Party Contracting**

- (1) **RECIPIENT** shall not award a construction contract over \$10,000 or other contracts over \$25,000 (excluding professional service contracts of the type which are required to be procured in accordance with Government Code Sections 4525 (d), (e) and (f) on the basis of a noncompetitive negotiation for work to be performed under this Agreement without the prior written approval of **STATE**. Contracts awarded by **RECIPIENT**, if intended as local match credit, must meet the requirements set forth in Section 1, A(1) and A(2) of **ARTICLE I** regarding local match funds.
- (2) Any subcontract entered by **RECIPIENT** as a result of this **AGREEMENT** shall contain all of the provisions of **ARTICLE II – GENERAL PROVISIONS**.

**E. Change in Terms/Amendments**

This **AGREEMENT** may be modified, altered, or revised only with the joint written consent of **RECIPIENT** and **STATE**.

**F. Project Ownership**

- (1) Unless expressly provided to the contrary in the **PROGRAM SUPPLEMENT**, subject to the terms and provisions of this **AGREEMENT**, **RECIPIENT** shall be the sole owner of all improvements and property included in the **PROJECT** constructed, installed or acquired by **RECIPIENT** with funding provided to **RECIPIENT** under this **AGREEMENT**. **RECIPIENT** is obligated to continue operation and maintenance of **PROJECT** dedicated to the public transportation purposes for which **PROJECT** was initially approved, unless **RECIPIENT** ceases ownership of such **PROJECT** property; or ceases to utilize **PROJECT** for the intended public transportation purposes; or sells or transfers title to or control over **PROJECT**, and **STATE** is refunded the Credits due as provided in this paragraph (4) below.
- (2) Should **STATE** bond funds encumbered to fund **PROJECT** under this **AGREEMENT**, then at **STATE**'s option, **RECIPIENT** shall be required to first obtain a determination by Bond Counsel acceptable to the State Treasurer's Office that a change in operation, proportion, or scope of **PROJECT** as proposed by **RECIPIENT** will not adversely affect the tax-exempt status of those bonds.
- (3) **PROJECT** right-of-way, **PROJECT** facilities constructed or reconstructed on a **PROJECT** site and/or **PROJECT** property purchased by **RECIPIENT** (excluding temporary construction easements and excess property whose proportionate resale proceeds are distributed pursuant to this **AGREEMENT**) shall remain permanently dedicated to public transit use in the same proportion and scope, and to the same extent as described in the **PROGRAM SUPPLEMENT** and related Bond Fund Certification documents, if applicable, unless **STATE** agrees otherwise in writing. Vehicles acquired as part of **PROJECT**, including rail passenger equipment and ferry vessels, shall be dedicated to that public transportation use for their full economic life cycle, which, for

the purpose of this AGREEMENT, will be determined in accordance with standard national transit practices and applicable rules and guidelines, including any extensions of that life cycle achieved by reconstruction, rehabilitation or enhancements.

- (4) Except as otherwise set forth in this Section 3, **STATE**, or any other assignee public body acting on behalf of the CTC, shall be entitled to a refund or credit (Credit), at **STATE'S** sole option, equivalent to the proportionate **PROJECT** funding participation offered **RECIPIENT** by **STATE** and third parties in the event that **RECIPIENT** ceases to utilize **PROJECT** for the intended public transportation purposes or sells or transfers title to or control over **PROJECT**. **STATE** shall also be entitled to an equivalent acquisition credit for any future purchases or condemnation of all or portions of **PROJECT** by **STATE** or a designated agent of **STATE**. The refund or credit due **STATE** will be measured by the funding ratio of **STATE** and other third party funding (unless that 3<sup>rd</sup> Party's to also contractually entitled to a similar refund (credit)) to **RECIPIENT** funding participation applied to the then fair market value of **PROJECT** property acquired or constructed. For vehicles, this refund shall be equivalent to the proportion of the full economic life cycle remaining, multiplied by the non-**RECIPIENT** funds provided for the equipment acquisition. For real property, this credit shall be measured by the funding ratio of **STATE** and other third party funding (unless that 3<sup>rd</sup> Party's also contractually entitled to a similar refund (credit)) to **RECIPIENT** funding participation applied to the present fair market value, as determined by **STATE**, of the **PROJECT** property acquired under this AGREEMENT.
- (5) In determining the present fair market value of the property for purposes of calculating **STATE's** Credit under this AGREEMENT, any portions of **PROJECT** site contributed by **RECIPIENT** shall not be included. In determining **STATE's** proportionate funding participation, **STATE's** contributions to parties other than **RECIPIENT** shall be included, if made a part of **PROJECT** funding.
- (6) Once **STATE** receives the Credit as provided for above because **RECIPIENT** ceased to utilize **PROJECT** for the intended public transportation purposes, or sold, or transferred title to, or control over **PROJECT**, neither **RECIPIENT** nor any person to whom **RECIPIENT** has transferred said title or control shall any longer have any obligation under this AGREEMENT to continue operation of **PROJECT** and/or **PROJECT** facilities for public transportation purposes, but may then use **PROJECT** and any of its facilities for any lawful purpose.
- (7) To the extent that **RECIPIENT** operates and maintains Intermodal Transfer Stations as any integral part of **PROJECT**, **RECIPIENT** shall maintain each station and all its appurtenances, including, but not limited to, restroom facilities, in good condition and repair in accordance with high standards of cleanliness (Public Utilities Code, Section 99317.8). Upon request of **STATE**, **RECIPIENT** shall also authorize **STATE**-funded bus services to use the station and its appurtenances without any charge to **STATE** or the bus operator. This permitted use will include the placement of signs and informational material designed to alert the public to the availability of the **STATE**-

funded bus service (for the purpose of this paragraph, "STATE-funded bus service" means any bus service funded pursuant to Public Utilities Code, Section 99316).

- (8) Special conditions apply to any proposed sale or transfer or change of use as respects PROJECT property, facilities or equipment acquired with State bond funds and RECIPIENT shall conform to those restrictions as set forth in ARTICLE III, A(7) here in below.

#### G. *Disputes*

The remedy for the resolution of any claims brought by RECIPIENT against STATE under this AGREEMENT shall be by arbitration. Unless otherwise agreed by STATE and RECIPIENT, an arbitration shall be conducted by a single arbitrator selected by the parties from the certified list created by the Public Works Contract Arbitration Committee per Public Contract Code Section 10240.

#### H. *Hold Harmless and Indemnification*

- (1) Neither STATE nor any officer or employee thereof shall be responsible for any damage or liability occurring by reason of anything done or omitted to be done by RECIPIENT, its agents and contractors under or in connection with any work, authority, or jurisdiction delegated to RECIPIENT under this AGREEMENT or any PROGRAM SUPPLEMENT or as respects environmental clean up obligations or duties of RECIPIENT relative to PROJECT. It is also understood and agreed that, pursuant to Government Code Section 895.4, RECIPIENT shall fully defend, indemnify and hold the CTC and STATE and their officers and employees harmless from any liability imposed for injury and damages (as defined by Government Code Section 810.8) or environmental obligations or duties arising or created by reason of anything done or imposed by operation of law or assumed by, or omitted to be done by RECIPIENT under or in connection with any work, authority, or jurisdiction delegated to RECIPIENT under this AGREEMENT and all PROGRAM SUPPLEMENT.
- (2) RECIPIENT shall indemnify, defend and hold harmless STATE, the CTC and the State Treasurer relative to any misuse by RECIPIENT of State funds, PROJECT property, PROJECT generated income or other fiscal acts or omissions of RECIPIENT.

#### I. *Labor Code Compliance*

RECIPIENT agrees that it shall include in all subcontracts awarded using PROJECT funds a requirement that each subcontractor shall comply with California Labor Code requiring that all workers employed on public works aspects of any PROJECT (as defined in California Labor Code § 1720-1815) be paid not less than the general prevailing wage rates predetermined by the Department of Industrial Relations as effective at the date of Contract award by the RECIPIENT.

*J. Non-Discrimination*

In the performance of work under this AGREEMENT, **RECIPIENT**, its contractor(s) and all subcontractors shall not unlawfully discriminate, harass or allow harassment against any employee or applicant for employment because of sex, race, color, ancestry, religious creed, national origin, physical disability (including HIV and AIDS), mental disability, medical condition (cancer), age, marital status, or family and medical care leave and denial of pregnancy disability leave. **RECIPIENT**, its contractor(s) and all subcontractors shall ensure that the evaluation and treatment of their **RECIPIENT**, its contractor(s) and all subcontractors shall comply with the provisions of the Fair Employment and Housing Act (Government Code Section 12900 et seq.), and the applicable regulations promulgated thereunder (California Code of Regulations, Title 2, Section 7285.0 et seq.). The applicable regulations of the Fair Employment and Housing Commission implementing Government Code, Section 12990 (a-f), set forth in Chapter 5 of Division 4 of Title 2 of the California Code of Regulations are incorporated into this AGREEMENT by reference and made a part hereof as if set forth in full. Each of the **RECIPIENT**'s contractors and all subcontractors shall give written notice of their obligations under this clause to labor organizations with which they have a collective bargaining or other agreements. During performance of this AGREEMENT, **RECIPIENT** shall comply with the nondiscrimination program requirements of Title VI of the Civil Rights Act of 1964. Accordingly, 49 CFR Part 21, and 23 CFR Part 200 are applicable to this AGREEMENT by reference. **RECIPIENT** shall include the non-discrimination and compliance provisions of this clause in all contracts and subcontracts to perform work under this AGREEMENT.

*K. STATE Fire Marshal Building Standards*

The State Fire Marshal adopts building standards for fire safety and panic prevention. Such regulations pertain to fire protection design and construction, means of egress and adequacy of exits, installation of fire alarms, and fire extinguishment systems for any State owned or State occupied buildings per Section 13108 of the Health and Safety Code. When applicable, State Fire Marshal to ensure consistency with State fire protection standards.

*L. Americans with Disabilities Act*

By signing this Master Agreement, **RECIPIENT** assures STATE that **RECIPIENT** shall comply with the Americans with Disabilities Act (ADA) of 1990, which prohibits discrimination on the basis of disability, as well as all applicable regulations and guidelines issued pursuant to the ADA (42 U.S.C. 12101 et seq.)

*M. Access for Persons with Disabilities*

Disabled access review by the Department of General Services (Division of the State Architect) is required for all publicly funded construction of buildings, structures, sidewalks, curbs and related facilities. No construction contract will be awarded by **RECIPIENT** unless **RECIPIENT**'S plans and specifications for such facilities conform to the provisions of Sections 4450 and 4454 of the California Government Code, if applicable. Further requirements and guidance are provided in Title 24 of the California Code of Regulations.

*N. Disabled Veterans Program Requirements*

- (1) Should Military and Veterans Code Sections 999 et seq. be applicable to **RECIPIENT**, **RECIPIENT** will meet, or make good faith efforts to meet, the 3% Disabled Veterans Business Enterprises goals (or **RECIPIENT'S** applicable higher goals) in the award of every contract for **PROJECT** work to be performed under these this **AGREEMENT**.
- (2) **RECIPIENT** shall have the sole duty and authority under this **AGREEMENT** to determine whether these referenced code sections are applicable to **RECIPIENT** and, if so, whether good faith efforts asserted by those contractors were sufficient as outlined in the Military and Veterans Code Sections 999 et seq.

*O. Environmental Process*

Completion of the environmental process ("clearance") for **PROJECT** by **RECIPIENT** (and/or **STATE** if it affects a **STATE** facility within the meaning of the applicable statutes) is required prior to requesting **PROJECT** funds for right-of-way purchase or construction. No **STATE** agency shall request funds nor shall any **STATE** agency, board or commission authorize expenditures of funds for any **PROJECT** effort, except for feasibility or planning studies, which may have a significant effect on the environment unless such a request is accompanied by an environmental impact report per mandated by the California Environmental Quality Act (CEQA). California Public Resources Code Section 21080(b)(10), does provide an exemption for passenger rail **PROJECT** which institutes or increases passenger or commuter services on rail or highway rights-of-way already in use.

**ARTICLE III – SPECIAL PROVISIONS**

**SECTION 1. BOND PROVISIONS**

*A. General Bond Provisions*

- (1) If **RECIPIENT** enters into a management contract with a private party (including **AMTRAK**) for operation of rail, ferry or other transportation services in connection with **PROJECT**, **RECIPIENT** will obtain approval from Bond Counsel acceptable to **STATE** that the terms of that management contract meet the requirements of Internal Revenue Service Revenue Procedure 82-14 (as supplemented or amended) or any successor thereto (dealing generally with guidelines for when management contracts may be deemed not to create a "private use" of bond-financed property) or are otherwise acceptable. **RECIPIENT** will also be prepared to certify, upon request of **STATE**, that the revenues which **RECIPIENT** (or its manager) will receive directly from the operation of transportation services in connection with **PROJECT** (but not including any subsidy of the transportation operation from taxes or other outside fund sources) are, for any fiscal year less, than the ordinary and necessary expenses directly attributable to the operation and maintenance of the transportation system (excluding any overhead or administrative costs of **RECIPIENT**).

# **EXHIBIT 9**

# **EXHIBIT 9**

STATE OF CALIFORNIA  
DEPARTMENT OF TRANSPORTATION  
DIVISION OF MASS TRANSPORTATION

PROGRAM SUPPLEMENT/AMENDMENT  
STATE FUNDED TRANSIT PROJECTS

PROGRAM SUPPLEMENT NO.:	01A0045-12	CTC PROJECT APPROVAL RESOLUTION NO.:	STIP	TCR	Other
				TAA-06-60	

MASTER AGREEMENT NO.:	64A0045	ALLOCATION RESOLUTION NO.:		TFP-06-25	
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PROVISION SECTION

This PROGRAM SUPPLEMENT hereby incorporates all of the provisions contained in MASTER AGREEMENT No. 64A0045, entered into between STATE of California and NORTHCOAST RAILROAD AUTHORITY (RECIPIENT) on February 21, 2001 and is subject to all the terms and conditions thereof. This PROGRAM SUPPLEMENT is adopted in accordance with ARTICLE I of the aforementioned MASTER AGREEMENT under authority of Resolution 2001-02, approved by the RECIPIENT on April 18, 2001. The RECIPIENT further stipulates that, as a condition to the reimbursement of State funds obligated to this PROJECT, it accepts and will comply with the covenants, obligations, terms and conditions set forth in said MASTER AGREEMENT and on the following page(s) of this PROGRAM SUPPLEMENT.

FUND SOURCE	EFFECTIVE DATE	TERMINATION DATE	ALLOCATION AMOUNT	PROJECT PHASE
TCR	11/9/06	6/30/2009	\$5,429,000	PA&ED
TCR	11/9/2006	6/30/2009	\$1,397,000	PS&E

PROJECT TITLE: #32.9 - NCRA; Upgrade to FRA Class 2 and 3 and Long-term Stabilization

PROJECT SUMMARY: Upgrade the NWP rail line to class 2 and 3 standards and stabilize landslides using various funding sources. The first phase of the project to be completed will result in an operable phase of the Russian River Division extending north from Lombard to Windsor and an EIR/EIS in the Canyon.

REQUIRED SIGNATURES

Recipient: North Coast Railroad Authority By: <u>Mitch Stogner</u> Title: <u>MITCH STOGNER, Executive Director</u> Date: <u>12-18-06</u>	STATE OF CALIFORNIA State Dept.: <u>Department of Transportation</u> By: <u>Cheryl Willis</u> Title: <u>Deputy District Director, Planning D1</u> Date: <u>1/17/07</u>
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DISTRIBUTION LIST

- Caltrans Headquarters Accounting (2)
- Caltrans District 1 (1)
- Recipient (1)
- Caltrans Mass Transportation (1)
- Caltrans Headquarters Audits (1)

LIST OF ATTACHMENTS INCLUDED

- Scope of Work/Project Application
- CTC/TCRP Resolution
- Certification of Funds
- 3<sup>rd</sup> Party Agreements
- Special Conditions

## ATTACHMENT I

### ***Scope of Work***

*(Scope of Work includes the CTC-approved Project Description, Project Schedule, Overall Funding Plan and Project Financial Plan for the total project.)*

#### **Ia. Project Description**

##### **Agency Oversight**

1. Prepare/maintain project work plan and schedule
2. Maintain project files
3. Coordinate with NCRA staff and Board
4. QA/QC all deliverables
5. Coordinate and attend project meetings
6. Field design data and investigations
7. Coordinate information between the on-call engineer, Operator, Caltrans, FRA and other interested parties
8. Strategy/status meetings and project management: on-going meetings through out the project and general project management activities.

##### **Russian River Division Phase I and Phase II – Lombard to Willits Environmental Document Preliminary Engineering**

1. Preliminary engineering for Russian River Division Ph I (Lombard to Windsor)
  - a. Prepare a Design Basis Memo indicating AREMA standards and other design standards to be reviewed by Caltrans, SMART, the Operator, and FRA.
  - b. Perform data collection and design surveys of roadbed, rail, switches, culverts, crossings, structures and utilities
  - c. Rail testing/inspection program
  - d. Drainage/Hydrology report preparation including a matrix of condition and repairs.
  - e. Mapping
  - f. Geotechnical analysis for Haystack bridge pivot pier and Blackpoint approaches.
  - g. Bridge Ratings for 4 steel bridges
  - h. Gather detailed electrical and mechanical data for rehabilitation plans for 3 movable bridges
  - i. Design assumes all work within NCRA right of way
2. Preliminary engineering for Russian River Division Ph II (Windsor to Willits)
  - a. Obtain aerial mapping from Windsor to Willits
  - b. Geotechnical analysis to define project requirements, recommendations for embankments and slope stabilization, and identify necessary temporary construction easements
  - c. Develop project description

##### **Environmental**

1. Preliminary Project and Scoping Activities
  - a. Project Description
  - b. Preliminary Environmental Assessment Form
  - c. Field Review
  - d. Initial Study/EA
  - e. NOP/NOI
  - f. Additional Agency scoping, if needed

2. Draft EIR/EIS
  - a. Prepare public participation materials
  - b. Identify stakeholders, conduct informational meetings, and identify and prepare alternatives evaluation
  - c. Prepare Preliminary Draft
  - d. Prepare Technical Studies
    - Aesthetics
    - Agricultural resources
    - Air Quality
    - Biological Resources
    - Cultural Resources
    - Geology and soils
    - Hazards and hazardous materials
    - Hydrology and water quality
    - Land use and planning
    - Mineral resources
    - Noise and vibration
    - Population and housing
    - Public services/safety
    - Recreation and parks
    - Transportation and traffic
    - Utilities/energy and service systems
  - e. Identify and prepare Cumulative Impact Evaluation
  - f. Identify mitigation strategies
  - g. Agency review, comments and revisions
  - h. Notice of Completion of Draft EIR/EIS
  - i. Public participation, comment period, Hearing and response to comments
3. Final EIR/EIS
  - a. Revise draft per comments
  - b. Agency review, comments and revisions
  - c. Final EIR and Notice of Determination, and EIS and Record of Decision

### **Russian River Division Phase I – Lombard to Windsor Plans Specifications & Estimates**

1. Preparation plans, specifications and engineer's estimate, construction staging and schedule for the following:
  - a. Replacement of railroad grade crossings
    - Crossing Warning Systems
    - Roadway surface
  - b. Repair of timber, concrete and steel bridges
    - Original design capacity
    - Plans for three movable bridges including potential automation of the Black Point bridge with controls on the ground and mechanical, electrical, and structural repairs
  - c. Trackway repair plans (mainline and sidings)
    - Tie replacement program

- Ballast program
  - Track surfacing program
  - Switch upgrade program
  - Rail and OTM (other track materials) replacement program
    - d. Culvert clean out/replacement/repair plans,
    - e. Roadbed restoration
    - f. Signage/Gates
  - Mileposts, Whistle posts
  - Private crossings
2. Three bid packages will be developed for construction:
- a. Replacement of grade crossings
  - b. Prioritized bridge repairs
  - c. Remainder of repairs: track and roadbed

### **Canyon EIR/EIS**

1. Preliminary Project and Scoping Activities
  - a. Project Description
  - b. Preliminary Environmental Assessment Form
  - c. Field Review
  - d. Initial Study/EA
  - e. NOP/NOI
  - f. Additional Agency scoping, if needed
2. Draft EIR/EIS
  - a. Prepare public participation materials
  - b. Identify stakeholders, conduct informational meetings, and identify and prepare alternatives evaluation
  - c. Prepare Preliminary Draft
  - d. Prepare Technical Studies
    - Aesthetics
    - Agricultural resources
    - Air Quality
    - Biological Resources
    - Cultural Resources
    - Geology and soils
    - Hazards and hazardous materials
    - Hydrology and water quality
    - Land use and planning
    - Mineral resources
    - Noise and vibration
    - Population and housing
    - Public services/safety
    - Recreation and parks
    - Transportation and traffic
    - Utilities/energy and service systems
  - e. Identify and prepare Cumulative Impact Evaluation
  - f. Identify mitigation strategies

- g. Agency review, comments and revisions
  - h. Notice of Completion of Draft EIR/EIS
  - i. Public participation, comment period, Hearing, and response to comments
3. Final EIR/EIS
- a. Revise draft per comments
  - b. Agency review, comments and revisions
  - c. Final EIR and Notice of Determination, and EIS and Record of Decision

**Ib. Project Cost and Schedule (\$ X 1,000)**

<i>Phase</i>	<i>Scope</i>	<i>Start</i>	<i>End</i>	<i>Cost</i>
1	• Russian River Div. Reopening Lombard to Windsor	Dec 2006	June 2007	\$1,460
	• Russian River Division Windsor to Willits	Dec 2006	June 2007	\$979
	• Canyon EIR/EIS Preparation and PE	Dec 2006	June 2008	\$4,000
	• Canyon Permitting	Feb 2008	Sep 2008	\$928
	• North-end environmental/permit/PE	June 2008	Nov 2009	\$2,799
2	• Russian River Div. Lombard to Windsor PS&E	Dec 2006	June 2007	\$1,557
	• Russian River Div. Windsor to Willits PS&E	July 2007	Feb 2008	\$1,084
	• Canyon PS&E	Jan 2008	Sep 2009	\$4,346
	• North-end PS&E	Oct 2008	Nov 2009	\$3,159
3	Not Applicable			
4	• Russian River Div. Lombard to Windsor (multiple contracts)	Feb 2007	Mar 2008	\$22,613
	• Russian River Division Windsor to Willits (2 contracts)	Sep 2007	Oct 2008	\$15,515
	• Canyon (two 18 month contracts)	Sep 2008	Mar 2011	\$47,832
	• North-End (one 2-year contract)	Dec 2009	Dec 2011	\$44,352
<b>Total:</b>				<b>\$150,624</b>

**Ic. Funding Plan for Total Project**  
For the Total Project (\$ X 1,000)

<i>Source</i>	<i>Type</i>		<i>Phase 1</i>	<i>Phase 2</i>	<i>Phase 3</i>	<i>Phase 4</i>	<i>Total</i>
TCRP 32.9	State	Committed	\$5,429	\$2,433		\$23,138	\$31,000
TCRP 32.3	State	Committed	\$600				\$600
TCRP 32.4	State	Committed	\$390	\$261		\$4,249	\$4,900
TCRP 32.7	State	Committed				\$1,800	\$1,800
Demo Funds	Federal	Committed				\$8,600	\$8,600
FEMA 1203-DR-CA	Federal	Committed				\$695	\$695
Measure M	Local	Committed				\$3,000	\$3,000
Operator – NWP Co.	Private Funds	Committed	\$100				\$100
		Proposed	\$928	\$4,346		\$44,832	\$50,106
Other	Future Funding Sources	Committed					
		Proposed	\$2,719	\$3,106		\$43,998	\$49,823
<b>Project Totals:</b>			<b>\$10,166</b>	<b>\$10,146</b>		<b>\$130,312</b>	<b>\$150,624</b>

**Id. Financial Plan for this Allocation**

<i>Phase of Work</i>	<i>Activity</i>	<i>Agency Oversight Estimated Cost</i>	<i>On-call Engineer Estimated Cost</i>	<i>TOTAL ESTIMATED COST</i>
Phase 1	PA&ED Russian River Lombard to Willits	\$64,000	\$2,065,000	\$2,129,000
Phase 1	Canyon EIR/EIS	99,000	3,201,000	3,300,000
Phase 2	PS&E Russian River Lombard to Windsor	42,000	1,355,000	1,397,000
<b>TOTAL NOV-06 ALLOCATION</b>				<b>\$6,826,000</b>

ATTACHMENT II

*CTC Resolution*

State of California  
DEPARTMENT OF TRANSPORTATION

Business, Transportation and Housing Agency

**Memorandum**

To: CHAIR AND COMMISSIONERS

CTC Meeting: November 8-9, 2006

Reference No.: 2.6c(1)  
Action Item

From: CINDY McKIM  
Chief Financial Officer

Prepared by: Ross A. Chittenden  
Division Chief  
Transportation Programming

Subject: FINANCIAL ALLOCATION FOR TRAFFIC CONGESTION RELIEF PROGRAM (TCRP)  
PROJECTS  
RESOLUTION TFP-06-25

RECOMMENDATION:

The California Department of Transportation (Department) recommends that the California Transportation Commission (Commission) approve Resolution TFP-06-25, allocating \$19,806,000 in new TCRP funding for four TCRP projects, as identified on the attached vote list, with the stipulation that these allocations be under contract within six months.

ISSUE:

The attached vote list describes four TCRP projects totaling \$19,806,000. The agencies for these projects are ready to proceed and are requesting an allocation at this time.

FINANCIAL RESOLUTION:

Resolved That:

The project(s), as component phases or in their entirety, appear under Government Code Section 14556.40(a) and are entitled to participate in this allocation.

Reimbursement of eligible costs is subject to the policies, restrictions and assurances as set forth in the Commission's policy for allocating, monitoring, and auditing TCRP projects, and is governed by the terms and conditions of the Fund Transfer Agreement, Program Supplement or Cooperative Agreement, and subsequent amendments to the same if required, as executed between the Implementing Agency and the Department.

