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SURFACE TRANSPORTATION BOARD

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Docket No. NOR 42133

SIERRA RAILROAD COMPANY AND SIERRA NORTHERN RAILWAY,

Complainants,

v.

**SACRAMENTO VALLEY RAILROAD, LLC, MCCLELLAN BUSINESS
PARK LLC AND COUNTY OF SACRAMENTO,**

Respondents.

COMPLAINTS' REBUTTAL EVIDENCE AND ARGUMENTS

Fritz R. Kahn
Fritz R. Kahn, P.C.
1919 M Street, NW (7th fl.)
Washington, DC 20036
Tel.: (202) 263-4152

Attorney for

**SIERRA RAILROAD COMPANY
SIERRA NORTHERN RAILWAY**

Due and dated: July 9, 2012

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Complainants, Sierra Railroad Company of Davis, Calif. ("Sierra") and Sierra Northern Railway of Woodland, Calif. ("SERA"), pursuant to 49 C.F.R. §1112.2 and the Board's Decisions, served April 23, April 30 and June 12, 2012, respond to the Reply of Respondents, Sacramento Valley Railroad, LLC of Boca Raton, Fla. ("SAV"), McClellan Business Park LLC of McClellan, Calif. ("McClellan") and the County of Sacramento of Sacramento, Calif. ("County"), filed June 19, 2012, as follows:

I.

The background is largely undisputed.

The parties are in substantial agreement in their statements of the background of the controversy between them, and it is well summarized in the decision of the Board, served April 23, 2012.

What renders Respondents' Reply somewhat unique, however, is that the Respondents assail arguments which the Complainants did not make and at the same time fail to respond to arguments upon which the Complainants had relied. In that connection, it bears noting that, pursuant to 49 C.F.R. §1112.6, Respondents will be considered to have admitted the truth of allegations of fact in Complainants' Opening Evidence and Arguments left unchallenged by the Respondents in their Reply.

II.

For SAV to be the sole and exclusive rail carrier to operate on the Line necessitated seeking the adverse discontinuance of SERA's authority.

For whatever the reason, McClellan determined not to renew the Railroad License and Operating Agreement between the Sacramento and Yolo Shortline Railroad Company, dated as of February 6, 2001 (the "2001 Licensing Agreement")¹, and notified SERA of its termination by letter, dated August 31, 2007². McClellan's request for proposals was circulated by letter, dated October 11, 2007, and, among other things, it stated that "it is [McClellan's] intent to award the successful respondent with the exclusive right to provide short line rail service at McClellan Business Park for a minimum five (5) year term commencing on March 1, 2008."³ By e-mail, dated January 7, 2008, McClellan notified Sierra and SERA that it had selected Patriot Rail as the short line operator and looked forward to their cooperation during the next two months' transition⁴. Not being a short line railroad, Patriot Rail formed SAV, and SAV, on January 29, 2008, filed its Verified Notice of Exemption in Finance Docket No. 35117,

¹ Exhibit 2 to Complainants' Opening Evidence and Arguments.

² Exhibit 4(a) to Complainants' Opening Evidence and Arguments.

³ Exhibit 4(b) to Complainants' Opening Evidence and Arguments.

⁴ Exhibit 4(c) to Complainant's Opening Evidence and Arguments.

Sacramento Valley Railroad, Inc.--Operation Exemption--McClellan Business Park, LLC, asking the Board to permit it "to obtain the exclusive occupancy and operating rights over about seven miles of unmarked railroad track within McClellan Business Park, in McClellan, Sacramento County, CA (the 'Line')." ⁵ The 2008 Licensing Agreement between McClellan (the "Licensor") and SAV (the "Licensee") explicitly stated, "

⁶ In their discovery response served the Complainants on February 16, 2012, Respondents acknowledged, "McClellan and SAV admit that their agreement intended SAV to be the exclusive operator in the McClellan Business Park."⁷

None of the foregoing is disputed by the Respondents. Yet Respondents extract a single sentence from SAV's 15-page Verified Notice of Exemption, filed January 29, 2008, to suggest that the Respondents would be agreeable to having SERA as a competing rail carrier on the Line. The sentence in question reads, "SAVR is willing to enter an operational protocol with Yolo's successor, if that becomes necessary, in order to meet the needs of MBP [McClellan]." Based on that single sentence, Respondents, at page 8 of their Reply, contend "SERA has not been precluded from the Park. SAV offered a protocol and SERA has not accepted that offer." What the protocol referred to is altogether evident. SAV's Notice of Exemption was filed January 29, 2008, a full month before the February 29, 2008, expiration date of the 2001 Licensing Agreement, and, as the exchanges of e-mails between McClellan's Frank Meyers and Sierra's Mike Hart make clear, it was not at all certain what steps, if any, SERA would take to vacate

⁵ Exhibit 1 to Complainants' Opening Evidence and Arguments.

⁶ Exhibit 7 to Complainants' Opening Evidence and Arguments.

⁷ Exhibit 8 to Complainants' Opening Evidence and Arguments.

the Line by the deadline date⁸. The offer to enter into the operational protocol reasonably cannot be read to overcome the Respondents' repeated assertions that it was their intent that after March 1, 2008, SAV was to have the exclusive occupancy and operating rights on the Line.

SERA, however, to this day continues to have the Board granted authority to operate as a rail carrier on the Line, a fact that the Respondents fail to dispute in their Reply. SERA's predecessor had entered into the 2001 Licensing Agreement⁹, and in turn secured the Board's authorization to "the exclusive occupancy and operating rights" on the Line by the decision of the Board in STB Finance Docket No. 34028, *Yolo Shortline Railroad Company--Acquisition and Operation Exemption--County of Sacramento, CA*, served March 27, 2001¹⁰. Nowhere in their Opening Evidence and Arguments did the Complainants contend that 2001 Licensing Agreement could not be terminated by McClellan or that SERA continues to have an "exclusive" right to serve the Line in the McClellan industrial park, as Respondents infer on page 6 of their Reply. What the Complainants did say, however, is that, in the absence of a provision such as Section 18.1 of the 2008 Licensing Agreement

the 2001 Licensing

Agreement did not oblige SERA to seek the Board's discontinuance authorization upon McClellan's termination of the 2001 Licensing Agreement. As the Board noted in its Decision in this proceeding, served April 23, 2012, "A rail carrier may seek authority to discontinue its operations under 49 U.S.C. §10903; however, the statute does not require it to do so under the circumstances presented here."

⁸ Exhibit 4(d) to Complainants' Opening Evidence and Arguments.

⁹ Exhibit 2 to Complainants' Opening Evidence and Arguments.

¹⁰ Exhibit 3 to Complainants' Opening Evidence and Arguments.

At page 8 of their Reply, Respondents note that "SERA voluntarily left the Park without protest." The reason for that is not difficult to discern and may be found in the Response which SAV's corporate parents, Patriot Rail Corp, et al., filed June 11, 2012, in Docket No. FD 35622, *SteelRiver Infrastructure Partners LP, etc.* On page 8 of their Reply, Patriot Rail Corp., et al., acknowledged that "[n]egotiations resumed [between Patriot Rail, Inc., and Sierra] in February 2008 which led to the execution of a Letter of Intent ('LOI') on March 20, 2008. Pursuant to the LOI, the parties agreed to enter into formal negotiations for Patriot Rail to acquire SERA. * * * The negotiations spanned over nine months after execution of the LOI." Patriot Rail, Inc., and its affiliates even went so far as to file with the Board on July 16, 2008, their Notice of Exemption to acquire and operate Sierra and SERA,¹¹ a transaction which, of course, Patriot Rail, Inc. never consummated, leading to subsequent litigation between the parties. If SERA anticipated being acquired by Patriot Rail, Inc., it would have been nonsensical for SERA to contest SAV's commencement of service on the Line, and that is the reason why SERA left the McClellan industrial park without protest.

