IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

CALIFORNIA HIGH-SPEED RAIL AUTHORITY, GOVERNOR EDMUND G. BROWN JR., TREASURER BILL LOCKYER, DIRECTOR OF DEPARTMENT OF FINANCE MICHAEL COHEN, SECRETARY OF THE STATE TRANSPORTATION AGENCY BRIAN KELLY, and CHIEF EXECUTIVE OFFICER OF THE HIGH-SPEED RAIL AUTHORITY JEFF MORALES, Petitioners, **v.** **THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SACRAMENTO,** Respondent, **JOHN TOS, AARON FUKUDA, COUNTY OF KINGS,** Real Parties in Interest.	Case No. C076042

Sacramento Superior Court, Case No. 34-2011-00113919 CUMCGDS
Dept. 31; The Honorable Michael P. Kenny, Judge

PETITIONERS' REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF REPLY TO PRELIMINARY OPPOSITION

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Pursuant to Evidence Code sections 452, subdivision (d)(1), and 459, Petitioners respectfully request that the Court take judicial notice of the following documents attached hereto as Exhibits 1-4:

Exhibit 1 is a true and correct copy of the Complaint for Declaratory Relief in *Morris Brown et al. v. Peninsula Joint Powers Board et al.*, Sacramento Superior Court, Case No. 34-2010-0007562 (hereafter "*Brown*"), filed April 15, 2010;

Exhibit 2 is a true and correct copy of the Order sustaining defendants' demurrer without leave to amend in the *Brown* case, filed October 15, 2010;

Exhibit 3 is a true and correct copy of the First Amended Complaint for Declaratory Relief in *Russel J. Peterson et al. v. California High Speed Rail Authority et al.*, Sacramento Superior Court, Case No. 34-2010-00069687 (hereafter "*Peterson*"), filed August 31, 2009; and

Exhibit 4 is a true and correct copy of the Judgment entered in the *Peterson* case, filed July 19, 2010.

These documents are relevant to the argument by Real Parties In Interest John Tos et al. that "[a]lthough it has been more than five years since the passage of Proposition 1A, this is the only lawsuit that has been filed alleging noncompliance with that measure's requirements." (Preliminary Opposition of Real Parties In Interest, filed April 1, 2014, p. 2, fn. 2.)

Moreover, because these documents are records of the Sacramento Superior Court, they are judicially noticeable. (Evid. Code, § 452, subd. (d)(1); see e.g., *Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 882 ["courts are free to take judicial notice of the *existence* of each document in a court file"], italics in original; *People v. Thacker* (1985) 175 Cal.App.3d 594, 599.)

Wherefore, Petitioners pray for an Order granting this request, and that the Court take judicial notice of the foregoing exhibits.

Dated: April 11, 2014

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California

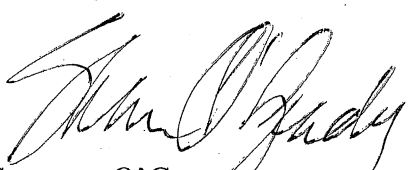

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EXHIBIT 1

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FILED
Superior Court Of California,
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04/15/2010
tcalaustro
By_____, Deputy
Case Number:
34-2010-00075672

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

MORRIS BROWN; MOAVCO, INC., Plaintiffs, v. PENINSULA JOINT POWERS BOARD, THE CALIFORNIA HIGH SPEED RAIL AUTHORITY; DOES 1 THROUGH 5, INCLUSIVE, Defendants	CASE NO. **COMPLAINT FOR DECLARATORY RELIEF**

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FIRST CAUSE OF ACTION

1. Plaintiff Morris Brown is a long-time resident of the City of Menlo Park, State of California; plaintiff is a taxpayer, paying state income taxes, local property taxes, and state/local sales taxes. MOAVCO, Inc., is a California corporation in good standing and is wholly owned by Morris Brown and his wife, Denise;

2. Plaintiffs have standing to bring this suit under CCP 526a, which permits taxpayer suits to prevent the illegal expenditure of public funds, the waste of public property/assets/funds, and to prevent the commission of illegal acts, including illegal acts associated with the implementation and construction of the California High Speed Rail Project (hereafter referred to as the HSR Project);

3. Defendant California High Speed Rail Authority (the Authority) is the entity/agency charged with the responsibility for building a high speed rail project (HSR project) in the state of California;

4. The Peninsula Corridor Joint Powers Board (JPB) is a public agency which owns the right of way (ROW) between San Francisco and San Jose, California; JPB holds such property as a trustee, fiduciary, and steward for the taxpayers of San Mateo County (including the plaintiffs herein); plaintiffs have paid taxes for decades to support the activities of the JPB, including its operation of Cal Train, the local intercity passenger train/commuter service between San Francisco and San Jose; the JPB intends to allow the Authority to use its ROW for the purposes of building the HSR project thereon.

5. Does 1-5, inclusive, are sued hereunder pursuant to the fictitious name statute of California; these defendants are involved in the implementation and contemplated construction of the HSR project.

6. In November, 2008, the Legislature of the State of California placed before the voters an initiative known as Proposition 1A (Prop. 1A); this provided for the construction of a HSR project throughout the state of California, this initiative also incorporated the provisions of a statute earlier passed by the legislature and known as AB 3034; AB 3034 was intended by the legislature to create extensive oversight authority in the legislature and its legislative bodies, Prop. 1A and AB 3034 also contained numerous requirements and restrictions on the release and use of the $9 billion dollars in bond funds which potentially would be available for a HSR project, if said requirements were fulfilled and said restrictions were complied with; in November, 2008, the voters approved Prop. 1A.

7. One of the restrictions/requirements in Prop.1A/AB 3034 is that before bond funds can be released/ used, there must be MATCHING FUNDS provided by the federal government; local agencies, or private investors; the federal government did establish a nationwide program in 2008 (known as AARA) to provide funds to the entire nation for, *inter alia*, high speed rail systems, although this program was not limited to HSR projects, but also included funding for local rail projects as well; in October, 2009, the State of California/the Authority applied to the

federal government/U.S. Dept. of Transportation for federal funding assistance, this funding request is attached hereto as Exhibit A; the cover letter from the Governor (attached hereto as Exhibit B) represented that if federal funding were granted to California/the Authority, "matching funds" would be provided from Prop. 1A bond funds (a promise not authorized by law, as set forth , *infra.*); in its funding request (Exhibit A), the Authority represented that it intended for the funds to be used for the construction of four separate HSR corridors in four different parts of the state: San Francisco to San Jose corridor, Merced to Fresno corridor; Fresno to Bakersfield corridor; and Los Angeles to Anaheim corridor; the Authority represented (see Exhibit A) that the cost of the project work to be done on these four corridors would be approximately $9 billion and that the Authority was asking the federal government for one half that amount, or 4.5 billion dollars.

8. In the 2009 business plan, the Authority estimated that the cost of the first stage of the state-wide HSR project would be $43 billion; this amount is actually greatly UNDERESTIMATED, but that is the last estimate from the Authority. IF the federal government had granted the $4.5 billion requested, and IF Prop 1A bond funds were legally available to supplement/match those federal funds (not true), then only approximately 20% of the total cost of the first stage of the project stood to be funded.

9. But the federal government DID NOT grant California's request; instead , the federal government cut the request in half, only granting $2.34 billion to the state, with the balance of the $8 billion under the federal program going to other states and being entirely exhausted. There is no further funding under the special federal funding program for HSR projects.

10. This, in turn, means that , if you take the $2 34 billion potentially available from the federal government, and assume that matching bond funds from Prop.1A are available, this total comes to $4.68 billion, which is only 10% of even the low statewide estimate of $43 billion, as estimated by the Authority itself. If Prop. 1A bond funds are NOT AVAILABLE (as will be demonstrated, *infra*), then only 5% of funding is available for the state wide project Therefore, under either approach, VERY LIMITED FUNDING is available for the HSR project, and yet the

Authority fully intends to proceed with construction on four separate corridors in four different geographical locations in California

11. When the legislature was in the process of putting Prop.1A before the voters, and was in the process of drafting the oversight provisions and restrictions contained in AB 3034, the legislature was extremely concerned with the financial risk to the state from the project; specifically, it was the legislative intent that no construction on a given corridor or usable segment thereof could be commenced UNLESS adequate funding/financing was in place to ensure completion of that particular corridor or usable segment thereof; the legislature wanted to avoid the risk that the project could be commenced in various areas with the funding running out and the project left in suspension, abandoned and uncompleted; numerous provisions of Prop.1A/AB 3034 provide these protections. Specifically, no bond funds under Prop.1A were to be released/used unless there were matching federal/other funds and unless the total amount then available was sufficient to allow for completion of the corridor/usable segment thereof on which construction was planned, no construction can commence unless and until these funding/financing requirements have been met. Section 2704.08(d) (which is part of AB 3034/Prop. 1A) provides as follows:

> "Prior to committing any proceeds of bonds for expenditures for construction and real property and equipment acquisition on each corridor, or usable segment thereof . . . the Authority shall have approved and concurrently submitted to the Director of Finance and the Chairperson of the Joint Legislative Budget Committee the following. (1) a detailed funding plan for that corridor or usable segment thereof that (A) identifies the corridor or usable segment thereof, and the estimated full cost of constructing the corridor or usable segment thereof, (B) identifies the sources of all funds to be used and anticipates time of receipt thereof based on offered commitments by private parties and authorizations, allocations, or other assurances received from governmental agencies, (C) includes a projected ridership and operating revenue report, (D) includes a construction cost projection including estimates of cost escalation during construction and appropriate reserves for contingencies, (E) includes a report describing any material changes from the plan submitted pursuant to subdivision (C) for this corridor or usable segment thereof, (F) describes the terms and conditions associated with any agreement proposed to be into by the Authority and any other party for the construction or operation of passenger train service along the corridor or usable segment thereof"

12. The Authority imminently plans to commence construction on the four separate corridors mentioned above, the funding/financing available is woefully inadequate to ensure that those corridors, or any one of them, or any usable segments thereof, will/can be completed as a HSR project The combined cost on these four separate corridors is vastly in excess of even the most generous amount of potential funding available.

