



**Wipf & Cotton, L.L.C.**

A Professional Limited Liability Company  
Attorneys at Law  
107 South Main Avenue  
Wagner, South Dakota 57380-0370

May 15, 2007

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Telephone (605) 384-5471  
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Kenneth W. Cotton  
ASSOCIATE:  
Scott J. Podhradsky

219307

**VIA FEDERAL EXPRESS**

Mr. Vernon A. Williams  
Secretary  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20024

**FEE RECEIVED**

MAY 15 2007

**SURFACE  
TRANSPORTATION BOARD**

MAY 15 2007  
RECEIVED

Re: **Finance Docket No. 35026**  
**Napa-Platte Regional Railroad Authority -- Modified**  
**Rail Certificate -- Between Tabor and Ravinia, SD**

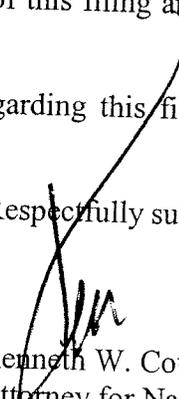
Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are an original and ten copies of the **Notice of Napa-Platte Regional Railroad Authority for Modified Certificate of Public Convenience and Necessity Pursuant to 49 C.F.R. § 1150.23**, dated May 15, 2007. A check in the amount of \$1,400, representing the appropriate fee for this filing, and a computer diskette containing the text of the Notice and in MS Word 2003 format are attached.

One extra copy of the Notice and this letter also are enclosed. I would request that you date-stamp those items to show receipt of this filing and return them to me in the provided envelope.

If you have any questions regarding this filing, please feel free to contact me. Thank you for your assistance on this matter.

Respectfully submitted,

  
Kenneth W. Cotton  
Attorney for Napa-Platte  
Regional Railroad Authority

ENTERED  
Office of Proceedings  
MAY 15 2007  
Part of  
Public Record

Enclosures  
cc: Mr. Bruce Lindholm

**FILED** BOARD  
MAY 15 2007  
**SURFACE  
TRANSPORTATION BOARD**

219307

BEFORE THE  
SURFACE TRANSPORTATION BOARD

MAY 15 2007  
RECEIVED

FINANCE DOCKET NO. 35026

NAPA-PLATTE REGIONAL RAILROAD AUTHORITY  
-- MODIFIED RAIL CERTIFICATE --  
BETWEEN TABOR AND RAVINIA, SD

**FILED**  
MAY 15 2007  
SURFACE  
TRANSPORTATION BOARD

**NOTICE OF NAPA-PLATTE REGIONAL RAILROAD AUTHORITY FOR  
MODIFIED CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY  
PURSUANT TO 49 C.F.R. § 1150.23**

**FEE RECEIVED**

MAY 15 2007

SURFACE  
TRANSPORTATION BOARD

ENTERED  
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Public Record

Kenneth W. Cotton  
Wipf & Cotton Law Offices LLC  
107 South Main Street  
Wagner, South Dakota 57380  
(605) 384-5471

**ATTORNEY FOR NAPA-PLATTE  
REGIONAL RAILROAD AUTHORITY**

Dated: May 15, 2007

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 35026

NAPA-PLATTE REGIONAL RAILROAD AUTHORITY  
-- MODIFIED RAIL CERTIFICATE --  
BETWEEN TABOR AND RAVINIA, SOUTH DAKOTA.

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**NOTICE OF NAPA-PLATTE REGIONAL RAILROAD AUTHORITY FOR  
MODIFIED CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY  
PURSUANT TO 49 C.F.R. § 1150.23**

Napa-Platte Regional Railroad Authority ("NPRRA"), a political subdivision of the State of South Dakota, hereby files this notice for a Modified Certificate of Public Convenience and Necessity pursuant to 49 C.F.R. § 1150.23 to operate a line of railroad between Tabor and Ravinia, South Dakota (the "Tabor-Ravinia segment") owned by the South Dakota Department of Transportation ("SDDOT").