Attachment

*"Caltrans improves mobility across California"*

Project # Allocation Amount Implementing Agency District-County	BREF # and Project Description Description of Allocation	Item # Program Code	Total Allocation Amount
<b>Section 11 - Traffic Competition Relief Program Allocations</b>			
1 \$900,000 North Coast Railroad Authority (NCRA) 01 - Eureka	Project #32.3 - North Coast Railroad; completion of the rail line from Willits to Arata.  Reopen the railroad between Willits and Arata.  This allocation provides \$800,000 in new TCRP funding for Project Approval and Environmental Document.  The NCRA is requesting that \$225,000 of the allocation be in the form of a cash advance.	Chapter 91 of the Statutes of 2000  800-3807 30.10.710.050	\$800,000
2 \$6,826,000 North Coast Railroad Authority (NCRA) 01 - Eureka	Project #32.9 - North Coast Railroad; long-term stabilization.  Stabilization of landslides pursuant to Government Code Section 14506.50(f).  This allocation provides a total of \$6,826,000 in new TCRP funding, including \$5,429,000 for Project Approval and Environmental Document and \$1,397,000 for Project Specifications and Estimates.  The NCRA is requesting that \$600,000 of the allocation be in the form of a cash advance.	Chapter 91 of the Statutes of 2000  800-3807 30.10.710.050	\$6,826,000
3 \$10,500,000 Sacramento Area Council of Governments 03 - Sacramento	Project #116 - Sacramento Emergency Clean Air/Transportation Plan (SECAT).  Reduce emissions from heavy-duty diesel engines through engine replacement or fleet modernization within the Sacramento federal ozone non-attainment area.  This allocation provides \$10,500,000 new TCRP funding for Phase 4 activities.	Chapter 91 of the Statutes of 2000  800 -3057 20.30.710.877	\$10,500,000
4			

**ATTACHMENT III**

***Certification of Funds***

**TRAFFIC CONGESTION RELIEF PROGRAM**

Name of Recipient: North Coast Railroad Authority  
 Name of Project: #32.9 - Upgrade to FRA Class 2 and 3 and Long-term Stabilization  
 CTC Resolution Number: TFP-06-25  
 Date of Resolution: November 9, 2006  
 Allocation Amount: \$6,826,000  
 Fund Source: TCR  
 Date of Third Party Contract Award: n/a  
 Period of Availability: 11/9/2006 through 6/30/2009

SOURCE DIST-UNIT	CHARGE DIST-UNIT	EXP AUTH NO.	OBJECT	ALLOCATION AMOUNT	LED	FY	ENCUMBRANCE DOCUMENT NO.	PROJECT #
01-804	01-804	R9497A	7049	\$6,826,000	6/30/09	01	TR R9497A 05	32.9
I hereby certify upon my own personal knowledge that budgeted funds are available for the period and purpose of the expenditure stated above.						Signature of Accounting Officer		Date
ITEM	CHAPTER	STATUTES	FISCAL YEAR	<i>Julia Kimmel</i>				1/4/06
2660-689-3007	91	2000	200/2001					

## ATTACHMENT IV

### *Special Conditions*

RECIPIENT agrees to exercise best efforts toward meeting the one remaining condition (of five) imposed by the Department of Transportation (Caltrans) on RECIPIENT for the release of State or federal funds. The five conditions were identified in the July 17, 1998 letter from the Director of Caltrans to the Executive Director of the North Coast Railroad Authority. The remaining condition is to "resolve audit deficiencies".

RECIPIENT continues to be designated as a "high risk grantee" by Caltrans Audits and Investigations (Caltrans Audits) based on CFR 49, Part 18.12 and is subject to enhanced monitoring and compliance conditions set forth in this section. RECIPIENT shall be reimbursed solely for subcontracted third party costs until such time that RECIPIENT demonstrates to the satisfaction of Caltrans Audits that recipient has the ability to accumulate and segregate reasonable, allocable and allowable in-house costs (in-house direct costs or any indirect costs). If RECIPIENT intends to seek reimbursement for in-house direct and indirect costs, the RECIPIENT is to enter three complete months of such costs into their accounting system and then request Caltrans Audits to perform a follow-up audit to determine the adequacy of the recipient's accounting system and internal management controls. RECIPIENT also agrees to request verification and approval of indirect and fringe benefit rates by Audits before billing these costs to any project. If it is determined, after the above follow-up audit is performed, that the RECIPIENT has an adequate financial management system and an approved indirect cost allocation plan, a formal written amendment will be required prior to reimbursement of in-house direct and indirect costs.

Actual costs reimbursed shall not exceed the estimated line items set forth in the financial plan. The maximum amount payable under this program supplement shall not exceed \$6,826,000.

For the purposes of Cash Flow, RECIPIENT shall submit Progress Payment Requests. The process and timeline are defined below:

- After RECIPIENT has paid the contractor, RECIPIENT may seek reimbursement by submitting an invoice and supporting documentation to District 1.
- District 1 must receive from RECIPIENT all cancelled checks for all expenses claimed on said invoice within 30 calendar days of receipt of said invoice.
- The District will have 15 calendar days from the date that said invoice is received to process the request, verify supporting documentation, and forward it to HQ Accounting.
- HQ Accounting will have 15 calendar days to process the invoice and forward it to the State Controller's Office (SCO).
- SCO will have 15 calendar days to process the invoice and issue payment to RECIPIENT.
- Caltrans shall withhold 10% of the final billing. Upon receipt of all cancelled checks supporting the final invoice, the 10% retainer withheld by Caltrans shall be released to RECIPIENT per the above timeline.

In the event that RECIPIENT does not comply with the process as described above, this agreement becomes null and void and RECIPIENT will be required to submit cancelled checks concurrent with any future requests for reimbursement.

*Approved as to form and procedure*

BY: 	
CALTRANS ATTORNEY	DATE

# **EXHIBIT 10**

# **EXHIBIT 10**

**AGREEMENT FOR THE  
RESURRECTION OF OPERATIONS UPON  
THE NORTHWESTERN PACIFIC RAILROAD LINE  
AND  
LEASE**

**NORTH COAST RAILROAD AUTHORITY**

**and**

**NORTHWESTERN PACIFIC RAILROAD COMPANY**

**SEPTEMBER 2006**

## **Agreement For The Resurrection of Operations Upon The Northwestern Pacific Railroad Line and Lease**

### **I. Preamble**

**This Agreement is made this 13th Day of September 2006 by and between NORTH COAST RAILROAD AUTHORITY, (“NCRA”) a public agency, and NORTHWESTERN PACIFIC RAILROAD COMPANY, (“NWP”), a California Corporation.**

### **II. Recitals**

- A. NCRA is the owner of portions of the Northwestern Pacific Line (the “NWP Line”) and the holder of certain easements of the NWP Line;
- B. NCRA is an agency created by the Legislature of the State of California pursuant to the Government Code Sections 93000, *et seq.* with a statutory duty to provide freight rail service on the NWP Line;
- C. NCRA has residual common carrier responsibility for the NWP Line by reason of ownership of railroad property as defined by Interstate Commerce Commission Termination Act of 1995 and the implementing regulations adopted by the Surface Transportation Commission;
- D. NCRA was authorized by the Legislature of the State of California pursuant to Government Code Section 93023(d) to select a franchisee to finance and operate the railroad system;
- E. To fulfill its statutory duties and to fulfill its common carrier responsibilities, NCRA in January 2006 issued a Request for Proposals for a franchisee to assume the management of NCRA properties and to operate the Northwestern Pacific Rail Line;
- F. NCRA received five responses, including the response of Northwestern Pacific Railroad Company, a California corporation; and

G. NCRA evaluated the responses and selected Northwestern Pacific Railroad Company, a California Corporation as its franchisee on May 31, 2006.

### III. Definitions

The following terms shall have the following meanings as used in this Agreement:

- A. "Affiliate" means, with respect to any person or entity, each stockholder, subsidiary, officer, director, agent and employee of that person or entity.
  
- B. "Easement Premises " are generally described as the Northwestern Pacific Line from NWP Milepost 68.22 near Healdsburg, California to NWP Milepost 40.60 near Schellville, California to SPT Milepost 63.40 near Lombard, California more particularly described and defined as the "Easement Land" in the Operating Agreement at Section 1.01; Exhibits A, B, and C, thereof, subject to the reservations to SMART as successor in interest to the NWPRRA in Sections 1.02 and XV of the Operating Agreement.
  
- C. "Eel River Block" means all land owned, easements held, and licenses received by NCRA comprising the Northwestern Pacific Line from NWP Milepost 142.5 near Willits , California to NWP Milepost 238.00 near South Fork, California.
  
- D. "Humboldt Bay Block" means all land owned, easements held, and licenses received by NCRA comprising the Northwestern Pacific Railroad Line from NWP Milepost 238.00 near South Fork, California to NWP Milepost 302.90 near Samoa, California and NWP Milepost 295.57 near Arcata, California.
  
- E. "Indemnifiable Losses" means the aggregate of Losses and Litigation Expenses.
  
- F. "Indemnitee" means any person who makes a claim for indemnification under this Agreement, and each Affiliate of the Indemnitee.

- G.** "Indemnitor" means any person against whom a claim is made by an Indemnitee under this Agreement
- H.** "Leased Premises" means the Northwestern Pacific Railroad Line from NWP Milepost 142.5 near Willits , California to NWP Milepost 68.22 near Healdsburg, California including all of the property described as the "Willits Segment" in the NWPRRA and NCRA Principles of Agreement dated April 30, 1996.
- I.** "Litigation Expense" means any court filing fee, court cost, arbitration fee or cost, witness fee, and each other fee and cost of investigating and defending or asserting a claim for indemnification under this Agreement, including without limitation, in each case, attorneys' fees, or other professional's fees and disbursements.
- J.** "Loss" means any liability, loss, claim settlement payment, cost and expense interest, award, judgment, damages (including punitive damages), diminution in value, fines, fees and penalties or other charge, other than a Litigation Cost. As to the Easement Premises and for consistency with the Operating Agreement, "Loss" shall have the same meaning as defined in Section 9.04 of the Operating Agreement except the references to "NWPRRA" shall be deemed as being as to SMART and the references to "NCRA" shall be deemed as being as to NWP.
- K.** "NCRA Passenger Service" shall mean, with respect to the Leased Premises and Option Premises, rail passenger excursion and regional intercity passenger service and, with respect to the Easement Premises, shall have the same meaning as the term "Permitted Passenger Service" in the Operating Agreement.
- L.** "NWPRRA" means The Northwestern Pacific Railroad Authority, a dissolved joint powers agency, the rights and responsibilities of which were assigned to the Sonoma Marin Area Rapid Transit, ("SMART"), by the Memorandum of Understanding dated June 13, 2003.
- M.** "NWP Line" means the Northwestern Pacific Railroad Line encompassing the Easement Premises, Leased Premises, and Option Premises extending from SPT Milepost 63.40 near Lombard to NWP Milepost 302.90 near Samoa and NWP Milepost 295.57 near Arcata, including all branch lines.

- N. "Operating Agreement" means the Operating Agreement For Northwestern Pacific Line, with exhibits, dated August 19, 1996 by and between NWPRRA and NCRA.
- O. "Option Premises" means the Eel River Block or the Humboldt Bay Block, if the option for such Block has been effectively exercised.
- P. "Premises" shall mean the Leased Premises, the Easement Premises, or any Block the option for which NWP has been effectively exercised .
- Q. "Railroad Owner" means NCRA as to the Leased Premises, and the Option Premises and SMART as to the Easement Premises.
- R. "Railroad Property" means the Leased Premises, the Option Premises, and the Easement Premises".
- S. "SMART" means the Sonoma Marin Area Rapid Transit, or to any agency succeeding to its rights and obligations
- T. "STB" means the Surface Transportation Board, or such successor federal agency as may be established in the future for the purpose of regulating the railroad industry.
- U. "Track" means all rail and fastenings, switches and frogs complete, ties, ballast and signals.
- V. "Track Support Structure" means all appurtenances to the Track, including without limitation bumpers, roadbed, embankment, bridges, trestles, tunnels, culverts and any other structures or things necessary for support or construction thereof, pavement, any crossing planks and other similar materials or facilities used in lieu of pavement or other street surfacing material at vehicular crossings of tracks, culverts, drainage facilities and crossing warning devices.
- W. "Willits Block" shall have the same meaning as the "Leased Premises."

#### IV. Conditions

This Agreement is conditioned upon:

- A. NCRA having obtained any necessary consents from Sonoma Marin Rail Transit "SMART") pursuant to Paragraph 16.04 of the Operating Agreement; together with the cancellation of the note dated April 18, 2001 in the sum of \$250,000 and the reconveyance of the deed of trust of even date encumbering the Ukiah Depot property securing a loan for the improvement of the Haystack Bridge the cancellation and reconveyance being in accord with the First Amendment to Promissory Note dated February 5 2004,
- B. NCRA and NWP having executed an Equipment Lease for all equipment being transferred to NWP in accordance with the terms of this Agreement.
- C. NCRA having complied with the California Environmental Quality Act ("CEQA") as it may apply to this transaction.
- D. NCRA having obtained any necessary approvals or having made any appropriate notifications concerning the Private Activity Tax Rules relating to property acquired with Proposition 116 Bond funds.

#### V. Conveyance of Premises

##### A. Easement Premises

NCRA assigns all of its interest in the Easement Premises to NWP in accord with the terms and conditions of this Agreement.

##### B. Leased Premises

NCRA Leases all of its interest in the Leased Premises to NWP in accord with the terms and conditions of this Agreement.

##### C. Option Premises

NCRA grants to NWP options to the Option Premises as described in this Agreement in accord with the terms and conditions of this Agreement for:

1. The Eel River Block
2. The Humboldt Bay Block

**D.** All of the Leased Premises, Easement Premises , and Option Premises that are conveyed by this Agreement from NCRA to NWP shall be used for railroad purposes unless NCRA and NWP agree in writing that specific properties are not needed to provide railroad service and may be leased to others. In that event, an independent real estate appraiser shall determine the fair market value of the property and an appropriate lease rate that is reasonably expected to reflect market conditions over the expected life of the lease.

**E.** Excepted from the conveyance above is:

1. The Passenger Easement granted by NCRA to NWPRA upon the Willits Block April 30, 1996, which easement was assigned by NWPRA to SMART;
2. The Grant of Easement for Passenger Rail Operations- Sonoma County for the operation of regularly scheduled passenger commute service, and intercity and intermittent or seasonal passenger service originating or terminating from points south of Healdsburg, including the right to effect improvements;
3. Any rock deposits upon property owned by NCRA. However, NCRA grants the right of extraction of such rock without royalty, provided that such rock is utilized for construction , rehabilitation, or improvement of any portion of the Northwestern Pacific Railroad Line, upon documentation of such use as may be in the future be agreed to in writing by and between the parties;
4. The reservation set forth in Article IX C herein.

## **VI. Term**

- A.** This Agreement shall commence as of September 13, 2006 and continue for an initial term of five (5) years.
- B.** The NWP is granted the following options to extend the term of this Agreement for an additional term; (i) twenty (20) years commencing upon the expiration of the initial term, (the "First Option"); (ii) a twenty-five (25) year commencing at the termination of the First Option, (the "Second

Option”); (iii) a forty-five (45) year option commencing at the termination of the Second Option, (the “Third Option”).

- C. The foregoing options may be effectively exercised by the NWP by delivery of a written Notice of Exercise delivered to the NCRA in the manner provided herein for delivery of notices, at a time the NWP is in material compliance with the terms of this Agreement, no sooner than eighteen (18) months prior to the expiration of the then applicable term, and no later than twelve (12) months prior to expiration of the then applicable term.
- D. Any notice of exercise of an Option shall be on the same terms and conditions as this Agreement, unless modifications are otherwise agreed to between the parties.
- E. Notwithstanding the foregoing, as an Alternative Option, the NWP is granted during the initial term an option to extend the term of this Agreement for an additional term of ninety-nine (99) years commencing upon expiration of the initial term, which may be exercised by the NWP only at such time that the NWP has made private capital investment in the Northwestern Pacific Railroad Line in an amount equal to or greater than the higher of : (1) \$10.5 Million; or (2) the aggregate amount of the investment of Proposition 116 funds or other public bond funds by the NCRA in the Northwestern Pacific Railroad Line as of the date of the commencement of this Agreement.
- F. The Alternative Option may be exercised by NWP by delivery of a written Notice of Exercise delivered to NCRA in the manner provided herein for delivery of Notices, at a time NWP is in material compliance with the terms of this Agreement, together with documentation of NWP private capital investment in the amount required in subsection E.
- G. For purposes of the Alternative Option, the following categories shall be considered “private capital investment:” (i) physical improvements to the Track or Track Structures; (ii) acquisition of railcars dedicated for use on the Northwestern Pacific Railroad Line; (iii) Acquisition of locomotives dedicated for use on the Northwestern Pacific Railroad Line; or (iv) investment in ancillary facilities which will contractually generate gross shipping revenues aggregating in excess of \$10.0 million during the Initial Term.

- H. The Alternative Option shall be on the same terms as this Agreement, except as to term, and as to term it will be ninety-nine (99) years without any other options.
- I. Notice of exercise of an Option for the Eel River Block or The Humboldt Bay Block will be on the same terms and conditions as this Agreement, except that the term for any such exercise will commence immediately upon the NCRA's compliance with the California Environmental Quality Act ("CEQA") unless modifications are otherwise agreed to between the parties.
- J. In the event of the exercise of an Option for the Eel River Block, or the Humboldt Bay Block, NCRA shall pursue compliance with CEQA, and NEPA if applicable, with due diligence and with the exercise of its best efforts.

## **VII. Rail Operations**

### **A. NWP Line Restoration**

The Parties agree that it shall be solely NCRA's responsibility to rehabilitate and restore all portions of the NWP Line to the Utility Levels specified in Section VIII. Until such Utility Levels have been achieved on each specified segment of any portion of the NWP Line, NWP shall have no obligation whatsoever to operate either rail freight service or rail passenger service on or to maintain that specific segment of any portion of the NWP Line. If, however, NWP elects to operate either rail freight service or rail passenger service over any portion of the NWP Line at a lesser Utility Level than is specified in Section VIII, then NWP must maintain that portion of the NWP over which rail operations will occur in accordance with the terms of this Agreement.

The Parties also agree that after the effective date of this Agreement, NWP may operate work train service over any portion of the NWP Line subject only to any required authorization by the Federal Railroad Administration, and that the operation of any work train service shall not be considered as either rail freight service or rail passenger service as those terms are used in this Agreement. For work train operations the insurance requirement set forth in Article XV I (1) (a) herein shall be relaxed to require a limit of \$5

million in the place and stead of the stated requirements for \$25 million limits.

## **B. Rail Freight Operations**

1. After obtaining the necessary authority or exemption from the STB, NWP shall be the sole and exclusive provider of rail freight service to, from and across the Premises. Neither NCRA nor NWP shall grant to any third party any rights whatsoever to conduct rail freight operations on the Premises, without the prior, written consent of the other Party.
2. NWP shall not suspend or discontinue its operation as a common carrier over all or any part of the Premises without first applying for and obtaining from the STB and any other regulatory agency with jurisdiction, any necessary certificate of public convenience and necessity or other approval or exemption from regulation for such discontinuance of operations over the Easement Premises, Leased Premises, or any optioned portion of the Option Premises or any portion thereof.
3. NWP shall not seek regulatory authority for suspension or discontinuance of its operations or take any action to suspend or discontinue its operations on the NWP Line without first receiving written concurrence from NCRA, which shall not be unreasonably withheld. However, the concurrence of NCRA shall not be required for a suspension or discontinuance resulting from an event of Force Majeure or a lawful embargo.
4. NWP may in its sole discretion enter into any commercial arrangement with any other company, including but not limited to transloading, joint railroad or highway transportation operations, car haulage, and the like; provided, however, no such commercial arrangement may adversely affect (i) commuter passenger services, intercity excursion or other passenger service on the Easement Premises or (ii) NCRA Passenger Services on the Leased Premises or the Option Premises.
5. NWP shall manage, control and dispatch all train operations on the Leased Premises and on the Option Premises and subject to the limitations below, upon the Easement Premises. In the event SMART establishes commuter passenger, intercity, excursion, or other passenger

transit operations on the Easement Premises pursuant to the Operating Agreement, NWP shall act as NCRA's agent to negotiate the Coordination Agreement pursuant to Paragraph 3.09 of the Operating Agreement with reference to all of the topics therein contained including but not limited to the assumption by SMART or its franchisee of maintenance and/or dispatching functions as defined in Paragraph 3.07 (b) of the Operating Agreement.

6. NWP shall manage, control and have sole authority to grant and schedule access by third parties to the Leased Premises and the Option Premises to the extent consistent with Section XI herein relating to Capital Projects, and to the extent consistent with the Operating Agreement, and as may be provided for in the Coordination Agreement to be negotiated between NCRA (with NWP as NCRA's agent) and SMART, to the Easement Premises.
7. In the event that SMART undertakes to provide commuter rail, intercity, excursion or other passenger transit operations on the Easement Premises pursuant to the Operating Agreement, as amended, either directly or through the designation of a passenger service operator, NCRA agrees to designate NWP as a party agent and as a party of interest in the Coordination Agreement that will describe in detail the respective rights and obligations of the Parties with respect to maintenance, capital expenditures, dispatching, scheduling of operations, environmental liability, taxes and other matters concerning the joint use of the Easement Premises. NWP shall be entitled to negotiate the Coordination Agreement for all provisions of the coordination agreement except as the coordination agreement committing NCRA to capital improvements, or to reimbursement for such improvements for which matters the written consent of NCRA is to be necessary, and it shall negotiate in good faith with SMART, keeping NCRA informed as to status of all such negotiations.

**C. Rail Passenger Service.** NWP shall be the sole and exclusive use of the Leased Premises, Easement Premises, and the Option Premises, to the extent effectively exercised, to provide NCRA Passenger Service originating or terminating from points north of Healdsburg, provided that these operations shall be subordinate to regularly scheduled commuter operations conducted on the Easement Premises if any, as provided for in the Operating Agreement ("Permitted Passenger Service"). Further, the Operating Agreement provides that neither NWP nor NCRA may use the

Premises for any other type of passenger service; provided, however, that the term "passenger service" shall not include the transportation of officers, employees or invitees of either NCRA or NWP or the use of equipment utilized for the transportation of such persons.

If, at any time after two years from the date that any portion of the NWP Line has been rehabilitated to the FRA Class specified in Section VIII, NWP has not proposed to NCRA to operate NCRA Passenger Service over that portion of the NWP Line, or NCRA has not accepted such proposal within sixty (60) days of such proposal, then NWP agrees to join with NCRA in issuing a Request For Proposals ("Passenger RFP") for such service and the parties agree to then accept and consider applications to operate NCRA Passenger Service over that portion of the NWP Line from third party operators who are financially and operationally qualified. The parties shall require that any contract with a third party operator provides for safe operations, will not adversely affect NWP's freight service operations, will provide adequate compensation to NWP as defined below, will provide insurance and indemnification of NWP in accordance with the terms of this Agreement and provide for the retirement of the \$134,937 plus interest, franchise fee NCRA is contractually required to collect, payable in three annual installments.

The term "adequate compensation as used in the preceding paragraph shall be deemed to include, without limitation, the cost of locomotives; cars; train crews; engine crews; dispatching; track and track support structure maintenance; and property and liability insurance. It is the intent of the Parties that reimbursement to NWP shall reflect the principles for the direct assignment and separation of common expenses between passenger and freight service as promulgated by the STB in 49 CFR Part 1201 and 49 CFR Part 1242. NCRA shall not require that NWP accept any NCRA Passenger Service operation by another carrier over any portion of the NWP Line that is not then in active service by NWP, would not provide safe passenger train operations, would adversely affect NWP's freight service operations, would not provide insurance and indemnification in accordance with the terms of this Agreement, and would not adequately compensate NWP for any costs it would incur in accommodating such NCRA Passenger Service.

In the event that NCRA rejects a proposal from NWP for passenger service, such rejection shall be subject to the dispute resolution provisions of this agreement. NCRA may solicit third party operators during such dispute

resolution, but shall not accept any proposal from a third party operator so long as the dispute resolution is pending, and neither party has unnecessarily delayed such process.

- D. NCRA reserves the right to require NWP to admit contractors upon the Leased Premises for purposes of performing capital projects, subject to Section XI relating to Capital Projects.
- E. NCRA warrants that it has not granted rights to use the Easement Premises, Leased Premises, or Option Premises for rail operations to any third party except:
  - 1. A lease Agreement with NWPY and NORCARE, which agreement terminated June 30, 2005;
  - 2. A trackage rights agreement with California Northern Railroad relating to the Lombard-Schellville segment, which agreement both NCRA and California Northern Railroad consider to be terminated;
  - 3. A trackage rights agreement with California Western Railroad dated March 11, 1999 relating to the use of Willits Yard.

### **VIII. Maintenance, Rehabilitation, and Level of Utility**

- A. NCRA has an interest in rehabilitating, restoring the level of utility and preserving the physical condition of the NWP Line to facilitate the further development of economical and efficient freight services and the eventual development of NCRA Passenger Services. As long as the Premises are exclusively used by NWP for rail freight service, NWP shall perform all Normalized Maintenance functions on the Premises at NWP's sole cost and expense, subject to the definition of "Normalized Maintenance" below. When NCRA Passenger Services are initiated, NWP shall perform all Normalized Maintenance functions for said NCRA Passenger Services on the Premises at the sole cost and expense of the operator of said NCRA Passenger Services, subject to the definition of "Normalized Maintenance" below. NCRA shall, however, bear all expense of storm damage repairs, rehabilitation and restoration of the level of utility of the Premises as defined in Subsection B, below.