13. If construction on these four corridors is allowed to commence, this would violate Prop.1A/AB 3034 and would completely frustrate the legislature's intent to minimize the financial risk to the state from unfinished projects, and would constitute the waste of public funds/assets.

14. This court should therefore enter a declaratory judgment as follows:

A. No construction on any corridor, or usable segment thereof, may commence by, or on behalf of the Authority, unless adequate funds are in place to ensure completion of that corridor or usable segment thereof as a HSR project; and that no Prop.1A bond funds can be used/released until this requirement of ability to complete has been satisfied. Such a declaration is necessary and proper in light of the fact that the Authority IMMINENTLY plans to commence construction on these four corridors WITHOUT satisfying these mandatory requirements under law and in violation of the restrictions placed by the Legislature on the use/release of Prop. 1A bond funds.

SECOND CAUSE OF ACTON FOR DECLARATORY RELIEF

15. Paragraphs 1-14 are hereby incorporated by reference.

16. The Authority and defendants are estopped from claiming that they intend to, and have the ability to, complete the corridors, or any of them, with the funding available. This is by reason of the fact that when the Authority submitted its funding request to the federal government (Exhibit A), this document indicates that the defendants do not contemplate being able to complete the corridors in question as a HSR project even if they receive the maximum funding requested (which they did not receive, in fact) Because of these representations by defendants, they will be unable to claim that they can satisfy the "completion" requirements of Prop.1A/AB 3034.

17. For example: Exhibit A outlines in detail the Authority's construction plans and the components of the alleged HSR project for which they are requesting funding. With respect to all the four corridors, vital components of a HSR project are OMITTED, indicating that there are no plans to complete AS A HSR PROJECT any of the four corridors. With respect to San Francisco to San Jose, no money is requested for land acquisition/eminent domain, even though hundreds of millions of dollars will be required for such, since the HSR project traverses adjoining real estate that is among the most expensive in California, including the cities of Mountain View, Palo Alto, Menlo Park, Atherton, Belmont, San Carlos, San Mateo, and Burlingame. Furthermore, on this 55 mile long Bay Area corridor, only a miniscule number of intersections will be reconstructed as elevated grade crossings, despite the fact that there are 47 intersections/grade crossings between San Francisco and San Jose, with each grade crossing and grade separation costing approximately $100 million (Exhibit A shows that the Authority estimates that one grade crossing in San Bruno will ALONE cost $300 million). Under the Authority's plans, this HSR project cannot be completed without grade separation at every intersection. This indicates that the Authority has no ability whatsoever to "complete" the Bay Area corridor as a HSR project. The Bay Area corridor also does not even request money for the actual HSR TRACKS. Nor is money requested for the billions that will be necessary to run the HSR train from 4th and King to the new Transbay Terminal with a tunnel, even the overhead contact systems (superstructure/electrical systems) are not contemplated to be done, but are something to be considered "in the future." The total costs of the planned work on the Bay Area corridor is $2 5 billion (including federal money and contemplated state Prop 1A bonds), which is a fraction of the amount necessary for completion of the corridor as a HSR project

18. Another example of the "no intent/ability to complete" problem is the Merced to Fresno corridor; there is no request for funding for "electrification," a vital component of a HSR project. Without electrification, it will be impossible to complete a HSR project.

19 With respect to the Fresno to Bakersfield corridor, likewise, no money is requested for electrification, a vital and expensive part of any HSR project and no such project can be "completed" without such an essential component.

20. The "independent utility" question: the funding requests for the four corridors all indicate that it is not contemplated that with the federal funding, and the contemplated receipt of Prop. 1A bond funds, the HSR project will be capable of being completed on ANY one of the four corridors; instead, the Authority states that the projected construction will have "independent utility" IN THAT local rail commuter services, such as Amtrak, Metrolink, and Cal Train will be able to make use of the corridors and the improvements UNTIL, some day, the corridors can be completed AS HSR RAIL CORRIDORS FULLY READY FOR HSR TRAINS. This concept of "independent Utility" is a FEDERAL concept only, since the federal HSR funding program envisioned some aid to local rail projects; but the concept of independent utility is not germane to state law, since Prop 1A/AB 3034 only contemplates that the $9 billion in bond funds can be used for direct support of a HSR project; there was never any legislative intent the $9 billion in those bond funds would be used to subsidize and assist local rail/commuter services.

21. The "independent utility" argument made by the Authority (Exhibit A, B, and C) demonstrates that (a) the Authority has no contemplation of completing a HSR project with the funding available; (b) the federal funds are largely planned for the direct benefit of local rail projects/services, something prohibited by Prop. 1A; (c) it would be completely inappropriate for any of the $9 billion Prop. 1A bond funds to be used/released for any of the four corridors.

22 Accordingly, the court should enter a declaratory judgment as follows:

A. That the Authority is estopped from arguing , and will be unable to prove, that it has the intent and ability to COMPLETE any of the four corridors or usable segments thereof as a HSR project, by reason of the Authority's own language /admissions in the funding requests, and

B. That without the ability to complete a corridor/usable segment thereof as a HSR project, none of the $9 billion Prop. 1A bond funds can be released/used by the Authority

THIRD CAUSE OF ACTION FOR DECLARATORY RELIEF

23. Plaintiffs hereby incorporate paragraphs 1-22 above.

24 This cause of action relates specifically to the San Francisco-San Jose corridor, hereafter referred to as the Bay Area corridor.

25. The Authority specifically represents that it intends to use part of the $9 billion in Prop. 1A/AB 3034 bond funds for the construction of the HSR project on the Bay Area corridor.

26. But Prop. 1A/AB 3034 bond funds may only be used if the construction activity is in fact specifically FOR a high speed rail project as contemplated in Prop. 1A/AB 3034; it was never the intent of the legislature that the $9 billion in Prop. 1A bond funds be used for the direct benefit of local rail /commuter services; yet, the federal funding request (Exhibit A) is largely for the benefit of local rail/commuter services, with a HSR project brought to completion sometime in the future and AFTER the local rail services begin utilizing the corridors.

27. For example, on the Bay Area corridor, the Authority requested some $800 million for "electrification", but indicated that this would primarily be for the benefit of Cal Train, operated by defendant JPB, and that this was one reason why the Authority's plans would have "independent utility", until sometime in the future when a HSR project could be completed.

28. Therefore, the Federal funds requested (and the potential grant thereof by the federal government) are NOT for a HSR project, as such, but are primarily for the benefit of Cal Train; This means that the federal grant of funds cannot be considered "matching funds" under the requirements of Prop. 1A. They are not funds of "like kind" with Prop. 1A bond funds. Accordingly, the Bay Area corridor is INELIGIBLE to receive any Prop. 1A bond funds, since a prerequisite for the release of bond funds is that there be "MATCHING FUNDS" from the federal government, designated for the same purposes and uses imposed on Prop 1A bond funds.

29. Furthermore, it is even inappropriate for the federal government to actually grant money to the Authority, because the Governor (Exhibit B) promised that if federal funds were granted, Prop. 1A bond funds would be used to match the federal funds – a representation that is not permitted under Prop. 1A; the inducement for the grant of federal funds therefore does not exist, and it may be appropriate for the federal government to reconsider the propriety of granting federal funding at all to the Authority.

30. Accordingly, the court should enter a declaratory judgment as follows:

A That any federal grant of funding primarily for the benefit of local rail/commuter services, is not designed to assure completion of a HSR project by that funding,

and accordingly the federal funds granted cannot be considered to be "matching funds" under Prop. 1A/AB 3034 and that since "matching funds" of the same kind and type are required under Prop. 1A, no Prop. 1A bond funds can be released for the construction of the Bay Area corridor

FOURTH CAUSE OF ACTION FOR DECLARATORY RELIEF

32. Plaintiffs hereby incorporate paragraphs 1-31 above.

33. The JPB claims to be the owner of the right of way between San Francisco and San Jose; this ROW was actually purchased by the taxpayers of San Mateo County, including plaintiffs, years ago, and the JPB holds such property in trust and as a fiduciary and steward for said taxpayers.

34. The JPB imminently plans to enter into arrangements with the Authority to ALLOW the Authority to use the ROW for a HSR project

35. But no Prop. 1A bond funds can be used for any such project in the Bay Area corridor for the reasons set forth above; nor is the Bay Area corridor ELIGIBLE to receive any Prop. 1A bond funds for the reasons set forth above.

36. Since no HSR project can commence construction for the reasons set forth above, it would be completely illegal and inappropriate and a waste of public property/funds/assets for the JPB to surrender its valuable asset (the ROW), thereby allowing the Authority to use said property.

37. Accordingly, the court should enter a declaratory judgment as follows:

A. That the JPB is not authorized to surrender ownership or control of the ROW to the Authority because the contemplated HSR project on the ROW may not legally commence construction for the reasons set forth in the first three causes of action and because the Bay Area corridor is not eligible to receive state bond funds under Prop 1A for the reasons set forth in the first three causes of action.