At page 8 of their Reply, Respondents contend that the failure to have SERA's obligation to seek the Board's discontinuance authorization expressed more explicitly in the 2001 Licensing Agreement was the result of the County's "[b]eing unsophisticated as far as railroad regulation at the time the License of was entered into."¹² In fact, the County had had considerable experience with railroads serving its area. Southern Pacific

¹¹ STB Finance Docket No. 35165, *Sierra & Central Pacific Railroad Company, Inc.--Acquisition and Operation Exemption--Sierra Northern Railway and Sierra Railroad Company*, and STB Finance Docket No. 35166, *Patriot Rail, LLC, Patriot Rail Holding, LLC and Patriot Rail Corp.--Continuance in Control Exemption--Sierra & Central Pacific Railroad Company, Inc.*, filed July 16, 2008.

¹² The County did not claim lack of sophistication in matters of railroad regulation. That came from Mr. Meyer. No representative of the County submitted a verified statement.

Company and Sacramento Northern Railway, predecessors of the Union Pacific Railroad Company, long had operated in the County, and attached as Exhibit A are lists of transactions involving the two railroads which were recorded in the Office of the County Clerk/Recorder for Sacramento County for each of the years 1950 through 1990.

Section 15.1 of the 2001 Licensing Agreement said that upon its termination "the Licensee shall, at Licensee's sole expense, remove its equipment, personnel, and other property from Licensor's premises." At page 8 of their Reply, as in Mr. Meyer's verified statement, Respondents acknowledge that as of the effective date of the termination of the 2001 Licensing Agreement, February 29, 2008, SERA had removed its equipment, personnel and other tangible property from McClellan's premises. Respondents, however, have come up with the novel theory that the Board's grant of authority for SERA to serve as a rail carrier on the Line was intangible property which also needed to be removed upon the 2001 Licensing Agreement's termination. At pages 8-9 of their Reply, Respondents note, "The Board has permitted the sale and retention of the common carrier obligation." Complainants, of course, never contended otherwise. It hardly was necessary for Respondents to refer in footnote 7 on page 9 of their Reply to the Interstate Commerce Commission's approval of the purchase and sale of motor carrier operating rights. The authorization to operate as a rail carrier routinely is granted by the Board apart from the applicant's acquisition of the railroad line, whether by purchase, lease or otherwise.¹³ Indeed, SAV itself, by its Verified Notice of Exemption, filed January 29,

¹³ See, i.e., Docket No. FD 35624, *Cleveland Harbor Belt Railroad--Operation Exemption--Cleveland-Cuyahoga County Port Authority*, served May 24, 2012; Docket No. FD 35631, *Saratoga and North Creek Railway, LLC-Operating Exemption--Tahawus Line*, served June 1, 2012; Docket No. FD 35390, *Afton Terminal Railroad Company--Operation Exemption--Afton Trucking Company*, served March 30, 2012.

2008, secured the Board's authorization to operate as a common carrier railroad on the Line without acquiring any interest in the property.

The Board, however, at no time has deemed its authorization to operate as a rail carrier to be intangible property, and Respondents do not, and cannot, cite a single Decision of the Board which lends support to their novel theory. The best Respondents can come up with is to quote an excerpt from the definition of intangible property in Black's Law Dictionary. That is no more helpful in determining how the Board treats its grants of authority to operate as rail carriers than it would be to turn to Black's Law Dictionary's definition of abandonment to learn that one needs the Board's approval before a railroad line can be abandoned.

At page 9 of their Reply, Respondents contend that under the 2001 Licensing Agreement "SERA has the obligation to remove its property from the [McClellan] Park at its own cost, which includes the common carrier authority granted by the Board . . . SERA must file its own discontinuance of service under 49 U.S.C. §10903 to comply with its contractual commitments and to remove its property from the Park." That is Mr. Meyers' view as well. Obviously Complainants disagree. The Board, however, is the inappropriate forum for seeking the construction of a contract. The Board time and again has said that the resolution of contractual disputes is not within the Board's jurisdiction and is appropriate for a state court to address.¹⁴ Beginning at page 11 of Complainants' Opening Evidence and Arguments, Complainants stated:

¹⁴ See, i.e., Docket No. FD 35388, *Allegheny Valley R.R.--Petition for Declaratory Order--William Fiore*, served April 25, 2011; STB Finance Docket No. 34867, *General Railway Corporation, d/b/a Iowa Northwestern Railroad--Exemption for Acquisition of Railroad Line--in Osceola and Dickinson Counties, IA*, served June 15, 2007; STB Finance Docket No. 33905, *Lackawanna County Railroad Authority--Acquisition Exemption--F&L Realty, Inc.*, served October 22, 2001; STB Docket No. AB-406 (Sub-No. 6X), *Central Kansas Railway Limited Liability Company--Abandonment Exemption--in Marion and McPherson Counties, KS*, served December 18, 1998.

"The position of the parties in this proceeding is not dissimilar from that in STB Docket No. AB-878, *City of Peoria and the Village of Peoria Heights, IL--Adverse Discontinuance--Pioneer Industrial Railway Company*, served August 10, 2005, in which the Board explained:

The Cities are the owners of a rail line, and [Pioneer Industrial Railway Company] PIE is their tenant. The Cities contend that the agreement between the parties has expired, that it has obtained a new carrier [Central Illinois Railway Company] (CIRY) and that it seeks to have PIRY removed from the property. Although the Board does not undertake to interpret or enforce operating agreements or contracts, see Tacoma [Eastern Railway Co.--Adverse Discontinuance of Operation Application--A Line of the City of Tacoma in Pierce, Thurston and Lewis Counties, WA]; The Kansas City Southern Railway Company--Adverse Discontinuance Application--A Line of Arkansas and Missouri Railroad Company; STB Docket No. AB-103 (Sub-No. 14) (STB served Mar. 26, 1999), the Cities seek to have the Board remove its primary jurisdiction with respect to PIRY's operating authority so that they may attempt to have PIRY evicted from the Keller Branch under any applicable state law. Until the Board removes its primary jurisdiction, no state court may apply the processes of state law.

The proper way for the Board to remove its primary jurisdiction in such circumstances is through an adverse discontinuance proceeding. Jacksonville Port [Authority -- Adverse Discontinuance in Duval County, FL, Docket No. AB-469 (STB served July 17, 1996); Modern Handcraft, Inc.---Aband., 363 I.C.C. 969 (1981) (Modern Handcraft); Thompson v. Texas-Mexican Ry. Co., 328 U.S. 134 (1946). If the Board grants an adverse discontinuance application, the Cities can proceed to court to attempt to have PIRY evicted. At the same time, adverse discontinuance authority is permissive, which means that the operator can continue to operate until there is an adverse state court judgment against it or until it voluntarily ceases operations. Modern Handcraft at 972. Thus, if the Cities failed to evict PIRY in state court after the Board granted an adverse discontinuance application, PIRY could continue to operate on the line.

"*Accord*, STB Finance Docket No. 34090, *Union Pacific Railroad Company -- Petition for Declaratory Order*, served November 9, 2001, in which the Board held, 'The courts have been clear that "[a]bsent . . . valid . . . abandonment [authority] . . . a state may not require a railroad to cease operations over a right-of-way.' National Wildlife Federation v. ICC, 850 F.2d 694, 704 (D.C. Cir 1988) (citing New Orleans Terminal Co. v. Spencer, 366 F.2d 160 (5th Cir. 1966)). Thus, any party seeking the abandonment of a

line of railroad or discontinuance of rail service, must first obtain appropriate authority from the Board. See Consolidated Rail Corp. v. I.C.C., 29 F.3d 706 (D.C. Cir. 1994).