**B.** The following specific principles and understandings shall govern NCRA's maintenance responsibilities:

1. The Parties acknowledge that the freight revenue stream generated historically by traffic moving on the NWP Line has been inadequate either to fund the Normalized Maintenance requirements of the NWP Line, or to maintain it to the FRA Track Classes specified in Paragraph (4) below.
2. As a result of the foregoing, the Parties agree that, during the Term of this Lease Agreement, including any extensions thereof, NCRA shall utilize its best efforts to (i) bear all expenses of rehabilitating and restoring the level of utility of the Easement, Lease, and Option Premises, (ii) bear all expense of repairing any present or future damage to the Easement, Lease, and Option Premises attributable to all forms of Force Majeure, including, but not limited to, natural calamity, and (iii) NCRA shall independently, and with the solicited assistance of SMART, seek to obtain potentially available public funds for the rehabilitation, restoration, and continuation of the level of utility of the Easement, Lease, and Option Premises (without detriment to similar needs of any part of the Premises). The foregoing notwithstanding, the parties understand and agree that any reasonable unreimbursed capital expenditure for the rehabilitation or restoration of the Premises borne by NWP shall be capitalized by NWP as a leasehold improvement and will be subject to recapture as provided in Section XII, provided however that prior to commencement of construction NWP receives NCRA's written concurrence, which will not be unreasonably or unseasonably withheld, and further provided, however, that NWP shall report to the NCRA not less than annually at the time of submitting its financial statement all such capitalized leasehold improvements made during the immediately preceding calendar year and shall have been designated in writing as a capitalized leasehold improvement when made pursuant to Section XI relating to privately funded Capital Projects.
3. NCRA commits that all available public funds which are, or may be, designated for rehabilitation, restoration, and improvement projects of the NWP Line shall be invested in the NWP Line in a timely and efficient manner.
4. It shall be solely NCRA's responsibility to use its best efforts to seek public funding to reopen, rehabilitate, restore, and continue the level of

utility of the NWP Line at the following FRA Classes in order to achieve the following minimum acceptable track standards (“Utility Levels”):

- (a) Lombard – Ignacio Segment: FRA Class 3;
- (b) Ignacio – Healdsburg Segment: FRA Class 3;
- (c) Healdsburg – Redwood Valley: FRA Class 3;
- (d) Redwood Valley – Willits: FRA Class 2; and
- (e) Willits – Arcata/Samoa: FRA Class 3.

The Parties recognize and agree that actual track conditions and FRA Classes for most of the Premises do not meet these standards as of this date. NCRA shall use its best efforts to fund restoration of the Utility Levels set forth above. Prior to the commencement of rail operations on any portion of the NWP Line, NCRA and NWP shall make appropriate joint inspections of the Premises to document the actual condition and the FRA Classes of the Track and Track Support Structures.

5. Upon the commencement of rail operations on any portion of the NWP Line, NWP shall assume exclusive responsibility for performing (i) all Normalized Maintenance, (ii) all privately funded capital improvement projects, and (iii) and to the extent permitted by applicable law or regulation or exercise of regulatory authority, all disaster relief management and emergency repairs of damage sustained by the Premises as the result of natural disasters for and on behalf of NWP and the NCRA.
  6. Accounting for maintenance of way expenditures must be performed in accordance with Generally Accepted Accounting Principles as consistently applied in the railroad industry and subject to any and all orders of the STB or other entity with jurisdiction over NWP’s accounting. To the extent of any conflict between GAAP and orders of the STB, the policies and procedures of GAAP must apply.
- C. In the event that NWP determines that it is not economical in consideration of traffic volumes on any portion of the NWP Line to perform Normalized Maintenance on such line segment, NWP may seek to suspend or discontinue service or embargo the line upon ninety (90) days of notice to NCRA. In the event that NWP obtains regulatory authority or exemption to suspend or discontinue service on any portion of the NWP Line, the standard of maintenance for such line segment(s) may be suspended by

NWP. In the event that NCRA unsuccessfully opposes such suspension or discontinuance of service it may terminate this Agreement as to any section or any portion of a section of the NWP line necessary in its sole discretion to restore service to the portion of the NWP line to which service has been suspended. In addition, to the extent that NWP lawfully and in good faith embargoes a portion of the NWP Line, the Normalized Maintenance obligations of NWP shall be suspended for so long as the embargo remains in effect.

#### D. Normalized Maintenance

1. For the purposes of this Lease Agreement, "Normalized Maintenance" is defined as the annual operating expenses necessary to preserve the Levels of Utility of the Track and Track Support Structures, as is reasonable and appropriate following restoration of the Track and Track Support Structures to the standards established in Paragraph 1(e) above, from the combined effects of actual freight railroad usage and the passage of time, excluding any effects of Force Majeure events. Excluded from the definition of Normalized Maintenance specifically are those costs actually reimbursed to NCRA by the Federal Emergency Management Administration ("FEMA"), or the Governor's Office of Emergency Services, "(OES)".
2. Normalized Maintenance for NCRA Passenger Services shall be the obligation of, and paid for by, the third-party operators, and performed by NWP. During the Term hereof, all NCRA contracts for the operation of NCRA Passenger Services shall provide for a reasonable roadway maintenance expense and capital expenditure recovery in such amounts as agreed between NCRA, NWP, and the third party operators, in accordance with the principles and costing methodology promulgated by the STB in 49 CFR Part 1201 and 49 CFR Part 1242.
3. As long as the Premises are exclusively used for rail freight service by NWP and NCRA Passenger Service by, or on behalf of, NCRA, NWP shall perform any and all work required by lawful authority in connection with maintenance and operation of the Track and Track Support Structures, including but not limited to roadway, bridges, and tunnels on the NWP Line, and all additions thereto; provided, however, payment for all expenses in excess of Normalized Maintenance shall be solely the responsibility of NCRA. All work required for passenger services by lawful authority in connection with maintenance and

operation of the Track and Track Support Structures on the Easement Premises, and all additions thereto, shall be performed at the sole expense of NCRA or its third party passenger operator.

- E.** Upon commencement of rail operations on any portion of the NWP Line authorized by the Federal Railroad Administration, NWP shall assume exclusive responsibility for providing all ordinary and normalized maintenance on such portion of the NWP Line and only on those portions of the NWP Line that NWP operates.
- F.** As to the Leased Premises including any portion of the NWP Line for which an Option has been exercised, NCRA shall own, and as to the Easement Premises, SMART shall own, all fixtures, improvements, and materials added to the Track and Track Support Structures unless otherwise agreed to in writing by NCRA or SMART as the case may be. Materials removed from the Track and Track Support Structures shall to the extent not prohibited by law, or agreements to which NCRA is a party, become the property of NWP provided that such materials are replaced by NWP. No rail or other material utilized for railroad operations shall be replaced with lesser weight or size rail or material without the prior written consent of NCRA or SMART as the case may be. However, nothing contained herein shall prohibit NWP from making emergency or other temporary repairs with lesser weight or size rail or other inferior materials provided that with respect to the Easement Premises, SMART consent is first obtained and with respect to the Leased Premises, NCRA consent is first obtained, and permanent repairs are made within a reasonable time thereafter and that such permanent repairs comply with the standards set forth in this Paragraph.
- G.** NWP shall comply with all laws affecting the Premises or requiring any alterations or improvements to be made thereon; shall not commit or permit waste thereof; shall not commit, suffer, or permit any act upon the Premises in violation of law; and shall do all other acts which from the character or use of the Premises for rail freight and permitted passenger operations may be reasonably necessary, the specific enumeration herein not excluding the general.
- H. Inspection of Premises**
1. NCRA shall have the right at any time, upon reasonable advance notice (except for emergencies, where no notice is required) and from time to

time to inspect the Premises for conformity with the maintenance standards of this Agreement and to verify compliance with this Agreement; provided, that such inspections shall not unreasonably interfere with NWP's freight operations.

2. If, and when, SMART exercises its rights pursuant to the Operating Agreement to inspect the Easement Premises at any time, upon reasonable advance notice (except for emergencies, where no notice is required), and from time to time to inspect for conformity with the standards of maintenance contained in the Operating Agreement and to verify compliance with the Operating Agreement, then NWP shall grant access to the Easement Premises, provided, however, that such inspections shall not unreasonably interfere with NWP's freight service operations or any Permitted Passenger Service operations.

#### **I. Maintenance Records and Documentation**

1. NWP shall maintain full and complete records of all maintenance, rehabilitation, track relocation or removal performed on the Premises and shall maintain track profiles and track charts in a current condition so as to disclose and show all program maintenance and rehabilitation performed on the Track and Track Support Structures, together with all crossings permitted by NWP (the Track Charts"). NCRA shall have the right at all reasonable times and places to inspect such records and Track Charts. Copies of records and track charts shall be provided by NWP to NCRA promptly upon request.
2. NWP shall provide copies of all reports of track inspections by Federal Railroad Administration ("FRA") or California Public Utilities Commission ("CPUC") inspectors to NCRA as to the Leased Premises and to SMART as to the Easement Premises promptly upon receipt of said reports; the term "reports" shall include all notices or citations alleging deficiencies from FRA track standards.
3. NWP shall annually submit its maintenance plan and budget (the "Maintenance Plan") to NCRA for consideration and consent of NCRA on or before the March meeting of the Board of Directors of NCRA, such consent not to be unreasonably withheld by NCRA. The Maintenance Plan shall be in sufficient detail to enable NCRA to meet its contractual requirements to SMART set forth in the Operating Agreement.

- J.** NWP shall not use nor permit the use of the Premises in any manner that will tend to create waste or a nuisance or would materially interfere with the continued commercial, industrial or transportation corridor uses of the Premises. In using the Premises, and in constructing, maintaining operating and using the Track and Track Support Structures, NWP shall comply with any and all requirements imposed by federal or state statutes, or by ordinances, orders or regulations or any governmental body having jurisdiction, including, but not limited to, building and zoning ordinances regulating the occupancy, use or enjoyment of the Premises or regulating the character, dimensions or location of any Track and Track Support Structures on the Premises, subject to such exemptions from jurisdiction as may be set forth in the Interstate Commerce Commission Termination Act of 1995, 49 USC 10500 et seq. Nothing herein shall diminish by this Agreement any rights under law or regulation to which NWP is entitled as a railroad providing common carrier service on any portion of the NWP Line.
- K.** Subject to the provisions hereof, NWP may construct or relocate sidetracks or industrial spur tracks on the Leased Premises and Option Premises (and upon the Easement Premises upon written consent of SMART) as required in the ordinary course of business so long as such work is done in conformity with applicable governmental regulations. Sidetracks or industrial spurs in place on the Leased Premises as of the effective date of this Agreement may not be removed from the Leased Premises without consent of NCRA, which consent will not be unreasonably withheld and in the event any tracks are removed and track materials sold for salvage, the net proceeds (after removal costs) of such sale shall belong to NCRA, or SMART as the case may be, unless otherwise agreed to in writing; provided that NWP may remove sidetracks and industrial spurs it installs, and retain the proceeds from the sale of such materials, without obtaining the prior consent of NCRA.

**L. Transfer of Road Inventories**

On the effective date of this Agreement, NCRA shall transfer possession and convey by itemized written description all of its equitable interests and title in and to all inventories of (i) track, signal, communication and other roadway materials, parts and supplies of every kind or description, and all other consumable roadway supplies of every kind whatsoever, wherever situated on the Leased Premises or the Option Premises (collectively, the "Roadway Inventories") to NWP and (ii) all freight car, locomotive,

# **EXHIBIT 11**

# **EXHIBIT 11**

# Notice of Exemption

To: Office of Planning and Research  
1400 Tenth Street, Room 121  
Sacramento, CA 95814

From: North Coast Railroad Authority  
419 Talmage Road, Suite M  
Ukiah, CA 95482

County Clerk  
County of Marin, Sonoma, Mendocino, Napa, Humboldt, Trinity

Project Title: Emergency Levy/Roadbed and Debris Removal Repairs

Project Location - Specific: NCRA Mileposts 31.8 to 34.3, 44.37, 59.50, 79.29, 91.82, 110.40, 116.41, 120.49, 122.31, and MP 279.4

Project Location - City/County: Novato, Penngrove, Fulton, Asti, Unincorporated Sonoma, Ukiah, Calpella, Redwood Valley, and Fields Landing near Eureka

Project Location - County: Marin, Sonoma, Mendocino, and Humboldt

Description of Nature, Purpose, and Beneficiaries of Project: Emergency repair of roadbed/levies in Novato and at Fields Landing near Eureka, and removal of debris at various bridge sites in Marin, Sonoma and Mendocino counties required as a result of December 2005-March 2006 storm damage to prevent current and future flooding of agricultural lands and the continued degradation of natural stream beds. The work proposed is not seen to impact any particularly sensitive environments. If the work is not done, sensitive areas outside of the work area could be affected.

Name of Public Agency Approving Project: North Coast Railroad Authority

Name of Person or Agency Carrying Out Project: North Coast Railroad Authority

FILED

SEP 08 2006

MICHAEL J. SMITH  
MARIN COUNTY CLERK  
By: J. Whitney, Deputy

Exempt Status: (check one)

- Ministerial (Sec. 21080(b)(1), 15268);
- Declared Emergency (Sec. 21080(b)(3), 15269(a));
- Emergency Project (Sec. 21080(b)(4), 15269(b)(c));
- Categorical Exemption. State type and section number:
- Statutory Exemptions. State code number: 15269(b)(c)

Reasons why project is exempt: The repair and maintenance activities involve no expansion of existing use. Any reconstruction of existing structures or roadway will be in an identical site and will have substantially the same purpose and capacity as previously existed. These repairs are an emergency because they are needed to avoid/mitigate future and present flooding and destruction of private and public property including privately owned service facilities essential public safety and welfare. Emergency permit applications will be submitted to the Department of Fish and Game, the U.S. Army Corps of Engineers, the Regional Water Quality Control Board, and the Bay Conservation and Development Commission 30 days prior to construction.

Lead Agency Contact Person: Mitch Stogner Area Code/Telephone/Extension: (707) 463-3280

If filed by applicant:

1. Attach certified document of exemption finding.
2. Has a Notice of Exemption been filed by the public agency approving the project?  Yes  No

Signature: Mitch Stogner Date: August 22, 2006 Title: Environmental Officer

- Signed by Lead Agency
- Signed by Applicant

Date received for filing at OPR:

## **EXHIBIT 12**

## **EXHIBIT 12**

# Notice of Exemption

To: Office of Planning and Research  
1400 Tenth Street, Room 121  
Sacramento, CA 95814

From: North Coast Railroad Authority  
419 Talmage Road, Suite M  
Ukiah, CA 95482

County Clerk  
County of Marin, Sonoma, Mendocino, Napa, Humboldt, Trinity

**Project Title:** Russian River Division Maintenance and Repairs

**Project Location - Specific:** NCRA Mileposts 1.0 to 62.9 (See Attached Figure 1)

**Project Location - County:** Napa, Marin, Sonoma, and Mendocino

**Description of Nature, Purpose, and Beneficiaries of Project:** North Coast Rail Authority (NCRA) shall engage in maintenance and repair activities from Milepost 1.0 to Milepost 62.9 (Russian River Division – Lombard to Windsor) to bring the rail line into conformance with FRA Class 2/3 standards, to address safety issues identified by local jurisdictions and to comply with the intent of an Environmental Consent Decree. The identified maintenance and repair activities will be within the existing NCRA right-of-way, will not involve any expansion of existing use and will not change the purpose or capacity of the structures being repaired. This Categorical Exemption is supported by a detailed description of work and justification supporting the determination of categorical exemption at each milepost.

**Name of Public Agency Approving Project:** North Coast Railroad Authority

**Name of Person or Agency Carrying Out Project:** North Coast Railroad Authority

**Exempt Status:** *(check one)*

- Ministerial (Sec. 21080(b)(1); 15268);
- Declared Emergency (Sec. 21080(b) (3); 15269(a));
- Emergency Project (Sec. 21080(b)(4); 15269(b)(c));
- Categorical Exemption: Classes 1,2,3,4,5,8,9,11,21 & 30, (PRC 21084; 14 CCR 15300 et seq.)
- Statutory Exemptions. State code number: 15269(b)(c)

**Reasons why project is exempt:** See attached Categorical Exemption Determination Form

**Lead Agency Contact Person:** Mitch Stogner Area Code/Telephone/Extension: (707) 463-3280

**If filed by applicant:**

1. Attach certified document of exemption finding.
2. Has a Notice of Exemption been filed by the public agency approving the project?  Yes  No

Signature: Mitch Stogner Date: 6-4-07 Title: Executive Director

Signed by Lead Agency  
 Signed by Applicant

Date received for filing at OPR:

# **EXHIBIT 13**

# **EXHIBIT 13**

**FILED**

**NOV 03 2008**

**KIM TURNER**  
Court Executive Officer  
**MARIN COUNTY SUPERIOR COURT**  
By: M. Murphy, Deputy

**COPY**

1 **JEFFREY A. WALTER, CBN 63626**  
2 **VERONICA A. F. NEBB, CBN 140001**  
3 **Walter & Pistole**  
4 **670 W. Napa Street**  
5 **Suite F**  
6 **Sonoma, CA 95476**

7  
8 **Attorneys for Petitioner,**  
9 **City of Novato**

10  
11  
12 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
13 **IN AND FOR THE COUNTY OF MARIN**

14 **CITY OF NOVATO,**

**Case No. CV 074645**

15 **Petitioner,**

16 **v.**

17 **NORTH COAST RAILROAD**  
18 **AUTHORITY,**

**CONSENT DECREE [REDACTED]**

19 **Respondent.**

20 **CALIFORNIA DEPARTMENT OF**  
21 **TRANSPORTATION, CALIFORNIA**  
22 **TRANSPORTATION COMMISSION,**  
23 **CALIFORNIA DEPARTMENT OF FISH**  
24 **AND GAME, KERNEN**  
25 **CONSTRUCTION, MASS. ELECTRIC**  
26 **CONSTRUCTION CO.,**  
27 **NORTHWESTERN PACIFIC**  
28 **RAILROAD COMPANY, AND DOES 1**  
to 10,

**Real Parties in Interest.**

29 \_\_\_\_\_ **Petitioner, City of Novato ("Novato"), Respondent, the North Coast Railroad Authority**  
30 **("NCRA") and Real Party in Interest, the Northwestern Pacific Railroad Company ("NWPCo"),**  
31 **a California corporation, hereby stipulate and agree to the terms and conditions of this Consent**  
32 **Decree [REDACTED] ("Consent Decree") and its execution and entry as such by the**

**CONSENT DECREE AND STIPULATED JUDGMENT**

**EXHIBIT A**

1 Marin County Superior Court as follows:  
2

3 **I. BACKGROUND**  
4

5 A. Novato filed a Petition for a Writ of Mandamus and Complaint for Declaratory Relief  
6 ("Petition") in this matter on September 28, 2007 against NCRA and the California Department  
7 of Transportation ("CalTrans"), the California Transportation Commission ("CTC"), the  
8 California Department of Fish & Game ("CDFG"), Kern Construction ("Kern"), Mass.  
9 Electric Construction Company ("Mass") and Northwestern Pacific Railroad Company  
10 ("NWPCo"), as Real Parties in Interest, alleging, among other things, violations of the  
11 California Environmental Quality Act ("CEQA") in the undertaking of certain activities by the  
12 NCRA to lease, repair, rehabilitate, restore and/or upgrade rail improvements in and along the  
13 Northwestern Pacific Railroad Line ("NWP Line").  
14

15 B. In its Petition, Novato prays for, among other things, that: (1) the Court issue a Peremptory  
16 Writ of Mandamus ordering NCRA to set aside and void (i) contracts for the Track  
17 Improvements (defined below) to the NWP Line and (ii) funding agreements and to refrain from  
18 consideration or approval of any other contract or to take any other action to approve any project  
19 related to the Track Improvements until full compliance with CEQA; (2) the Court issue a  
20 Peremptory Writ of Mandamus ordering NCRA to set aside and void the Lease (defined below)  
21 until full compliance with CEQA; (3) the Court issue a Peremptory Writ of Mandamus ordering  
22 CalTrans and CTC to set aside and void all approvals relative to the NCRA's applications for  
23 transportation funds until full compliance with CEQA; (4) that the Court issue a Preliminary  
24 Injunction enjoining the NCRA, Ghilotti (defined below), Mass, Kern, and CDFG from taking  
25 any further steps or actions to perform under the agreements they entered with NCRA during the  
26 pendency of the action; (5) the Court issue a Preliminary Injunction enjoining CalTrans and CTC  
27 from paying to or reimbursing NCRA any transportation funds during the pendency of the action;  
28 (6) that the Court issue a Peremptory Writ of Mandamus ordering NCRA to set aside the Bridge

1 Financing and Security Agreement with NWP Co. and approved by NCRA on or about August  
2 15, 2007 and/or September 12, 2007; (7) for Petitioner's costs and attorneys' fees pursuant to  
3 C.C.P. Section 1021.5; and (8) for such other relief as the Court may deem proper.  
4

5 C. Preliminary injunctions were issued on January 22, 2008, and February 6, 2008  
6 generally prohibiting work on the NWP Line pursuant to any contracts that had not been awarded  
7 as of January 7, 2008 and for contracts awarded as of January 7, 2008, but under which no  
8 construction work had commenced as of January 7, 2008.  
9

10 D. The Parties (defined below) recognize, and the Court by entering this consent Decree  
11 finds, that implementation of this Consent Decree will avoid prolonged and complicated  
12 litigation between the Parties and Real Parties in Interest, may result in some mitigation of some  
13 of the potential environmental impacts associated with the operation of freight trains on the NWP  
14 Line which may not otherwise be mitigated and that this Consent Decree is fair, reasonable, and  
15 in the public interest.  
16

## 17 II. JURISDICTION

18

19 This Court has jurisdiction over the subject matter of this action and over the Parties and  
20 Real Parties in Interest under Cal. Public Resources Code Section 21168.5 and Cal. Code of  
21 Civil Procedure Section 1085. Additionally, this Court has independent, subject matter  
22 jurisdiction to enter and enforce this Consent Decree. Solely for the purposes of the instant  
23 action, the Consent Decree and the ongoing enforcement and implementation thereof, the Parties  
24 hereto waive all objections and defenses that they may have to the jurisdiction of the Court or to  
25 venue in the County of Marin. The Parties shall not challenge and hereby waive the right to  
26 challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this  
27 Consent Decree. NCRA's and/or NWPCo's activities and/or obligations described in Sections  
28 V, VI, VII, IX, X, XI, XIII, XVI, XIX, XXII and XXIV, and the compliance with CEQA as to

1 any projects described in Sections V, VI, VII, VIII and X of the Consent Decree are voluntarily  
2 entered into with the recognition that those activities and/or obligations as defined in the  
3 foregoing provisions do not constitute an unreasonable burden on interstate commerce.  
4

5 **III. PARTIES BOUND**  
6

7 A. This Consent Decree applies to and is binding upon Novato and upon NCRA and NWPCo  
8 and their respective officers, officials, agents, contractors, members, successors and assigns and  
9 any person or entity claiming under or through the NCRA and/or NWPCo. Any change in  
10 ownership or status of the NCRA or NWPCo, including, but not limited to, any transfer of their  
11 assets or real or personal property shall in no way alter NCRA's and/or NWPCo's  
12 responsibilities under this Consent Decree.  
13

14 B. NCRA shall provide a copy of this Consent Decree to the Real Parties in Interest to this  
15 action and to each contractor hired to perform any part of the Work (as defined below) required  
16 by the Consent Decree and shall expressly condition all contracts entered to perform any or all of  
17 the Work to comply with the terms of this Consent Decree. NCRA or its contractors shall  
18 provide written notice of the Consent Decree to all subcontractors hired to perform any portion of  
19 the Work described in this Consent Decree. NCRA shall nonetheless be responsible for  
20 ensuring that its contractors and subcontractors perform the Work contemplated herein in  
21 accordance with this Consent Decree.  
22

23 C. Within thirty (30) days of this Consent Decree's Effective Date, NCRA shall provide a  
24 copy of this Consent Decree to the Sonoma Marin Area Rail Transit District ("SMART").  
25

26 **IV. DEFINITIONS**  
27

28 Unless otherwise expressly provided herein, terms used in this Consent Decree which are

1 defined in CEQA or in the CEQA Guidelines shall have the meaning assigned to them in CEQA  
2 or said CEQA Guidelines. Whenever the terms listed below are used in this Consent Decree or  
3 in the Exhibits attached hereto, the following definitions shall apply:

4  
5 1. "CalTrans" shall mean the California Department of Transportation, a California state  
6 public agency

7  
8 2. "CDFG" shall mean the California Department of Fish and Game, a California state public  
9 agency.

10  
11 3. "CEQA" shall mean the California Environmental Quality Act, California Public Resources  
12 Code Section 21000 et seq.

13  
14 4. "CEQA Guidelines" shall mean the CEQA Guidelines promulgated by the Office of  
15 Planning and Research pursuant to CEQA section 21083, specifically, 14 California Code of  
16 Regulations Section 15000 et seq.

17  
18 5. "CFR" shall mean the Code of Federal Regulations.

19  
20 6. "CTC" shall mean the California Transportation Commission.

21  
22 7. "Consent Decree" shall mean this Decree and all Exhibits attached hereto. In the event of a  
23 conflict between this Decree and any Exhibit, this Decree shall control.

24  
25 8. "Cooper" shall mean Cooper Crane & Rigging Inc., a California Corporation.

26  
27 9. "County" shall mean Marin County, California.

28

1 10. "Day" shall mean a calendar day unless expressly stated to be a Working Day. "Working  
2 day" or "business day" shall mean a day other than a Saturday, Sunday or federal holiday. In  
3 computing any period of time under this Consent Decree, where the last day would fall on a  
4 Saturday, Sunday or federal holiday, the period shall run until 5:00 p.m. of the next working day.