FIFTH CAUSE OF ACTION FOR DECLARATORY RELIEF

38. Plaintiffs incorporate paragraphs 1-37 herein.

39. When Proposition 1A was placed before the voters by the state legislature, it was the intent of the legislature that the financial risk to the State of California be minimized;

accordingly, Proposition IA/AB 3034 provided that the HSR project was required to operate at an annual profit and that no state subsidies would be provided for its annual operations

"Proceeds of bonds authorized pursuant to this Chapter shall not be used for any operating or maintenance costs of trains or facilities." Streets and Highways Code Section 2704 04(d)

> "The planned passenger service by the authority in the corridor or usable segment thereof will not require a local, State, or federal operating subsidy." Streets and Highways Code, Section 2704.08 (c)(2)(J).

40. Despite these restrictions and requirements, defendant CHSRA has on numerous occasions taken the position that the State can and should "guarantee" the annual revenues of the HSR project, in order for defendant CHSRA to attract private investors, who, otherwise, would be reluctant to invest in the HSR project without such a guarantee

41. If the State were to "guarantee" the annual revenues of the HSR project, this would constitute the granting of a subsidy to defendants, something prohibited by Proposition 1A/AB 3034 and would further violate the intent of the Legislature that financial risk to the State be minimized.

42. Therefore, the court should further declare as follows:

(a) The granting of a guarantee by the State with regard to annual operating revenues/profits of the CHSRA would constitute a state subsidy under Proposition 1A/AB 3034, and would therefore be prohibited by said provisions

PRAYER FOR RELIEF

1. For a declaratory judgment on each cause of action as set forth above;

2. For costs of suit herein;

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3. For attorney fees pursuant to statute, under the private attorney general theory, and for serving the public interest.

Dated: April 13, 2010

By: _____
MICHAEL J. BRADY
Attorneys for Plaintiffs
MORRIS BROWN; MOAVCO, INC.,

EXHIBIT A

FLY CALIFORNIA
Without ever leaving the ground

CALIFORNIA HIGH-SPEED RAIL AUTHORITY

From: Mehdi Morshed

To: CHSRA Board

Date: September 18, 2009

Subject: ARRA Applications for Track 2 Funding

BACKGROUND

A total of $8 billion in federal funding is currently available through the High-Speed Intercity Passenger Rail (HSIPR) Program, designated for intercity and high-speed rail projects across the country. The guidance issued by the Federal Railroad Administration (FRA) for administering this Program established four "tracks" as follows:

- Track 1 Projects (funded under the American Recovery and Reinvestment Act (ARRA))
- Track 2 Service Development Program (funded under ARRA)
- Track 3 Service Planning Activities (funded under FY 2008 and FY2009 DOT Appropriations Acts)
- Track 4 Projects (funded under the FY09 Appropriations Acts)

California's applications for Track 1, 3 and 4 grants were submitted by the Governor on August 24, 2009, and totaled $1.1 billion, focusing on improvements to existing intercity passenger rail services and near-term job creation. In adherence to the federal requirements, Track 1, 3 and 4 applications were for improvements to existing passenger rail lines, including the integration of high-speed rail with intercity passenger service. California's Track 1 application included a request for $400 million for the TransBay Terminal project in San Francisco.

On September 3, the Board directed staff to prepare ARRA Track 2 grant applications encompassing each section of the proposed high-speed rail route: completion of the EIS/EIR documents for each of the 10[1] sections, Preliminary Engineering (PE) for all Phase 1 Corridor sections, and Final Design and Construction of four sections (San Francisco–San Jose, Merced–Fresno, Fresno–Bakersfield, and Los Angeles–Anaheim). A total cost target of $9 billion in Year-of-Expenditure was established for the four D/B Corridor Programs. A dollar-for-dollar match of state and local funds was to be used to match the federal share of $4.5 billion. These proposed grant applications will be consistent with the Pre-applications that were submitted to the FRA in July 2009 by the Governor.

[1] *Note: Nine of the sections are part of the HST Project. The tenth section is the Altamont Corridor Rail Project. Subsequent to the submittal of the HSIPR Track 2 Pre-Applications in July 2009, the Authority and FRA have agreed to split the Merced to Bakersfield section into two sections. Merced – Fresno and Fresno-Bakersfield*

925 L Street, Suite 1425 Sacramento, CA 95814 916.324.1541 fax 916.322.0827

California's Track 2 applications, which must be submitted by no later than October 2, 2009, are currently being prepared by Authority staff and consultants for Board approval and submission to the Governor. The Governor will submit the grant applications to the FRA as he did with the State's Track 1, 3, and 4 grant applications.

TIMELINE

The FRA guidance established the following timeline for Track 2 applications:

- Pre-application and comment: July 10, 2009
- Application: October 2, 2009
- FRA Decisions on Award to Be Made: Unknown / although the federal government has indicated 3-4 months for any decisions
- FRA Obligation/Letter of Intent (LOI): no later than Sept. 30, 2011
- Corridor Program Environmental Approval (ROD/NOD): no later than Sept. 30, 2011
- Begin construction: no later than Sept. 30, 2012
- Project Completion: no later than Sept. 30, 2017

CHSRA PROGRAM PROPOSALS

Consistent with the pre-application submitted by the Governor, and with the Board's guidance received on September 3, the staff and consultants have reviewed the corridors and found the following seven Corridor Programs meet the requirements for Track 2 funding. The total cost and proposed federal share for each Corridor Program is also listed below.

ARRA Track 2 Proposals		**Total Cost (YOE$ in millions)**	**Federal Share (YOE$ in millions)**
Preliminary Engineering- NEPA/CEQA Corridor Programs:			
1	**CA-PHASE1HSRPROGRAM-PE/NEPA/CEQA**	**$388**	**$194**
a.	CA-SF/SANJOSEHSR-PE/NEPA/CEQA	$61	$30.5
b.	CA-SANJOSE/MERCEDHSR-PE/NEPA/CEQA	$60	$30
c.	CA-MERCED/FRESNOHSR-PE/NEPA/CEQA	$42	$21
d.	CA-FRESNO/BAKERSFIELDHSR-PE/NEPA/CEQA	$75	$37.5
e.	CA-BAKERSFIELD/PALMDALEHSR-PE/NEPA/CEQA	$40	$20
f.	CA-PALMDALE/LAHSR-PE/NEPA/CEQA	$80	$40
g.	CA-LA/ANAHEIMHSR-PE/NEPA/CEQA	$30	$15
2	**CA-PHASE2HSR-NEPA/CEQA**	**$120**	**$60**
a.	CA-MERCED/SACRAMENTOHSR-NEPA/CEQA	$35	$17.5
b.	CA-LA/SANDIEGOHSR-NEPA/CEQA	$85	$42.5
3	**CA-ALTAMONTCORRIDORRAIL-NEPA/CEQA**	**$45**	**$22.5**
Design/Build Corridor Programs:			
4	**CA-SF/SANJOSEHSR-DESIGN/BUILD**	**$2,560**	**$1,280**
5	**CA-MERCED/FRESNOHSR-DESIGN/BUILD**	**$932**	**$466**
6	**CA-FRESNO/BAKERSFIELDHSR-DESIGN/BUILD**	**$1,639**	**$819.5**

7	CA-LA/ANAHEIMHSR-DESIGN/BUILD	$4,005	$2,002.5
Total Design/Build Corridor Programs		$9,136	$4,568

Note: The names of the above Corridor Programs (numbered 1-7) and Projects (lettered a, b,...) were assigned in accordance with the FRA application instructions.

PE/Environmental Review Applications
The first grant proposal listed above requests funding for Preliminary Engineering as well as preparation of NEPA/CEQA documents for seven Phase 1 HSR Corridor Projects.

The second and third grant proposals listed above request funding for the two Phase 2 HSR Corridor Projects, plus the Altamont Corridor Rail project. These proposals will include NEPA/ CEQA work, and Preliminary Engineering only up to a 15% level of design.

The Authority is preparing EIR/EIS documents to obtain an approved Notice of Determination (NOD) and Record of Decision (ROD) for each of the above ten sections comprising the entire 800-mile California HSR system.

As part of the PE effort, the Authority is also in discussion with the FRA to facilitate a draft Rule of Particular Applicability and associated waivers by the summer of 2010 to enable construction bidding documents to appropriately reflect FRA requirements to operate trains at 220 mph.

Final Design and Construction Applications
Four applications are being prepared for Final Design and Construction of the following CHSRA sections:

San Francisco-San Jose Section

Route Description

Route will be co-located with Caltrain's Peninsula Commuter Rail Corridor between San Francisco and San Jose.

Assumptions

- Proposal includes all of the Metropolitan Transportation Commission's Phase 1 High-Speed Rail scope, except for Transbay Transit Center costs submitted earlier under the ARRA Track 1 by the Transbay Joint Powers Authority. Only limited additional funding is being requested by the Authority under Track 2 for Transbay Terminal Rail Platform Extensions (as shown in the table below).
- Positive Train Control, complying with FRA requirements, is included to facilitate the construction of HSR infrastructure while maintaining Caltrain operations.
- Includes San Bruno Grade Separations and other High-Priority Grade Separations up to the dollar limit shown.

- Proposal includes a complete, integrated Peninsula Rail Corridor electrification system that would support both Caltrain and HSR service, except for construction of the Overhead Contact System above future HSR tracks, which are not being built as part of this Program application.
- Includes both Diridon Station (Phase 1) and 4th & King Station (Phase 1) improvements.

Independent Utility

- In the event the HSR system does not proceed according to plan, the MTC Phase I projects will serve Caltrain immediately and are fully-compatible with the HSR operational requirements.
- The Phase II funding continues the work begun under Phase I.
- The Authority has requested a letter from Caltrain to be included in the application confirming the "independent utility" of these proposed improvements.