In accordance with the requirements of 49 C.F.R. § 1150.23, NPRRA submits the following:

**Information Regarding the Operator: 49 C.F.R. § 1150.23(b)(1)**

The name and address of the operator is:

Napa-Platte Regional Railroad Authority  
c/o Mr. Kenneth Cotton  
Wipf & Cotton Law Offices LLC  
107 South Main Street  
Wagner, South Dakota 57380

NPRRA was formed on July 29, 1981. Attached as Exhibit A is a Certificate of Incorporation and an Establishing Agreement for NPRRA. 49 C.F.R. § 1150.23(b)(1)(i).

The Members of NPRRA are the Counties of Charles Mix and Bon Homme. Its Chairman and Board of Directors are: Gerald Harrington, Richard Rysary, Cory Beeson, Roger Bennet and Lyle Hoelsing. None of the Members or the Directors have any present affiliation with a rail carrier. 49 C.F.R. § 1150.23(b)(1)(ii).

With respect to financial responsibility, NPRRA receives funds from two sources: (1) rental fees paid by the third-party operator which it engages to operate the rail line and (2) the levy of taxes. NPRRA has the authority, as necessary to levy taxes for railroad purposes pursuant to SDCL § 49-17A-21, 21.1 and 22. 49 C.F.R. § 1150.23(b)(1)(iii).

**Information About the Prior Abandonment: 49 C.F.R. § 1150.23(b)(2)**

The Tabor-Ravinia segment is part of a larger line of railroad (from Napa to Platte, South Dakota) that was acquired by the State of South Dakota from the bankrupt Chicago, Milwaukee, St. Paul and Pacific Railroad Company ("MILW") after the line was approved for abandonment by MILW's bankruptcy court. Richard B. Olgivie, Trustee of the Property of Chicago, Milwaukee, St. Paul & Pacific Railroad Company -- Abandonment -- In South Dakota, Iowa and Nebraska, Docket No. AB-7 (Sub-No. 88) (ICC served May 14, 1980); In the Matter of Chicago, Milwaukee, St. Paul & Pacific Railroad Company, Debtor, No. 77 B 8999 (N.D. Ill., June 9, 1980), Order No. 342A.

The State of South Dakota purchased the line and subsequently leased the line to NPRRA in 1981. That lease has been periodically renewed since then, and the line has been operated as needed by subleases pursuant to modified certificates of public convenience and necessity.

**Dates of Operation: 49 C.F.R. § 1150.23(b)(3)**

As indicated above, NPRRA has entered into a series of leases with the State of South Dakota for operations over a line of railroad encompassing the Tabor-Ravinia segment since 1981. The most recent lease was entered into on March 22, 2006, and extends for a term of five years (a copy of that lease is attached hereto as Exhibit B). NPRRA's operational authority under this modified certificate would extend for the term of that agreement or until sale of the line as described below.

The Tabor-Ravinia segment was the subject of a Modified Certificate of Public Convenience and Necessity issued to the South Dakota Railway Company ("SDRC") in 1991. South Dakota Railway Company -- Modified Rail Certificate, Finance Docket No. 31874 (ICC served May 30, 1991). SDRC is no longer in existence, and a termination of its modified certificate on the Tabor-Ravinia segment is being filed concurrently with this Notice by SDDOT.<sup>1</sup>

**Description of Service: 49 C.F.R. § 1150.23(b)(4)**

The Tabor-Ravinia segment extends from Milepost 13.4 near Tabor to Milepost 54.5 near Ravinia, a total distance of approximately 41.1 miles, see map attached as Exhibit C. The line segment connects to an adjoining segment from Tabor to Napa (Milepost 13.4 to Milepost 0.0) which is also leased from the State by NPRRA.<sup>2</sup> At Milepost 0.0, the line has interchange capability with the BNSF Railway Company and, through a haulage agreement with

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<sup>1</sup> A prior modified certificate for the Napa-Platte line (including the Tabor-Ravinia segment) had been issued in Dakota Southern Railway Company -- Modified Rail Certificate, Finance Docket No. 30734 (ICC served October 31, 1985). That modified certificate was terminated by letter filed April 6, 1989 in that docket.