5  
6 11. "EIR" shall mean Environmental Impact Report pursuant to CEQA.

7  
8 12. "ERD" shall mean the Eel River Division which is that portion of the NWP Line north of  
9 mile post 142.5 at Willits, California.

10  
11 13. "Emergency" shall mean a sudden, unexpected occurrence, involving a clear and  
12 imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life,  
13 health, property or essential public services.

14  
15 14. "FHWA" shall mean the Federal Highway Administration of the U.S. Department of  
16 Transportation.

17  
18 15. "Ghilotti" shall mean Ghilotti Bros., Inc. a California Corporation.

19  
20 16. "Freight train", "freight engine", "commercial freight train" and "commercial freight  
21 engine" shall mean any locomotive train engine (genset, diesel or otherwise) or train other than a  
22 Work Engine (defined below).

23  
24 17. "ISTEA" shall mean the Intermodal Surface Transportation Efficiency Act of 1991, as  
25 amended from time to time.

26  
27 18. "Kernan" shall mean Kernan Construction, a partnership organized under the laws of the  
28 state of California.

1 19. "Lease" shall mean that certain AGREEMENT FOR THE RESURRECTION OF  
2 OPERATIONS UPON THE NORTHWESTERN PACIFIC RAILROAD LINE AND LEASE,  
3 between the NWPCo and NCRA, dated September 2006.

4  
5 20. "Mass" shall mean Mass. Electric Construction Company, a corporation incorporated  
6 under the laws of the state of Delaware.

7  
8 21. "NCRA" shall mean the North Coast Railroad Authority, a public agency created by  
9 California Government Code Section 93000 et seq.

10  
11 22. "CPUC" shall mean the California Public Utilities Commission.

12  
13 23. "Novato" or "City" shall mean the City of Novato, a general law city in Marin County,  
14 established and existing as such under the laws of the State of California.

15  
16 24. "NWPCo" shall mean the Northwestern Pacific Railroad Company.

17  
18 25. "NWP Line" shall mean that portion of the rail right of way and improvements located  
19 therein from Samoa in Humboldt County, California, to Ignacio in Marin County, California, and  
20 then eastward to Lombard in Napa County, California.

21  
22 26. "Operations EIR" shall mean the EIR that NCRA is currently preparing for the operation  
23 of freight service on the NWP Line in the RRD for which a Notice of Preparation dated July 10,  
24 2007, was issued by NCRA and which is to be certified by the NCRA prior to commencing such  
25 operations.

26  
27 27. "Parties" shall mean Novato, NWPCo and the NCRA.

1 28. "Quiet Zone" shall mean segment(s) of the NWP Line within which is situated one or a  
2 number of rail crossings at which locomotive horns are not routinely sounded as established in  
3 accordance with 49 CFR Section 222.39 (a).

4  
5 29. "RRD" shall mean the Russian River Division which is that portion of the NWP Line  
6 south of mile post 142.5 at Willits, California.

7  
8 30. Intentionally left blank.

9  
10 31. "Real Parties In Interest" shall mean collectively CalTrans, CTC, CDFG, Kernan, NWPCo,  
11 Mass, Cooper and Ghilotti.

12  
13 32-35. Intentionally left blank.

14  
15 36. "TCRP" shall mean the funding program established under the California Transportation  
16 Congestion Relief Act, Cal. Gov't Code §14556 et seq.

17  
18 37. "Track Crossings" shall mean the at grade rail right of way crossings located at the  
19 intersections of the NWP Line and the following streets, roads and pedestrian pathways or trails  
20 within the City of Novato, as depicted and numbered on Exhibit A, attached hereto and  
21 incorporated herein by reference:

- 22 a. #1. Rush Creek Place
- 23 b. #2. Golden Gate Place
- 24 c. #3. Olive Avenue
- 25 d. #4. Grant Avenue
- 26 e. #5. Pedestrian/Bike Crossing (Manuel Drive)
- 27 f. #6. Novato Creek (Private)
- 28 g. #7 Wetlands Access (Private)

- 1 h. #8 Hanna Ranch Road
- 2 i. #9. Private Crossing (Highway 37)
- 3 j. #10. Renaissance Road.
- 4 k. #11. Private Crossing (Harbor Drive Business Park)
- 5 l. #12. Grandview Avenue
- 6 m. #13. Private Driveway (Hunter's Club Drive);

7 as well as the trail crossing immediately to the east of the Petaluma River and all  
8 other intersections of the NWP Line with pedestrian trails or vehicular rights of way as may be  
9 required or recommended by the regulatory agencies in order to establish Quiet Zones covering  
10 all NWP Line crossings in Novato.

11  
12 38. "Track Improvements" shall mean any and all repair, rehabilitation, construction,  
13 improvement, restoration and/or upgrading of the NWP Line.

14  
15 39. "Work" shall mean all of NCRA's and/or NWPCo's activities and/or obligations  
16 described in Sections V, VI, VII, VIII, IX and X of this Consent Decree.

17  
18 40. "Work Engine" shall mean a train engine that is used exclusively for non-commercial  
19 purposes.

20  
21 **V. GENERAL PROVISIONS**

22  
23 **A. Commitments of NCRA.**

24  
25 1. NCRA and NWPCo, as the case may be, shall fully, satisfactorily and timely perform and  
26 complete the Work in accordance with this Consent Decree at its sole cost and expense; (i)  
27 provided, however, that should NCRA and/or NWPCo, as the case may be, fail to or decide not  
28 to so perform and complete any or all of the Work NCRA and NWPCo shall be prohibited from

1 operating any commercial freight engines and/or freight trains in or on the Low Emission Engine  
2 Division (defined below) until all of the Work is so performed and completed; (ii) provided,  
3 further, that notwithstanding the foregoing proviso, during any period of time during which any  
4 or all of said Work is not so performed and completed, NCRA and NWPCo may run on or in the  
5 Low Emission Engine Division no more than a cumulative total of six, one-way commercial  
6 freight train trips per week (Monday through the following Sunday) each with no more than  
7 eighteen (18) cars, but between the hours of 7:00 p.m. and 8:00 a.m. NCRA and NWPCo shall  
8 not operate any trains or locomotive engines of any kind except for Work Engines which may be  
9 operated between said hours only in the event necessary to and only for such time and to the  
10 extent required to address an Emergency; and (iii) provided, further, that notwithstanding the  
11 foregoing provisos, in the event any or all of said Work is not so performed and completed by  
12 December 31, 2011, thereafter NCRA and NWPCo shall be prohibited from operating, and they  
13 shall not operate, any freight trains or freight engines of any kind in or on the Low Emission  
14 Engine Division until all of the Work is so performed and completed. Said Work shall include  
15 but not be limited to, all required design, design engineering, engineering, permitting, equipment,  
16 materials, construction work and all other work, actions and activities necessary for the  
17 completion, installation and/or effectuation of (i) the improvements that are required for the  
18 establishment of Quiet Zones applicable to each of the Track Crossings, (ii) the rail welding  
19 described in Section VII, below, (iii) the acquisition and use of environmentally friendly engines  
20 described in Section VIII, below, (iv) the installation of the landscaping improvements described  
21 in Section IX, below, and (v) the installation of the fencing improvements described in Section  
22 X, below. Subject to Sections XIII and XV, below, and except as is otherwise expressly  
23 provided hereinbelow, NCRA shall not be required to reimburse Novato for costs incurred by  
24 Novato relating to said Work, including, but not necessarily limited to, Novato's complying with  
25 the procedural requirements applicable to the establishment of Quiet Zones, review of plans and  
26 specifications, staff time, engineering peer review, and permit processing and inspection.

27

28 2. In the event that either or both NCRA and/or NWPCo declare insolvency, file for or are

1 involuntarily placed in bankruptcy or are otherwise relieved of their debts pursuant to Federal or  
2 State Law or legislative action, NCRA and/or NWPCo, as the case may be, shall notify Novato  
3 within three (3) days of any and all such actions or events.  
4

5 B. Compliance with Law.  
6

7 All Work shall be performed in accordance with all standards, specifications, requirements  
8 and schedules set forth in this Consent Decree; (i) provided, however, that should NCRA and/or  
9 NWPCo, as the case may be, fail to or decide not to so perform and complete any or all of the  
10 Work, NCRA and NWPCo shall be prohibited from operating any commercial freight engines  
11 and/or freight trains in or on the Low Emission Engine Division (defined below) until all of the  
12 Work is so performed and completed; (ii) provided, further, that notwithstanding the foregoing  
13 proviso, during any period of time during which any or all of said Work is not so performed and  
14 completed, NCRA and NWPCo may run on or in the Low Emission Engine Division no more  
15 than a cumulative total of six, one-way commercial freight train trips per week (Monday through  
16 the following Sunday) each with no more than eighteen (18) cars, but between the hours of 7:00  
17 p.m. and 8:00 a.m. NCRA and NWPCo shall not operate any trains or locomotive engines of any  
18 kind except for Work Engines which may be operated between said hours only in the event  
19 necessary to and only for such time and to the extent required to address an Emergency; and (iii)  
20 provided, further, that notwithstanding the foregoing provisos, in the event any or all of said  
21 Work is not so performed and completed by December 31, 2011, thereafter NCRA and NWPCo  
22 shall be prohibited from operating, and they shall not operate, any freight trains or freight engines  
23 of any kind in or on the Low Emission Engine Division until all of the Work is so performed and  
24 completed. Unless the provisions of this Consent Decree specifically state otherwise, all Work  
25 shall be performed by NCRA in accordance with all applicable laws, rules, and regulations.  
26

27 C. Permit Requirements.  
28

1 1. NCRA shall, at its sole cost and expense, obtain and keep in effect all necessary permits and  
2 licenses for the construction, implementation and/or installation of the Work, and give all  
3 necessary notices and pay all fees required by law. NCRA shall not commit any violations of  
4 said permits and licenses. All Work within vehicular and/or pedestrian rights of way located in  
5 Novato shall require the issuance of all required permits, including but not limited to  
6 encroachment permits. As long as NCRA complies with all (i) requirements of the City of  
7 Novato which Novato is legally permitted to impose, (ii) applicable environmental and other  
8 laws and regulations and (iii) the other provisions specified in this Consent Decree relating to  
9 such permits, including but not limited to standard specifications and insurance, and which are  
10 applicable to the Work performed herein by the NCRA and/or by any contractor or subcontractor  
11 performing said Work, the City shall issue the relevant permit to the appropriate party.  
12 Notwithstanding anything to the contrary stated herein, NCRA shall not be liable for Novato's  
13 standard permit fees nor shall it be required to post any performance bonds with Novato pertinent  
14 to the Work NCRA performs to establish Quiet Zones pursuant to Section VI, below.

15 Notwithstanding anything to the contrary stated herein, this Consent Decree is not, and shall not  
16 be construed to be, a permit or entitlement of any kind issued pursuant to any Federal, State or  
17 local law, statute, rule, regulation or ordinance. Novato reserves all discretionary authority  
18 lawfully vested in it in acting upon any application that NCRA and/or its contractors must submit  
19 to the City pursuant to this Consent Decree.  
20

21 2. Prior and as a condition to the issuance of any grading, encroachment or other permit by  
22 Novato for said Work, if any, NCRA shall have obtained and shall provide to Novato evidence  
23 that the NCRA has obtained all necessary consents, approvals, permits, and/or waivers required  
24 for said Work from any and all agencies with jurisdiction over all or any portion of the Work,  
25 including, but not necessarily limited to, the CPUC, CDFG, CalTrans, NWPCo, U.S. Army  
26 Corps of Engineers, the Regional Water Quality Control Board, the Marin County Flood Control  
27 District.  
28

1 3. NCRA shall, at its sole cost and expense, act as and perform the duties imposed upon a  
2 lead agency for purposes of performing and preparing the necessary environmental review and  
3 documentation in connection with the approval and implementation of each component of the  
4 Work. The approval and implementation of the Work shall be subject to applicable  
5 environmental review, findings and approvals. Insofar as the Work is concerned, this Consent  
6 Decree shall be subject to CEQA and/or the National Environmental Policy Act ("NEPA"). In  
7 deciding whether to approve and undertake the performance of any and all components of the  
8 Work, NCRA shall comply with CEQA and/or NEPA, and NCRA reserves the right to exercise  
9 its full discretionary authority with respect thereto. If in the exercise of its discretion NCRA  
10 decides not to approve or implement any or all of the components of the Work, it shall retain the  
11 right to lawfully do so; (i) provided, however, that until the NCRA and/or the NWPCo, as the  
12 case may be, performs and completes all of the Work in accordance with this Consent Decree,  
13 NCRA and NWPCo may run on or in the Low Emission Engine Division no more than a  
14 cumulative total of six, one-way commercial freight train trips per week (Monday through the  
15 following Sunday) each with no more than eighteen (18) cars, but between the hours of 7:00  
16 p.m. and 8:00 a.m. NCRA and NWPCo shall not operate any trains or locomotive engines of any  
17 kind except for Work Engines which may be operated between said hours only in the event  
18 necessary and only for such time and to the extent required to address an Emergency; and (ii)  
19 provided, further, that notwithstanding the foregoing proviso, in the event any or all of said Work  
20 is not so performed and completed by December 31, 2011, thereafter NCRA and NWPCo shall  
21 be prohibited from operating, and they shall not operate, any freight trains or freight engines of  
22 any kind in or on the Low Emission Engine Division until all of the Work is so performed and  
23 completed.

24  
25 D. Priority Use of Funds.

26  
27 1. In the event the NCRA approves implementation, construction and completion of the  
28 Work described in Sections VI, VII, IX and X of this Consent Decree, and except as to capital

1 improvement funds already allocated and programed for use in paying for the costs of (i) the  
2 bridge construction contract (Contract T-3) entered between NCRA and Cooper and Ghilotti and  
3 (ii) performing the track work (replacing ties, placing ballast and repairing and surfacing the  
4 track) between Lombard and Windsor, California, required to upgrade the NWP Line between  
5 Lombard and Windsor, California to FRA Class 3 standards (also known as the Trackway  
6 Contract), all of NCRA's funds available or usable for capital improvement projects,  
7 irrespective of the source of those funds, shall be appropriated, allocated, re-allocated and/or re-  
8 programed by NCRA, as the case may be, to the maximum extent possible, such that they will  
9 first be used to pay for the said Work and all other obligations which are NCRA's to discharge  
10 pursuant to this Consent Decree. Copies of any unprivileged documents evidencing NCRA's  
11 compliance with this Section shall be delivered to the City promptly after their preparation.

12 2. The Parties acknowledge and agree that the FHWA has appropriated up to \$8.6 million  
13 in ISTEA funds for NCRA's utilization, but has yet to approve any NCRA projects for which  
14 said funds may be spent. Pursuant to Section VI(A), below, NCRA shall apply to the FHWA and  
15 Cal Trans to obtain approval to use said ISTEA funds to pay for all the Work except that  
16 described in Section VIII. Said application may include requests for allocations of ISTEA funds  
17 to pay for projects in addition to the said Work. In the event and to the extent that FHWA and  
18 Cal Trans authorize said ISTEA funds to be used by NCRA to pay for the said Work, the Work  
19 for which said ISTEA funds are approved shall be performed and completed in accordance  
20 herewith before any other projects and activities funded with said ISTEA funds are commenced.  
21 Copies of any unprivileged documents evidencing NCRA's compliance with this Section shall be  
22 delivered to the City promptly after their preparation.

23  
24 **VI. PERFORMANCE OF THE QUIET ZONE WORK**

25  
26 **A. Funding for Installation of Quiet Zone Improvements at the Track Crossings**

27  
28 NCRA shall, no later than ten (10) days after the Effective Date, commence negotiations

# **EXHIBIT 14**

# **EXHIBIT 14**



MEMO

**To:** NCRA Board of Directors  
**From:** Executive Director Mitch Stogner  
**Date:** March 10, 2010  
**Subject:** **Agenda Item F – Discussion Items**

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**Status of Lombard – Windsor Repair Project – Lifting of Emergency Order 21**

As previously reported, the 62-mile Lombard-Windsor repair project is substantially complete. 56 crossing signals have been replaced or repaired; 53,000 new ties have been inserted; 21,000 tons of ballast have been applied to the trackway; repairs to 40 timber bridges and 3 moveable bridges are complete, and the Schellville levees have been repaired.

Before NCRA/NWP Co. formally request inspection by the FRA, the following additional work, which will be financed by NWP Co., needs to be completed:

- Destress, respike, and anchor about 8 miles of continuously welded rail (CWR) from Sears Point to Blackpoint Bridge;
- Vegetation control along entire right-of-way;
- Installation of wayside bridge signals at Haystack, Blackpoint, and Brazos;
- Minor additional trackwork and welding from Ignacio – Windsor.

The operator estimates total cost of this work to be less than \$1 mil.

These 4 projects are among the 10 projects contained in NCRA's January 20 letter to FRA; the letter was included in the Board packets and discussed at the February 10 Board meeting in Healdsburg.

If the RRIF loan of \$3.18 mil. is approved by the FRA, and the NCRA Board approves the terms and repayment schedule, staff will request Board authority to use proceeds from the RRIF loan to repay NWP Co. for the financing of these 4 projects.

**Status of RRIF loan**

On January 20, a letter was sent to the FRA outlining the 10 projects for which NCRA/NWP Co. request funding under the RRIF low-interest loan program. IF the FRA

approves NCRA's request, staff will seek Board authorization to execute the loan documents.

As previously stated, at least 4 of these projects will be financed and managed by the Operator in conformance with state and federal contracting law, and NCRA's Policies and Procedures, with the expectation that RRIF funds would repay the operator for this work.

On March 2, the FRA staff advised NCRA staff that the FRA Credit Council would review NCRA's project application, including the 10 projects to be funded and the environmental clearance for each, this month. A full presentation to the FRA Credit Council is expected in April.

### **Status of November 5, 2009 Russian River Division EIR.**

On November 10, NCRA staff advised all interested parties that it has revised and re-circulated NCRA's March 9, 2009 DEIR, incorporating revisions to the March Draft to accomplish the following:

- Reflect current NCRA Trail Guidelines;
- Include an Appendix A which lists BMP's and NCRA's plans and procedures;
- Additional technical corrections throughout the March 9 DEIR.

The comment period was extended to January 14, 2010. It was also made clear in the Notice of Availability that previous comments to the March 9, 2009 DEIR would be considered part of the public record, but that written responses to comments, to the March 9 draft, would not be included in the final EIR. Therefore, the public was advised to submit new comments to the November re-circulated DEIR. Responses to these comments will be included in the FEIR.

NCRA received extensive comments on January 14. Staff met with the environmental consultants (Kleinfelder) on February 10 and February 24 to begin assimilating comments and developing responses.

The goal is to have an FEIR complete sometime in June, allow 2 weeks for public review, and request Board certification in June or early July.

### **SMART/NCRA Revised Operating Agreement**

As reported previously, NCRA lawyers and SMART lawyers began meeting last July to develop a new Operating Agreement involving joint use of the NWP line between Highway 37 (Ignacio) and Cloverdale. On September 24, SMART submitted a "redline" version of the proposed agreement for NCRA's review. After conducting a review of operating agreements employed by other California railroads with shared-use agreements, and thorough review of the many existing documents that govern use of the NWP track, NCRA/NWP Co. submitted a "redline" response to SMART's initial draft on January 11, 2010.

On January 28, SMART Chair, Debora Fudge, sent a letter to NCRA's Chair Hemphill objecting to NCRA's January 11 Draft. Chair Hemphill responded on February 11 with a further explanation of NCRA's justification for the suggested revisions, and recommended continued negotiation of the issues in dispute.

On March 1, Chair Fudge sent a letter to Chair Hemphill explaining that SMART would agree to an all day session with NCRA to attempt to resolve issues relative to the new Operating Agreement; she also indicated that she has named SMART Directors Charles McGlashan and Valerie Brown to join her in these discussions. Chair Hemphill has not yet formally responded to Chair Fudge's March 1 letter, but has named Directors Kelley and Wagenet to join him as NCRA's counterparts in these talks.

### **Sale of the Ukiah Depot Property**

The Administrative Office of the Courts (AOC), acting as the staff agency for the Judicial Council of California, has identified Mendocino County as one of 9 counties in California eligible for state funding in Fiscal Year 2009-2010 for the construction of a new County Courthouse complex. Funding for the acquisition of land and construction of the new Mendocino County Courthouse is provided through the enactment of SB 1407 in 2008, which authorized \$5 billion in state revenue bonds for the trial court facility construction.

On December 14, 2009, the Judicial Council announced that the state Public Works Board has given formal approval for a new courthouse in Ukiah. According to the press release issued by the Judicial Council, "this approval marks the official start of the courthouse construction project, which will be managed by the state Administrative Office of the Courts (AOC)."

The County of Mendocino and the City of Ukiah have jointly determined that the Ukiah Depot site is the preferred location for the new County Courthouse complex which will cost an estimated \$120 million to complete. The City and NCRA have entered into discussions with a nationally recognized development firm, Weston Solutions Inc., to acquire, clean-up, and possibly construct the new courthouse on the 11-acre Depot site.

NCRA staff and City staff have spent several hours in meetings discussing the steps necessary to transfer ownership of the Depot site to the developer (Weston Solutions Inc.) for construction of the new courthouse. NCRA legal counsel, Chris Neary, drafted an issues paper for presentation to the CTC, CalTrans, and the Federal Highway Administration (FHWA) in Sacramento on January 25. The purpose of the meeting was to seek permission to sell the Depot property and to gain a common understanding of what conditions, if any, would be placed on this transaction.

As I have reported to the Board, CalTrans/CTC/FHWA staff seemed to agree with NCRA's contention that 90% of the cost of the Willits Segment (\$5.3 mil.) was covered by a federal loan that was deemed satisfied in 2005, and that 10% of the cost of the Willits Segment (\$590,000) was covered with state TCI funds. There also seemed to be agreement that NCRA would be required, at the discretion of the CTC, to repay the state 10% of the proceeds from the sale of the Depot property, the pro-rata share of the state's contribution to the purchase of the Willits Segment. Caltrans legal counsel, Matthew George, Chris Neary, and FHWA legal counsel have scheduled a meeting to discuss what conditions the federal government (FHWA) would place on the sale of the Depot property.

Legal Counsel Neary and Weston Solutions have agreed that the next step is the execution of an Option Agreement which grants Weston Solutions the exclusive right to purchase the Depot property from NCRA provided specific conditions are met. A meeting involving all the interested parties has been scheduled for March 15 in Ukiah. The goal is to finalize the Option Agreement between Weston Solutions and NCRA as soon as possible.

### **NCRA/SMART Joint Use of \$8.6 mil. In ISTEALU Funds**

NCRA and SMART staffs met jointly with staff representatives from CalTrans, CTC, and FHWA on January 25 in Sacramento to discuss the possibility of designating SMART as the lead agency for implementation of the ISTEALU funds. FHWA staff questioned whether transfer to SMART could be accomplished through a joint MOU, when section 1912 of SAFETELU (2005) names NCRA as the lead agency for receipt of the funds. CalTrans/CTC programming staff thought that such a transfer could be accomplished administratively, but suggested requesting a letter from Rep. Thompson to FHWA calling for the transfer.

NCRA and SMART staff met with a representative from Rep. Thompson's office on February 9 to request such a letter. Thompson's staff assistant said that the Congressman would need to see the agreed-upon scope-of-work before transmitting a letter to FHWA.

Accordingly, staffs for both agencies need to finalize the scope-of-work and gain Board approval of the projects to be funded in the shared corridor.

### **April 7/8 CTC meeting in Irvine**

On April 8, CTC will consider NCRA's request for an extension of several Program Supplements applicable to TCRP Project 32.9. The most critical is the Project Supplement that expired in 6-30-09 which has remaining funds of about \$2.5 million. The extension of previously approved Program Supplements is generally a routine matter, but does require the submission of several documents, and will require staff presence at the April meeting.

# **EXHIBIT 15**

# **EXHIBIT 15**



## MEMO

**To:** NCRA Board of Directors  
**From:** Executive Director Mitch Stogner  
**Date:** December 12, 2007  
**Subject:** CTC Applications

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After extensive discussions at the October 17 Operator Committee meeting held in Santa Rosa, the NCRA plans to submit two applications to the CTC at its January meeting that will provide the final funding component for Phase 1 Russian River Divisions (Lombard to Windsor).

### Staff Recommendation:

Staff recommends reallocation of TCRP Project 32.3 (\$600,000) and TCRP Project 32.9 (\$3.3 mil) as follows:

32.3-Retain the entire \$600,000 included in Project 32.3 for a Geotechnical Study that includes mapping and cost estimates for repair of the Eel River Canyon. This information will be used to initiate the first step toward "defining the project" for the EIR/EIS in the Canyon.

32.9 – Retain \$240,000 for the objectives outlined in Project 32.3 above.

Reallocate the remaining funds included in Project 32.9 for environmental clearance North of Willits as follows:

- \$831,000 – Russian River Division EIR
- \$16,000 – Russian River Division Engineering
- \$2,213,000 – Augment funding available for signal, trackway, and moveable bridge construction contracts.

Allocate the remaining \$1.561 available under Project 32.9 to augment funding for signal, trackway, and movable bridge construction contracts.

# **EXHIBIT 16**

# **EXHIBIT 16**

ATTACHMENT II

*CTC Resolutions*

State of California  
DEPARTMENT OF TRANSPORTATION

Business, Transportation and Housing Agency

**Memorandum**

To: CHAIR AND COMMISSIONERS

CTC Meeting: May 19-20, 2010

Reference No.: 2.1a.(5)  
Action Item

From: Norina Ortega  
Chief Financial Officer

Prepared by: Rachel Falsetti  
Division Chief  
Transportation Programming

Subject: TRAFFIC CONGESTION RELIEF PROGRAM PROJECT APPLICATION  
AMENDMENT APPROVAL  
RESOLUTION TAA-09-24, AMENDING RESOLUTION TAA-07-47

**RECOMMENDATION:**

The California Department of Transportation (Department) recommends the California Transportation Commission (Commission) consider an application amendment for Traffic Congestion Relief Program (TCRP) Project 32.9, as described below.