"In Docket No. AB 32 (Sub-No. 100), *Boston and Maine Corporation and Springfield Terminal Railway Company--Adverse Discontinuance--New England Southern Railroad Co., Inc.*, served April 30, 2010, the Board declared, 'In an adverse discontinuance case, if we conclude that the PC&N does not require or permit a carrier's continued operation over the line, our decision removes the shield of our jurisdiction, enabling the applicant to pursue other legal remedies, if necessary, to force the carrier off the line [footnote omitted].' In STB Docket AB-1014, *Denver & Rio Grande Railway Historical Foundation--Adverse Abandonment--in Mineral County, CO*, served May 23, 2008, the Board said, 'In an adverse abandonment case, if we conclude that the PC&N does not require or permit continued operation over the line, our decision removes the shield of our jurisdiction, enabling the applicant to pursue other legal remedies to force the carrier off a line [footnote omitted].' In STB Finance Docket No. 33905, *Lackawanna County Railroad Authority--Acquisition Exemption--F&L Realty*, served October 22, 2001, the Board noted, 'If the Board should grant a third party discontinuance, the Board's jurisdiction over the . . . line would be removed as a shield and the parties could then proceed to state court to pursue enforcement of any contractual rights.'

"The foregoing decisions of the Board permit of no doubt that, if SAV, McClellan or the County believe that revocation of the 2001 Licensing Agreement negated SERA's right to operate on the Line and that by virtue of the 2008 Licensing Agreement SAV currently has sole and exclusive authority to operate on the Line, it was incumbent upon one or another of them to apply to the Board for the third-party or adverse discontinuance

of SERA's operating authority. Should the Board grant SAV, McClellan or the County such relief and revoke SERA's operating authority, the Board's decision would remove the shield of its jurisdiction so that SAV, McClellan or the County could proceed to court to pursue enforcement of their alleged contractual rights. Their failure to invoke the Board's jurisdiction to secure the third-party or adverse discontinuance of SERA's authority to operate on the Line constitutes an unreasonable practice."

Significantly, Respondents in their Reply did not challenge Complainants' assertion. All they were able to come up with, at page 9 of their Reply, was the limp claim that "[t]he Defendants do not have any obligation to file an adverse discontinuance of service on behalf of SERA." The foregoing decisions of the Board, set out in Complainants' Opening Evidence and Arguments, permit of no doubt that Respondents have erred in their denial of culpability.

III.

The County and McClellan retained such rights relating to the Line on which Yolo, SERA and SAV were authorized to operate as to subject them to the Board's jurisdiction as common carriers.

The owner of the Line in what had been the McClellan Air Force Base, the County, and the company which the County engaged to manage the acquired properties, including the Line, McClellan, took what had been a seven-mile private railroad track and converted it into a line of railroad on which Yolo, SERA and SAV were authorized by the Board to render service as rail carriers. Their ownership and management of the Line on which Yolo, SERA and SAV have operated and their contractual rights affecting the rail carriers' operations on the Line made the County and McClellan rail common

carriers and obliged them obtain the requisite authority from the Board, pursuant to 49 U.S.C. §10901, or an exemption therefrom, under 49 U.S.C. §10502. That, however, they failed to do. They evidently believed that by seeking to avoid the Board's jurisdiction they were relieved of the obligations of rail carriers, including, among other things, the requirement that they observe reasonable practices. Their inaction, however does not excuse the County and McClellan from observing the statutory or regulatory provisions which they would have had to observe if they had secured the Board's authorization as rail carriers. Two wrongs do not make a right.

At page 9 of their Reply, Respondents assert that "SERA contends that Sacramento and McClellan have obtained authority from the Board . . . to provide rail service in the Park . . ." That statement can only be described as a figment of the Respondents' imagination. Nowhere in their Opening Evidence and Arguments did the Complainants contend that the County and McClellan were authorized by the Board to render service on the Line. What Complainants did say, at page 14 of their Opening Evidence and Arguments, was that, as the owner and manager of the Line on which Yolo, SERA and SAV were authorized by the Board to render service as rail carriers, the County and McClellan were residual common carriers and were required -- but failed -- to secure the requisite authority from the Board pursuant to 49 U.S.C. §10901, or an exemption therefrom, under 49 U.S.C. §10502.

At pages 9-10 of their Reply, Respondents allege that the Complainants relied on precedents where the owner of the excepted track becomes a rail carrier upon receiving the requisite authority from the Board. Respondents obviously are referring to the line of Board Decisions which followed *Effingham RR Co.--Pet. for Declaratory Order*, 2

S.T.B. 606 (1997), *aff'd sub nom., United Transp. Union--Ill. Legislative Bd. v. Surface Transp. Bd.*, 183 F. 3d. 606 (7th Cir. 1999), but Complainants cited none of them, and Respondents fail in their Reply to indicate just where in their Opening Evidence and Arguments the Complainants had relied on even one of such Board decisions.

At page 11 of their Reply, Respondents claim that in STB Finance Docket No. 34258, *North Carolina State Ports Authority--Acquisition Exemption--North Carolina Ports Railway Commission*, served October 31, 2002, "the ICC authorized the North Carolina Ports Railway Commission ('CPRC') to acquire and operate rail lines at the port facilities." The ICC did no such thing. The Board's decision clearly identifies the North Carolina Ports Railway Commission to be a nonoperating railroad, the assets of which were being acquired by the North Carolina State Ports Authority to be operated by Wilmington Terminal Railroad, Inc. and Carolina Rail Services, Inc. Complainants cited the Board's decision, at page 16 of their Opening Evidence and Arguments, because the ICC had found the North Carolina Ports Railway Commission to have a residual common carrier obligation but on its own motion exempted it from filing an application. In the same way, the County and McClellan have a residual common carrier obligation on the Line authorized by the Board to be operated by Yolo, SERA and SAV, but the County and McClellan neither filed for the appropriate authority nor sought an exemption from the Board.

Similarly, at page 11 of their Reply, Respondents mischaracterize the Board's Decision in Finance Docket No. 32112, *Clark Shortline Railroad Company--Acquisition and Operation Exemption--Indiana Port Commission* and Finance Docket No. 32113, *Southwind Shortline Railroad Company--Acquisition and Operation Exemption--Indiana*

Port Commission, served May 14, 1988. The critical finding of the Board, for which the Complainants cited the Decision, at page 16 of their Opening Evidence and Arguments, was, "Even though CLSL and SWSL have contracted with operators who actually perform rail service, CLSL and SWSL have the residual common carrier obligation to provide service at the respective facilities." So, too, in the instant proceeding the County and McClellan have the residual common carrier obligation to provide service on the Line notwithstanding that the Board authorized Yolo, SERA and SAV to be the rail carriers on the Line.

Finally, at page 11 of their Reply, Respondents misrepresent the Board's holding in its Decisions in STB Finance Docket No. 34448, *Allegheny & Eastern Railroad, LLC--Acquisition Exemption--Buffalo & Pittsburgh Railroad, Inc.* and STB Finance Docket No. 34449, *Pittsburg & Shawmut Railroad, LLC--Acquisition Exemption---Buffalo & Pittsburgh Railroad, Inc.*, served January 24, 2004. While the parent company, Buffalo & Pittsburgh Railroad, Inc., intended to retain the operating authority and render the service over the lines acquired by its two newly established subsidiaries, the Board held that the property owning entities, the Allegheny & Eastern Railroad, LLC and Pittsburg & Shawmut Railroad, LLC "will have the residual common carrier obligation." The Complainant, at page 17 of their Opening Evidence and Arguments, cited the Decisions, because similarly the County, as the owner of the Line, and McClellan, as its manager, have the residual common carrier obligation, even though the Board authorized Yolo, SERA and SAV to render service on the Line as rail carriers.