Environmental Review

FRA Record of Decision (ROD) is scheduled to be issued by the September 2011 ARRA mandate. The Phase I projects have already received FTA environmental approval, which should expedite the FRA approval.

Summary of San Francisco to San Jose Section Costs

ARRA Track 2 Corridor Program Name: CA-SF/SANJOSEHSR-DESIGN/BUILD	**Total Cost (YOE$ in Millions)**
Program Elements	
Transbay Terminal Rail Platform Extensions	$205
4th and King (Phase I)	$100
San Bruno Grade Separations	$300
High-Priority Grade Separations	$689
Corridor Electrification	$885
Positive Train Control	$231
Diridon Station Phase I	$150
Total Cost	**$2,560**
State & Local Share (dollar-for-dollar match)	**$1,280**
Federal Share	**$1,280**

Based on Phase I (MTC list, June 2009) plus added CHSRA electrification and additional High-Priority Grade Separations

Merced – Fresno Section

Proposal

Construct HSR infrastructure including track but not electrification and other HSR "systems" for 220 mph operation in the 50-mile section between Merced and Fresno.

Proposal Assumptions:

- HSR tracks would parallel the Union Pacific Railroad (UPRR) route and State Route (SR) 99.
- Includes ROW acquisition adjacent to UPRR, grade separations, SR99 interchange modifications, utility relocation, environmental mitigation, earthwork, guideway structures, and track.

Estimated Cost Summary (see breakdown below)

Total Capital Cost: $932 million (YOE)

State & Local Share: $466 million (YOE)

Federal Share: $466 million (YOE)

Independent Utility

- Independent utility is provided by constructing approximately 50 miles of new high-speed double-track railroad between Merced and Fresno allowing connection into conventional rail passenger services at each end.
- Undertaking the highway modifications and grade separations of the UPRR early in the CHST Project would provide immediate safety and traffic-flow benefits complimentary to Caltrans' "SR 99 Corridor Program" under the Highway Safety, Traffic Reduction, Air Quality and Port Security Bond Act of 2006.
- The Authority has requested a letter from Caltrans Division of Rail to be included with the application, confirming the "independent utility" of these proposed improvements.

Environmental Review

- Authority is expediting environmental clearance (NOD/ROD) of this segment to Sept 2011.
- Splitting NOI / NOP from Fresno-Bakersfield segment should simplify the environmental review process.

Merced-Fresno Capital Costs	**YOE$ in Millions**
Track and Structures	$603
ROW and Sitework	$208
Professional Services	$88

Unallocated Contingency	$33
Total Cost	**$932**
State & Local Share	$466
Federal Share	$466

Fresno-Bakersfield Section

Proposal

Construct HSR infrastructure including track but not the electrification and other HSR "systems" for up to 220-mph operation.

Proposal includes:

- Relocation of BNSF track within their existing right-of-way (ROW) to make room for new HSR tracks to run generally adjacent to the freight tracks.
- Right-of-way acquisition, grade-separations, utility relocation, environmental mitigation, earthwork, guideway structures, and track.

Proposed Route

Approximately 98-miles long, from just south of the Fresno metropolitan area to an area just north of the Bakersfield metropolitan area. Includes work in the towns of Corcoran, Wasco, and Shafter. The alignment could accommodate a possible future Visalia/Tulare/Hanford station.

Estimated Cost Summary (see breakdown below)

Total Capital Cost: $1,639 million (YOE)

State and Local Funding: $819.5 (YOE)

Federal Share: $819.5 million (YOE)

Independent Utility

- Independent utility is provided by constructing approximately 98 miles of new high-speed double track between Fresno and Bakersfield, connecting to BNSF tracks at the north and south ends, providing a grade-separated, dedicated route for use by Amtrak if HSR-system implementation is delayed that would greatly improve safety and trip time.
- The Authority has requested a letter from Caltrans Division of Rail to be included with the application, confirming the "independent utility" of these proposed improvements.

Environmental Review

- Authority is expediting environmental clearance (NOD/ROD) of this segment to Sept 2011

Fresno-Bakersfield Capital Costs	**YOE$ in Millions**
Track and Structures	$749
ROW and Sitework	$690
Professional Services	$142

Unallocated Contingency	$58
Total Cost	**$1,639**
State & Local Share	$819.5
Federal Share	$819.5

Los Angeles – Anaheim Section

Proposal

Construct the HSR infrastructure including track (but not electrification and other HSR "systems" elements) in this 30.1-mile segment that parallels the existing freight and passenger LOSSAN rail corridor.

Proposal includes:

- HSR facilities at Los Angeles Union Station (LAUS), Norwalk Station, and the Anaheim Regional Transportation Intermodal Center (ARTIC).
- Right-of-way acquisition, grade-separations, utility relocation, environmental mitigation, earthwork, guideway structures, tunneling, and trackwork. It does not include a maintenance facility.

Estimated Cost Summary (see breakdown below)

Total Capital Cost: $4,005 million (YOE)

State and Local Funding: $2,002.5 (YOE)

Federal Share: $2,002.5 million (YOE)

Independent Utility

- HSR infrastructure could be used by Metrolink in the interim (or longer-term until Phase 1 HSR system is completed) using higher-speed, lighter-weight trains.
- The Authority has requested a letter from LAMTA/OCTA to be included with the application, confirming the "independent utility" of these proposed improvements.

Environmental Review

FRA Record of Decision (ROD) is scheduled to be issued in April 2011 well in advance of the September 2011 ARRA mandate.

LA-Anaheim Capital Costs	**YOE$ in Millions**
Track and Structures	$1,126
Stations	$556
ROW and Sitework	$1,770
Professional Services	$404
Unallocated Contingency	$149
Total Cost	**$4,005**
State & Local Share	$2,002.5
Federal Share	$2,002.5

DISCUSSION

As part of the updating capital cost estimates in support of the applications for the ARRA grants, the capital costs had to be represented in 2010 Base Year with further escalation to the Year of Expenditure (YOE) in accordance with the FRA requirements. The cost estimate updates were based on the programmatic level estimate last updated in August 2008 as represented by the Authority's Business Plan. The escalation process was based on actual published data between years 2008 and 2009, and based on forecasted inflation rates for year 2010 and beyond.

Published Cost Index Data

In review of the ENR published Construction Cost Index (CCI) inflation recorded between August of 2008 and August 2009 are:

CCI (Aug, 2008) = 8362

CCI (Aug, 2009) = 8564

The resulting recorded inflation rate between 2008 and 2009 based on ENR CCI is 2.42%.

As a check, California Construction Cost Index (CCCI) was reviewed for the same time period:

CCCI (Aug, 2008) = 5142

CCCI (Aug, 2009) = 5265

The resulting recorded inflation rate between 2008 and 2009 based on CCCI is 2.39%.

The assumed rate inflation between years 2008 and 2009 is **2.40%**.

Forecasted Inflation Rates

Following IMG Team's recommendation to the Authority regarding long-term annual construction cost inflation of **3.50%**, and taking into account recorded construction inflation rates, the following inflation rates were assumed:

2009 to 2010 – **3.0%**

2010 and beyond – **3.5%**

YOE Calculation

In accordance with the FRA instructions, the capital costs represented in Standard Cost Categories (SCC) were first escalated to the Base Year, 2010. Following projected construction duration and generally accepted sequence of major construction activities, the Base Year costs were distributed across implementation years while escalating each allocation. The summation of all distributed and escalated costs for each SCC and in total results in the projected YOE cost estimate.

"Independent Utility"

Beyond the independent utility of each section described above (based on a scenario in which the HSR program does not proceed as planned), it is important to describe how we do envision the Statewide HSR program proceeding to revenue service by 2020. The Business Plan currently being prepared will describe this in much greater detail, but it is important to note that these ARRA-funded Track 2 Corridor Programs are just the first step of the plan to implement sections of the statewide system. As funding is identified these initial sections will be linked together to create a Minimum Operable Segment and ultimately the Full-Build System. So the "utility" of

each of these ARRA Corridor Programs is to advance the HSR project in buildable pieces as quickly as possible.

Required Action

Staff requests approval of the seven ARRA Track 2 Corridor Program applications and guidance on any desired changes needed prior to submission to the FRA on October 2, 2009.

EXHIBIT B

GOVERNOR ARNOLD SCHWARZENEGGER

October 2, 2009

The Honorable Raymond H. LaHood
Secretary of Transportation
1200 New Jersey Avenue, SE
Washington, DC 20590

Dear Mr. Secretary,

We may talk about "high-speed rail." We may talk about "steel wheel on steel rail" technology. We may use words such as "intermodal" and "energy efficient" and aim for improved travel times and impressive job creation numbers.

But in California, when we talk about transportation, we understand that we're also talking about the person who lives in Fresno but often travels to downtown San Francisco for work. We're talking about the family from the Central Valley wanting to visit Disneyland on a holiday weekend. We're talking about a business person being able to move efficiently from his neighborhood to a city center then to another city center for a meeting – and back again – all within a day and while being productive the entire way.

That's because in California, transportation is more than asphalt, track and airways. It's the means by which we've become the eighth largest economy in the world. It's a part of the reason that our state has given birth to the high-tech industry of the Silicon Valley, the biotech centers in Southern California's Orange and San Diego counties, our agricultural industry that feeds the world and the art and glamour of Hollywood. It's a significant part of the answer to our greenhouse gas reduction goals, and it has the potential to be the remedy for our unemployment ills.