**ISSUE:**

The North Coast Railroad Authority (NCRA) requests an application amendment for TCRP Project 32.9 – North Coast Railroad; long-term stabilization (PPNO T0329) to update the project schedule for completion of Environmental (PA&ED) and construction from Fiscal Year (FY) 2008-09 to FY 2010-11.

**BACKGROUND:**

On February 14, 2008, the Commission approved Resolution TAA-07-47, which revised the project scope, reprogrammed funds among project components, updated the project funding plan, and revised the project schedule for TCRP Projects 32.9 and 32.3. Also approved was the use of TCRP funds from both projects to fund a Geotechnical Study and Mapping of the Eel River Canyon (Canyon Study).

For Project 32.9, the scope of construction was revised under TAA-07-47 to focus the project on restoring a segment of the rail line within the Russian River Division. To coincide with that construction scope revision, PA&ED was also revised. Rather than produce an Environmental Impact Report addressing activities in the Eel River Canyon (one part of the original PA&ED scope of Project 32.9), NCRA was required to produce the Canyon Study, which was approved under TAA-07-47 to be funded under both TCRP Project 32.9 and 32.3.

As part of the original PA&ED scope of Project 32.9, NCRA is producing an "Environmental Impact Report (EIR) for Operation in the Russian River Division". This EIR evaluates the impact

CHAIR AND COMMISSIONERS

Reference No.: 2.1a.(5)  
May 19-20, 2010  
Page 2 of 2

of using the rail line for freight operations. The EIR is not affected by the change approved in February 2008, which left the Canyon Study as the remaining scope of PA&ED for Project 32.9.

On April 8, 2010, the Commission approved Resolution TAA-09-16 for Project 32.3, which established FY 2010-11 as the completion date for the Canyon Study.

In order to align the PA&ED allocations from both Project 32.3 and 32.9, for the Canyon Study, NCRA requests the Commission approve this new resolution, TAA-09-24, to complete PA&ED in FY 2010-11. NCRA needs this additional time because access into the canyon is limited due to seasonal water flows and private property concerns. By delaying its final field reviews for the Canyon Geotechnical study and mapping until May 2010, NCRA can enter the canyon along with other agencies who are conducting fish passage assessments under other projects unrelated to transportation.

For the remaining scope of construction for Project 32.9, NCRA filed a Notice of Categorical Exemption. Construction has been delayed but is ongoing and is not subject to the Canyon Study. NCRA will complete construction concurrently with their work on the Canyon Study.

Construction was delayed primarily due to litigation against NCRA initiated in September 2007 by the City of Novato. This litigation has been concluded, but there were additional delays to construction due to at-grade crossing issues in the city of Petaluma. Petaluma required an encroachment permit for signal work at a crossing near the intersection of Washington Street and D Street, which entailed additional design work for NCRA.

One segment of the construction scope for Project 32.9 cannot be completed until the California Department of Fish and Wildlife approves a permit for bridge work. NCRA applied for this permit in November 2009 but it has been delayed due to state staffing shortages. NCRA expects to have this permit by November 2010.

NCRA requests a project application amendment to update the project schedule to change the completion date for Environmental and construction from FY 2008-09 to FY 2010-11.

NCRA did not make this request prior to the end of FY 2008-09, which is when Program Supplements (contracts) reached their termination dates. Approval of this resolution would allow payment of outstanding invoices. NCRA requests that the new term for completion of Environmental and construction be retroactive to FY 2008-09 for both Environmental and construction.

#### **RESOLUTION TAA-09-24**

Be it Resolved, that the California Transportation Commission does hereby amend Traffic Congestion Relief Program Project 32.9 - North Coast Railroad; long-term stabilization (PPNO T0329) to update the project schedule for Environmental and construction, as described above.

# **EXHIBIT 17**

# **EXHIBIT 17**

RESOLUTION NO. 2011-02

DATED: June 20, 2011

**Resolution of the Board of Directors of the North Coast Railroad Authority making findings, certifying an Environmental Impact Report, adopting a Statement of Overriding Considerations, and Approving a Project resuming freight rail service from Willits to Lombard in the Russian River Division. The NCRA rail corridor is approximately 142 miles, runs roughly along the Highway 101 corridor, and extends from Willits to Lombard and runs through the towns of Redwood Valley, Calpella, Ukiah, Hopland, Cloverdale, Geyserville, Healdsburg, Windsor, Santa Rosa, Rohnert Park, Cotati, Petaluma, and Novato. The rail line includes various existing sidings, spur tracks, rail yards, stations, and maintenance facilities. The proposed freight service would initially have three round trip trains per week with each train having an estimate of 15 rail cars during the "start up phase." Once service is established, the proposed service may increase to three round trip trains per day, six days per week with an estimate of 25 round trip cars for one trip per day and 60 round trip cars on the other two trips. One 60-car train would go from Willits to Lombard, the second 60-car train would potentially haul waste from Santa Rosa to the Cal Northern connection at Lombard, and the other train would initiate with 10 cars in Willits and increase to up to 25 cars from Redwood Valley to Lombard. The proposed service does not include transporting hazardous waste, dangerous, highly flammable, or explosive materials. Operating the line would require the following rehabilitation, construction and repair activities in four areas: track and embankment repairs at Bakers Creek north of Cloverdale; Foss Creek north of Healdsburg; mechanical repairs to Black Point Bridge, at the mouth of the Petaluma River; and a new siding at Lombard to allow rail interchange with the Cal Northern Rail Line.**

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**SECTION 1  
PROPOSED PROJECT AND PROCEDURAL HISTORY**

WHEREAS, the North Coast Railroad Authority ("NCRA") was formed by the North Coast Railroad Authority Act to ensure continuing freight rail service to the North Coast area pursuant to the North Coast Railroad Authority Act (Government Code 93000 §§ et seq.);

WHEREAS, NCRA is governed by its Board of Directors ("Board").

WHEREAS, in 1995, NCRA, the Golden Gate Bridge Highway and Transportation District, and Marin County established a joint powers authority for the purpose of purchasing the Northwestern Pacific Railroad Line, ("the line") extending from Lombard near Napa in Napa County, to Willits in Mendocino County from Southern Pacific Railroad Co., which transaction was concluded on April 30, 1996;

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WHEREAS, in 1998 the Federal Railroad Administration issued Emergency Order No. 21 closing the line until potential safety issues caused by deferred maintenance extending back several decades were corrected;

WHEREAS, in 2000 the California Legislature adopted the Traffic Congestion Relief Act which appropriated to the NCRA \$31 million pursuant to Government Code §14556.50 in part for restoration of the Line, which appropriation was allocated to the NCRA by the California Transportation Commission beginning in December 2006 for restoration of the Line;

WHEREAS, the repairs were made and the Federal Railroad Administration subsequently released the operation of the Emergency Order 21 permitting freight railroad service for the portion of the line between Lombard in Napa County to Windsor in Sonoma County;

WHEREAS, in September 2006 the NCRA entered into an agreement with a private sector operator, (the "operator,") to provide freight railroad service between Lombard and Willits, subject to environmental review of the resumption of freight railroad service;

WHEREAS, in July 2007 the NCRA issued a Notice of Preparation of an Environmental Impact Report in compliance with the agreement with the operator. Subsequently, NCRA retained an environmental consultant to prepare the necessary environmental documents. The consultant conducted public scoping sessions in Santa Rosa in Sonoma County, and Novato in Marin County, and a scoping session in Petaluma with interested public agencies to determine the scope of the EIR;

WHEREAS, in March 2009 the Draft EIR was released for comment and public hearings on the Draft EIR were held in April 2009 in Petaluma and Willits. During the comment period new information was raised causing the NCRA Board of Directors to cause the Draft EIR to be revised pursuant to CEQA guideline 15088.5. A Revised Draft EIR was prepared and recirculated in November 2009 with a new public comment period extending into January 2010. After comments were received at the close of the public comment period, the Final EIR was prepared and released in May 2011 in which the comments upon the Draft Revised EIR were addressed;

WHEREAS, it was discovered that the Final EIR did not respond to a letter of comment written by one of the Directors of NCRA. An addendum to the Final EIR was prepared and added to the Final EIR on May 31, 2011. The addendum is not a technical addendum as anticipated by CEQA Regulation 15164, but rather is an additional response to a letter received during the public comment period.

WHEREAS, NCRA and its operator propose to resume freight rail service in the Russian River Division ("RRD") of the rail line from Willits to Lombard in the RRD. The NCRA rail corridor is approximately 142 miles, runs roughly along the Highway 101 and Highway 37 corridors, and extends from Willits to Lombard and runs through the towns of Redwood Valley, Calpella, Ukiah, Hopland, Cloverdale, Geyserville, Healdsburg, Windsor, Santa Rosa, Rohnert Park, Cotati, Petaluma, and Novato. The rail line includes one main line track and various

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existing sidings, spur tracks, rail yards, stations, and maintenance facilities. The proposed freight service would initially have three round trip trains per week with each train having an estimate of 15 rail cars during the "start-up phase." Once service is established, the proposed service may increase to three round trip trains per day, six days per week with an estimate of 25 round trip cars for one trip per day and 60 round trip cars on the other two trips. One 60-car train would go from Willits to Lombard, the second 60-car train would potentially haul waste from Santa Rosa to the Cal Northern connection at Lombard, and the other train would initiate with 10 cars in Willits and increase to up to 25 cars from Redwood Valley to Lombard. The proposed service does not include transporting hazardous waste, dangerous, highly flammable, or explosive materials. Operating the line would require the following rehabilitation, construction, and repair activities in four areas: Track and embankment repairs at Bakers Creek north of Cloverdale; Foss Creek north of Healdsburg; mechanical repairs to Black Point Bridge, at the mouth of the Petaluma River; and a new siding at Lombard to allow rail interchange with the Cal Northern Rail Line. For purposes of this resolution, these activities shall collectively be called "the Proposed Project" or "Proposed Project";

WHEREAS, NCRA determines, based on the findings set forth in this resolution and the entirety of the record of this proceeding, that operation of the RRD between Willits and Lombard is of independent economic utility and is desirable as a discrete and independent transportation unit based upon the evidence in the record, including but not limited to the Statement of the President of the operator dated September 23, 2009; the fact that the Southern Pacific Railroad Company operated the line as a separate division from 1914 to the mid 1980's; the Southern Pacific Railroad Company leased the Line to California Northern as a discrete entity; the Board of Directors issued a Request For Proposals to the Railroad industry in 2006, receiving a number of proposals, all confining their proposed operations to this portion of the line; the Federal Emergency Management Agency prepared an Administrative Final Programmatic Environmental Assessment in 2004 recognizing the line as having historic independent utility; and the termini are logical in that the line connects at Lombard with the California Northern Railroad and hence to the national rail system, and the line connects with the California Western Railroad at the population center of Willits;

NOW THEREFORE BE IT RESOLVED the Board of Directors of the NCRA finds as follows:

## **SECTION 2 CEQA COMPLIANCE**

2.1 NCRA has engaged teams of biologists, engineers, and other experts to determine the scope of potential impacts which may result from the proposed project. Beginning with the Initial Study, finalized in July, 2007, and through May of 2010, more than \$2.8 million dollars was spent by NCRA conducting environmental review and analyzing potential mitigation measures. Substantial additional amounts have been spent since May of 2010 in pursuit of the project's CEQA compliance. The focus of those efforts was to highlight potentially significant impacts and to produce mitigation measures crafted to provide paths to successful mitigation of each potentially significant impact, which are included both in the Final EIR and the appendices attached to it.

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2.2 The Final EIR consists of the Draft EIR of November 5, 2009, the Response to Comments on the Draft EIR of November 5, 2009 (“the Response to Comments”), and the Addendum to the Final EIR dated, May 31, 2011.

2.3 The Draft and Final EIRs were completed, noticed, and circulated for public review and agency review and comment in accordance with all procedural and substantive requirements of CEQA and the State CEQA Guidelines.

2.4 The Final EIR constitutes an adequate, accurate, objective, and complete EIR for the purposes of approving the Proposed Project, and represents a good faith effort to achieve completeness and full environmental disclosure for the Proposed Project.

2.5 The Final EIR discloses that the Proposed Project poses certain significant or potentially significant adverse environmental impacts that can be mitigated to less than significant levels. The Board finds that changes or alterations have been required in, or incorporated into, the Proposed Project through the mitigation measures imposed herein on the rail line, which will, in fact, mitigate those impacts to less than significant levels as set forth in Exhibit “A” to this Resolution. The Board therefore determines that, with the exception of those impacts specifically noted, the significant adverse environmental impacts of the Proposed Project summarized in Exhibit “A” to this Resolution have been eliminated or reduced to a point where they would have no significant effect on the environment.

2.6 The Final EIR discloses that the Proposed Project poses certain significant or potentially significant adverse environmental impacts that, even after the inclusion of mitigation measures, may not, or cannot, be avoided if the Proposed Project is approved. These impacts which relate to noise and ground borne vibrations, locomotive headlights during night operations, and cumulative impacts are fully and accurately summarized in Exhibits “A” and “B” to this Resolution, attached hereto and incorporated herein by this reference.

2.7 As to the significant environmental effects of the Proposed Project identified in the Final EIR and this Resolution that are not avoided or substantially lessened to a point less than significant, the Board finds that specific economic, social, or other considerations make additional mitigation of those impacts infeasible, in that all feasible mitigation measures have been incorporated into the Proposed Project, and also make project alternatives infeasible. The Board further finds that it has balanced the benefits of the Proposed Project against its unavoidable environmental risks and determines that the benefits of the Proposed Project outweigh the unavoidable adverse environmental effects. The Board further determines that the unavoidable adverse environmental effects of the Proposed Project are acceptable, and there are overriding considerations which support the Board’s approval of the Proposed Project, and that those considerations are identified in Exhibit “C” to this Resolution, attached hereto and incorporated herein by this reference (“the Statement of Overriding Considerations”).

2.8 The Final EIR describes a range of reasonable alternatives. Those alternatives are fully and accurately summarized in Exhibit “D” to this Resolution, attached hereto and incorporated herein by this reference. Those alternatives, however, cannot feasibly achieve

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certain objectives of the Proposed Project for the reasons set forth in Exhibit "D" to this Resolution. The Board therefore determines that all of the alternatives summarized in Exhibit "D" to this Resolution are infeasible.

2.9 To ensure that the proposed revisions and mitigation measures identified in the Final EIR are implemented, the Board is required by CEQA and the State CEQA Guidelines to adopt a mitigation monitoring program on the revisions the Board has required in the Proposed Project and the measures the Board has imposed to mitigate or avoid significant environmental effects. The mitigation monitoring program for the Proposed Project ("the Mitigation Monitoring Program") is attached hereto as Exhibit E. The Mitigation Monitoring Program will be implemented in accordance with all applicable requirements of CEQA and the State CEQA Guidelines.

2.10 The Board makes the following additional findings relating to the Final EIR and its environmental determinations with respect to the Proposed Project:

(A) The Board received several public comments alleging that the Board was unlawfully piece-mealing operations in the Eel River Division ("ERD") and RRD and that the Final EIR was inadequate because it failed to analyze operations in both the ERD and RRD. The Board finds that any future operations in the ERD are speculative and that the Board has no plan or intention of resuming service in the ERD at this time. The potential resumption of service in the ERD would require additional federal and other funding that does not exist at this time. Given that there are no financial resources available to resume services in the ERD, the Board does not intend to operate in the ERD.

(B) In making the findings and determinations set forth herein and in any exhibit hereto, the Board, on occasion references specific evidence in the record. No such specific reference is intended to be exclusive or exhaustive. Rather, the Board has relied on the totality of the evidence relating to the RRD in the record of these proceedings in reaching its decision.

(C) The findings in this Resolution and all exhibits hereto are true and correct, are supported by substantial evidence in the record, and are adopted as hereinabove set forth.

(D) The Final EIR is adopted and certified as follows:

1. The Final EIR has been completed in compliance with CEQA.
2. The Final EIR was presented to the Board and the Board reviewed and considered the information contained in the Final EIR prior to approving the Proposed Project.
3. The Final EIR reflects the independent judgment of the Board.
4. The Statement of Overriding Considerations, attached hereto as Exhibit C, is hereby adopted.

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5. The Mitigation Monitoring Plan attached as Exhibit "E" is hereby adopted.

6. NCRA staff is directed to file a Notice of Determination in accordance with CEQA and state CEQA Guidelines in each County through which the RRD runs.

7. The Proposed Project is approved as follows: NCRA with its operator shall resume freight rail service from Willits to Lombard in the RRD. The NCRA rail corridor is approximately 142 miles, runs roughly along the Highway 101 corridor, and extends from Willits to Lombard and runs through Redwood Valley, Calpella, Ukiah, Hopland, Cloverdale, Geyserville, Healdsburg, Windsor, Santa Rosa, Rohnert Park, Cotati, Petaluma, Napa, Schellville, Novato and the unincorporated areas of Napa, Sonoma, Marin and Mendocino counties. The rail line includes various existing sidings, spur tracks, rail yards, stations, and maintenance facilities. The proposed freight service would initially have three round trip trains per week with each train having an estimate of 15 rail cars during the "start up phase." Once service is established, the proposed service may increase to three round trip trains per day, 6 days per week with an estimate of 25 round trip cars for 1 trip per day and 60 round trip cars on the other trip. One 60-car train would go from Willits to Lombard, the second 60-car train would potentially haul waste from Santa Rosa to the Cal Northern connection at Lombard, and the other train would initiate with 10 cars in Willits and increase to up to 25 cars from Redwood Valley to Lombard. The proposed service does not include transporting hazardous waste, dangerous, highly flammable, or explosive materials. Operating the line would require the following rehabilitation, construction and repair activities in four areas: track and embankment repairs at Bakers Creek north of Cloverdale; Foss Creek north of Healdsburg; mechanical repairs to Black Point Bridge, at the mouth of the Petaluma River; and a new siding at Lombard to allow rail interchange with the Cal Northern Rail Line.

8. The Executive Director of NCRA is hereby designated as the custodian of documents and other materials that constitute the record of the proceedings upon which the Board's environmental and substantive decisions herein are based. These documents may be found at NCRA, 419 Talmage Road, Suite M, Ukiah, California 95482, during normal business hours.

**Directors:**

Clendenen: X Hemphill: X Kelley: X Kier:     MacDonald: X  
McCowen: X Meyers:     Wagenet: X Wolter: X

Ayes: 6 Noes: 1 Absent: 2 Abstain: Ø

**So Ordered.**

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# **EXHIBIT 18**

# **EXHIBIT 18**

DATED: April 10, 2013

Resolution of the Board of Directors of the North Coast Railroad Authority (“NCRA”) rescinding, in part, Resolution No. 2011-02, dated June 20, 2011 (the “Resolution”), to clarify that the NCRA did not have before it a “project” as that term is used in the California Environmental Quality Act (CEQA) and did not approve a project when it certified the EIR that was the subject of the Resolution. More specifically, NCRA rescinds any word, phrase or section of the Resolution to the extent that it purported to approve a project for the resumption of railroad operations, including but not limited to: (i) paragraph 2.10 (D) 4 of the Resolution adopting a Statement of Overriding considerations; (ii) paragraph 2.10 (D) 6 of the Resolution directing NCRA staff to file a Notice of Determination; (iii) paragraph 2.10 (D) 7 of the Resolution purporting to approve a project of resumption of railroad operations, describing those operations, and stating that certain rehabilitation, construction, and repair activities in four areas would be required; AND (iv) rescinding in their entirety all Notices of Determination for the Resolution filed in Marin, Humboldt, Sonoma, Mendocino, Trinity, and Napa counties.

---

I.  
FEDERAL REGULATION OF RAILROAD

WHEREAS, in 1887, the U.S. Congress passed the Interstate Commerce Act (“ICA”) (see 24 Stat. 379 (1887)), which created the Interstate Commerce Commission (“ICC”) to regulate railroads;

WHEREAS, since the adoption of the ICA and creation of the ICC, the courts of the United States, including the United States Supreme Court, have consistently affirmed the ICC’s preemptive power over state regulation of railroads;

WHEREAS, in 1995, Congress passed the Interstate Commerce Commission Termination Act (“ICCTA”) (49 U.S.C. §§ 10101, *et seq.*), which replaced the ICC with the Surface Transportation Board (“STB”);

WHEREAS, the ICCTA gives the STB exclusive jurisdiction over, among other things, railroad “construction, acquisition, operation, abandonment, or discontinuance”;

WHEREAS, before a rail carrier can operate a railroad, it must obtain permission from the STB (*e.g.*, 49 U.S.C. §§ 10901, 10902), and one means for obtaining STB’s permission involves compliance with certain exemption procedures specified in the ICCTA and its implementing regulations (*e.g.*, 49 U.S.C. § 10502; 49 C.F.R. §§ 1121.1, *et seq.*; 49 C.F.R. § 1150.31 *et seq.*);

**II.**  
**NCRA BACKGROUND AND AUTHORIZATION TO OPERATE THE LINE**

WHEREAS, the North Coast Railroad Authority (“NCRA”) was formed in 1989 by the North Coast Railroad Authority Act to ensure continuing freight rail service to the North Coast area pursuant to the North Coast Railroad Authority Act (Government Code 93000 §§ *et seq.*);

WHEREAS, NCRA is governed by its Board of Directors (“Board”);

WHEREAS, the North Coast Railroad Authority Act empowered NCRA to, among other things, acquire, own, operate, and lease real and personal property reasonably related to the operation and maintenance of railroads;

WHEREAS, in 1995, NCRA, the Golden Gate Bridge Highway and Transportation District, and Marin County established a joint powers authority for the purpose of purchasing the Northwestern Pacific Railroad line, extending from Lombard near Napa in Napa County, to Willits in Mendocino County from Southern Pacific Railroad Co., which transaction was concluded on April 30, 1996;

WHEREAS, on September 18, 1996, the STB granted NCRA, through exemption procedures, authorization to operate the line (Federal Register, v. 61, no. 189, p. 50902), which approval was not subject to the California Environmental Quality Act, and was not challenged;

**III.**  
**TEMPORARY CESSATION OF RAILROAD OPERATIONS ON A PORTION OF THE LINE**

WHEREAS, prior to NCRA’s authorization from STB to operate the line, railroad operations had continued on the line for nearly a century;

WHEREAS, on December 9, 1998 the Federal Railroad Administration issued Emergency Order No. 21 prohibiting railroad operations on portions of the line until potential safety issues caused by several years of severe weather and flooding, together with deferred maintenance extending back several decades, were corrected (Federal Register, vol. 63, no. 236, pp. 67976-79);

WHEREAS, on May 5, 2011, the Federal Railroad Administration ordered the partial lifting of Emergency Order No. 21 (Federal Register, vol. 76, no. 90, pp. 2171-7);

**IV.**  
**STB’S APPROVAL OF NCRA’S LEASE WITH NWPY**

WHEREAS, in or around 2000, NCRA entered into an agreement with Northwestern Pacific Railway Co., LLC (“NWPY”) to operate freight service on the line, which agreement was approved by the STB on or about February 6, 2001;

WHEREAS, the NCRA-NWPY agreement gave NWPY the right to operate subject only to the lifting of the Federal Railroad Administration's Emergency Order No. 21, NWPY did not have required funds to perform the requisite repairs and filed for bankruptcy, which caused NCRA to look for another railroad operator;

WHEREAS, Northwestern Pacific Railroad Company ("NWPCo") responded to a request for proposals to operate the line and the NCRA Board selected NWPCo as its operator;

V.  
**CALIFORNIA LEGISLATURE'S APPROVAL OF \$31 MILLION TO PERFORM  
REPAIR AND RESTORATION WORK ON THE LINE**

WHEREAS, in 2000 the California Legislature adopted the Traffic Congestion Relief Program ("TCRP") (Cal. Gov. Code § 14556 *et seq.*), which, among other things, appropriated to NCRA \$31 million for track repairs and restoration and related activities (Cal. Gov. Code §§ 14556.40(a)(32), 14556.50);

WHEREAS, to obtain the appropriated monies, beginning in November 2006 and continuing through June of 2010, NCRA submitted applications to the California Transportation Commission ("CTC") for the TCRP funding, a portion of which funding was to be used on an environmental impact report for "Operation in the Russian River Division" that NCRA mistakenly, but in good faith, believed was required for resumed operations;

WHEREAS, during the presentation of NCRA's strategic plan to the CTC, the CTC stated that it hoped that NCRA could proceed with the TCRP-funded repair projects based on categorical exemptions so that the TCRP funds could be used instead for the projects;

WHEREAS, to support NCRA's funding applications to the CTC, NCRA submitted categorical exemptions, which served as the California Environmental Quality Act ("CEQA") documentation for the TCRP-funded repair work projects;

WHEREAS, beginning in December 2006, the CTC began funding NCRA's repair projects based on NCRA's applications and categorical exemptions;

WHEREAS, the CTC expressly acknowledged in its construction funding approvals that the TCRP-funded repair work was proceeding on NCRA's categorical exemptions (not upon the promise that an environmental impact report would be prepared)

WHEREAS, NCRA's categorical exemptions for TCRP-funded repair work were not challenged, except in one instance, which occurred when the City of Novato brought an action against NCRA and others alleging that NCRA had violated CEQA (the "City of Novato Action");

WHEREAS, on November 3, 2008, NCRA and the City of Novato settled the City of Novato Action by entering into a Consent Decree, which Consent Decree generally required the establishment of certain “quiet zones,” track welding, certain landscaping and fencing improvements, and the use of certain locomotive engines;

WHEREAS, well before May 5, 2011, the date the Federal Railroad Administration ordered the partial lifting of Emergency Order No. 21, the TCRP-funded repair work had been substantially completed and all TCRP funds allocated by the CTC to NCRA for the repair work had been used;