Alternatively, the County, as the owner of the Line, and McClellan, as its manager, retained the rights to exercise such pervasive control over the operations of the

certificated rail carriers, Yolo, SERA and SAV, as to render the County and McClellan common carriers. Respondents tend to make light of the relationship between the County, as the Licensor, and Yolo, renamed SERA, as the Licensee, pursuant to the 2001 Licensing Agreement and the relationship between McClellan, as the Licensor, and SAV, as the Licensee, pursuant to the 2008 Licensing Agreement. It is the documents establishing the relationships between the Licensors and Licensees, however, which are crucial in determining the parties' rights and obligations and which, accordingly, warrant close examination by the Board. As the Board said in its Decision, served April 23, 2012, "[T]he Board has in the past examined the relationship between line owners and rail carriers to determine whether a line owner acquired a common carrier obligation because of its degree of control and potential interference with the rail carrier operating over the line." The Board cited its Decision in Docket No. FD 35296, *Anthony Macrie--Continuance in Control Exemption--N.J. Seashore Line, Inc.*, served August 31, 2010, a Decision excerpts of which were quoted by the Respondents, at page 23 of their Opening Evidence and Arguments, but is scarcely mentioned in Respondents' Reply. In its Decision in that proceeding, the Board had held that the owner of the railroad line "cannot (1) exercise control over [the rail carrier's] operations such that [the owner] must become a common carrier itself, thus implicating the Board's jurisdiction, or (2) interfere with [the rail carrier's] ability to meet its common carrier obligation to its shippers."

Respondents do not dispute, as Complainants had asserted at pages 17 of their Opening Evidence and Arguments, that neither agreement -- not the 2001 Licensing Agreement and not the 2008 Licensing Agreement -- granted the Licensee an "exclusive, irrevocable, perpetual, assignable, divisible and transferable freight operation easement to

provide freight rail service" on the Line. *Cf.*, Docket No. FD 35606, *State of Michigan Department of Transportation--Acquisition Exemption--Certain Assets of Norfolk Southern Railway Company*, served April 13, 2012.

The agreements did not convey perpetual easements. Section 9.1 of the 2001 Licensing Agreement established its term for five years and year to year thereafter, and Section 8.1 of the 2008 Licensing agreement

The agreements did not grant irrevocable easements. Section 9.4 of the 2001 Licensing Agreement allowed either party to terminate the agreement without cause upon six months' written notice, and Section 8.2 of the 2008 Licensing Agreement enables the

The agreements did not permit the Licensees to assign their easements. Section 23.1 of the 2001 Licensing Agreement disallowed the agreement's assignment, in whole or in part, without the Licensor's written consent, and section 23 of the 2008 Licensing Agreement

The agreements did not permit the Licensees to operate excepted tracks¹⁵. Section 3.2 of the 2001 Licensing Agreement required the Licensee to maintain the Line to FRA class I standards or better, and Section 3.1(k) of the 2008 Licensing Agreement

¹⁵ *See*, 49 C.F.R. §213.4.

The agreements directed the manner in which the Licensees could operate the Line. Section 6.1 of the 2001 Licensing Agreement obliged the Licensee to operate the Line "in such a manner as to minimize interference with the use by the tenants of the roadway, property and facilities of the Lessor" and Section 6 of the 2008 Licensing Agreement

16.

The agreements curtail the Licensees' handling of hazardous materials on the Line. Section 16.2 of the 2001 Licensing Agreement prohibited the Licensee from handling any hazardous materials on the Line, except with the written permission of the Licensor, which could be withheld in the Licensor's sole discretion, and Section 15.2 of the 2008 Licensing Agreement

Section 15.12 of the 2008

Licensing Agreement moreover

The agreements enabled the Licensor to restructure the Line. Sections 2.1 and 5.1 of the 2001 Licensing Agreement allowed the Licensor, if it found such action to be necessary, to add to, change, modify, relocate or remove any segment of the Line on which the Licensee was operating, and Section 2.1 of the 2008 Licensing Agreement reserves to the Licensor

¹⁶ Respondents' reliance, at page 14 of its Reply, on STB Docket No. FD 35312, *Massachusetts Department of Transportation--Acquisition Exemption--Certain Assets of CSX Transportation*, served May 3, 2010, is altogether misplaced, because the Board specifically found that the agreement between them did not enable the owner of the railroad line in any manner to control the freight operations conducted by the rail carrier on the same tracks as the commuter train operations.

Respondents do not -- and cannot -- disavow the foregoing provisions of the agreements. The agreements speak for themselves, and they permit of no doubt that they enable the Licensor to control the Licensee's operations on the Line so as to render the County and McClellan common carriers subject to the Board's jurisdiction.¹⁷

Respondents, at page 14 of their Reply, note that some of the provisions of the agreements would be incapable of being consummated without the Board's authorization. For example, the Licensees would be unable to discontinue rendering service on the Line and the Licensors would be unable to have the Licensees abandon the main line track absent the Board's approval. The Board's potential role, however, does not alter the terms of the 2001 Licensing Agreement and 2008 Licensing Agreement and the control they permit the Licensors to exercise over the Licensees' operations as rail carriers on the Line.

Mr. Myers in his Verified Statement says that the County acquired approximately 9,000,000 square feet of existing facilities served by spur track. Mr. Meyers can be forgiven if he fails to use the term spur track as it is normally defined, but there can be no doubt that, to enable the Licensees to serve the many plants and warehouses within the McClellan industrial park, the Line included considerable lengths of industrial, switching and side tracks. These, of course, pursuant to 49 U.S.C. §10906, can be constructed, discontinued or abandoned either by the Licensee or by the Licensor without the Board's approval.

¹⁷ See, Docket No. FD 35491, *Santa Cruz Regional Transportation Commission--Petition for Declaratory Order*, served August 22, 2011; Docket No. FD 35366, *Wisconsin Department of Transportation--Petition for Declaratory Order--Rail Lines in Almena, Cameron, and Rice Lake, Barron County, Wis.*, served September 23, 2010.

Essentially, Respondents, at pages 14-16 of their Reply, without any supporting authority simply dismiss the evident effects of the restrictions in the 2001 Licensing Agreement and the 2008 Licensing Agreement and glibly contend that none serves unreasonably to interfere with the Licensees' operations as rail carriers on the Line. They conclude with the self-serving declaration that over the past ten years the County and McClellan have not unreasonably interfered with the operations of Yolo, SERA or SAV. It is not what may have transpired that matters, however; it is the restrictive effects of the agreements themselves which are determinative of the restraining rights retained by the Lessors. As the ICC said in *Southern Pacific Transp. Co. - Abandonment*, 8 I.C.C. 495, 506 (1992), "[W]e look at what an entity does, rather than what it says it does."

Moreover, Respondents conveniently overlook that the 2008 Licensing Agreement still has more than five years left before it is due to expire, and, while, as the Respondents and Mr. McGowan in his verified statement claim, McClellan to date has not unreasonably interfered with the railroad operations of SAV, that is no guarantee that it will not do so in the future. McClellan's unreasonable interference with SAV's operations as a rail carrier on the Line consistent with the provisions the 2008 Licensing Agreement well may be in the offing for, as is noted in the Comstock's Magazine article, dated June 20, 2012, attached as Exhibit B, McClellan's architect "is designing and planning new facilities to supplement the existing buildings to create villages or neighborhoods of business." The new facilities undoubtedly will want to be served by SAV as the existing facilities have been, and that may entail McClellan's reconfiguration of the Line and the undue interference with SAV's operations which would be the inevitable consequence.