<sup>2</sup> Operations have been conducted on the Napa-Tabor segment under both modified rail certificates issued pursuant to 49 C.F.R. § 1150.23 and exemption authority issued pursuant to 49 C.F.R. § 1150.31. NPRRA is concurrently filing herewith a notice of exemption in Finance Docket No. 35025, Napa-Platte Regional Railroad Authority -- Lease and Operation Exemption -- Dakota Short Line Corp. to lease and operate the Napa-Tabor segment.

BNSF (convertible to trackage rights), access to Canadian National Railway Company, Union Pacific Railroad Company, and certain other South Dakota shortlines.

The line is currently out of service and requires rehabilitation before actual rail operations can be recommenced. If such rail operations were to recommence prior to an anticipated sale of the line, NPRRA would provide service through a third-party contract operator or a temporary sublease of the line to a third party rail carrier.

The State of South Dakota is currently engaged in negotiations to sell the Tabor-Ravinia segment, as well as the connecting segment from Tabor to Napa, to Wagner Native Energy, LLC ("Wagner"). If that sale is consummated, NPRRA will assign all of its rights in the Tabor-Ravinia segment, as well as the connecting line segment from Tabor to Napa, to Wagner. It is anticipated that Wagner would then operate both line segments as a common carrier, through use of a third-party rail carrier.

In the event that, prior to the anticipated sale to Wagner, NPRRA engages the services of a third-party rail carrier, it will require that third-party rail carrier obtain adequate liability insurance coverage.

There are no preconditions which shippers must meet to receive service other than substantial rehabilitation of the line. As indicated above, it is anticipated that, ultimately, the sale to Wagner will facilitate that rehabilitation.

**Information Regarding Subsidizers: 49 C.F.R. § 1150.23(b)(5)**

At this time, it is not anticipated that there will be any subsidizers of the Tabor-Ravinia segment. It is conceivable that the NPRRA may receive railroad trust funds for rehabilitation of the line from the State of South Dakota, but no such plans currently exist.

**Financial Responsibility of Subsidizer: 49 C.F.R. § 1150.23(b)(6)**

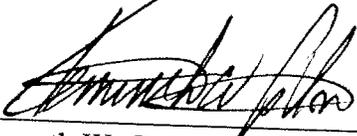
If it becomes necessary or desirable for the State of South Dakota to provide subsidies for the Tabor-Ravinia segment, the South Dakota State Rail Board may do so pursuant to the terms of SDCL § 49-16C-3.

**Environmental and Historic Preservation Data: 49 C.F.R. Part 1105**

Under 49 C.F.R. § 1105.6(c)(2), NPRRA's operation of the Tabor-Ravinia segment pursuant to a modified certificate is exempt from the Board's environmental reporting requirements. The proposed operation will not result in significant changes in carrier operations (i.e., changes that exceed the thresholds established in 49 C.F.R. § 1105.7(e) or (5)).

Under 49 C.F.R. § 1105.8(a), NPRRA's operation of the Tabor-Ravinia segment also is exempt from historic preservation reporting requirements. The proposed operation will not result in the lease, transfer or sale of a railroad's rail lines, sites or structures.

Respectfully submitted,

By: 

Kenneth W. Cotton  
Wipf & Cotton Law Offices LLC  
107 South Main Street  
Wagner, South Dakota 57380  
(605) 384-5471

**ATTORNEY FOR NAPA-PLATTE  
REGIONAL RAILROAD AUTHORITY**

Dated: May 15, 2007

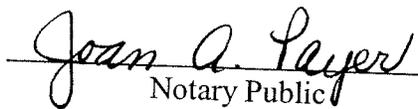
VERIFICATION

State of South Dakota        )  
  )  
County of Charles Mix        )        ss:

Gerald D. Harrington, being duly sworn, deposes and says that he is Chairman of Napa-Platte Regional Railroad Authority, that he has read the foregoing Notice of Modified Certificate for Public Convenience and Necessity and knows the facts asserted therein, and that the same are true as stated.