That's why I am proud to submit this application for $4.73 billion in Track 2 funding from the American Recovery and Reinvestment Act's (ARRA) High-Speed Intercity Passenger Rail Program (HSIPR). It's an application that supports both our long- and near-term visions for helping our state's transportation systems keep pace with our growing and dynamic population. It's an application that is strongly and widely supported in Californians – by our Legislature, local governments, labor leaders, business groups and environmentalists. And it's an application that I believe supports President Obama's vision for high-speed intercity rail in America.

California already knows the power of effective transportation infrastructure. Our state is home to the nation's most traveled interstate highway (Interstate 405 at some 400,000 vehicles per day), its busiest port (Los Angeles) and to the second, third and sixth busiest intercity passenger rail corridors in the country (constituting more than 20 percent of all Amtrak riders and half of the total ridership on Amtrak's state-supported intrastate, intercity services).

With California's population projected to rise by 12 million people in the next two decades (to 50 million by 2030), it is essential that we continue to improve our transportation systems and provide more transit options. Doing so is critical to California's environmental goals, which are the most aggressive in the nation when it comes to reducing climate change-causing greenhouse gas emissions. And it's critical to putting Californians back to work quickly, especially in areas of the state where unemployment now tops 15 percent. Our proposed high-speed rail system alone will generate 600,000 construction-related jobs, nearly 130,000 of them within the coming few years if we are awarded this ARRA funding.

Our vision for an improved transportation system in California includes as a backbone an 800-mile true high-speed rail system traveling up to 220 miles per hour and linking our state's major economic centers, from Los Angeles to San Francisco via our growing Central Valley, and then up to Sacramento and down to San Diego. The system – sure to be the first of its kind on our continent – will provide connections to airports, regional passenger rail systems, bus lines and bike paths so that an integrated web of transit systems makes it easy to move any Californian across the state seamlessly, efficiently and in a way that improves our environment, our quality of life and our state's overall productivity.

I've summarized our application and high-speed intercity rail priorities in an attachment to this letter. It's truly a vision that will redefine and reinvigorate the face of the nation's most populous state, just as the construction of Interstate 5 did decades ago.

Clearly, our application represents much more than just a vision. More than any other state or region in our country, California is poised to make true high-speed rail a reality. Since 1990, the state has invested more than $2 billion in its existing intercity passenger rail program. And since 1996, the California High-Speed Rail Authority has been forging ahead to design and plan our proposed high-speed rail system. This past November, California voters supported this historic project by approving a $9.95 billion bond measure – some of which we pledge to use to match HSIPR funding dollar-for-dollar. That means California will double the federal government's investment and double the job creation. No other application you receive will be able to match that.

As California continues to grow, so do its possibilities. For those possibilities to remain limitless, its transportation options continue to increase. And as grows California, so grows the nation. With the investment and inspiration of a transportation network in the Golden State anchored by true high-speed rail, we will help to ensure that our state and our nation remain prosperous. It's for the traveler moving from city to city in our large state, the family on holiday and the biotech scientist traveling from Orange County to our state's capital to share a promising lab discovery.

California is the first place in our nation where we will see a true high-speed rail system that is effectively tied into other modes of transportation, dramatically improves mobility, improves the environment by reducing greenhouse gases, and quickly produces hundreds of thousands of quality jobs. And therefore we believe that California ought to be the first place in our nation where ARRA funding for high-speed intercity rail is spent.

Sincerely,

Arnold Schwarzenegger

/la

ATTACHMENT
SUMMARY: CALIFORNIA'S APPLICATION
American Recovery and Reinvestment Act (ARRA)
High-Speed Intercity Passenger Rail Program (HSIPR)
Track 2 Priorities

- High-Speed Rail – Los Angeles to Anaheim Section

$2.1875 billion

This will be the first true high-speed rail track in the nation. Because of significant work already completed and because of strong support from local jurisdictions, this section of our proposed line is far ahead of the others. The line will include intermodal stations in Los Angeles and Anaheim and efficiently link one the nation's largest cities to one of the world's best-known tourist attractions. The project will be constructed in cooperation with Caltrans to immediately begin improving existing service during build-out. Dollar-for-dollar matching funds from California would total an investment of $4.375 billion dollars, which will generate 53,700 jobs beginning in 2011.

- High-Speed Rail – Central Valley

$1.2855 billion

You can't have true high-speed rail without California's Central Valley, where trains will reach 220 mph. Additionally, this is where California will build its test track so the trainsets can be tested – a necessity before true high-speed trains ever make their way to the United States. The work on this section will additionally bring existing trains in the Valley to a minimum of 110 mph – attaining higher-speed intercity rail lines while California's high-speed backbone is still being constructed. Dollar-for-dollar matching funds from California would total an investment of $2.571 billion dollars, which will generate 27,000 jobs in the region of California where unemployment is the highest.

- High-Speed Rail – San Jose to San Francisco

$980 million

Nowhere in our state is support for high-speed intercity rail stronger than in the Bay Area. This section would connect California's 3rd-largest city to San Francisco, through the Peninsula, bringing myriad connections to BART and Caltrain regional rail lines. It includes funds to greatly expand existing stations. Dollar-for-dollar matching funds from California would total an investment of $1.96 billion dollars, which will generate 34,200 jobs beginning immediately.

- High-Speed Rail – Entire System Preliminary Engineering and Environmental Clearance Work (NEPA/CEQA)

$276.5 million

This funding would support the completion of environmental work and preliminary engineering for the entire high-speed rail system, as well as for the Altamont Corridor Rail Project, enabling California to move on to construction on the entire system and guaranteeing that key environmental clearance and obligation dates are met. With this funding, the entire 800-mile system will truly be shovel-ready.

EXHIBIT 2

ORIGINAL

DEPARTMENT 53

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SACRAMENTO COURTS
DEPT. #53

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California High-Speed Rail Authority

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

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MORRIS BROWN, et al., Plaintiffs. v. **PENINSULA JOINT POWERS BOARD, et al.,** Defendants.	Case No. 34-2010-00075672 **[~~PROPOSED~~] ORDER** Date: September 22, 2010 Time: 2:00 p.m. Dept: 53 Judge: Hon Kevin R Culhane Reservation No. 1375498 Trial Date: None Action Filed: April 15, 2010

The hearing on the demurrer of defendant High Speed Rail Authority to plaintiffs' complaint went forward shortly after 2:00 P.M on September 22, 2010 in Department 53 of this Court, the Honorable Kevin R. Culhane presiding. Michael J. Brady appeared on behalf of plaintiffs Morris Brown and Moavco, Inc. Adam Hofmann appeared on behalf of defendant Peninsula Joint Powers Board Deputy Attorney General Jeffrey A. Rich appeared on behalf of defendant California High Speed Rail Authority. After oral argument, the Court took the matter

under submission. On September 23, 2010, the court issued its minute order, affirming its tentative ruling. A true and correct copy of the court's minute order is attached hereto and incorporated herein by reference.

The demurrer is sustained without leave to amend.

IT IS SO ORDERED.

Dated: OCT 15 2010

Judge of the Superior Court
KEVIN R. CULHANE

Approved as to Form:

Dated: 10-11-, 2010

Attorney for Plaintiffs

Dated: October 11, 2010

Attorney for Defendant Peninsula Joint Powers Board

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SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE

MINUTE ORDER

DATE: 09/23/2010 TIME: 10:17:00 AM DEPT: 53

JUDICIAL OFFICER PRESIDING: Kevin Culhane
CLERK: T. West
REPORTER/ERM:
BAILIFF/COURT ATTENDANT:

CASE NO: **34-2010-00075672-CU-MC-GDS** CASE INIT.DATE: 04/15/2010
CASE TITLE: **Morris Brown vs. Peninsula Joint Powers Board**
CASE CATEGORY: Civil - Unlimited

EVENT TYPE: Hearing on Demurrer - Civil Law and Motion - Demurrer/JOP

APPEARANCES

Nature of Proceeding: Ruling on Submitted Matter (Hearing on Demurrer (Ca High-Speed Rail Authority)) Taken Under Submission 9/22/2010

TENTATIVE RULING

Defendant California High-Speed Rail Authority's ("the Authority") Demurrer to the Complaint is sustained without leave to amend for failure to state facts sufficient to constitute a cause of action. CCP 430.10(e).

Plaintiff's request for Judicial Notice is granted as to Ex. C, D, E, and F. The Request for Judicial Notice is denied as to Ex. A. The Court does not take judicial notice of the truth of the facts set forth in the judicially noticed documents, however the Court is considering the contents of the documents for the purposes of determining whether plaintiffs can cure the defects in the Complaint.

Defendant's Request for Judicial Notice is granted.

The defendant's evidentiary objections are sustained.

Plaintiff Morris Brown is a resident of the City of Menlo Park and plaintiff MOAVCO, Inc. is a corporation owned by plaintiff and his wife. Plaintiffs bring this action as taxpayers pursuant to CCP 526a, alleging that defendants are committing waste with regard to their intent to pursue construction of High Speed Rail along the San Francisco - San Jose corridor and along three other corridors in California.

Plaintiffs seek the following declaratory relief: (No. 4 seeks relief only as to JPB (Caltrain) :

(1) No construction on any corridor, or usable segment thereof, may commence by, or on behalf of the Authority, unless adequate funds are in place to ensure completion of that corridor or usable segment thereof as a High Speed Rail project and that no Prop. 1A/AB 3034 bond funds can be used/released until this requirement of ability to complete has been satisfied.

(2) The Authority is estopped from arguing, and will be unable to prove, that it has the intent and ability to complete any of the four corridors or usable segments thereof as a High Speed Rail project, by reason of the Authority's own language/admissions in the funding request.