The extensive control which the County and McClellan were able to exercise over the operations of Yolo, SERA and SAV under the 2001 Licensing Agreement and the 2008 Licensing Agreement made them common carriers notwithstanding that they were not authorized by the Board to serve as rail carriers and, indeed, did not hold themselves out to provide common carrier railroad transportation for compensation. Whether as residual common carriers or as common carriers by virtue of their ability to control the operations of the rail carriers on the Line, the County and McClellan were obliged to secure the requisite authority from the Board, pursuant to 49 U.S.C. §10901, or an exemption therefrom, under 49 U.S.C §10502. This, however, they failed to do. Their inaction does not relieve the County or McClellan from the statutory and regulatory provisions which they would have needed to observe had they been certificated by the Board. One violation of the law does not confer a license to commit another. SAV is guilty of having engaged in an unreasonable practice, in violation of 49 U.S.C. §10702(2), in not seeking the third-party or adverse discontinuance of SERA's authority to operate as a rail carrier on the Line, and the County and McClellan, whether as residual common carriers or the owner and manager of the Line with the ability unreasonably to interfere with the operations of Yolo, SERA and SAV as rail carriers on the Line, are part and parcel of the law's violation.

WHEREFORE, Complainants Sierra Railroad Company and Sierra Northern Railway, ask the Board to find Respondents, Sacramento Valley Railroad, Inc., McClellan Business Park, LLC and the County of Sacramento, to have engaged in unreasonable practices, in violation of 49 U.S.C. §10702(2), and to order them, pursuant

to 49 U.S.C. §10704(a)(1), to stop the violations by complying with the law's requirements.

Respectfully submitted,

SIERRA RAILROAD COMPANY
SIERRA NORTHERN RAILWAY

By their attorney,



Fritz R. Kahn
Fritz R. Kahn, P.C.
1919 M Street, NW (7th fl.)
Washington, DC 20036
Tel.: (202) 263-4152

Dated: July 9, 2012

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Party Name	Party Type	Document Title	Book	Page
<u>SOUTHERN PAC CO</u>	GRANTOR	AGREEMENT	19500126	0368
<u>SOUTHERN PAC CO</u>	GRANTOR	OIL & GAS LEASE	19500126	0368
<u>SOUTHERN PAC CO</u>	GRANTOR	NOTICE COMPLETION	19500323	0376
<u>SOUTHERN PAC CO</u>	GRANTOR	BOND	19500501	0000
<u>SOUTHERN PAC CO</u>	GRANTOR	PLAN & SPEC	19500501	0000
<u>SOUTHERN PAC CO</u>	GRANTOR	POWER OF ATTORNEY	19500501	0000
<u>SOUTHERN PAC CO</u>	GRANTOR	DEED	19500505	0220
<u>SOUTHERN PAC CO</u>	GRANTOR	NOTICE COMPLETION	19500519	0263
<u>SOUTHERN PAC CO</u>	GRANTOR	NOTICE COMPLETION	19500605	0213
<u>SOUTHERN PAC CO</u>	GRANTOR	JUDGEMENT	19500705	0273
<u>SOUTHERN PAC CO</u>	GRANTOR	BOND	19500711	0000
<u>SOUTHERN PAC CO</u>	GRANTOR	PLAN & SPEC	19500711	0000
<u>SOUTHERN PAC CO</u>	GRANTOR	NON RESPONSIBILITY	19500726	0113
<u>SOUTHERN PAC CO</u>	GRANTOR	NON RESPONSIBILITY	19500726	0114
<u>SOUTHERN PAC CO</u>	GRANTOR	NOTICE COMPLETION	19500829	0174
<u>SOUTHERN PAC CO</u>	GRANTOR	DEED	19500913	0069
<u>SOUTHERN PAC CO</u>	GRANTOR	DEED	19500926	0145
<u>SOUTHERN PAC CO</u>	GRANTOR	NON RESPONSIBILITY	19501004	0552
<u>SOUTHERN PAC CO</u>	GRANTOR	NON RESPONSIBILITY	19501101	0350
<u>SOUTHERN PAC CO</u>	GRANTOR	NON RESPONSIBILITY	19501101	0354

Page: 1

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Party Name	Party Type	Document Title	Book	Page
SOUTHERN PAC CO	GRANTOR	DEED	19600106	0893
SOUTHERN PAC CO	GRANTOR	RESOLUTION	19600122	0240
SOUTHERN PAC CO	GRANTOR	DEED	19600122	0240
SOUTHERN PAC CO	GRANTOR	DEED	19600125	0213
SOUTHERN PAC CO	GRANTOR	DEED	19600125	0214
SOUTHERN PAC CO	GRANTOR	DEED	19600210	0195
SOUTHERN PAC CO	GRANTEE	RESOLUTION	19600330	0519
SOUTHERN PAC CO	GRANTEE	QUITCLAIM DEED	19600330	0519
SOUTHERN PAC CO	GRANTEE	DEED	19600330	0520
SOUTHERN PAC CO	GRANTEE	OPTION	19600401	0637
SOUTHERN PAC CO	GRANTEE	DEED	19600425	0639
SOUTHERN PAC CO	GRANTOR	RESOLUTION	19600510	0155
SOUTHERN PAC CO	GRANTOR	RESOLUTION	19600510	0163
SOUTHERN PAC CO	GRANTEE	DEED	19600518	0917
SOUTHERN PAC CO	GRANTOR	AMENDED LEASE	19600610	0513
SOUTHERN PAC CO	GRANTOR	DEED	19600816	0398
SOUTHERN PAC CO	GRANTOR	MOD OIL&GAS LEASE	19600919	0929
SOUTHERN PAC CO	GRANTOR	MOD OIL&GAS LEASE	19600919	0933
SOUTHERN PAC CO	GRANTOR	DEED	19601017	0735
SOUTHERN PAC CO	GRANTOR	MOD OIL&GAS LEASE	19601018	0519

Page: 1

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Party Name	Party Type	Document Title	Book	Page
SOUTHERN PAC CO	GRANTEE	DEED	19700102	0317
SOUTHERN PAC CO	GRANTOR	DEED	19700112	0428
SOUTHERN PAC CO	GRANTOR	NOTICE COMPLETION	19700126	0469
SOUTHERN PAC CO	GRANTOR	MISC. SEE DOCUMENT	19700129	0327
SOUTHERN PAC CO	GRANTOR	DEED	19700130	0615
SOUTHERN PAC CO	GRANTOR	RIGHT OF WAY DEED	19700218	0324
SOUTHERN PAC CO	GRANTOR	EASEMENT	19700317	0389
SOUTHERN PAC CO	GRANTEE	MOD AGREEMENT	19700417	0487
SOUTHERN PAC CO	GRANTOR	LEASE	19700522	0291
SOUTHERN PAC CO	GRANTOR	NOTICE OF ACTION	19700629	0413
SOUTHERN PAC CO	GRANTOR	NOTICE OF ACTION	19700629	0447
SOUTHERN PAC CO	GRANTOR	NOTICE COMPLETION	19700807	0409
SOUTHERN PAC CO	GRANTEE	DEED	19700820	0104
SOUTHERN PAC CO	GRANTEE	CANCELLATION LEASE	19700921	0248
SOUTHERN PAC CO	GRANTOR	DEED	19701009	0540
SOUTHERN PAC CO	GRANTEE	PARTIAL RELEASE	19701216	0210
SOUTHERN PAC CO	GRANTEE	CANCELLATION LEASE	19701222	0243
SOUTHERN PAC CO	GRANTEE	CANCELLATION LEASE	19701229	0346
SOUTHERN PAC CO	GRANTOR	NOTICE COMPLETION	19710223	0417
SOUTHERN PAC CO	GRANTEE	PARTIAL RELEASE	19710913	0260