WHEREAS, no TCRP funds were allocated to NCRA by the CTC for railroad operations on the line, nor were any TCRP funds used for actual railroad operations;

**VI.**  
**NCRA’S LEASE AGREEMENT WITH NWPCO, STB’S APPROVAL OF THE SAME,**  
**AND THE STB’S REJECTION OF CHALLENGES TO THE LEASE AGREEMENT**

WHEREAS, in September 2006 NCRA entered into an operating and lease agreement with NWPCo to provide freight railroad service on the line;

WHEREAS, the NCRA-NWPCo lease agreement gave NWPCo the right to operate on the line, subject only to NWPCo’s obtaining approval to do so from the STB, and the lifting of the Federal Railroad Administration’s Emergency Order No. 21;

WHEREAS, the lease agreement contains a provision that NCRA will comply with CEQA “as it may apply to this transaction,” (meaning the NCRA’s entry into the lease agreement), but the lease transaction was not challenged on CEQA grounds within the statutory time period, thus obviating NCRA’s obligation to determine whether CEQA would have attached to the lease transaction;

WHEREAS, on August 24, 2007, the STB approved NWPCo’s exemption to operate on the line (Federal Register, vol. 72, no. 168);

WHEREAS, two entities—Mendocino Railway and Friends of the Eel River—filed challenges to NWPCo’s exemption with the STB, claiming, among other things, that further environmental review was required prior to operations on the line;

WHEREAS, on September 7, 2007, the STB rejected Mendocino Railway’s challenge, specifically concluding that no further environmental review was required (STB Decision, Finance Docket 35073, Sept. 7, 2007);

WHEREAS, on January 31, 2008, the STB rejected the Friends of Eel River’s challenge, specifically concluding, among other things, that further environmental review was not required (STB Decision, Finance Docket 35073, Jan. 31, 2008);

WHEREAS, neither Mendocino Railway nor Friends of the Eel River sought judicial review of the STB's orders rejecting their challenges to NWPCo's approval to operate the line;

#### VII.

#### NCRA'S JUNE 2011 PROJECT APPROVAL AND CERTIFICATION OF THE EIR

WHEREAS, after the Federal Railroad Administration's May 5, 2011 order partially lifting Emergency Order No. 21, NWPCo had the legal and contractual authority to conduct operations on the line and needed no further approvals from NCRA to commence operations;

WHEREAS, as the repairs to the line neared completion, NCRA continued to mistakenly, but in good faith, believe that it needed to complete the environmental impact report for resumed operations;

WHEREAS, on or about June 20, 2011, after the release of a draft environmental impact report, receiving and responding to public comments, and several public hearings, NCRA adopted Resolution No. 2011-02, certifying the environmental impact report and purporting to approve as a "project," the previously authorized resumption of rail operations;

WHEREAS, between June 22, 2011 and June 28, 2011, NCRA caused Notices of Determination of the NCRA's Resolution No. 2011-02 purporting to approve the project of resumed railroad operations on the line to be posted and filed with the counties of Marin, Humboldt, Sonoma, Mendocino, Trinity, and Napa counties;

#### VIII.

#### NWPCO'S RESUMPTION OF OPERATIONS

WHEREAS, pursuant to the NCRA-NWPCo lease, the STB's approvals, and the Federal Railroad Administration's lifting of Emergency Order No. 21, NWPCo resumed freight rail operations on the line in July 2011, which operations continue on an ongoing basis;

#### IX.

#### LAWSUITS CHALLENGING NCRA'S JUNE 20, 2011 PROJECT APPROVAL AND THE EIR

WHEREAS, on or about July 20, 2011, Californians for Alternatives to Toxics filed an action against NCRA, naming NWPCo as a real party in interest, Marin County Superior Court Case No. CIV1103591, alleging that the environmental impact report for resumed operations is defective, and requesting the court to enjoin NWPCo's railroad operations (the "CATS lawsuit");

WHEREAS, on or about July 20, 2011, Friends of the Eel River filed an action against NCRA, naming NWPCo as a real party in interest, Marin County Superior Court Case No. CIV1103605, alleging that the environmental impact report for resumed operations is defective, and requesting the court to enjoin NWPCo's railroad operations (the "FOER lawsuit");

WHEREAS, during the course of preparing the administrative record of proceedings for the CATS and FOER lawsuits, NCRA staff reviewed and evaluated NCRA's statutory authority for conducting operations on the line, including NCRA's legislative mandate to operate the line, STB approvals and authority, the Federal Railroad Administration's imposition and lifting of Emergency Order No. 21, the ICCTA and its express preemption of state regulation over railroad operations, and NCRA's lease with NWPCo;

WHEREAS, on March 12, 2013, NWPCo submitted to the NCRA a letter setting forth NWPCo's demand that the NCRA Board rescind the Resolution in order to clarify that there is no "project approval" that could support the FOER Lawsuit and the CATS Lawsuit, which NWPCo views as both preempted and moot;

WHEREAS, the NCRA Board considered NWPCo's demand, has received advice of its own legal counsel, and concurs in NWPCo's analysis and the NCRA wishes to clarify that neither the FOER Lawsuit nor the CATS Lawsuit can serve any practical purpose of obtaining relief by attacking the Resolution because the Resolution, to the extent that it purported to approve a project for resumption of railroad operations, was unnecessary and without legal effect.

THEREFORE, as a result of NCRA's review and evaluation of the foregoing, NCRA hereby resolves and finds as follows:

1. The ICCTA preempts CEQA's application over railroad operations on the line.
2. After entering into the lease with NWPCo in 2006, no further discretionary actions or approvals were necessary by NCRA as a condition to NWPCo's right to operate the line.
3. After the STB approved NWPCo's operation of the line in August 24, 2007, and subsequently rejected Mendocino Railway's and Friends of the Eel River's challenges to that approval, no further action or approval was required by the STB as a condition to NWPCo's right to operate the line.
4. After the Federal Railroad Administration lifted Emergency Order No. 21 on May 5, 2011, no further action or approval was required by the Federal Railroad Administration, or any other state or federal agency, as a condition to NWPCo's right to operate the line, and NWPCo had the legal right to immediately commence operations at that time.
5. NCRA's preparation of the EIR, and continuing through the EIR process from 2007 through June 2011 was a valuable effort in that it identified potential environmental impacts of railroad operations, provided information to NCRA and the public about railroad operations, and examined ways that potentially

significant impacts could be mitigated, but certification of the EIR was not legally required as a condition to NWPCo's legal right to operate the line.

6. NCRA's purported approval of the resumption of rail operations as set forth in Resolution 2011-02 was not legally required as a condition to NWPCo's then-existing legal right to operate the line because (i) NCRA had already approved NWPCo's operation of the line in its lease with NWPCo; (ii) the STB had approved of the NCRA-NWPCo lease and rejected challenges to that approval; (iii) no further challenges or judicial review were brought against the NCRA-NWPCo lease approval; and (iv) the Federal Railroad Administration had lifted Emergency Order No. 21.
7. Since NCRA's adoption of Resolution No. 2011-02, NWPCo's ongoing operations have been threatened by the CATS and FOER lawsuits, which attack NCRA's purported approval of resumed operations and seek an injunction against ongoing operations, even though NWPCo's legal right to operate the line exists independent of, and is not conditioned upon, NCRA's adoption of Resolution No. 2011-02.
8. The CATS and FOER lawsuits continue to cause NCRA to incur extensive legal fees and costs that are unnecessary in that NWPCo's railroad operations are not dependent upon the ongoing efficacy of Resolution No. 2011-02 to the extent said Resolution purports to approve a project for the resumption of railroad operations.
9. It is in the best interests of NCRA, NWPCo, the shippers that depend upon the continued rail operations on the line, and is consistent with the ICCTA's preemption of state regulation over railroad operations, as well as NCRA's legislative mandate to ensure that ongoing railroad operations continue, for NCRA to take whatever reasonable action will ensure the ongoing operation of the line.
10. Based on the foregoing, NCRA hereby RESCINDS any word, phrase or section of the Resolution to the extent that it purports to approve a project for the resumption of railroad operations, including, but not limited to: (i) paragraph 2.10 (D) 4 of the Resolution adopting a Statement of Overriding considerations; (ii) paragraph 2.10 (D) 6 of the Resolution directing NCRA staff to file a Notice of Determination; (iii) paragraph 2.10 (D) 7 of the Resolution purporting to approve a project of resumption of railroad operations, describing those operations, and stating that certain rehabilitation, construction, and repair activities in four areas would be required.
11. Based on the foregoing, NCRA hereby RESCINDS in their entirety the Notices of Determination for the Resolution that NCRA caused to be posted and filed with the counties of Marin, Humboldt, Sonoma, Mendocino, Trinity, and Napa counties.

12. Upon adoption, any word, phrase, or section of Resolution No. 2011-02, to the extent that any such word, phrase, or section purported to approve a project for the resumption of railroad operations, including but not limited to the Notices of Determination, contained therein, shall be of no further force and effect.

Directors:

Hemphill: Aye      Kelley: Aye      Meyers: No      Wagenet: Aye  
Peters: Aye      McCowen: Aye      Kier: Aye      Fennell: Aye  
Wolter: Aye

**SO ORDERED.**

The foregoing is a true copy of the resolution adopted by the Board and Directors on April 10, 2013.

  
Secretary North Coast Railroad Authority  
Mitch Slogner

# **EXHIBIT 19**

# **EXHIBIT 19**

1 Andrew B. Sabey (State Bar No. 160416)  
2 COX, CASTLE & NICHOLSON LLP  
3 555 California Street, 10th Floor  
4 San Francisco, CA 94104-1513  
5 Telephone: (415) 262-5100  
6 Facsimile: (415) 262-5199  
7 E-mail: asabey@coxcastle.com

8 Attorneys for Real Party In Interest  
9 NORTHWESTERN PACIFIC RAILROAD COMPANY

10  
11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

12 **COUNTY OF MARIN**

13 FRIENDS OF THE EEL RIVER,

14 Petitioner,

15 vs.

16 NORTH COAST RAILROAD AUTHORITY,  
17 BOARD OF DIRECTORS OF NORTH COAST  
18 RAILROAD AUTHORITY,

19 Respondents.

20 NORTHWESTERN PACIFIC RAILROAD  
21 COMPANY, SONOMA-MARIN AREA RAIL  
22 TRANSIT DISTRICT, and DOES 11-50,

23 Real Parties in Interest

Case No. CIV 11-03605

**NOTICE OF ENTRY OF ORDER  
DENYING CEQA PETITION**

24 **TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:**

25 **PLEASE TAKE NOTICE** that the Order Denying CEQA Petition, a true and correct copy of  
26 which is attached as Exhibit A and incorporated herein by this reference, has been entered by the  
27 above-referenced court.

28 ///

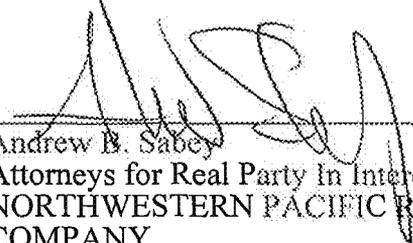
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Dated: May 16, 2013

COX, CASTLE & NICHOLSON LLP

By:   
\_\_\_\_\_  
Andrew B. Sabey  
Attorneys for Real Party In Interest  
NORTHWESTERN PACIFIC RAILROAD  
COMPANY

**FILED**

**MAY 10 2013**

**KIM TURNER**  
Clerk of Superior Court  
**MARIN COUNTY SUPERIOR COURT**  
*By: M. Murphy, Deputy*

**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF MARIN**

**CALIFORNIANS FOR ALTERNATIVES  
TO TOXICS,**

**Petitioner,**

**vs.**

**NORTH COAST RAILROAD AUTHORITY, et al.,**

**Respondents,**

**NORTHWESTERN PACIFIC RAILROAD COMPANY,  
et al.,**

**Real Parties in Interest.**

**Case Nos.: CV1103591 and CV1103605**

**MOTIONS TO DISMISS, et al.**

**FRIENDS OF THE EEL RIVER,**

**Plaintiff,**

**vs.**

**NORTH COAST RAILROAD AUTHORITY, et al.,**

**Defendants,**

**NORTHWESTERN PACIFIC RAILROAD COMPANY,  
et al.,**

**Real Parties in Interest.**

**MOTIONS TO DISMISS, et al.**

**EXHIBIT     A**

1 21080.13) simply because it prepared and certified an EIR for its planned railroad grade separation  
2 project, and it did nothing to intentionally mislead another party that would equitably estop it from  
3 invoking that statutory exemption. (*Id.* at pp. 179-180.)

4  
5 In arriving at its decision, the *Del Cerro* court followed the decision in *Santa Barbara County Flower*  
6 *and Nursery Growers Ass'n, Inc. v. County of Santa Barbara* (2004) 121 Cal. App. 4th 864.

7 In *Santa Barbara County Flower*, the court expressly concluded that the County's preparation of an  
8 EIR, that it was not statutorily required to prepare, in order to obtain approval of a local coastal plan  
9 amendment by the California Coastal Commission, did not waive the County's right to raise the  
10 Coastal Commission's statutory exemption from CEQA when that EIR was later challenged as  
11 violating CEQA. (*Santa Barbara County Flower and Nursery Growers Ass'n., supra*, 121 Cal.App.4th  
12 at pp. 873-874.)

13  
14 2. Preemption Under the Termination Act –

15  
16 The Termination Act established the Surface Transportation Board ("STB"), 49 U.S.C. § 701, and gave  
17 the STB exclusive jurisdiction over certain aspects of railroad transportation. (49 U.S.C. § 10501(b).)

18 Specifically, the STB has exclusive jurisdiction over:

- 19 (1) transportation by rail carriers, and the remedies provided in this part with respect  
20 to rates, classifications, rules (including car service, interchange, and other operating  
21 rules), practices, routes, services, and facilities of such carriers; and  
22 (2) the construction, acquisition, operation, abandonment, or discontinuance of spur,  
23 industrial, team, switching, or side tracks, or facilities, even if the tracks are located,  
24 or intended to be located, entirely in one State, is exclusive. Except as otherwise  
provided in this part, the remedies provided under this part with respect to regulation  
of rail transportation are exclusive and preempt the remedies provided under Federal  
or State law.

(§ 10501(b). emphasis added.)

MOTIONS TO DISMISS, et al.

1 "State law is preempted by federal law when: (1) the preemptive intent is explicitly stated in [a  
2 federal] statute's language or implicitly contained in its structure and purpose; (2) state law actually  
3 conflicts with federal law; or (3) federal law so thoroughly occupies a legislative field 'as to make  
4 reasonable the inference that Congress left no room for the States to supplement it. [Citations.]  
5 The ultimate touch-stone of preemption analysis is congressional intent: Congress' intent, of course,  
6 primarily is discerned from the language of the pre-emption statute and the statutory framework  
7 surrounding it." [Citation.] (*Green Mountain Railroad Corporation v. State Of Vermont* (2<sup>nd</sup> Cir. 2005)  
8 404 F.3d 638, 641, internal quotations and citations omitted.)

9 Because the ICCTA contains express preemption provisions for the "regulation of rail  
10 transportation", the court evaluates the "plain wording" of the statute which "necessarily contains  
11 the best evidence of Congress' preemptive intent, [citation] but because an express preemption  
12 clause may not always immediately end the inquiry, we also look to the statute's structure and  
13 purpose [Citation.]" (*PCS Phosphate Co., Inc. v. Norfolk Southern Corp.* (4<sup>th</sup> Cir. 2009) 559 F.3d 212,  
14 217-218, internal quotations and citations omitted.)

15 The cases interpreting that statute hold that the Termination Act gave the STB exclusive jurisdiction  
16 over the regulation of rail transportation, which statute has been held to "preempt[] all state laws  
17 that may reasonably be said to have the effect of managing or governing rail transportation, while  
18 permitting the continued application of laws having a more remote or incidental effect on rail  
19 transportation." (*N.Y. Susquehanna & W. Ry. Corp. v. Jackson* (3d Cir. 2007) 500 F. 3d 238, 252,  
20 internal quotations and citations omitted; accord. *PCS Phosphate Co., Inc. v. Norfolk Southern Corp.*,  
21 *supra*, 559 F.3d at p. 218; *People v. Burlington Northern Santa Fe R.R.* (2012) 209 Cal.App.4th 1513,  
22 1528.)

23 For example, it has been held that the plain language of the Termination Act grants the STB wide  
24 authority over the construction on railroad property of transloading and storage facilities  
undertaken by the railroad, and that state environmental pre-permitting regulations are expressly

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1 preempted. (*Green Mountain Railroad Corporation v. State Of Vermont* (2<sup>nd</sup> Cir. 2005) 404 F.3d 638,  
2 642, emphasis added.)

3  
4 A similar result was reached by the 9<sup>th</sup> Circuit Court of Appeals in *City of Auburn v. United States*  
5 (9th Cir.1998) 154 F.3d 1025.

6 That court held the ICCTA expressly preempted a state regulation requiring a railroad to conduct a  
7 local environmental review as a permitting precondition to proposed repairs and improvements on  
8 the line, which planned improvements included replacement of track sidings and snow sheds,  
9 tunnel improvements, and communication towers.

10  
11 The court found support for its holding of preemption in “the plain language of two sections of the  
12 ICCTA [that] explicitly grant the STB exclusive authority over railway projects” like the one in this  
13 case. (*City of Auburn, supra*, 154 F.3d at p. 1030.)

14 The *Auburn* court also rejected the state’s attempt to justify its state environmental permitting  
15 requirements as a valid exercise of state police power, rather than an “economic regulation of the  
16 railroads” that is subject to preemption. (*Id.*, 154 F.3d at p. 1030.)

17 It held:

18 Additionally, given the broad language of § 10501(b)(2), (granting the STB exclusive  
19 jurisdiction over construction, acquisition, operation, abandonment, or  
20 discontinuance of rail lines) the distinction between “economic” and  
21 “environmental” regulation begins to blur. For if local authorities have the ability to  
22 impose “environmental” permitting regulations on the railroad, such power will in  
23 fact amount to “economic regulation” if the carrier is prevented from constructing,  
24 acquiring, operating, abandoning, or discontinuing a line.

(*City of Auburn, supra*, 154 F.3d at p. 1031, emphasis added.)

A similar ruling was reached in the STB administrative decision cited in *Green Mountain Railroad Corporation, supra*, as follows:

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1 The Transportation Board has likewise ruled that "state and local permitting or  
2 preclearance requirements (including environmental requirements) are preempted  
3 because by their nature they unduly interfere with interstate commerce." *Joint*  
4 *Petition for and Declaratory Order-Boston and Maine Corp. and Town of Ayer, MA,*  
5 *STB Finance Docket No. 33971, 2001 WL 458685, at \*5 (S.T.B. Apr. 30, 2001), aff'd,*  
6 *Boston & Maine Corp. v. Town of Ayer, 191 F.Supp.2d 257 (D.Mass.2002)(affirming*  
7 *the Transportation Board's determination that town's pre-construction permit*  
8 *requirement was preempted by the Termination Act.)*

9 (*Id.*, 404 F.3d at pp. 642 – 643, emphasis added.)

10 Also, the STB Decision Order in *DesertXpress Enterprises, LLC*, STB Finance Docket No. 34914, dated  
11 6/25/07, reached a similar conclusion.

12 DesertXpress was a private company planning to construct a 200-mile interstate high-speed  
13 passenger rail system between Victorville, CA and Las Vegas, NV. DesertXpress stated that it was  
14 already working with the Federal Railroad Administration to prepare an Environmental Impact  
15 Statement ("EIS") under the National Environmental Policy Act ("NEPA").

16 DesertXpress petitioned for a declaratory order by the STB arguing that in light of the federal  
17 preemption under 49 USC §10501(b), the proposed construction was not subject to state and local  
18 land use and other permitting requirements, or subject to state and local environmental laws,  
19 including CEQA.

20 The STB granted the petition, confirming that federal preemption applied to the project, stating that  
21 while federal environmental statutes like NEPA will apply to the project, "[h]owever, state  
22 permitting and land use requirements that would apply to non-rail projects, such as the California  
23 Environmental Quality Act, will be preempted. [Citation]." (*DesertXpress Order* at p.3, emphasis  
24 added.)

"As the agency authorized by Congress to administer the [ICCTA], the Transportation Board is  
uniquely qualified to determine whether state law should be preempted by the [ICCTA].' [Citations];  
**MOTIONS TO DISMISS, et al.**

1 see also *R.R. Ventures, Inc. v. Surface Transp. Bd.* (6<sup>th</sup> Cir. 2002) 299 F.3d 523, 548 [“[T]his Court must  
2 give considerable weight and due deference to the [STB’s] interpretation of the statutes it  
3 administers unless its statutory construction is plainly unreasonable.”]” (*Emerson v. Kansas City  
4 Southern Ry. Co.* (10<sup>th</sup> Cir., 2007) 503 F.3d 1126, 1130.)

5 The state law at issue here is CEQA (Pub. Resources Code § 21000 et seq.), which requires “[w]ith  
6 certain limited exceptions, a public agency must prepare an EIR whenever substantial evidence  
7 supports a fair argument that a proposed project ‘may have a significant effect on the environment.’  
8 [Citations.] ‘Significant effect on the environment’ means a substantial, or potentially substantial,  
9 adverse change in the environment. [Citations.]” (*Laurel Heights Improvement Assn. v. Regents of  
10 the University of California* (1993) 6 Cal.4th 1112, 1123, internal quotations and citations omitted;  
11 see Pub. Resources Code §§ 21180, 21151.)

12 CEQA requires that before a state or local agency can approve and proceed with a “project” that  
13 may have significant direct and indirect environmental effects, it must prepare and certify an EIR  
14 containing: “detailed information about the effect which a proposed project is likely to have on the  
15 environment; to list ways in which significant effects of such a project might be minimized; and to  
16 indicate alternatives to such a project.” (Pub. Resources Code §§ 21061, 21100; California  
17 Administrative Code, title 14, §§ 15126(a), 15126.2, 15126.4, 15126.6, Guidelines § \_\_\_\_\_.)

18 By their express purpose, these preclearance CEQA regulations provide the public and the elected  
19 officials with necessary information to make informed decisions about the environmental  
20 consequences of a project “‘before they have reached ecological points of no return.’ [Citation.]”  
21 (See *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1220.)

22  
23 Despite this very laudable policy goal, CEQA mandates a time-consuming review which may result in  
24 indefinite delays and unduly interfere with exclusive federal jurisdiction over rail transportation by  
giving state or local officials the ability to withhold approval for a Project because the EIR and/or the  
lead agency’s findings fail to comply with one or more of the CEQA conditions.

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1 Petitioners contend the ICCTA does not preempt the enforcement of Respondents' *voluntary* CEQA  
2 obligations as expressed in the Master Agreement with the State of California/California  
3 Transportation Commission (CTC) to receive state funds for repair and upgrade of the line; and also  
4 with the Consent Decree executed by Respondents and the City of Novato to resolve prior litigation.  
5 (*City of Novato v. NCRA*, Civ. No. 074645).

6 Petitioners have no standing to enforce those agreements since they were not parties to either  
7 agreement. A contract cannot be enforced by non-parties, who are only incidentally or remotely  
8 benefitted by that contract. (*Lake Almanor Associates, L.P., Huffman-Broadway Group, Inc.* (2009)  
9 178 Cal.App.4th 1194, 1199.)

10 Here, Petitioners do not allege, and there is no support in the record to find that the agreements at  
11 issue were expressly made for their benefits. (Civil Code § 1559 ["A contract expressly for the  
12 benefit of a third-party, may be enforced by him at any time before the parties thereto rescind it."].)

13  
14 Petitioners' reliance on *PCS Phosphate Co., supra*, 559 F.3d 212, and other cases is misplaced  
15 (*Friends' Reply B.* pp. 26 -27), since Petitioners cannot show they were intended third-party  
16 beneficiaries under these agreements.

17  
18 Based on the foregoing, the court finds that the Termination Act, giving the STB exclusive  
19 jurisdiction over the rail transportation and remedies involved in this action, expressly preempts the  
20 application of CEQA to Respondents' activities in repairing the tracks and operating along the  
21 Russian River Division.

22 Accordingly, the CEQA petitions filed herein (Pub. Resources Code § 21168.5) are denied.

23 SO ORDERED.

24 //

MOTIONS TO DISMISS, et al.

## **EXHIBIT 20**

## **EXHIBIT 20**

Case No. S222472  
**IN THE SUPREME COURT OF CALIFORNIA**

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**Friends of the Eel River and Californians for Alternatives to Toxics**  
Plaintiffs and Appellants,

v.

**North Coast Railroad Authority and Board of Directors of North  
Coast Railroad Authority**  
Defendants and Respondents.

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**Northwestern Pacific Railroad Company**  
Real Party in Interest and Respondent

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After a Decision by the Court of Appeal  
First Appellate District, Division One  
Case Nos. A139222, A139235

SUPREME COURT  
FILED

Appeal from the Marin County Superior Court,  
Case Nos. CIV11-3605, CIV11-03591  
Honorable Roy Chernus, Judge

FEB 23 2015

Frank A. McGuire Clerk

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**PLAINTIFFS' OPENING BRIEF**

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## ISSUES PRESENTED

(1) Where a railroad is also a State agency, can the Interstate Commerce Commission Termination Act (“ICCTA”) be construed to preempt the California Environmental Quality Act (“CEQA”) and thus nullify California’s sovereign authority to govern how its subdivisions make decisions that affect California’s environment?

(2) Does the ICCTA preempt the application of CEQA to a State agency’s proprietary acts with respect to a State-owned and funded rail line, as the Opinion holds, or is CEQA not preempted under the market participant doctrine, as the Third District held in *Town of Atherton v. California High-Speed Rail Authority* (2014) 228 Cal.App.4th 314?

(3) Does the ICCTA preempt a State agency’s voluntary commitments to comply with CEQA as a condition of: (i) receiving State funds for a State-owned rail line, and/or (ii) leasing State-owned property?