  
\_\_\_\_\_  
Gerald D. Harrington  
Chairman

SUBSCRIBED AND SWORN TO  
before me this 14 day  
of May, 2007

  
\_\_\_\_\_  
Notary Public

My Commission expires: 1-11-2011

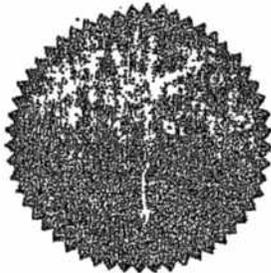
EXHIBIT A

  
**State of South Dakota**  
Secretary of State

CERTIFICATE OF INCORPORATION

I, ALICE KUNDERT, Secretary of State of the State of South Dakota, hereby certify that the Agreement and certified copy of the Resolution of Charles Mix County and Bon Homme County to establish the NAPA-PLATTE REGIONAL RAILROAD AUTHORITY pursuant to SDCL 49-17A ~~has been~~ received into this office and are found to conform to law.

ACCORDINGLY and by virtue of the authority vested in me by law, I hereby issue this Certificate of Incorporation to NAPA-PLATTE REGIONAL RAILROAD AUTHORITY.



IN TESTIMONY WHEREOF, I  
have herunto set my hand  
and affixed the Great Seal  
of the State of South Dakota,  
at Pierre, the Capitol, this  
29th day of July, 1961.

*Alice Kundert*

(Miss) ALICE KUNDERT  
Secretary of State

24th day of July 1981

*Alvin Lundberg*  
SECRETARY OF STATE

ESTABLISHING AGREEMENT

NAPA-PLATTE REGIONAL RAILROAD AUTHORITY

THIS AGREEMENT, made this 24th day of July 1981, among the political subdivisions which have executed this agreement, hereinafter referred to as the "Members", pursuant to the resolution of the governing body of such political subdivision authorizing such execution included in Exhibit A attached hereto.

ARTICLE I

PURPOSE AND POWERS

There is hereby created and incorporated a regional railroad authority under the provisions of Chapter 49-17A South Dakota Codified Laws 1980, and acts amendatory thereto, which shall be a political subdivision of the State of South Dakota, to exercise thereunder a part of the sovereign power of the State of South Dakota.

ARTICLE II

NAME

The name of the regional railroad authority created and incorporated by this agreement shall be Napa-Platte Regional Railroad Authority, hereinafter referred to as the "Authority".

ARTICLE III

MEMBERS

1. The names of the political subdivisions of the State of South Dakota which have approved this agreement and are the initial members of the Authority are as follows: County of Charles Mix and County of Bon Homme.
2. Any political subdivision qualified under Chapter 49-17A South Dakota Codified Laws 1980, and acts amendatory thereto, desiring to join the Authority subsequent to the date of this agreement, shall do so by depositing with the Chairman of the Authority a supplement to this agreement executed by such political subdivision and a resolution of the governing body (as defined by SDCL 49-17A et seq.) of such political subdivision authorizing such execution. A political subdivision shall become a Member of the Authority upon approval of its executed supplement to this agreement.

by the Members of the Authority and the filing of the same with the Secretary of State of the State of South Dakota.

#### ARTICLE IV

##### LIABILITY OF MEMBERS

The political subdivisions which are Members of the Authority and its Commissioners, officers and agents, shall not be liable for obligations of the Authority.