Page: 1

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Party Name	Party Type	Document Title	Book	Page
SOUTHERN PAC CO	GRANTOR	DEED	19800208	0698
SOUTHERN PAC CO	GRANTOR	LIEN	19800722	0519
SOUTHERN PAC CO	GRANTOR	LIEN	19801107	0712
SOUTHERN PAC CO	GRANTOR	DEED	19811222	0142
SOUTHERN PAC CO	GRANTOR	RELEASE	19811223	0549
SOUTHERN PAC CO	GRANTOR	RELEASE	19820526	0704
SOUTHERN PAC CO	DEBTOR	UTILITY BILLING	19831102	0718
SOUTHERN PAC CO	GRANTEE	CANCEL LIS PENDENS	19831118	0776
SOUTHERN PAC CO	GRANTOR	NOTICE OF ACTION	19850514	1305
SOUTHERN PAC CO	GRANTEE	OIL & GAS LEASE	19860121	0016
SOUTHERN PAC CO	GRANTOR	NOTICE OF ACTION	19860411	1564
SOUTHERN PAC CO	DEBTOR	UTILITY BILLING	19861210	1065
SOUTHERN PAC CO	GRANTOR	EASEMENT	19870505	2282
SOUTHERN PAC CO	MAP	PARCEL MAP	19870917	2238
SOUTHERN PAC CO	GRANTEE	TERM LIEN UTIL	19890810	0793
SOUTHERN PAC CO	GRANTEE	TERM LIEN UTIL	19890810	2140
SOUTHERN PAC COMMCTNS	CREDITOR	JUDGEMENT	19840503	0960
SOUTHERN PAC COMMCTNS CO	GRANTEE	DEED TR ASGT RENT	19810305	0477
SOUTHERN PAC COMMUNICATIONS	GRANTEE	OPTION	19830627	1394
SOUTHERN PAC COMMUNICATIONS	CREDITOR	JUDGEMENT	19831026	1303

Page: 1

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Party Name	Party Type	Document Title	Book	Page
SOUTHERN PAC CO	GRANTOR	DEED OF TRUST	19920505	0520
SOUTHERN PAC CO	GRANTOR	ASSIGNMENT OF RENT	19920505	0520
SOUTHERN PAC CO	GRANTOR	SECURITY AGM	19920505	0520
SOUTHERN PAC CO	DEBTOR	UCC FIN STATEMENT	19920505	0520
SOUTHERN PAC CO	GRANTEE	QUITCLAIM DEED	19921112	1330
SOUTHERN PAC CO	GRANTEE	OIL & GAS LEASE	19950719	1154
SOUTHERN PAC CO	GRANTOR	ASGT OF LEASE	19970131	0857
SOUTHERN PAC CO	GRANTOR	ASGT OF LEASE	19970131	0857
SOUTHERN PAC CO	GRANTOR	ASGT OF LEASE	19970131	0857
SOUTHERN PAC CO	GRANTOR	ASGT OF LEASE	19970131	0857
SOUTHERN PAC CO	GRANTOR	ASGT OF LEASE	19970131	0857
SOUTHERN PAC CO	GRANTOR	ASGT OF LEASE	19970131	0857
SOUTHERN PAC CO	GRANTOR	ASGT OF LEASE	19970131	0858
SOUTHERN PAC CO	GRANTOR	ASGT OF LEASE	19970131	0858
SOUTHERN PAC CO	GRANTOR	ASGT OF LEASE	19970131	0858
SOUTHERN PAC CO	GRANTOR	ASGT OF LEASE	19970131	0858
SOUTHERN PAC CO	GRANTOR	ASGT OF LEASE	19970131	0858
SOUTHERN PAC CO	GRANTOR	ASGT OF LEASE	19970131	0858
SOUTHERN PAC CO	GRANTOR	ASGT OF LEASE	19970131	0859
SOUTHERN PAC CO	GRANTOR	ASGT OF LEASE	19970131	0859

Page: 1

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Party Name	Party Type	Document Title	Book	Page
SACTO NORTHERN RAILWAY	GRANTOR	DEED	19500415	0151
SACTO NORTHERN RAILWAY	GRANTEE	DEED	19510628	0559
SACTO NORTHERN RAILWAY	GRANTEE	RELEASE	19511016	0567
SACTO NORTHERN RAILWAY	GRANTOR	DEED	19511016	0571
SACTO NORTHERN RAILWAY	GRANTEE	DEED	19520111	0124
SACTO NORTHERN RAILWAY	GRANTOR	RIGHT OF WAY	19520506	0199
SACTO NORTHERN RAILWAY	GRANTEE	DEED	19520903	0270
SACTO NORTHERN RAILWAY	GRANTEE	DEED	19520903	0274
SACTO NORTHERN RAILWAY	GRANTEE	DEED	19520905	0119
SACTO NORTHERN RAILWAY	GRANTEE	DEED	19520908	0432
SACTO NORTHERN RAILWAY	GRANTEE	DEED	19520910	0137
SACTO NORTHERN RAILWAY	GRANTEE	DEED	19520910	0138
SACTO NORTHERN RAILWAY	GRANTEE	DEED	19520910	0140
SACTO NORTHERN RAILWAY	GRANTEE	DEED	19520910	0297
SACTO NORTHERN RAILWAY	GRANTEE	RELEASE MORTGAGE	19520925	0164
SACTO NORTHERN RAILWAY	GRANTOR	DEED	19520925	0167
SACTO NORTHERN RAILWAY	GRANTEE	DEED	19520925	0186
SACTO NORTHERN RAILWAY	GRANTEE	DEED	19530410	0487
SACTO NORTHERN RAILWAY	GRANTOR	AGREEMENT	19530805	0491
SACTO NORTHERN RAILWAY	GRANTOR	EASEMENT	19530827	0111

Page: 1

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Party Name	Party Type	Document Title	Book	Page
SACTO NORTHERN RAILWAY	GRANTOR	RESOLUTION	19600106	0024
SACTO NORTHERN RAILWAY	GRANTOR	DEED	19600106	0024
SACTO NORTHERN RAILWAY	GRANTEE	DEED OF TRUST	19600106	0028
SACTO NORTHERN RAILWAY	GRANTEE	ASSIGNMENT OF RENT	19600106	0028
SACTO NORTHERN RAILWAY	GRANTOR	RESOLUTION	19601230	0329
SACTO NORTHERN RAILWAY	GRANTOR	DEED	19601230	0329
SACTO NORTHERN RAILWAY	GRANTOR	DEED	19611103	0299
SACTO NORTHERN RAILWAY	GRANTOR	DEED	19611109	0272
SACTO NORTHERN RAILWAY	GRANTOR	NON RESPONSIBILITY	19611109	0472
SACTO NORTHERN RAILWAY	GRANTEE	NOTICE OF DEFAULT	19620226	0477
SACTO NORTHERN RAILWAY	GRANTOR	PLAN & SPEC	19620531	0000
SACTO NORTHERN RAILWAY	GRANTEE	BOND PERFORMANCE	19620531	0517
SACTO NORTHERN RAILWAY	GRANTOR	AGREEMENT	19620802	0000
SACTO NORTHERN RAILWAY	GRANTEE	BOND PERFORMANCE	19620802	0254
SACTO NORTHERN RAILWAY	GRANTOR	RESOLUTION	19620822	0395
SACTO NORTHERN RAILWAY	GRANTOR	DEED	19620822	0395
SACTO NORTHERN RAILWAY	GRANTOR	RESOLUTION	19620823	0887
SACTO NORTHERN RAILWAY	GRANTOR	DEED	19620823	0887
SACTO NORTHERN RAILWAY	GRANTOR	DEED	19621226	0236
SACTO NORTHERN RAILWAY	GRANTOR	DEED	19630430	0158