(3) Any federal grant of funding primarily for the benefit of local rail/commuter services, is not designed to assure completion of a HRS project by that funding, and accordingly the federal funds granted cannot be considered to be "matching funds" under Prop. 1A/AB 3034 and that since "matching funds" of the same kind and type are required under Prop 1A, no Prop 1A bond funds can be released for the construction of the Bay Area corridor.

(4) The Joint Powers Board (operating Caltrain) is not authorized to surrender ownership or control of the Right of Way to the Authority because the contemplated High Speed Rail project on the Right of Way may not legally commence construction for the reasons set forth in the first three causes of action and because the Bay Area Corridor is not eligible to receive state bond funds under Prop 1A for the reasons set forth in the first three causes of action.

(5) The granting of a guarantee by the State with regard to annual operating revenues/profits of the Authority would constitute a state subsidy under Prop. 1A/AB 3034 and would therefore be prohibited by said provisions.

In a related action, the Court previously sustained, without leave to amend, the demurrers of the Authority and the Joint Powers Board ("JPB") to a complaint of another plaintiff who sought to prevent the defendants from entering any agreement for the construction of a high speed rail facility from San Francisco to San Jose unless the public entities obtained the express written consent of Union Pacific Railroad ("UPRR"). (See minute order June 22, in Case No. 2010 - 00069687, Russell Peterson v California High Speed Rail Authority et al.)

In this action Plaintiffs contend that the Authority will not be able to obtain the financing for construction of the corridors and that JPB (Caltrain) intends to surrender its Right of Way to Authority. Plaintiffs contend that their allegations, as supported by the documents attached to the complaint, and the documents that are the subject of judicial notice, establish waste in that the project is severely under-funded and that defendants are going to violate Prop 1A by using the funds for the benefit of Caltrain (operated by JPB) rather than directly for the benefit of the High Speed Rail project

Prop 1A/AB 3034 requires that no funds be released for construction until 50% of the funding is obtained from another source, and that no commencement of construction on a corridor or segment thereof can commence until all of the funding is in place Plaintiffs conclude that because the federal government has only agreed to provide $2.34 billion, that no segment of the project can be commenced given that the cost of the first stage of the project is estimated to be $43 billion, which plaintiffs contend is an under-estimate.

Plaintiffs contend that statements made in the Authority's application for federal funding (ARRA), attached to the Complaint as Ex. A, and in Governor Schwarzenegger's letter to the Secretary of Transportation (Ex. B), show that Authority intends to use Prop 1A funds to help Caltrain, not to build

High Speed Rail, and that therefore the federal funding cannot be used as part of the 50% outside funding. (See page 3 of Ex. A, Independent Utility) However, section 2704.04 of the the HSR Bond Act does not specify nor limit the source of funds for the remaining 50% of the construction costs.

Plaintiffs also contend that Authority has indicated in certain documents, in violation of specific Prop 1 A requirements (Street and Highways Code section 2704.08(c)(2)(J)), that it will attempt to require that the State guarantee the annual revenues of the project, in order to obtain private investment. There are no facts showing that such has occurred.

Authority contends that plaintiffs fail to state facts sufficient to state a cause of action for waste pursuant to CCP 526a. Authority also argues that no cause of action is stated under CCP 1060, however plaintiff's opposition clarifies that the only claims asserted are pursuant to CCP 526a.

Authority's demurrer to the Complaint is sustained without leave to amend for failure to state facts sufficient to state a cause of action for waste. The claim of waste is speculative and not justiciable. Although plaintiffs contend waste is imminent, the manner in which they have framed the requested relief reveals that plaintiffs are seeking an advisory opinion rather than an order that imminent waste be halted.

Plaintiffs have not alleged even one funding request for use of Prop 1A funds that is sufficiently developed or immediate to permit plaintiffs or the Court to test whether it constitutes waste. AB 3034 establishes that the Authority cannot even make an initial request for bond proceeds, or commit bond proceeds, without first fully complying with the funding plan requirements, obtaining the Director of Finance's approval of a funding plan, and obtaining an appropriation of funds by the Legislature. Plaintiffs have not adequately pled an actual or imminent expenditure of public funds that is either illegal or devoid of public benefit. Plaintiffs have not pleaded that the governmental agencies responsible for approving the release of Prop 1A funds have failed to comply with the applicable statutory requirements.

Under *Waste Management of Alameda County, Inc v. County of Alameda* (2000) 79 Cal.App.4th 1223, "[g]eneral allegations, innuendo and legal conclusions" cannot support a waste cause of action." (79 Cal.App.4th at p, 1240.) .) The expenditure § 526a contemplates must be an "actual" one, or "at least the threat of an actual expenditure of public funds." *Fiske v. Gillespie* (1980)
25 200 Cal.App.3d 1243,1246.) The challenged expenditure must be either illegal or devoid of any public benefit or useful purpose whatsoever. *Sundance v Municipal Court* (1986) 42 Cal.3d 1101, 1137-1139.

Plaintiffs opposition has failed to present facts that would cure the defects.
Plaintiffs opposition raises policy concerns about the high speed rail project, including the sufficiency of the Authority's business plan, ridership predictions and adequacy of the funding Authority has acquired to date. However, these concerns do not establish an actual or threatened expenditure of public funds. The most that plaintiffs have alleged is that JPB and Authority are working together to plan for potential, future projects.

Plaintiffs contend that the defendants are seeking Prop 1A funds for an electrification project in Caltrains Right of Way. (Introduction of AB 289 and State's application for federal funds to use to electrify Caltrain's rail corridor). These allegations to not support a justiciable waste claim. On its face, AB 289, if passed, would allocate federal ARRA funds, not Prop 1A funds. Plaintiffs have not identified even one funding request for use of Prop 1A funds. The Court is not bound to presume the truth of bare allegations and legal conclusions. *Aubry v Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.

Since the plaintiffs have not shown that the defects can be cured, no leave to amend is granted.

Defendants to prepare a formal order and proposed judgment pursuant to CCP 3. 1312.

COURT RULING

The matter was argued and submitted. The matter was taken under submission.

SUBMITTED MATTER RULING

Having taken the matter under submission, the Court now rules as follows:

The tentative ruling is affirmed.

EXHIBIT 3

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RUSSELL J. PETERSON

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

RUSSELL J. PETERSON, and HALSTEAD NURSERY INC. (DBA ROGER REYNOLDS NURSERY & CARRIAGE STOP) Plaintiff, v. CALIFORNIA HIGH SPEED RAIL AUTHORITY, EXECUTIVE DIRECTOR MEHDI MORSHED, PENINSULA CORRIDOR JOINT POWERS BOARD, CHAIRMAN DON GAGE, and DOES 1 through 5, Inclusive, Defendants.	CASE NO. CIV486749 **FIRST AMENDED COMPLAINT FOR DECLARATORY RELIEF**

1. Plaintiff Russell J. Peterson is a taxpayer and resident of the Town of Menlo Park, San Mateo County, State of California. Plaintiff has standing under CCP § 526a as a taxpayer who seeks to prevent the illegal expenditure of public funds, the waste of public assets/funds, and seeks to prevent the commission of acts by defendants not authorized by law. Peterson has paid taxes as a resident of Menlo Park, California to fund the county's acquisition of the ROW and operation of rail on the ROW facilities (Measure A funds). Plaintiff additionally represents that

these taxes have occurred within one year of the date of the commencement of this action.

2. Plaintiff Halstead Nursery Inc. operates a corporate retail business selling plants and other items in Menlo Park, San Mateo County, California. Halstead Nursery has standing to sue under CCP § 526a as a corporate citizen, and seeks to prevent the illegal expenditure of public funds, waste of public assets/funds, and prevent other activities of defendants not authorized by law. Halstead Nursery alleges that it has paid sales tax, business taxes, property tax, and income tax, to San Mateo County and the State of California in connection with its retail business on numerous occasions within the past year, and that a portion of these taxes has been allocated toward the purchase and operation of the ROW.

3. Plaintiffs Russell J. Peterson and Halstead Nursery Inc. allege that defendant Peninsula Corridor Joint Powers Board (hereafter "JPB") derives public funding for the ROW from many entities, including, without limitation, SamTrans, Muni, and VTA, and that Peterson and Halstead Nursery have paid sales taxes, property taxes, income taxes, and other taxes, collected by the above entities, that have been used to purchase and operate the ROW. Plaintiffs allege that defendant Don Gage is the Chairman of the JPB, and in his official capacity, executes control over the JPB.

4. Plaintiffs Russell J. Peterson and Halstead Nursery Inc. allege that defendant California High Speed Rail Authority (hereinafter "Authority") derives public funding from the State of California, which obtains taxes from many sources, including, without limitation, sales taxes, property taxes, income taxes, and other taxes, collected from plaintiffs, and that comprise the majority, or totality, of funds that must be used to purchase the ROW from the JPB and develop the ROW. Plaintiffs allege that defendant Mehdi Morshed is the Executive Director of the California High Speed Rail Authority, and in his official capacity, executes control over the California High Speed Rail Authority.

5. Defendant Peninsula Corridor Joint Powers Board (JPB) is a public agency, headquartered in San Carlos, California, which owns the railroad right- of-way (ROW) between San Jose and San Francisco, California. JPB has a fiduciary duty to the taxpayers of San Mateo County and is a steward of decades of taxpayer-provided railway-related funds (including but not

limited to Measure A funds, and including the original taxpayer funds used to purchase the Peninsula right-of-way in 1991), and is obligated to serve the best interests of those taxpayers, including plaintiffs.

6. Defendant California High Speed Rail Authority (CHSRA) is a public body which has the responsibility for building and constructing a high speed rail project in the State of California. Part of the route for the project includes the Cal Train corridor segment between San Francisco and San Jose, California. The Authority cannot build or construct the high speed rail project in that ROW unless it has a valid contract with JPB which administers the ROW.