#### ARTICLE V

##### REPRESENTATIVES

The names and addresses of the persons initially appointed by the resolutions approving this agreement to act as the representatives of the subdivisions, respectively, in the exercise of their powers as Members of the Authority, are as follows:

##### County of Charles Mix:

Albert Svatos, RR 1, Lake Andes, South Dakota 57356  
Albert Soukup, 103 North NE, Wagner, South Dakota 57380  
John Smith, 236 N 5, Lake Andes, South Dakota 57356

##### County of Bon Homme:

Chester Fees, 310 Birch, Avon, South Dakota 57315  
Clarence Tjeerdsma, RRI, Springfield, South Dakota 57062  
Ron Wagner, Box 411, Tyndall, South Dakota 57066

#### ARTICLE VI

##### BOARD OF COMMISSIONERS

The Board of Commissioners of the Authority shall be comprised of six (6) Representatives of Members, selected by the governing bodies of the parties hereto. The names and addresses of the initial Board of Commissioners each of whom shall serve for a term of one year, or until his or her successor is appointed and qualified, are as follows:

Albert Svatos, RRI, Lake Andes, South Dakota 57356  
Albert Soukup, 103 North NE., Wagner, South Dakota 57380  
John Smith, 236 N 5, Lake Andes, South Dakota 57356  
Chester Fees, 310 Birch, Avon, South Dakota 57315  
Clarence Tjeerdsma, RRI, Springfield, South Dakota 57062  
Ron Wagner, Box 411, Tyndall, South Dakota 57066

ARTICLE VII

REGISTERED OFFICE

The registered office of the Authority shall be 107 S. Main Street, Wagner, South Dakota 57380, and its registered agent at such office is Kenneth W. Cotton.

ARTICLE VIII

BY-LAWS AND RATES

The Commissioners of the Authority shall adopt and amend such rules and By-laws as they may deem appropriate to govern the operation of the Authority.

ARTICLE IX

AMENDMENTS

This agreement may be amended upon approval by a majority of the governing bodies of the Members; provided, however, a two-thirds vote shall be required to amend Article XI.

ARTICLE XI

TAX CERTIFICATION

The Authority shall not certify to any of the governing bodies of the Members any tax levy without having first received the approval for such certification from the governing body to whom such certification is made.

In Witness Whereof, the undersigned have executed this Agreement as of the date first written above, in counterpart copies, each of which shall constitute an original copy but all of which together shall constitute one and the same instrument.

COUNTY OF CHARLES MIX

By: *Albert S. Sater*  
Chairman, Charles Mix County  
Commissioners

ATTEST

*Armen E. Coble*  
Charles Mix County Auditor

**AGREEMENT BETWEEN  
NAPA TO PLATTE REGIONAL RAILROAD AUTHORITY  
AND THE STATE OF SOUTH DAKOTA**

THIS AGREEMENT made and entered into this 22 day of March, 2006, by and between the Napa to Platte Regional Railroad Authority, hereinafter called "Authority", and the South Dakota State Railroad Board, acting by and through the South Dakota Department of Transportation, Office of Railroads, hereinafter called "State".

WITNESSETH:

WHEREAS, the State is owner of the Rail Facilities more fully described in Appendix 1 hereto attached and made a part hereof;

NOW, THEREFORE, Authority and State do hereby mutually agree as follows:

1. Facility Description. The State shall permit the Authority to use the Rail Facilities described in Appendix 1 hereto.

It is understood and agreed that the Rail Facilities are leased in "as is" condition. State shall have no responsibility to make any improvements, modifications, rehabilitation, maintenance or other change to the Rail Facilities for the purpose of this agreement.

2. Operating Rights. The State hereby permits Authority to use any and all of the State's rights and licenses in the Rail Facilities as may be necessary for the purpose of providing rail freight service and/or passenger service. Passenger service shall also be defined to include recreational motorcar use by individuals and organizations. In the event individual or organizational motorcar clubs shall be allowed to utilize the trackage under lease in this agreement or sublease, as the case may be, then, and in that event, it shall be the responsibility of the Authority and the Authority's operator to obtain a certificate of insurance showing the State of South Dakota, the Authority, and the Authority's Operator, as additional insured, prior to any motorcar event; and, further, the Authority and/or the operator shall obtain from the individual recreational motorcar enthusiastic or organization, as the case may be, an indemnification and hold harmless agreement to be executed by the person or entity in charge of the motorcar event, with copies of said indemnification and hold harmless agreement to be provided to the State of South Dakota prior to any motorcar travel on the trackage leased herein. The rights granted Authority herein relate solely to the provision of rail and/or passenger service on the Rail Facilities and Authority may not use the Rail Facilities for any other purpose without the prior written authorization of the State.