Page: 1

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Party Name	Party Type	Document Title	Book	Page
SACTO NORTHERN RAILWAY	GRANTOR	DEED	19700213	0639
SACTO NORTHERN RAILWAY	GRANTOR	AGREEMENT	19700728	0369
SACTO NORTHERN RAILWAY	GRANTOR	DEED	19701210	0089
SACTO NORTHERN RAILWAY	GRANTEE	DEED TR ASGT RENT	19701210	0092
SACTO NORTHERN RAILWAY	GRANTOR	DEED	19701221	0177
SACTO NORTHERN RAILWAY	GRANTEE	DEED	19710122	0126
SACTO NORTHERN RAILWAY	GRANTOR	DEED	19710625	0476
SACTO NORTHERN RAILWAY	GRANTOR	DEED	19710625	0480
SACTO NORTHERN RAILWAY	GRANTOR	DEED	19720508	0043
SACTO NORTHERN RAILWAY	GRANTOR	NOTICE OF ACTION	19720714	0502
SACTO NORTHERN RAILWAY	GRANTOR	EASEMENT	19720830	0443
SACTO NORTHERN RAILWAY	GRANTOR	DEED	19730830	0587
SACTO NORTHERN RAILWAY	GRANTOR	EASEMENT	19731023	0618
SACTO NORTHERN RAILWAY	GRANTOR	NOTICE OF ACTION	19731112	0164
SACTO NORTHERN RAILWAY	GRANTOR	DEED	19740301	0108
SACTO NORTHERN RAILWAY	GRANTOR	DEED	19740705	0122
SACTO NORTHERN RAILWAY	GRANTOR	DEED	19761118	0280
SACTO NORTHERN RAILWAY	GRANTOR	NOTICE OF ACTION	19771116	1245
SACTO NORTHERN RAILWAY	GRANTOR	NOTICE OF ACTION	19771116	1249
SACTO NORTHERN RAILWAY	GRANTOR	DEED	19780427	0210

Page: 1

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[Back to Top of Page](#)

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To see all of the parties to a document and additional detailed information on a specific document, click on the underlined party name.

Party Name	Party Type	Document Title	Book	Page
SACTO NORTHERN RAILWAY	GRANTOR	EASEMENT	19811224	0365
SACTO NORTHERN RAILWAY	GRANTOR	DEED	19821019	0212
SACTO NORTHERN RAILWAY	GRANTOR	DEED	19830615	1164
SACTO NORTHERN RAILWAY	GRANTOR	NOTICE ASSESSMENT	19830907	1358
SACTO NORTHERN RAILWAY	GRANTOR	GRANT DEED	19840720	0415
SACTO NORTHERN RAILWAY	GRANTOR	POWER OF ATTORNEY	19841003	0838
SACTO NORTHERN RAILWAY	GRANTOR	POWER OF ATTORNEY	19841212	0567
SACTO NORTHERN RAILWAY	DEBTOR	WEED ABATEMENT	19850530	0916
SACTO NORTHERN RAILWAY	DEBTOR	WEED ABATEMENT	19850530	0916
SACTO NORTHERN RAILWAY	GRANTOR	NOTICE	19850607	0375
SACTO NORTHERN RAILWAY	GRANTOR	POWER OF ATTORNEY	19851018	0523
SACTO NORTHERN RAILWAY	GRANTOR	QUITCLAIM DEED	19851028	1447
SACTO NORTHERN RAILWAY	GRANTOR	QUITCLAIM DEED	19851028	1450
SACTO NORTHERN RAILWAY	GRANTOR	GRANT DEED	19860930	3757
SACTO NORTHERN RAILWAY	DEBTOR	WEED ABATEMENT	19870415	1269
SACTO NORTHERN RAILWAY	DEBTOR	WEED ABATEMENT	19880201	0355
SACTO NORTHERN RAILWAY	DEBTOR	WEED ABATEMENT	19880201	0355
SACTO NORTHERN RAILWAY	DEBTOR	WEED ABATEMENT	19880826	0671
SACTO NORTHERN RAILWAY	DEBTOR	WEED ABATEMENT	19880826	0671
SACTO NORTHERN RAILWAY	GRANTOR	NOTICE OF ACTION	19890517	2241

Page: 1

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To see all of the parties to a document and additional detailed information on a specific document, click on the underlined party name.

Party Name	Party Type	Document Title	Book	Page
<u>SACTO NORTHERN RAILWAY</u>	DEBTOR	WEED ABATEMENT	19900130	0562
<u>SACTO NORTHERN RAILWAY</u>	DEBTOR	WEED ABATEMENT	19900130	0562
<u>SACTO NORTHERN RAILWAY</u>	DEBTOR	UTILITY BILLING	19910123	0392
<u>SACTO NORTHERN RAILWAY</u>	GRANTOR	UTILITY BILLING	19920723	0658
<u>SACTO NORTHERN RAILWAY</u>	GRANTOR	UTILITY BILLING	19930816	0425
<u>SACTO NORTHERN RAILWAY</u>	GRANTEE	TERM LIEN UTIL	19941212	1125
<u>SACTO NORTHERN RAILWAY</u>	GRANTEE	TERM LIEN UTIL	19941212	1126
<u>SACTO NORTHERN RAILWAY</u>	GRANTOR	NOTICE ASSESSMENT	19950630	2270
<u>SACTO NORTHERN RAILWAY</u>	GRANTOR	WEED ABATEMENT	19950811	0385
<u>SACTO NORTHERN RAILWAY</u>	GRANTOR	WEED ABATEMENT	19950811	0385
<u>SACTO NORTHERN RAILWAY</u>	GRANTOR	WEED ABATEMENT	19960816	0006
<u>SACTO NORTHERN RAILWAY</u>	GRANTOR	WEED ABATEMENT	19960816	0006
<u>SACTO NORTHERN RAILWAY</u>	GRANTOR	WEED ABATEMENT	19980730	0647

Page: 1

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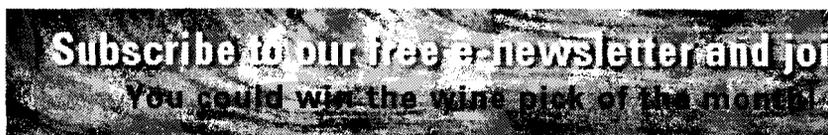
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Wednesday, June 20, 2012

SPECIAL REPORT: APRIL 2007

About Face

The largest infill project on earth is turning a mothballed base into a business park

Story by Don Lipper

Larry Kelley grew up an Air Force brat. Moving every two years or so, riding his bike around bases all over the globe, he became an aficionado of military complexes.

"Every base was its own self-contained small town," says Kelley. "It was always an interesting life. You'd play basketball, baseball in the parks. It was all pretty good."

In 2000, when he was chosen to turn the closing McClellan Air Force Base into a business park, he found an amazing prospect. McClellan was larger than any base Kelley had ever seen.

"When I first came here, I saw gates, guards, lots of buildings, a runway and opportunity," says Kelley. "Now, I see entries where the gates were, improved landscaping, a place where over 12,000 people come to work, an active airfield with 30,000 activities a year.

"I see a well-run, attractive hotel that provides overnight accommodations to visitors and is the site of over 60 weddings a year. I see property taxes that have been generated by creating the value in the buildings, and I see opportunities to develop new buildings. I see a steady stream of new tenants and employers to McClellan."

Unlike other mothballed bases, McClellan is a hive of thriving activity. Infrastructure improvements, building demolition and new construction are almost constant.

"We average between 45 to 60 construction jobs at any one time," says Cecilia Whittlesey, vice president of construction for McClellan Park. "In the last year, McClellan Park has demolished 114,000 square feet of buildings, two large engine test cell buildings, a mid-size building and two small buildings. McClellan Park currently has a list of approximately 28 buildings or structures of varying sizes that have been slated for demolition."

The demolition has led to a number of surprises. "Construction at McClellan is a never-ending story of adventure and

discovery," says Whittlesey.

"We've unearthed basements, tanks, tunnels, tarmac where it is not supposed to be, and utilities that are everywhere but where they are supposed to be."

Some buildings aren't demolished, but reconditioned. "Everyone has their favorite project," says Whittlesey. "The courtyard was one of my favorite jobs. The before and after pictures speak volumes."□

"The renaissance of McClellan has become the renaissance of North Highlands," says Kelley. "There is new retail on Watt. Property values have gone up for both residential and commercial along Watt. Our success has become a success for the community."