7. Does 1-5 are sued herein as fictitious defendants pursuant to the fictitious name provisions of the California Code of Civil Procedure. Plaintiff alleges that Doe Defendants make claims that they have some right to exercise control over the construction of a high speed rail project in the ROW in question.

8. Plaintiffs Russell J. Peterson and Halstead Nursery Inc. specifically allege, as discussed in greater detail below, that the JPB and the Authority have entered into a Memorandum of Understanding (hereinafter "MOU," see Exhibit B) with the intent to plan, develop, and construct, a high speed rail system over the ROW. Plaintiffs additionally allege that the JPB and the Authority's intent to plan, develop, and construct high speed rail along the ROW is illegal under the TRACKAGE AGREEMENT (Exhibit A) without the consent of Union Pacific Railroad. The TRACKAGE AGREEMENT gives Union Pacific, among other rights, the right to "perpetual and exclusive" use of the ROW for intercity passenger rail service, and includes intercity high speed passenger rail service. Plaintiffs assert that the TRACKAGE AGREEMENT requires defendants to obtain the consent of Union Pacific before any contracts or other agreements to construct high speed rail along the ROW are entered into. Plaintiffs allege that the proposed construction of the high speed rail project over the ROW will result in extensive damage to the track and other facilities owned by the counties of Santa Clara, San Mateo, and San Francisco, and will cost vast amounts of public funds if commenced. If defendants are allowed to proceed with the proposed construction illegally, plaintiffs allege that extensive waste and injury to the property and public funds of each respective county and the State of California will occur,

and that public funds will be put at risk in connection with the violation of Union Pacific's rights or their subsequent enforcement by Union Pacific against defendants. Plaintiffs assert that the MOU between the JPB and the CHSRA evidences the imminent intent of defendants to enter into contracts regarding illegal construction on the ROW, despite their receipt of multiple express communications by Union Pacific that Union Pacific will not permit construction of high speed rail on the ROW for safety, environmental, and legal reasons, among others (Exhibit C). The imminent intent of defendants to contract to build along the ROW without the consent of Union Pacific exposes the property and funds of the counties and the State to legal action and waste of all public resources devoted to planning and construction on the ROW. Plaintiffs request that the court declare the rights and obligations of the parties to the TRACKAGE AGREEMENT with respect to the construction of high speed rail over the ROW, so that imminent damage to public property and a corresponding waste of public funds can be avoided.

9. Pursuant to a series of mergers, by the year 1996, Union Pacific Ry. Corp. (hereafter "UPRR") acquired all the rights and interests of SP, including all rights and interests of SP as set forth in the TRACKAGE AGREEMENT. UPRR therefore succeeded to all those rights and enjoys and owns all those rights at the present time and in perpetuity, as the TRACKAGE AGREEMENT specifies and to which JPB agreed.

10. Plaintiff alleges that JPB and the AUTHORITY intend to enter into a formal written contract providing for the construction of a high speed rail system on the ROW; as evidence of this intent, see Exhibit "B," which is a MEMORANDUM OF UNDERSTANDING between the AUTHORITY and JPB. This memorandum of understanding (hereafter "MOU") is not the formal contract; instead, it is similar to an agreement to agree, and is evidence of the imminent intent of the defendants to start construction of the subject project on the Peninsula ROW. This MOU is an admission by defendants that their intended activities do indeed fall within the TRACKAGE AGREEMENT (Exhibit A) over which UPRR has jurisdiction, because the MOU characterizes what the Authority plans to provide as intercity passenger rail service and because the MOU specifically contemplates by its very language the "alteration and improvement" of the ROW from San Jose to San Francisco—activities over which UPRR has

perpetual and exclusive control.

11. Plaintiff alleges that no construction or alteration which can only be undertaken with the consent of UPRR of the project on the ROW and no alteration of the ROW to accommodate high speed rail can legally occur unless UPRR expressly consents in writing to such activities. This is by reason of numerous provisions of the TRACKAGE AGREEMENT (Exhibit "A"). The TRACKAGE AGREEMENT contains, inter alia, the following provisions bearing on this issue:

11.1 UPRR was granted the perpetual and exclusive right to provide freight service and intercity passenger service over the ROW. See Trackage Agreement, p. 1, sections B, C; p. 6, section 2.1; p. 7, sections 2.4 and 2.5.

11.2 The user's (UPRR's) usage rights concerning this ROW shall be exclusive and no other person or entity shall be entitled to or granted any rights to such use for such purposes (intercity passenger rail service). See p. 7, section 2.4.

11.3 The purpose of the agreement is to define the trackage rights retained by user (UPRR) with regard to user's exclusive, present, and future freight and intercity passenger service on the peninsula ROW. See page 1, section C.

11.4 The phrase "Intercity Passenger Service" is defined in the trackage agreement to mean intercity railroad passenger (other than Commuter Service) provided by NRPC or any other operator with whom user (UPRR) contracts to provide intercity passenger service over the Joint Facilities (the ROW) in accordance with this agreement. See page 5, section 1.15. This provision means that any organization or entity which plans to provide intercity passenger service, in addition to Cal Train, cannot do so unless UPRR expressly agrees to such an operation. This is made clear by the agreement's reference to NRPC, which refers to the National Railroad Passenger Corporation (known as AMTRAK). See page 5, section 1.22. Amtrak operates the existing commuter service through Cal Train.

8.5 "Commuter service" is presently provided on the Row and is operated currently by JPB through its Cal Train operations; A "Commuter Service" is expressly defined so as to exclude Intercity Passenger Service. See page 2, section 1.5.

11.6 Pursuant to these provisions, UPRR has the exclusive power to hire an operator to provide intercity passenger service on the ROW, and has the sole discretion to decide whether anyone is to operate intercity passenger rail service on the ROW and which operator provides the service, if any. Plaintiff specifically alleges that the proposed high speed rail service planned by the AUTHORITY, is in fact "Intercity Passenger Service," as defined in the TRACKAGE AGREEMENT. Accordingly, UPRR has perpetual and exclusive control over the manner in which such service is provided or whether the service and its related facilities are permitted at all in the ROW.

11.7 The TRACKAGE AGREEMENT reserves to UPRR the perpetual and exclusive right to make changes or additions to the ROW for the provision of freight and intercity passenger service. See p. 9, section 2.11. This provision means that UPRR has the exclusive right to do all construction or alteration of the ROW having to do with the tracks and all related facilities as pertaining to freight and intercity passenger service. No other entity may engage in such activities without the consent of UPRR.

11.8 The trackage agreement prohibits the retirement, withdrawal, elimination, or disposal of any part of the joint facilities (meaning all the property on and in the ROW) unless both the JPB and UPRR consent. See page 11, section 2.15. Plaintiff alleges that the Authority's plans to provide high speed rail service on the peninsula ROW will involve substantial alteration, disposal, and elimination of land and facilities. In addition, the demolition of large portions of the ROW and the joint facilities will occur, triggering the applicability of these provisions of the agreement and the necessity of UPRR's consent before any such activity can legally occur.

12. Plaintiff specifically alleges that defendants have not obtained the express consent of UPRR with respect to any of the above planned operations on the ROW. Despite the fact that the UPRR is to play an integral and fundamental role in the details of any implementation and construction of the high speed rail project, defendants in their MOU (Exhibit B) make no mention whatsoever of any plans to consult with UPRR or to involve them to any degree--evidence of their intention to take the position that the consent of UPRR is not required. Defendants take this position in their MOU despite the fact that they knew, prior to the MOU, that UPRR had, in

writing, expressed strong reservations and warnings concerning the contemplated activities of the defendants. See the UPRR letter of February 23, 2009, to the Authority expressing numerous objections to its environmental statement (attached hereto as Exhibit C). In possession of such knowledge, the defendants in their MOU make no mention of UPRR's rights whatsoever. Exhibit C demonstrates that the position of the UPRR is not an idle one, and UPRR expects to be involved intimately in any implementation and planning of the project. The conduct of the defendants evidences their intent not to include UPRR, despite the legal obligation imposed upon defendants to do so.

13. This Court should declare the rights and obligations of the parties with respect to the anticipated high speed rail project. Specifically, plaintiff desires a declaration that the express consent of UPRR is necessary and required before any contracts are entered into between JPB and the AUTHORITY for construction or alteration of the ROW. Such a declaration is necessary to prevent an illegal act from taking place with the resulting waste of public assets, resources, and funds.

14. Plaintiff specifically alleges that defendants are planning to enter into contracts for the construction of the project without obtaining the express consent of UPRR as required under the TRACKAGE AGREEMENT, or in the belief that no such consent is legally required, and that a declaration of the rights and obligations of the parties would serve to avoid the waste of funds and damage to public property that would otherwise occur without the court's declaration of rights and obligations.

15. Plaintiff alleges that UPRR, pursuant to its rights under the TRACKAGE AGREEMENT, is in a position to protect the interests of the residents of the Peninsula on the ROW, and that those public interests and the interests of plaintiff in such things as increased safety and efficiency and prudent use of public resources, will be served by acknowledging the rights of UPRR under the trackage agreement. UPRR is also in a position to work with the towns, cities, and communities of the Peninsula to protect the aesthetics of their geographical area and to better protect the environmental concerns of those communities and their residents concerning any deleterious effects of the high speed rail project.

WHEREFORE, plaintiff prays for judgment against defendants as follows:

1. For a declaration that no contracts between defendants for the construction of a high speed rail facility on the ROW may be entered into, nor any construction undertaken related to the project on the ROW, unless and until the express written consent of UPRR has been obtained for such undertakings.