3. Provision of Operations. If the Authority, in order to provide rail freight service, contracts with an operator to provide rail freight service over Rail Facilities, no

such contract shall be entered into without the prior consent of the State. Any sublease between Authority and an operator to provide rail service over Rail Facilities shall be expressly made subject to all of the terms, conditions and limitations contained in this Agreement.

4. Administration of Rail Facilities. Notwithstanding any provision of this Agreement, State shall retain sole responsibility for the management of State-owned Rail Facilities and equipment not required for rail freight service.
5. State and Napa to Ravinia Inspection. The State or its duly authorized representative, upon reasonable notice to Authority, shall have the right to inspect any and all Rail Facilities for the purpose of verifying Authority's compliance with the terms and conditions of this Agreement.

Further, it is agreed by the State and Authority that an FRA inspector and/or any other qualified and reliable rail inspector mutually agreeable to the parties hereto, shall perform an inspection of the Napa to Ravinia trackage within a reasonable amount of time after this agreement is executed, and said inspection shall form the base inspection from which future discussions involving the condition of the said trackage will be based. Regular rail inspections on the Napa to Ravinia trackage shall be conducted at least annually thereafter, upon such terms and conditions as may from time to time be agreeable between the parties hereto. The parties further agree that they will mutually share the expenses for said inspections. The Authority agrees that whatever deficiencies are noted during each rail inspection will be corrected within a reasonable amount of time, not to exceed one year, depending upon the seriousness of said deficiency.

6. Responsibility for Rehabilitation. The State shall have no responsibility for rehabilitating the Rail Facilities.
7. Additions to Rail Facilities. The State hereby grants to the Authority the right to make such Additions to the Rail Facilities as Authority may require to permit rail freight service, at Authority's sole expense. The term "Additions(s)" as used herein shall mean capital improvements that are in addition to the Rail Facilities. Authority shall own and have the right to remove any of said Additions which can be removed without causing the Rail Facilities to be less serviceable than before said Addition was made. Those Additions which cannot be removed without causing the Rail Facilities to be less serviceable than before said Addition was made, shall become the property of the State and a part of the Rail Facilities. However, under no circumstances will any additions or improvements placed into the actual track structure during the term of this lease agreement be removed at the termination of this lease and any of said additions or improvements placed into the track structure shall remain under all circumstances the property of the State of South Dakota.

8. Maintenance. The State shall have no obligation to perform any maintenance of the Rail Facilities. The Authority shall be responsible for the normal and regular work required to keep the Rail Facilities in the condition necessary to enable safe operations and shall include, but not be limited to, tie, rail, culvert and bridge repairs, tamping and lining, surfacing, tightening bolts, driving spikes, brush cutting, weed control, highway-rail grade crossing maintenance and renewal and other necessary repairs and work.
9. Force Majeure. This Agreement and any sublease is subject to force majeure, and is contingent on accidents, acts of God, weather conditions, tortuous acts of third parties, restrictions imposed by any government or governmental agency, or other events beyond the control of the parties. If performance under this Agreement or operability of the Rail Facilities is prevented by any cause of force majeure, the State is under no obligation to restore the operability of the Rail Facilities to enable resumption of performance under this Agreement or any subsequent sublease agreement. If restoration is not made, then this Agreement shall be void without penalty to either party.
10. Payment. Authority hereby agrees to make annual payments to the State based on traffic for each calendar year thereafter, for any freight traffic or rail car storage that originates or terminates at any point along the Napa to Ravinia rail line, as follows:

<u>Number of rail cars shipped/year</u>	<u>Aggregated Annual Lease Payments</u>
a. 750 cars or less	\$1.00 per car
b. 751 to 1,800 cars	plus \$2.50 per car for all cars over 750
c. 1,801 to 3,500 cars	plus \$5.00 per car for all cars over 1,800
d. 3,501 or above	plus \$7.50 per car for all cars over 3,500

11. Liability of Authority. The Authority shall indemnify, hold harmless, and protect the State, its subdivisions and representatives, their officers, employees, successors, and assigns, from all suits, actions, or claims of any character brought because of any injuries or damage received or sustained by any person, persons, or property, including State-owned property, on account of any negligent act, omission, neglect or misconduct of the Authority, its representatives, officers, employees or agents, including Authority's Operator.
12. Complaint Resolution Procedure. In the event the South Dakota State Railroad Board or South Dakota Office of Local Transportation Programs receives a written complaint regarding the conduct of operations on the facilities described herein, the South Dakota State Railroad Board (Board) may conduct a hearing to consider the allegations contained in the complaint. Reasonable prior notice of such hearing shall be provided to all interested parties, including, but not limited to, the party filing the complaint, the Program Manager of the Office of Local Transportation Programs, the Authority, and the Authority's operator, or any

other railroad conducting operations on the facilities pursuant to a sublease agreement with the Authority. Any hearing held pursuant to this provision shall be informal in nature and not subject to the requirements of SDCL 1-26, and acts amendatory thereto. All interested parties shall be allowed to present oral and written information to the Board. After considering all information presented, the Board shall issue a written decision, which shall be binding to this agreement as if incorporated as a provision herein. The decision of the South Dakota State Railroad Board shall be final and no party hereto shall be entitled to any right of appeal from its decision.

This complaint resolution procedure paragraph shall be included in any sublease agreement that the Authority may issue to any operator while this lease is in effect.

13. Laws to be Observed. The Authority and its Operator shall keep fully informed of all Federal and State laws, all local laws, ordinances and regulations, injunctions and all final orders and decrees of bodies of tribunals having any jurisdiction or authority, which in any way affect the performance of this Agreement, including without limitation any laws, ordinances, regulations, orders, or decrees, identified herein. The Authority and its operator shall at all times observe and comply with all such laws, ordinances, regulations, and all final orders and decrees, and shall protect, hold harmless and indemnify the State and its representatives against any claim or liability arising from or based on the violation of any such law, ordinance, regulation, injunction, or final order or decree, whether by the Authority or its operator.
14. Personal Liability of Public Officials. In carrying out any of the provisions of this Agreement, or in exercising any power of authority granted to them by or within the scope of this Agreement, there shall be no representatives, either personally or as officials of the State, it being understood that in all such matters they act solely as agents and representatives of the State.
15. Assignment. Authority shall not assign its rights or delegate its duties under this Agreement or any part thereof, without prior written consent of the State. An approved assignment, including assignments occurring by operator contracts, will not relieve the Authority of its primary responsibility to the State.
16. Amendment. No term or provision of this Agreement may be changed, waived, discharged or terminated, except by an instrument in writing signed by the party against which the enforcement of the change, waiver, discharge or termination is sought; provided however, that when an emergency situation arises, changes in this contract may be made orally by authorized representatives of both parties by mutual agreement subject to immediate confirmation by telegram or other delivered writing.

17. Term. This Agreement shall continue in full force and effect for a period of five (5) years from and after the date first above written, unless terminated by either party hereto, for fault, as set forth below. Upon termination of this Agreement, Rail Facilities shall be returned to the State in the same general condition, less normal wear and tear, as existed on the effective date of this Agreement.