## INTRODUCTION

In 1989, the California Legislature created the North Coast Railroad Authority (“NCRA”) to solve a regional economic problem. Private rail carriers on the north coast were failing and threatening to abandon century-old operations on the area’s lines. To support the floundering industry, the State entered the rail business. It created NCRA and empowered it to own, manage, and operate (either on its own or through a private vendor) a unified regional railroad. In creating NCRA, the State naturally established

Notably, *Nixon* confronted identical concerns to those presented here. The Supreme Court recognized that a state’s chosen manner for controlling its subdivisions is “indistinguishable from choices that express what the government wishes to do with the authority and resources it can command.” (*Nixon, supra*, 541 U.S. at p. 134.) If state self-governance were preempted, a “State or municipality could give the power, but it could not take it away later.” (*Id.* at p. 137.) Similarly, as an agency created by the Legislature, NCRA cannot retain legislatively-granted authority while simultaneously jettisoning legislatively-imposed obligations like CEQA. (See *Dan’s City, supra*, 133 S.Ct. at pp. 1780-81.) The Supreme Court rejected such an anomalous result in *Nixon*. This Court should reject it as well.

**III. The ICCTA Does Not Preempt CEQA Compliance that Is an Element of State Proprietary Action or Voluntary Commitments.**

Even if this Court were to determine that State-required CEQA compliance did not constitute a core sovereign function subject to the unmistakably clear statement required by *Nixon* and *Gregory*, the market participant and the voluntary commitment doctrines independently lead to the same result: CEQA is not preempted here. As explained above, the ICCTA only preempts state “regulation of rail transportation.” (49 U.S.C. § 10501, subd. (b); see *Florida East, supra*, 266 F.3d at p. 1331.) Here, nothing within the ICCTA indicates an intent to bar state proprietary

actions. To the contrary, the statute was passed to allow participants in the rail industry greater latitude in making decisions regarding proprietary operations. Similarly, a public agency's self-imposed and voluntary commitments are not "regulation of rail transportation" and therefore are not preempted by the ICCTA.

**A. Under the Market Participant Doctrine, CEQA Compliance Is Not Preempted Here.**

**1. State Actions that Constitute Direct Participation in the Marketplace Are Proprietary.**

The U.S. Supreme Court has long relied on the market participant doctrine to hold that federal law does not bar a state's proprietary actions. (See, e.g., *Hughes v. Alexandria Scrap Corp.* (1976) 426 U.S. 794 ("*Alexandria Scrap*").) This doctrine recognizes that public agencies, like private entities, enter the market in numerous ways—from managing public property, to undertaking public works projects, to buying and selling goods and services—to carry out their responsibilities. (See *Building & Constr. Trades Council v. Associated Builders & Contractors* (1993) 507 U.S. 218, 227 ("*Boston Harbor*").) In so doing, a state acts as a proprietor rather than a regulator. Because "pre-emption doctrines apply only to state *regulation*," absent an express or implied indication of Congressional intent to the contrary, courts will not infer that federal law prevents states from directing or negotiating the terms and conditions of their proprietary interactions. (*Id.* at pp. 227, 231-32 [emphasis in original] [National Labor Relations Act did

not preempt state agency requirement that all contractors adhere to prehire labor agreement]; see also *Alexandria Scrap, supra*, 426 U.S. at pp. 806-09 [Maryland law subsidizing in-state processors of abandoned vehicle hulks was valid market activity that did not violate dormant Commerce Clause].)

Courts undertake “a single inquiry” to determine whether a state action is proprietary, rather than regulatory: “whether the challenged program constituted direct state participation in the market.” (*Reeves, Inc. v. Stake* (1980) 447 U.S. 429, 430, 435, fn. 7, 447 [citation omitted (state agency’s policy of selling cement from state-owned plant only to state residents during shortage was proprietary and therefore did not violate dormant Commerce Clause)].) Federal courts have interpreted this inquiry to identify two types of state action that fall within the market participant doctrine. First are actions that “essentially reflect the entity’s own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances.” (*Cardinal Towing v. City of Bedford, Tex.* (5th Cir. 1999) 180 F.3d 686, 693.) Second are actions that have a “narrow scope” such that they “defeat an inference that [a state’s] primary goal was to encourage a general policy rather than address a specific proprietary problem.” (*Ibid.*) State action need only meet one of these tests to qualify for the market participant doctrine and defeat preemption. (*Johnson v. Rancho Santiago Community College Dist.* (9th Cir. 2010) 623 F.3d 1011, 1024; see also

*Atherton, supra*, 228 Cal.App.4th at p. 335 [adopting the *Cardinal Towing* test and agreeing with the Ninth Circuit that it applies in the alternative].)

It is the substance, not the form, of the governmental action that matters. (*Tocher v. City of Santa Ana* (9th Cir. 2000) 219 F.3d 1040, 1048-50, abrogated on other grounds in *City of Columbus v. Ours Garage and Wrecker Service* (2002) 536 U.S. 424.) Actions that take the form of a rule, policy, order, or law may qualify for the market participant doctrine so long as they involve a state's own interests in the marketplace. (See, e.g., *Alexandria Scrap, supra*, 426 U.S. at pp. 797-98 [state statute]; *Reeves, supra*, 447 U.S. at pp. 432-33, 440 [agency policy]; *Omnipoint Communications, Inc. v. City of Huntington Beach* (9th Cir. 2013) 738 F.3d 192, 199-201 [initiative measure]; *Tocher, supra*, 219 F.3d at pp. 1048-50 [city ordinance].) Further, the state's interests extend beyond price to other factors such as environmental or other policy considerations. (*Boston Harbor, supra*, 507 U.S. at p. 231; *Alexandria Scrap, supra*, 426 U.S. at p. 809; *Engine Manufacturers Assn. v. South Coast Air Quality Management Dist.* (9th Cir. 2007) 498 F.3d 1031, 1046-47.)

In *Engine Manufacturers*, after remand from the U.S. Supreme Court to consider the issue, the Ninth Circuit held that the express preemption provision in Clean Air Act section 209 did not bar the South Coast Air Quality Management District's fleet purchasing rules. (*Engine Manufacturers, supra*, 498 F.3d at p. 1043 [on remand from the U.S.

Supreme Court, *Engine Manufacturers Assn. v. South Coast Air Quality Management Dist.* (2004) 541 U.S. 246, 259].) The challenged rules required state and local governments or their operators to purchase vehicle fleets that met certain fuel or emissions standards. (*Id.* at p. 1045.) Section 209 provides that no state “shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part.” (42 U.S.C. § 7543, subd. (a).) The Ninth Circuit concluded that this language “contains nothing to indicate a congressional intent to bar states from choosing to use their own money to acquire or use vehicles that exceed the federal standards.” (*Engine Manufacturers, supra*, 498 F.3d at p. 1043.) Because the fleet rules governed legitimate state spending decisions, the court held they were proprietary and not preempted by the Clean Air Act. (*Ibid.*) The court rejected the argument that the rules could not be proprietary because they sought to achieve the policy goal of cleaner air: “[E]fficient procurement” means procurement that serves the state’s purposes – which may include purposes other than saving money,” including environmental goals. (*Id.* at p. 1046.)

Applying this precedent in circumstances materially similar to those here, *Atherton* held that the ICCTA does not preempt a CEQA challenge to the adequacy of an EIR prepared by the High-Speed Rail Authority (a public rail agency) for a portion of the High-Speed Rail line. (*Atherton*,

*supra*, 228 Cal.App.4th at pp. 336-41 [citing numerous U.S. Supreme Court and federal circuit market participant cases].) *Atherton* held that when a public rail agency is acting in its capacity as the owner of property (e.g., a rail line) or a purchaser or provider of goods and services (e.g., construction, engineering, and rail services), those actions fall within the market participant doctrine. (*Ibid.*) The rail carrier is a subdivision of the State, which has a legitimate proprietary interest in the “efficient procurement of needed goods and services” that “serves the state’s purposes.” (*Id.* at 335-36 [quoting *Cardinal Towing, supra*, 180 F.3d at p. 693]; *Engine Manufacturers, supra*, 498 F.3d at p. 1046.) “Undergoing full CEQA review . . . serves the state’s interest in reducing adverse environmental impacts as part of its proprietary action in owning and constructing” the rail line. (*Atherton, supra*, 228 Cal.App.4th at pp. 335-36.) Thus, *Atherton*’s holding falls well within market participant doctrine case law.

**2. NCRA’s CEQA Review for the Project Was Not Regulation of Rail Transportation, but Internal Decisionmaking Essential to the State’s Participation in the Marketplace.**

As in *Atherton*, CEQA review for this project is intrinsic to NCRA’s role as a public rail agency that acts in the marketplace. NCRA’s CEQA review fits within the market participant test for several independent reasons. First, the State is clearly acting as a proprietor through its political

subdivision, NCRA, the nominal owner and manager of the rail line. (AR:13:6595-96; Gov. Code §§ 93001, 93010.) “Proprietor” is defined as one “who has the legal right or exclusive title to something: Owner.” (Merriam-Webster’s Collegiate Dict. (10th ed. 1996).) Likewise, it is clear that the Legislature mandated CEQA compliance with respect to NCRA’s management of the rail line, including the decision to reopen the line. (See Pub. Res. Code § 21080 [requiring CEQA compliance for public agency projects]; Gov. Code § 93000 et seq. [NCRA authorizing legislation, which does not exempt agency from CEQA]; AR 13:6596; *Atherton, supra*, 228 Cal.App.4th at p. 337.) Thus, just as with the agency actions in *Reeves* and *Boston Harbor*, NCRA’s CEQA review was simply a component of the State’s proprietary decision to own and manage this public rail project. (*Reeves, supra*, 447 U.S. at pp. 430, 440; *Boston Harbor, supra*, 507 U.S. at p. 233.)

Second, in appropriating transportation funding for reopening the rail line, the State reiterated its direction for CEQA compliance in the approval of projects that spend those funds. (Gov. Code §§ 14556.11, 14556.40, subd. (a)(32), 14556.50; see App:9:84:2373 [Commission guidelines requiring a funded project’s “Implementing Agency” to comply with “the requirements of CEQA”].) In fact, the Legislature appropriated over two million dollars to pay for preparation of NCRA’s EIR. (Gov. Code § 14556.13, subd. (b)(1) [“environmental review” to be included in scope

of funded work]; AR 13:6796 [allocating over two million dollars for EIR]; compare *Atherton, supra*, 228 Cal.App.4th at p. 338 [noting that Proposition 1A provided funds for environmental review].) The State’s direction for CEQA compliance—built into the legislation appropriating funds for the project—was separately stated in agreements between NCRA and the Commission, the agency responsible for disbursing the funds. (See, e.g., AR:9:4638 [master agreement specifying NCRA as the agency responsible for ensuring CEQA compliance], 13:6801 [program supplement incorporating provisions of master agreement].)

“[T]he Government unquestionably is the proprietor of its own funds, and when it acts to ensure the most effective use of those funds, it is acting in a proprietary capacity.” (*Building and Const. Trades Dept., AFL-CIO v. Allbaugh* (D.C. Cir. 2002) 295 F.3d 28, 35.) Here, the State has a proprietary interest in ensuring that: (1) the funds it spends on environmental review for the public rail project result in an EIR that fully complies with CEQA, and (2) funding the reopening of the rail line results in a project that fully accounts for the State’s environmental policy to assess and reduce significant environmental impacts where feasible. Just as the State’s direction to subdivisions to spend State money on vehicle fleets in a particular manner was protected proprietary conduct in *Engine Manufacturers (supra)*, 498 F.3d at p. 1045), the State’s direction to NCRA

to spend money for the rail line subject to CEQA compliance is similarly proprietary and not preempted.

Third, pursuant to its legislative authorization, NCRA directly participated in the market to lease the rail line and engage a rail operator. (Gov. Code § 93020, subd (f); AR 13:6595 [NCRA seeking “private-public partnership”].) NCRA “solicit[ed] the creativity of the private marketplace . . . for this railroad.” (AR 13:6595.) In entering the marketplace to secure an operator, NCRA made CEQA compliance a term of engagement, which its private vendor NWPCo. fully accepted in the course of its business. (AR 13:6731, 6725-86; see also App:5:48a:1414 [“The lease agreement itself has a condition precedent that NCRA comply with CEQA prior to NWP Co. taking possession of the property”].) Courts routinely hold that conditions placed in leases or contracts for services are proprietary and not regulatory. (See, e.g., *Boston Harbor*, *supra*, 507 U.S. at pp. 232-33 [terms of contract labor agreement not preempted]; *Sprint Spectrum LP v. Mills* (2d Cir. 2002) 283 F.3d 404, 420 [“the actions of the School District in entering into the Lease agreement [are] plainly proprietary”].)

Finally, environmental concerns are a legitimate business factor that private entities also consider. (See, e.g., *Alexandria Scrap*, *supra*, 426 U.S. at p. 809 [“Maryland entered the market for the purpose, agreed by all to be commendable as well as legitimate, of protecting the State’s environment.”]; *Engine Manufacturers*, *supra*, 498 F.3d at p. 1047 [noting

that “FedEx and UPS, have, for their own purposes, adopted programs to introduce less-polluting vehicles into their fleets”].) For example, leases or purchase agreements often include environmental due diligence or survey clauses. (See, e.g., *Trovare Capital Group, LLC v. Simkins Industries, Inc.* (7th Cir. 2011) 646 F.3d 994, 996 [environmental studies necessary to private sale agreement]; *Keywell Corp. v. Weinstein* (2d Cir. 1994) 33 F.3d 159, 161 [environmental due diligence part of purchase agreement].) Any rail entity (whether public or private) has good reason to adopt management and accountability practices that facilitate the discovery of significant environmental impacts to avoid environmental harm and any resulting liability before the effects become too difficult or expensive to manage. (See *Emerson, supra*, 503 F.3d. at pp. 1128, 1131 [liability for improper disposal of railroad ties despite ICCTA].) This is especially true given the history of toxic contamination and extensive liability for cleanup of this rail line. (See App:8:77b:2027-43 [Consent Decree with resource agencies, which requires NCRA to address contamination and other harms on rail line].)

In sum, because NCRA’s CEQA obligation stems from California’s interest in managing its State-owned railroad in an environmentally sound manner, it reflects the State’s “own interest in its efficient procurement of needed goods and services.” (*Cardinal Towing, supra*, 180 F.3d at p. 693.) Such environmental interests are legitimate market considerations. Thus, as

in *Atherton*, CEQA compliance for the public rail project here is proprietary under the first *Cardinal Towing* test and falls outside the realm of ICCTA regulatory preemption.

### **3. Plaintiffs' CEQA Suit Is a Component of the Proprietary Action.**

The appellate court recognized the proprietary nature of NCRA's CEQA review, but held that citizen enforcement is not part of that proprietary action. (Opinion at p. 29.) The court stated that it would "stand the market participation doctrine on its head" to allow Plaintiffs to use the doctrine against an agency that is arguing for preemption. (*Ibid.*) *Atherton* correctly rejects this reasoning because there is "no authority supporting the argument that the power to 'invoke' the doctrine is reserved for [a public agency] to selectively assert in order to exempt those projects of its choosing from federal preemption." (*Atherton, supra*, 228 Cal.App.4th at pp. 339-40.) Because preemption is fundamentally a question of Congressional intent (*Boston Harbor, supra*, 507 U.S. at pp. 224, 231), no party may control whether preemption applies. Similarly, no party may dictate whether the challenged action "constituted direct state participation in the market" and thus is subject to the market participant doctrine. (*Reeves, supra*, 447 U.S. at p. 435, fn. 7.) These are legal questions for the Court to decide. (*In re Farm Raised Salmon Cases, supra*, 42 Cal.4th at p. 1089, fn. 10; *Engine Manufacturers, supra*, 498 F.3d at p. 1035.)

Further, there is no authority, and the appellate court cited none, for the proposition that CEQA's enforcement provisions should somehow be severed from its environmental review provisions for the purpose of the market participant analysis. A state directive does not lose its proprietary nature simply because it contains an enforcement mechanism. The Ninth Circuit held in *Engine Manufacturers* that fleet rules were not preempted under the market participant doctrine even though the rules contained penalties for non-compliance. (*Engine Manufacturers, supra*, 498 F3d. at p. 1048.) The court concluded that such "enforcement provisions" do not "have the effect of transforming the [rules] from proprietary to regulatory action." (*Ibid.*) Similarly here, CEQA's citizen suit enforcement is a mechanism the State has chosen, as a proprietor, to ensure the efficacy and integrity of the management objectives it has chosen for NCRA, its subsidiary. Authorization of citizen suits is not a separate regulatory action.<sup>5</sup>

---

<sup>5</sup> The appellate court also relied on recent New York and Florida false-claims act cases to construe Plaintiffs' suits as preempted regulation. (See Opinion at 30 [citing *State of New York ex rel. Grupp v. DHL Express (USA), Inc.* (2012) 19 N.Y. 3d 278; *State ex rel. Grupp v. DHL Express (USA), Inc.* (2011) 922 N.Y.S.2d 888; *DHL Express (USA), Inc. v. State ex rel. Grupp* (Fla. Dist. Ct. App. 2011) 60 So.3d 426].) *Atherton* correctly distinguished those cases because—unlike the state proprietary behavior at issue here—they regulated third party behavior through the imposition of civil penalties and treble damages as punitive and deterrent measures. (*Atherton, supra*, 228 Cal.App.4th at pp. 336-41.) This Court is reviewing a recent Second District opinion addressing that same legal issue. (See *Grupp* (footnote continued on next page)

California was fully aware of provisions for CEQA enforcement when it directed NCRA to comply with the CEQA in the reopening of the rail line. The Legislature could easily have exempted the rail line from these provisions (or from CEQA entirely), but it did not. (See, e.g., Pub. Res. Code § 21168.6.6 [circumscribing CEQA enforcement provisions for certain projects].) The State's proprietary interest in ensuring that environmental impacts from the project are recognized and mitigated in the manner the State has chosen—through CEQA review—includes a full public (and if necessary, judicial) vetting of the completeness and integrity of NCRA's CEQA process. Citizen enforcement of CEQA compliance regarding this publicly-owned line is merely California's management of its own proprietary affairs, not regulation of private rail transportation.

**B. The ICCTA Does Not Preempt Self-Imposed Commitments to Undertake CEQA Compliance.**

A separate legal doctrine provides that the ICCTA does not preempt commitments a railroad enters voluntarily. (See, e.g., *Fayard v. Northeast Vehicle Services* (1st Cir. 2008) 533 F.3d 42, 49.) As arms-length transactions between willing parties, such commitments reflect the railroad's choices, not regulation subject to preemption, even when they relate to rail transportation. (See *PCS Phosphate, supra*, 559 F.3d at

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(footnote continued from previous page)  
*v. DHL Express (USA), Inc.* (2014) 225 Cal.App.4th 510, review granted July 30, 2014, S218754.)

pp. 219-20 [voluntary “agreements do not fall into the core of economic regulation that the ICCTA was intended to preempt”].)

These cases reflect the same principle underlying the market participant doctrine: Freely-entered bargains reflect the workings of market forces, not regulation. (See, e.g., *Boston Harbor, supra*, 507 U.S. at p. 233.) If the parties do not like the potential outcomes of a deal, they can choose not to enter it. (See, e.g., *Northern Illinois Chapter of Associated Builders and Contractors, Inc. v. Lavin* (7th Cir. 2005) 431 F.3d 1004, 1006 [holding that a funding “condition differs from regulation because [the beneficiary] may decline the offer”]; *Hotz v. Rich* (1992) 4 Cal.App.4th 1048, 1055 [holding that a deed restrictions is not regulation “because operators could choose not to buy or lease properties subject to such restrictions”]; *Friends of East Willits Valley v. County of Mendocino* (2002) 101 Cal.App.4th 191, 201 [same].) In this light, NCRA’s CEQA obligation is not regulation, but rather a provision it accepted in return for \$60 million in State money. (See, e.g., AR:9:4638; *Atherton, supra*, 228 Cal.App.4th at p. 339.) Further, NWPCo.—the vendor of rail services for the rail line—freely agreed to CEQA compliance as a condition precedent to operations. (AR:13:6731.)

The appellate court held that the voluntary commitment cases are inapplicable on the grounds that Plaintiffs allegedly do not have standing to enforce NCRA’s agreements to comply with CEQA. (Opinion at pp. 22-

25.) But Plaintiffs' lawsuits do not, and need not, seek to enforce a contract. Rather, Plaintiffs brought their writ of mandate actions to require NCRA to comply with CEQA in reopening the rail line.<sup>6</sup> Defendants argued preemption as an affirmative defense to those actions. Neither federal nor California law limits which plaintiffs may argue against an affirmative defense. In fact, standing and the merits of an affirmative defense such as preemption "are two separate questions, to be addressed on their own terms." (*Official Committee of Unsecured Creditors v. R.F. Lafferty & Co., Inc.* (3rd Cir. 2001) 267 F.3d 340, 346; see also *Citizens for Uniform Laws v. County of Contra Costa* (1991) 233 Cal.App.3d 1468, 1473-74 [addressing standing separately from preemption argument].)

Plaintiffs do not cite the State's self-imposed commitments to CEQA compliance or Defendants' agreements to perform the same to support a breach of contract claim, but rather as evidence that defeats Defendants' preemption defense. Such commitments show that CEQA compliance is not regulation here and that ICCTA preemption does not apply. As *Atherton* correctly held, Plaintiffs' argument that preemption does not apply for this reason "is part of" their writ of mandate action. (*Atherton, supra*, 228

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<sup>6</sup> As Defendants have conceded, Plaintiffs indisputably have standing to bring their writ actions to enforce CEQA. (See, e.g., Joint Response Brief of Respondent and Real Party in Interest at p. 75 [Plaintiffs "had standing to seek enforcement of CEQA to the extent that it applied"]; *Save the Plastic Bag Coalition, supra*, 52 Cal.4th at p. 170; App:1:1:2-3, 1:5:36-37; AR:7:3590, 19:9704, 20:10577.)

Cal.App.4th at p. 340; see also *Friends of East Willits, supra*, 101 Cal.App.4th at pp. 194, 201 [addressing voluntary commitment exception to preemption in writ of mandate action brought by third party for violations of CEQA and the Williamson Act].) Plaintiffs need not plead or prove a separate breach of contract violation.

#### **IV. The ICCTA Does Not Impliedly Preempt Plaintiffs' Case.**

As discussed above, section 10501(b) does not expressly preempt NCRA's obligation to comply with California's environmental review and disclosure law. Without a clear statement to prohibit a state's management of its subdivisions, no federal statute can impliedly preempt California's application of CEQA to its own projects. (See *Nixon, supra*, 541 U.S. at p. 140; *City of Dallas, Tex. v. FCC* (5th Cir. 1999) 165 F.3d 341, 347-48.) Moreover, Plaintiffs have demonstrated that the ICCTA does not expressly or impliedly preempt a state's proprietary actions. (*Boston Harbor, supra*, 507 U.S. at pp. 231-32.) Therefore, the Court need not perform a separate implied preemption analysis.

Nonetheless, Plaintiffs address conflict and obstacle preemption because some courts analyze implied preemption under the ICCTA. (See, e.g., *PCS Phosphate, supra*, 559 F.3d at p. 221.) This implied preemption analysis only confirms that the ICCTA does not preempt the application of CEQA here.

# **EXHIBIT 21**

# **EXHIBIT 21**

JOINT POWERS AGREEMENT

THIS JOINT POWERS AGREEMENT, is entered into as of this 24<sup>th</sup> day of May, 1995, by and between the GOLDEN GATE BRIDGE, HIGHWAY AND TRANSPORTATION DISTRICT ("Bridge District"), the COUNTY OF MARIN ("Marin County"), and THE NORTH COAST RAILROAD AUTHORITY ("NCRA").

A. WHEREAS, the Bridge District, with the cooperation of, or jointly with, Marin County and the Marin County Transit District, acquired that portion of the former Northwestern Pacific Railroad right of way from Paradise Drive in Corte Madera to Novato Creek in Marin County for the purpose of preserving a public transportation corridor in the region; and

B. WHEREAS, Bridge District, with the cooperation of Marin County and Marin County Transit District, entered into two conditional sales agreements dated June 1, 1990 with the Southern Pacific Transportation Company and the Northwestern Pacific Railroad Company as follows: (1) the "Healdsburg Agreement" pertaining to the purchase of the right of way located between the centerline of Novato Creek in the vicinity of Rowland Boulevard in the City of Novato in Marin County at Milepost 26.96 north to the City of Healdsburg in Sonoma County at Milepost 68, a distance of approximately 41 miles ("Healdsburg Segment"); and (2) the "Willits Agreement" pertaining to the purchase of the railroad right of way located between Healdsburg at Milepost 68 to Willits in Mendocino County at Milepost 142.5, a distance of approximately 74.5 miles ("Willits Segment"), together with the right of way between Novato at Ignacio at Milepost 25.57

extending northeast to the railroad point known as Lombard in the County of Napa at Milepost 72.6, a distance of approximately 24.23 miles ("Lombard Segment"); and

C. WHEREAS, Bridge District has maintained a longstanding role in the development of public transit in the North Bay corridor as a regional agency spanning the counties of Del Norte, Mendocino, Sonoma, Marin, Napa, and San Francisco and, over the past fifteen years has taken steps to preserve the former Northwestern Pacific Railroad right of way for public transportation use;

D. WHEREAS, Marin County has had a longstanding interest and undertaken a leadership role in the preservation of the former Northwestern Pacific Railroad right of way for public transportation use;

E. WHEREAS, the North Coast Railroad Authority is a statutorily created public entity authorized to provide passenger and freight railroad service in Humboldt, Mendocino, Sonoma and Marin Counties, and pursuant to that authority, has acquired the former Northwestern Pacific Railroad right of way between Willits and Korbel and operates a common carrier freight and passenger excursion rail system over said line;

F. WHEREAS, Southern Pacific Transportation Company and California Northern Railroad Company, a limited partnership ("California Northern"), entered into a Lease Agreement for Northwestern Pacific Line dated August 27, 1993 providing for a twenty year lease of the former Northwestern Pacific Railroad right of way from NWP Milepost 142.5 near Outlet, California to NWP Milepost 40.6 near Schellville, California to S.P.T. Milepost

63.40 near Lombard, California for common carrier rail freight service, terminable only in accordance with the lease terms and conditions ("Lease Agreement");

G. WHEREAS, all of the parties share a common objective in preserving the former Northwestern Pacific Railroad right of way for passenger use, including excursion services, and the continuation of rail common carrier service and through separate efforts have sought to obtain funding, negotiate agreements and otherwise take steps to acquire and own the right of way;

H. WHEREAS, the parties further recognize that given the broad geographical area encompassed by the right of way, and the variety of economic, social and other characteristics of the communities through which the right of way passes, different priorities exist relative to use of the right of way for rail service;

I. WHEREAS, the parties have concluded that the modest differences in their individual priorities regarding use of the right of way should be subordinated to their overriding common objective to preserve the corridor and therefore have decided to undertake a consolidated and integrated effort to acquire ownership of the right of way;

J. WHEREAS, the parties therefore have decided to enter into this Joint Powers Agreement in order to establish a joint powers authority pursuant to Chapter 5 of Division 7 of Title 1 of the California Government Code (Section 6500, et seq.) (the "Law"), and thereby jointly provide for the acquisition, maintenance, management and operation of the Healdsburg and

Willits Segments for future public transportation and freight use, subject to certain operating principles as set forth below.