Looking at a large-scale, lighted map of the park, Kelley beams with pride over what has been called "the largest infill project on the earth." To get a grip on its size, consider this: You could take all of Disneyland's Anaheim property, including its hotels and put it in McClellan Park — 10 times over.

Like Disneyland, the park is separated into different clusters. The Core Airfield/Industrial District features aviation and aviation/industrial uses. The East McClellan District has the business park and community-support uses. The amenity area includes Freedom Park and the Lions Gate Hotel and Conference Center. There are also services for active and retired military personnel, as well as a health club and daycare facilities.

The South McClellan District has office, light-industrial and technology uses. The West McClellan District has industrial and open-space uses, including warehousing, manufacturing and assembly, and research and development, as well as a 150-acre preserve. The site also includes easy rail and truck access and many opportunities for the construction of new facilities.

"McClellan Business Park truly is evolving into a destination location and a 'city unto its own,'" says Alan C. Hom, president of Calpo Hom & Dong Architects, the firm doing most of the design work on McClellan's transformation. "Over the last five years McClellan Park has been very successful in their efforts to make this 'city' into a regional business hub."

CH&D is designing and planning new facilities that supplement the existing buildings to create villages or neighborhoods of businesses. Leading to these villages/neighborhoods, McClellan is enhancing the visitor's journey through the park via scenic street promenades along Peacekeeper Avenue.

To increase traffic on the park's key amenity, the runway, McClellan Jet Services will expand its destination corporate jet center/airfield operation, where corporate executives and their flight crews are pampered.

Another effort will include breaking down the walls between the park and the surrounding neighborhoods. "[We will] create solutions to reach into the surrounding neighborhoods to provide retail and service amenities at the edges of the park, which promote bridging [McClellan] into the community fabric," says Hom.

"What we are trying to achieve is a vibrant community to sustain successful relationships with various business groups for the long-term growth of the neighborhood.

"Most of the Air Force base was very utilitarian just to meet the mission goals," continues Hom. "Our challenge was to convert it into a more aesthetically pleasing and more economically viable community."

In addition to helping with the master plan, Hom hopes to create an aesthetic signature for the park. "We propose to promote the history and heritage of the Air Force base," says Hom. "We want the entryways to emphasize the way McClellan was woven into the fabric of the community, to give the entries an aeronautical feel from those bygone days."

The first order of business includes infrastructure improvements and bringing some of the older buildings up to code compliance so that tenants can move in immediately. As that inventory fills out, McClellan is planning a building boom. Office warehouse and R&D facilities, including wet labs, will be built to customer specifications.

"As big as we are and with as many buildings as we have, we don't always have the exact fit of what someone wants," says Kelley.

He estimates that new construction at McClellan will be "easily 5 percent" cheaper than anywhere else, and that tenants using existing buildings will see costs reduced by 15 percent.

McClellan is also going to be growing its retail footprint by taking its dormitories out and creating a retail window to busy Watt Avenue.

In addition to commercial construction, working with New Faze Development, McClellan will start building 800 to 1,000 residential units, including apartments, townhouses and houses.

"In 10 years, we're going to see 3 million square feet of new buildings in all categories," says Kelley. "Nobody else has exactly what we have. At the end of the day, we'll end up with over 30,000 jobs. We're really a small city, but we won't have a high population, just 800 to 1,000 units. It will be great for people who live and work here to be able to walk to work."

Through the use of the Local Agency Military Base Recovery Area Program, McClellan Park tenants receive certain tax benefits and employment incentives, creating extra business savings.

McClellan Park has the added advantage of three dedicated electrical sub-stations. Combined, these private facilities can provide over 210 megawatts of power to McClellan Park tenants, mitigating possible downtime from local and regional outages.

This in-house power-generating capability is available in addition to Western Area Power Administration eligibility, which means savings come back into the park for special projects, allowing the park to install more efficient lighting, air and heating and provide other upgrades for energy efficiency.

"There's a tremendous green side to what we're doing at McClellan," says Kelley. "This is one of those things we can do to save money and improve electrical efficiency for the park and our tenants."

McClellan Jet Services replaced the old lights in their hangars with more energy-efficient models and reaped immediate benefits. "It costs a third less and gives off a third more light," says Bill Appleton, operations manager for McClellan Jet Services.

Some green measures are complex; others are simple. For example, the park has painted its roofs white to reflect heat during the hot Sacramento summers. This simple technique on millions of square feet of rooftop reduces the urban heating effect, and allows individual buildings to consume less energy for cooling.

To paint the buildings in the park, a McClellan-based business called Visions Painting, uses nothing but recycled paint. "All that paint would otherwise end up in a landfill," says Kelley.

When any major demolition or renovation takes place in the park, concrete and asphalt is ground up and reused as road base. In addition to recycling the concrete for infrastructure projects and other construction projects, equipment that can be reused is removed and stored for future projects. Metals are either recycled by McClellan Park or its contractors to help defray demolition costs.

As with most former military installations, McClellan has groundwater pollution. "The military has done a very thorough job of investigating and owning up to the problem, and they are committed to fixing it. They are responsible, and they are not stepping away from that," says Kelley. "It's not a health and safety issue here. You can't sink a well and drink the groundwater. But the groundwater is 100 feet below you."

The groundwater is currently being pumped out and treated by the Air Force. In a pilot program, McClellan Park is working with the cleanup company TetraTech to clean up the groundwater at a faster rate than the Air Force.

"The Air Force will pay us to clean up a 60-acre site to a very acceptable industrial level so that the land is ready to be built on," says Kelley.

McClellan is home to a clean-energy incubator called CleanStart, which develops clean-energy technologies. There are several companies on base that are developing alternative fuels including ethanol and bio-diesel, as well as a whole fleet of electric cars.

For prospective tenants at McClellan, going green won't mean spending a lot of green. The entire park is a colossal reuse project, and as such, tenants get a lot of incentives for moving in, including state tax credits, business-expense deductions and operating-loss carryovers.

In addition to its green perks, McClellan Park is easily accessible via bus, shuttle and light-rail. There is an active carpool program and other mass-transportation incentive programs, as well.

As more people move into the residential section of the park once again, like the old Air Force bases of his youth, Kelley will enjoy watching young kids ride around on their bikes.



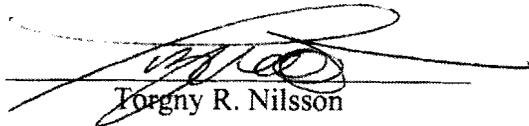
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VERIFICATION

I, Torgny R. Nilsson, Secretary and General Counsel of Sierra Railroad Company of Davis, California, declare under penalty of perjury, under the laws of the United States of America, that I have read the foregoing redacted version of Complainants' Rebuttal Evidence and Arguments and that its assertions are true and correct to the best of my knowledge, information and belief. I further declare that I am qualified and authorized to submit this verification on behalf of Sierra Railroad Company and Sierra Northern Railway. I know that willful misstatements or omission of material fact constitute Federal criminal violations punishable under 18 U.S.C. 1001 by imprisonment up to five years and fines up to \$10,000 for each offense. Additionally, these misstatements are punishable as perjury under 18 U.S.C. 1621, which provides for fines up to \$2,000 or imprisonment up to five years for each offense.

Dated at Davis, California this 6th day of July 2012.


Torgny R. Nilsson

CERTIFICATE OF SERVICE

I certify that I this day served a copy of the foregoing Complainants' Rebuttal Evidence and Arguments upon Respondents by e-mailing a copy to their attorney, Louis E. Gitomer, Esq., at Lou@lgraillaw.com and additionally by mailing a copy to him by pre-paid first-class mail

Dated at Washington, DC, this 9th day of July 2012.



Fritz R. Kahn