18. Termination for Fault. Should either Authority or State substantially fail to perform its obligations under this Agreement, and continue in such default for a period of ninety (90) days, the party not in default shall have the right at its option, after first giving sixty (60) days written notice thereof by certified mail to the party in default, and notwithstanding any waiver by the party giving notice of any prior breach thereof, to terminate this agreement. It is further agreed that inadequate or substandard performance by the operator which persists in excess of one hundred twenty (120) days after the Authority has been made aware of the inadequate or substandard conduct, shall constitute a basis upon which the State may terminate this agreement under this paragraph.

19. Notice. Except as expressly provided otherwise, all notices or other communications hereunder shall be in writing and shall be deemed duly given, if delivered in person or by certified or registered mail, return receipt requested, first class, postage prepaid to the person specified herein as entitled to receive such notice, or to their duly authorized representative unless notice of a change of address is given pursuant to the terms of this provision.

For the State: Program Manager, Local Transportation Programs  
SD Department of Transportation  
700 Broadway Avenue East  
Pierre SD 57501-2586

For the Authority: Napa to Platte Regional Railroad Authority  
% Ken Cotton, Attorney  
PO Box 370  
Wagner SD 57380-0370

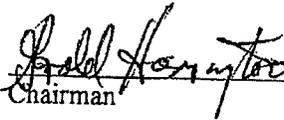
20. Severability. In the event any section, paragraph, sentence, clause or phrase contained herein shall be determined, declared or adjudged invalid, illegal, unconstitutional or otherwise unenforceable, such determination, declaration or adjudication shall in no manner affect the other sections, paragraphs, sentences, clauses or phrases of this Agreement, which shall remain in full force and effect as if the section, paragraph, sentence, clause or phrase declared, determined or adjudged, invalid, illegal, unconstitutional or otherwise unenforceable was not originally a part thereof.

21. Entire Agreement. This Agreement and the Appendix attached hereto represent the entire agreement between the parties, and all previous communications,

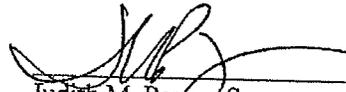
understandings or agreements between the parties are hereby abrogated and withdrawn except as provided herein.

The parties hereto have caused this Agreement to be executed and attested to by their duly authorized officers on the date and year first above written.

NAPA TO PLATTE REGIONAL RAILROAD  
AUTHORITY

  
Chairman

STATE OF SOUTH DAKOTA

  
Judith M. Payne, Secretary  
Department of Transportation

ACKNOWLEDGED

STATE OF SOUTH DAKOTA )  
: SS  
COUNTY OF Charles Mix )

On this 27<sup>th</sup> day of June, 2006, before me, a Notary Public within and for said County and State, personally appeared GERALD WARRINGTON, known to me to be the person who executed the above document and acknowledged to me that he did sign the foregoing document for the purposes herein stated.

  
NOTARY PUBLIC

My Commission Expires: 8-1-2009

(SEAL)

ACKNOWLEDGED

STATE OF SOUTH DAKOTA )  
: SS  
COUNTY OF HUGHES )

On this 19 day of July, 2006, before me, a Notary Public within and for said County and State, personally appeared Judith M. Payne, Secretary, Department of Transportation, known to me to be the person who is described in and who executed the within and foregoing instrument and acknowledged to me that he executed the same freely.

  
NOTARY PUBLIC

My Commission Expires: July 1 2009

(SEAL)

## APPENDIX 1

### Napa to Ravinia

Commencing at the intersection of the North Sioux City to Mitchell line located in the W ½ of the SW ¼ of Section 22, Township 94 North, Range 56 West of the 5<sup>th</sup> P.M., also known as Milepost 0.0, and additionally known as Railroad Engineer's Survey Station Number 0.0, and extending in a Westerly direction a distance of approximately 54.5 miles in and through the Counties of Yankton, Bon Homme and Charles Mix and terminating at the, westerly line of the NW1/4 of the NE1/4 of Section 17, Township 96 North, Range 64 West of the 5<sup>th</sup> P.M, Charles Mix County, also known as Milespost 54.5+, and additionally known as Railroad Engineer's Survey Station Number 1707+17.