NOW, THEREFORE, Bridge District, Marin County, the North Coast Rail Authority, for and in consideration of the mutual provisions and agreements herein contained, do agree as follows:

1. **Definitions.** The following captioned terms are used in this Agreement with meanings set forth below:

**Agreement:** "Agreement" refers to this Joint Powers Agreement, by and Between Golden Gate Bridge, Highway and Transportation District, County of Marin, and NCRA, as may be amended from time to time.

**Authority:** "Authority" refers to the Northwestern Pacific Railroad Authority.

**Healdsburg Agreement:** "Healdsburg Agreement" shall have the meaning set forth in Recital B.

**Healdsburg Segment:** "Healdsburg Segment" shall have the meaning set forth in Recital B.

**Lease Agreement:** "Lease Agreement" shall have the meaning set forth in Recital F.

**Lombard Segment:** "Lombard Segment" shall have the meaning set forth in Recital B.

**Right of Way:** "Right of Way" refers to that portion of former Northwestern Pacific Railroad right of way to be acquired by the Authority consisting of the Healdsburg and Lombard Segments. As described in Section 2, it may also include the Willits Segment if NCRA is not authorized to acquire it.

**The Law:** "The Law" shall have the meaning set forth in Recital J.

**Willits Agreement:** "Willits Agreement" shall have the meaning set forth in Recital B.

**Willits Segment:** "Willits Segment" shall have the meaning set forth in Recital B.

2. Purpose and Creation of the Northwestern Pacific Railroad Authority. This Agreement is made pursuant to the provisions of the Law to provide for the joint exercise of powers common to the Bridge District, Marin County and NCRA for the purpose of creating the Northwestern Pacific Railroad Authority ("Authority"), a joint exercise of powers entity, which is hereby created to acquire, hold title to, and preserve that portion of the former Northwestern Pacific Railroad right of way consisting of the Healdsburg, Willits and Lombard Segments. Specifically, these purposes shall include the completion of the public acquisition from Southern Pacific Transportation Company of the Healdsburg, Willits and Lombard Segments and the establishment of administrative mechanisms to preserve and maintain the Right of Way for passenger services and common carrier freight operations. The parties agree that the Healdsburg, Willits and Lombard Segments should be acquired at one time rather than on a phased basis. The Authority will take title to the Healdsburg and Lombard Segments as assignee of the Bridge District under the Healdsburg and Willits Agreements. Provided that approval is obtained from the funding agencies for the acquisition, the Bridge District will assign to NCRA the right to acquire the Willits Segment subject to the reservation of an easement for

passenger operations as described in Section 5 below for the benefit of County and the Bridge District, as well as Sonoma County if it so elects, or an assignee of those agencies ("Bridge District/Counties"). If the funding agencies do not approve of the proposed assignment to NCRA, the Authority will take title at the outset to the Willits Segment with the understanding that the Authority shall convey title to said segment (subject to the aforementioned easement for passenger operations) upon NCRA's request provided that the necessary approval of the conveyance ultimately is obtained from the funding agencies.

It is the intent of the parties that following acquisition of the Healdsburg, Willits and Lombard Segments, a permanent arrangement for ownership of the entire right of way under a single owner will be fully and completely examined. Alternative ownership arrangements to be considered include the NCRA in its current or a reconfigured form, the Authority and a new statutorily authorized entity.

The parties agree that the purpose of the Authority shall be to own, maintain, and oversee operations on the Right of Way in the interest of all of the using parties, it being understood that the Authority itself shall not function as an operator. The parties recognize the existence of and will protect the integrity of the Lease Agreement between Southern Pacific and California Northern, including the provisions of Schedule 3.10 attached hereto as Exhibit A. The parties also acknowledge that Southern Pacific shall retain a freight easement over the Right of Way for the duration of, and for the limited purpose of, providing general indemnity protection to the

Authority under the terms of the purchase agreement negotiated with Southern Pacific. It is understood that no additional operating rights over and above those possessed by California Northern under the aforementioned freight lease shall be created, or otherwise result from, Southern Pacific's retention of a freight easement. It is further understood that upon acquisition of the Right of Way, the Authority shall assume the responsibility of lessor under the California Northern freight lease. If the freight service of California Northern should terminate for any reason, the Authority shall convey a perpetual and exclusive easement for freight service to the NCRA promptly thereafter, in which event NCRA shall assume all freight service common carrier freight responsibilities in the Right of Way.

The Authority shall foster coordination of rail operations on the Right of Way, including coordinating the independent freight business as operated by the NCRA and California Northern, coordinating freight and passenger operations, and coordinating passenger services. Scheduling priorities shall recognize regularly scheduled passenger commute service first; intercity and intermittent or seasonal passenger service second; and freight operations third. In pursuit of these objectives the Authority shall seek to develop a consensus among public and private entities affected by Right of Way operations so as to maintain and enhance the Right of Way as a public asset for transportation purposes and at minimum public expense.

In addition to the purposes referenced above, the Authority will do the following:

a. Formulate and implement policies regarding requests for crossings, easements, licenses or other encroachments affecting the Right of Way;

b. Establish maintenance standards for the Right of Way;

c. Review and approve all proposed improvements to and operations on the Right of Way so as to cause no unreasonable impairment of any railroad services.

The purposes of this Agreement will be accomplished, and the Authority's powers will be exercised, in accordance with the Law and in the manner hereinafter set forth. The Authority shall be a public entity separate and apart from the Bridge District, Marin County or NCRA.

Within thirty (30) days after the effective date of this Agreement, or any amendment hereto, the Authority will cause a notice of this Agreement or amendment to be prepared and filed with the Office of the California Secretary of State in the manner set forth in Section 6503.5 of the Law.

3. Term. This Agreement shall be effective upon execution of all parties. Upon becoming effective, this Agreement shall continue in full force and effect until terminated pursuant to Section 21, below. In any event, the Authority shall cause all records regarding its formation, existence, and the proceedings pertaining to its termination to be retained for at least six (6) years following termination of the Authority.

4. Powers of the Authority. Subject to Section 5 below, the Authority shall have the power to exercise any power

common to the parties to accomplish the purposes of this Agreement, including, but not limited to, the power to make and enter contracts, to employ agents and employees, to acquire, construct, manage, maintain or operate any building, works or improvements, to acquire, hold or dispose of property, to insure against liability, to incur debts, liabilities or obligations, and the power to sue and be sued in its own name.

No debt, liability or obligation of the Authority shall be, or shall be deemed to be, a debt, liability or obligation of the Bridge District, Marin County or NCRA or their successors. Provided, however, that a party to this Agreement may separately assume responsibility for specific debts, liabilities or obligations of the Authority.

Pursuant to Section 6509 of the Law, the powers of the Authority shall be exercised subject only to such restrictions upon the manner of exercising such powers as are imposed upon the Bridge District. Pursuant to Section 6502 of the Law, it shall not be necessary that any power common to the parties be exercisable by each such party with respect to the geographical area in which such power is to be jointly exercised. The Authority shall hold any and all additional powers conferred under the Law, insofar as such additional powers may be necessary to accomplish the purposes set forth in this Agreement. Notwithstanding the foregoing, the Authority shall not have the power to operate or contract for operation of passenger transportation services.

5. Passenger Rail Operations. The Authority shall have no power to operate passenger rail service directly or by

contract with third party operators but shall convey the responsibility to undertake the development of passenger systems to the following parties as follows:

**NCRA:** For operation of passenger excursion and regional intercity service originating or terminating from points north of Healdsburg, provided that these operations shall be subordinate to Bridge District/Counties regularly scheduled passenger commute operations.

**Bridge District/Counties:** For operation of commuter rail, intercity, excursion or other passenger transit service from points along the Right of Way between and including Healdsburg south to Novato and northeast to Lombard, provided that said delegation of power to Bridge District/Counties carries with it no express or implied obligation to exercise that power, but does allow the Bridge District, in concert with Marin County and Sonoma County, to permit another public entity to plan, implement, finance and operate public transit service. Regularly scheduled passenger commute operations administered by the Bridge District/Counties or its designee pursuant to the exercise of rights by others to operate such service shall be accorded reasonable priority use of the Right of Way over other freight and other passenger operations and in accordance with Exhibit A. Bridge District/Counties shall also be granted an easement by NCRA on the Willits segment for operation of regularly scheduled passenger commute service originating anywhere and for the operation of intercity and intermittent or seasonal passenger service originating or terminating from points south of Healdsburg, or if NCRA is not authorized to hold title to the

Willits Segment, said easement shall be granted by the Authority, in accordance with the provisions of this section and Section 2 above. Passenger operations conducted pursuant to said easement shall be accorded reasonable priority as prescribed in Section 2 of this Agreement.

Upon acquiring title to the Right of Way, the Authority shall convey perpetual easements for passenger rail operations to NCRA and Bridge District/Counties for the segments and purposes described above. Any party undertaking a passenger rail program shall be required to adhere to the following conditions:

- a. The Authority shall be indemnified fully for all costs and liabilities of the passenger rail program;
- b. the Authority shall bear sole authority to negotiate with the existing or any future freight operator to coordinate passenger and freight operations; and
- c. the Authority shall establish reasonable liability requirements for passenger rail service.

6. Governing Board. The Authority shall be governed by a seven-member board of directors, constituted as follows: three members of the Board of Directors of the Bridge District appointed by the Bridge District, one of whom shall be from Mendocino County and one of whom shall be from Sonoma County, with the understanding that the third member shall be from a county other than Sonoma; two members of the Board of Directors of NCRA appointed by the NCRA; and two members of the Marin County Board of Supervisors appointed by said Board of Supervisors.

with any cooperating public entity, Authority may perform these functions on behalf of or in support of such entity in respect of any portion of the former Northwestern Pacific Railroad right of way for which title is held by the public entity.

The Authority will maintain, in appropriate professional manner, a complete, accurate and up-to-date inventory and records of all assets comprising and contained within the Right of Way. This will include, but not be limited to, the state of maintenance of physical assets; the status of such maintenance that is required to be performed pursuant to contracts with Authority; and the status of outstanding legal and administrative issues that relate to title, security, public use of crossings easements and other matters that relate to management of the Right of Way as a publicly held asset. The Authority will exercise best efforts to properly secure and protect all of its assets, including the implementation of a comprehensive property insurance program.

Members of the governing body shall be responsible for periodically reporting to their respective local agencies on the activities of the Authority. In addition, the Authority shall prepare and disseminate an annual report of its activities, financial condition and projected activities for the coming year.

**8. Meetings of the Governing Board.**

**A. Regular and Special Meetings.** The Authority governing board shall hold at least one (1) regular meeting each year. The date upon which, and the hour and place at which, each such regular meeting shall be held shall be fixed by resolution

pleasure of the board. The governing board may appoint a staff member of the parties to serve as Executive Director, or may engage a consultant as an independent contractor to serve in this capacity. The Executive Director shall assume such functions as directed by the Authority governing board to further the accomplishment of its purposes. The duties of the Executive Director may include, without limitation, analyzing and making policy recommendations, project management, obtaining necessary funding, providing administrative services and public information, and otherwise assuming overall responsibility and supervision for the Authority's activities.

C. The Auditor-Controller of the Bridge District is designated as Treasurer of the Authority and shall have custody of all the monies of the Authority from whatever source and shall perform the function of treasurer and have all the powers, duties and responsibilities specified in Section 6505.5 of the Law. Specifically, the Treasurer of the Authority shall receive, have the custody of, and disburse Authority funds and, as nearly as possible, in accordance with normal procedures of the Treasurer, shall make the disbursements required by this Agreement to carry out any of the provisions or purposes of this Agreement.

D. The Auditor-Controller of the Bridge District is hereby designated as Controller of the Authority and shall perform the functions and have the powers, duties and responsibilities set forth in Government Code Section 6505:5. The Controller shall cause an annual audit to be made of the accounts and records of the Authority in accordance with

Government Code Section 6505. The Controller shall draw warrants to pay demands against the Authority pursuant to authorization of the governing board.

E. The Authority's Treasurer and Controller are designated as the public officers or persons who have charge of, handle, or have access to property of the Authority; and such officers shall file an official bond in the amount of \$25,000 as required by Section 6505.1 of the Law; provided, that such bond shall not be required if the Authority does not possess or own property or funds with an aggregate value of greater than \$500.

F. Authority shall designate legal counsel to provide general legal assistance relative to Authority matters as may be required by the governing board. The Authority may select existing counsel of the parties or designate separate counsel.

G. The Authority may contract at cost with the Bridge District, Marin County or NCRA for the services of such personnel to serve the Authority as may be necessary to carry out this Agreement, and shall have the power to employ temporary professional and technical assistants for the performance of this Agreement, provided that adequate sources of funds are identified for the payment of such temporary professional and technical services. Neither the Bridge District, Marin County, or NCRA shall be obligated to provide such services if requested.

H. Upon presentation, the Authority governing board or its designee shall approve proper charges made against the Authority for the services of the Treasurer, the Controller, legal counsel, and any other Bridge District, Marin County or NCRA employee performing services for the Authority, which

charges shall not be a delegation or liability of Bridge District, Marin County or NCRA. Such charges shall be consistent with similar Treasurer, Controller, legal counsel, Bridge District, Marin County or NCRA charges, as applicable, for similar services. No Bridge District, Marin County or NCRA employee shall be deemed to be an employee of the Authority.

10. By-Laws. The Authority governing board shall adopt By-Laws that it, in its sole discretion, may deem necessary or desirable for the conduct of the business of the Authority. Nothing in the By-Laws shall be inconsistent with the provisions of this Agreement.

11. Title to Right of Way. Title to the Right of Way shall be acquired in the name of the Northwestern Pacific Railroad Authority.

12. Indemnification. The Authority shall acquire such insurance protection as is necessary to protect the interest of the Authority, its governing board, the parties to this Agreement and the public. The Authority shall assume the defense of, indemnify and save harmless, each party to this Agreement and its respective supervisors, directors, officers, agents and employees from all claims, losses, damages, costs, injury and liability of every kind, nature and description directly or indirectly arising from the performance of any of the activities of the Authority or the activities undertaken by this Agreement.

Each member agency shall assume the defense of, indemnify and save harmless the Authority and each other party to this Agreement and its respective supervisors, directors, officers, agents and employees from all claims, losses, damages,

costs, injury and liability of every kind, nature and description directly or indirectly arising from the performance of any of the activities of the indemnifying agency outside of those contemplated by this Agreement.

13. Fiscal Year. Unless and until changed by resolution of the Authority governing board, the fiscal year of the Authority shall be the period between July 1 of each year to and including the following June 30, except for the first fiscal year, which shall be the period from the date of this Agreement to the following June 30.

14. Budget. The Board of the Authority shall prepare and adopt on an annual basis operating and capital budgets. It is understood that the Authority shall be self-sustaining, relying on freight revenues, income from property management and grant funds, to balance its budget. Member agencies of the Authority will not be required to contribute local funds to satisfy any budget shortfalls.

15. Funding. The parties establish as a goal that the acquisition of the Healdsburg, Lombard and Willits Segments shall be achieved entirely with federal and state funds, with no general funds required from the parties or financing by Southern Pacific. The use of federal "Q" funds shall be maximized to acquire the Healdsburg, Lombard and Willits Segments, with the understanding that the NCRA agrees to serve as the exclusive guarantor for repayment thereof. The parties also will pledge their best efforts to obtain state TCI funds to meet federal match requirements for the acquisition. If NCRA is approved as guarantor of the "Q" funds, ISTEA funds that are thereby released

shall be allocated as follows: \$2.3 million for the acquisition of station sites in Marin; the balance to be allocated to NCRA for use in the development of its portion of the former Northwestern Pacific Right of Way located north of Willits. If the NCRA is not eligible to guarantee repayment of the "Q" funds, the source of repayment shall derive from available ISTEPA funds and required match funds for the ISTEPA funds shall derive from other sources to be determined by the parties, including the possibility of loan proceeds from the seller of the Corridor secured by freight revenues.

The Authority may apply for, receive, and utilize State, local, and federal funding and funds from all other sources given to it to accomplish the purposes of this Agreement. Specifically, the Authority governing board shall be authorized to pursue all eligible local, State and federal funding, as well as private sources to assist in the development and implementation of its purposes. The formal applications shall be forwarded to the State and federal agencies through the appropriate party or parties participating in this Agreement.

**16. Allocation of Revenues.** All revenues received from the California Northern freight lease shall be collected and used for the operation of the Authority, subject to allocation to the NCRA of a pro rata portion of revenues reflecting the NCRA's ownership interest in the Willits Segment, based upon the proportion that the Willits Segment mileage bears to the total mileage of the Healdsburg, Lombard and Willits Segments. In addition, for the duration of the period that NCRA is obligated to repay the "Q" funds obtained for acquisition of the Ignacio to

Lombard segment of the Right of Way, the Authority shall allocate to NCRA 37% of the California Northern freight lease revenues otherwise retained by the Authority. Rentals and any other revenues shall be collected and retained by the owner of those Right of Way segments from which such revenues are derived.

17. Accounts and Reports. The Authority shall establish and maintain such funds and accounts as may be required by good accounting practices. The books and records of the Authority shall be open to inspection at all reasonable times to the parties to this Agreement and their representatives. The governing board, within one hundred twenty (120) days after the close of each fiscal year shall give a complete written report of all financial activities for such fiscal year to the parties. The Controller shall prepare and maintain such accounts and reports.

18. Conflict of Interest Code. The Authority governing board, by resolution, shall adopt a conflict of interest code as required by law.

19. Enforcement. The Bridge District, Marin County and NCRA declare that this Agreement is entered into for the benefit of the Authority created hereby, and the Bridge District, Marin County and NCRA grant to the Authority the right to enforce, by whatever lawful means the Authority deems appropriate, all of the obligations of each of the parties hereunder. Each and all of the remedies given to the Authority hereunder, or by any law now or hereafter enacted, are cumulative and the exercise of one right or remedy shall not impair the right of the Authority to any or all other remedies.

20. Notices. Any notices, communications and payments deemed by any party to be necessary or desirable to be given to the other parties shall be personally delivered or mailed first class, certified or registered mail, postage pre-paid, and shall be deemed delivered on the date of delivery if personally served or two days after it is deposited in the U.S. mails provided above when mailed to the other parties addressed as follows:

If to the Bridge District: Golden Gate Bridge, Highway and Transportation District  
P.O. Box 9000, Presidio Station  
San Francisco, CA 94126-0601  
Attn: General Manager

If to Marin County: County of Marin  
Marin County Civic Center  
San Rafael, CA 94903  
Attn: County Administrator

If to NCRA: Northern California Railroad Authority  
4 West Second Street  
Eureka, CA 95501  
Attn: Executive Director

21. Withdrawal; Termination. The parties may mutually agree to terminate this Agreement and dissolve the Authority at any time. The terms and conditions for such mutual termination shall be set forth in a written agreement.

Any party may withdraw from this Agreement upon one (1) year's prior written notice to the other parties given at the end of any fiscal year. In the event of such a withdrawal by a single party, the Authority shall continue to exist, with the membership adjusted to reflect the withdrawal. Withdrawal by a single party shall not entitle that party to reimbursement for past capital contributions or to distribution of any assets or funds of the Authority. If two or more of the parties to this

Agreement withdraw, then this Agreement shall terminate at the end of the fiscal year following expiration of the one-year's notice given by the second party to withdraw from the Agreement.

At such time as this Agreement is terminated, any property interest remaining in the Authority, following discharge of all obligations due by the board, shall be disposed of and the proceeds or property shall be allocated in accordance with a separate agreement to be entered into between the parties. If the parties are unable to reach agreement, disposition of the proceeds or property shall be determined by binding arbitration. In no event shall termination of this Agreement adversely affect the District's or NCRA's easements for passenger operations described in Section 5 above. In addition, it is understood that the assets of the Authority upon termination shall be distributed, whether by agreement or arbitration determination, to a public entity.

22. Entire Understanding. This Agreement constitutes the entire of the understandings of the parties with respect to its subject matter as of the date hereof, and supersedes any prior or contemporaneous oral or written understandings and agreements between the parties on the same subject.

23. Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which together shall be deemed a single Agreement.

24. Successors; Assignment. This Agreement shall be binding upon and shall inure to the benefit of the successors of the parties. Except to the extent expressly provided herein, no

party hereto may assign any right or obligation hereunder without the consent of the other parties.

25. Governing Law. This Agreement shall be governed by and construed under the laws of the State of California as applied to contracts that are made and performed entirely in California.

26. Amendments. This Agreement may be amended by mutual consent of all parties. Any amendment shall be in writing signed by authorized representatives of all parties hereto.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement by their duly authorized representatives as of the dates indicated below.

GOLDEN GATE BRIDGE, HIGHWAY AND TRANSPORTATION DISTRICT

By: *Robert McDonnell*

By: *Charles Spork*

APPROVED AS TO FORM:

*David J. Miller*

Date: 5/24/95

COUNTY OF MARIN

By: *Anita Kore*

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

APPROVED AS TO FORM:

*[Signature]*

Date: 5-8-95

NORTH COAST RAILROAD AUTHORITY

By: *[Signature]*

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

APPROVED AS TO FORM:

*Christopher J. Lee*

Date: 5/17/95

EXHIBIT A

Priority of Use of Right of Way

The Lease Agreement for Northwestern Pacific Line dated August 27, 1993, by and between Southern Pacific Transportation Company, Lessor, and California Northern Railroad Company Ltd. Partnership, Lessee, addresses priority of service on the line in Section 3.09, which reads as follows:

"In the event that Lessor undertakes to provide passenger operations on the Leased Premises, either directly or through the designation of a passenger service operator, Lessee and Lessor shall enter into an agreement (the "Coordination Agreement") that describes in detail the respective rights and obligations of dispatching, scheduling of operations and other matters concerning the joint use of the Leased Premises. Lessee and Lessor shall negotiate the Coordination Agreement in good faith so as to ensure that passenger operations have reasonable priority over freight on the Leased premises in a manner that meets the needs of the shippers on the line, and that passenger operations disrupt lessee's freight operations to the minimum extent possible. The coordination agreement shall include provisions that address the issues set forth in Schedule 3.10.

The determination of priority use of the right of way shall take into account the terms of the aforementioned freight lease for the duration of that agreement. Schedule 3.10, referred to above, is attached hereto and incorporated herein by this reference.

SCHEDULE 3.10

The Coordination Agreement shall include provisions that address, inter alia, the following:

- (1) Passenger operations shall have reasonable priority over freight operations, provided that such priority shall not materially adversely affect Lessee's performance of its common carrier obligations, Lessee's conduct of rail freight operations or Lessee's ability to provide adequate service to shippers and receivers.
- (2) Reasonable accommodations shall be made during any construction required for passenger operations, at Commuter Authority's expense, to allow freight operations to continue during the construction period.
- (3) Lessee shall not bear any portion of any maintenance, rehabilitation or capital expense that is incurred in order to accommodate passenger service but that would not be required in order to continue freight operations substantially as such operations have been conducted by Lessee on the Leased Premises.
- (4) Lessee's share of maintenance expenditures shall not exceed the amount that Lessee reasonably would have expended for maintenance in the absence of passenger operations on the Leased Premises.
- (5) Capital expenditures shall be allocated between Lessee and Lessor on an equitable basis that takes into account whether Lessee would have made such a capital expenditure if there were no passenger operations on the Leased Premises, and if so, the relative benefit to the Parties.
- (6) Lessor may require that Lessee perform upgrading of the Track and Track Support Structures and/or installation of additional trackage, signals or other facilities, at Lessor's expenses, and Lessee may engage subcontractors to perform such work.
- (7) Reasonable fees shall be established for services such as dispatching that are provided by one Party to the other.
- (8) Lessor shall reimburse Lessee for the reasonable expenses incurred by Lessee (including without limitation attorneys' fees) as a result of Lessee's participation in regulatory proceedings or public hearings concerning passenger service on the Leased Premises.
- (9) There shall be mutual indemnification and an equitable allocation of environmental liability.
- (10) The parties shall address the issue of Lessor's right, if any, to raise affirmative defenses to performance of its obligations under the Lease Agreement (including without limitation Lessor's obligation to indemnify Lessee in certain circumstances) based upon Lessor's status as a governmental entity, quasi-governmental entity or political subdivision of same, and if such affirmative defenses are available to Lessor, the manner in which Lessee's interests may be reasonably protected in light of such defenses.