2. For costs of suit; and

3. For attorney fees as provided by law.

Dated: August 28, 2009

By: ZACHARY TYSON

486749

EXHIBIT A

TRACKAGE RIGHTS AGREEMENT --- PENINSULA MAIN LINE AND SANTA CLARA/LICK LINE

This AGREEMENT dated as of December 20, 1991, is by and between the PENINSULA CORRIDOR JOINT POWERS BOARD, a joint powers agency created under California law, (hereinafter referred to as "Owner") and SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Delaware corporation, (hereinafter referred to as "User");

RECITALS:

A. Owner and User have entered into a Purchase, Sale and Option Agreement dated as of November 22, 1991 ("Sale Agreement") providing, in part, for the purchase by Owner from User of certain properties in San Francisco, San Mateo and Santa Clara Counties, California including the Peninsula Main Line and the Santa Clara/Lick Line (both as defined in Section 1 hereof and as more fully described in Exhibit A hereto);

B. Pursuant to the Sale Agreement, Owner acquired the Peninsula Main Line and the Santa Clara/Lick Line for the purpose, in part, of providing Commuter Service (as defined in Section 1 hereof) and for any purpose other than those reserved exclusively to User in the Sale Agreement and User retained for itself and its successors and assigns a perpetual and exclusive easement (as set forth in the deeds and assignments conveying said properties) in and trackage rights over such properties acquired by Owner for User's present and future Freight Service and Intercity Passenger Service (both as defined in Section 1 hereof).

C. Owner and User desire to set forth the terms of the reservation by User of the trackage rights retained for User's exclusive present and future Freight Service and Intercity Passenger Service on the Peninsula Main Line and the Santa Clara/Lick Line.

D. Owner and User also desire to set forth the terms of Owner's Bridge Trackage Rights over User's Cahill/Lick Line for Gilroy Commuter Service (all as defined in Section 1 hereof).

NOW THEREFORE, it is mutually agreed by and between the parties hereto as follows:

Section 1. DEFINITIONS

The following capitalized terms are used in this Agreement with the following meanings:

1.1 "AAR" shall mean the Association of American Railroads.

1.2 "Bridge Trackage Rights" shall mean exclusive Gilroy Commuter Service trackage rights for Gilroy Commuter Service Trains only over User's Cahill/Lick Line, over which segment there shall be no intermediate Gilroy Commuter Service station stops; however, Owner's Trains may enter or leave the segment at any point. These Bridge Trackage Rights are to be used only in conjunction with the trackage rights granted (pursuant to the Lick/Gilroy Trackage Rights Agreement) by User to Owner from Lick (at or near Milepost 51.4) to Gilroy (at or near milepost 80.7), for Trains in Gilroy Commuter Service.

1.3 "Cahill Yard" shall mean the yard in front of the San Jose passenger station at San Jose, California, as more fully described in Exhibit A hereto.

1.4 "Changes and/or Additions" shall mean any capitalized improvements including, without limitation, the additions, betterments, construction, reconstruction, modifications and renewals thereof and additional facilities, regardless of book treatment as an expense or capital item, but excluding capitalized maintenance provided for in Section 9.

1.5 "Commuter Service" shall mean the operation by Owner (or an Operator for Owner) of Trains that provide commute passenger service on the Joint Facilities (excluding User's Cahill/Lick Line) between San Francisco (at or near Milepost 0.147) and Lick (at or near Milepost 51.4), California in San Francisco, San Mateo and Santa Clara Counties, and frequently characterized by reduced fare, multiple-ride and monthly commutation tickets. Commuter Service as so defined shall not include Intercity Passenger Service. The term "Commuter Service" shall also include Owner's Trains and Equipment operated for the purpose of Equipment review, schedule checks, personnel training, Changes and/or Additions and maintenance of way activities.

1.6 "Customary Additives" shall mean elements of cost added to billings of either party to the other that generally are calculated as a percentage of direct labor costs and are intended to compensate for, without limitation, paid holidays, vacation and personal leave days, health and welfare benefits, payroll taxes and administrative and supervisory expenses that include direct and general overhead, inclusive of a customary one percent (1%) additive for special administrative costs related to billing

preparation, and are subject to periodic changes depending upon industry practices and the provisions of Section 11.3. As an example of such additives, Exhibit B sets forth 1990 amounts as represented by SPT to JPB.

1.7 **"Designated Freight Trackage"** shall mean Trackage which is part of the Joint Facilities (excluding User's Cahill/Lick Line), which is located on real property owned by Owner (as described on Exhibit A hereto), which is used now or in the future solely for Freight or Intercity Passenger Service and which shall be maintained at the sole cost and expense of User (unless the parties have agreed in writing to use also by the Owner, in which case sharing of maintenance costs shall be as agreed to in writing by the parties notwithstanding the provisions of Section 9.1 hereof) including, without limitation, (i) the present yard Trackage at South San Francisco, (ii) the proposed gauntlet Track Structure between Milepost 3.18 and Milepost 5.26, (iii) storage Track Structure (for two tracks) between Bayshore at Milepost 4.9 and Brisbane at Milepost 7.1, and (iv) upon the approval of Owner (which shall not be unreasonably withheld), such additional Freight Service support Trackage and other facilities to meet User's Freight Service needs.

1.8 **"Effective Date"** shall have the meaning set forth in Section 11.12.

1.9 **"Equipment"** shall mean locomotives, cars, cabooses, hi-rail vehicles, other vehicles, and machinery which are capable of being operated on Joint Facilities.

1.10 **"Exclusive Commute Trackage"** shall mean that part of the Joint Facilities, excluding User's Cahill/Lick Line, (which is described by the designated line symbols on Exhibit A), including yard or other side Trackage used solely by Owner, and including but not limited to the double main Trackage from Santa Clara Junction to Cahill Yard, the passenger Trackage at Cahill Yard, the magnetic westerly main Trackage from Cahill Yard to Auzerais Street at Milepost 47.5 and all new Trackage which Owner may construct between Auzerais Street and Lick at Milepost 51.4, which Owner shall maintain at its sole cost and expense (unless the parties have agreed in writing to use also by User, in which case sharing of maintenance costs shall be as agreed to in writing by the parties notwithstanding the provisions of Section 9.1 hereof).

1.11 **"Fiscal Year"** shall mean the period beginning July 1 of any calendar year and ending June 30 of the following calendar year.

1.12 **"Freight Service"** shall mean User's railroad operations contemplated hereunder in furtherance of transporting freight commodities of all types and description in Trains whether loaded

or empty, including personnel training, and the use of all Equipment and Non-Revenue Equipment for such operations.

1.13 "Gilroy Commuter Service" shall have the meaning set forth in Section 1.13 of the Lick/Gilroy Trackage Rights Agreement.

1.14 "ICC" shall mean the Interstate Commerce Commission.

1.15 "Intercity Passenger Service" shall mean intercity railroad passenger service (other than Commuter Service) provided by NRPC or any other Operator with whom User contracts to provide Intercity Passenger Service over the Joint Facilities in accordance with this Agreement.

1.16 "Joint Facilities" shall mean the Peninsula Main Line and the Santa Clara/Lick Line, Designated Freight Trackage, Exclusive Commute Trackage, and only that portion of the New Coast Main consisting of User's Cahill/Lick Line, and all Changes and/or Additions thereto now or in the future.

1.17 "Lick/Gilroy Trackage Rights Agreement" shall mean that agreement between User and Owner dated as of the date hereof which grants Owner trackage rights over the rail lines of User from milepost 51.4 at or near Lick to milepost 80.7 at or near Gilroy.

1.18 "Materials Additives" shall mean elements of cost customarily charged by railroads to one another and which are to be added to any and all materials cost billings of either party to the other and that generally are calculated as a percentage of direct costs, are intended to compensate for store, purchasing and handling expenses, sales or use taxes, foreign line freight, and on-line freight and are subject to periodic changes depending upon industry practices and the provisions of Section 11.3. As an example of such additives, Exhibit B sets forth 1989 amounts as represented by SPT to JPB.

1.19 "New Coast Main" shall mean Track Structure of (i) the No. 1 Track, (ii) User's Cahill/Lick Line, and (iii) all Track Structure located on property of Owner magnetic east of the Track Structure described in (i) and (ii) above, all as more fully described in Exhibit A hereto.

1.20 "Non-Revenue Equipment" shall mean Equipment which is maintenance of way equipment and freight cars that are either empty or loaded only with maintenance of way equipment or material and equipment transported for the internal use of either party including, without limitation, rails, ties, ballast, and other track materials, and signal and bridge materials and supplies.

1.21 "No. 1 Track" shall mean the existing yard Track Structure designated as User's "No. 1 Track" on the easterly side of the double main Track Structure between Milepost 44.0 at or near

Santa Clara Junction and the southern end of Cahill Yard at or near Milepost 47.1.

1.22 "NRPC" shall mean the National Railroad Passenger Corporation, or Amtrak, in all circumstances other than in a capacity as Operator for Owner.

1.23 "NRPC Agreement" shall mean the Agreement between NRPC and User dated April 16, 1971, as amended from time to time.

1.24 "Operator" shall mean the person, firm, corporation or other legal entity utilized by Owner or User to conduct, on its behalf and for its account, operations on the Joint Facilities in accordance with this Agreement.

1.25 "Peninsula Main Line" shall mean the Trackage and the right-of-way and real estate underlying said Trackage between Milepost 0.147 at or near 4th and Townsend Streets in San Francisco County, California and Milepost 44.0 at or near Santa Clara Junction in Santa Clara County, California, all as more fully described in the Sale Agreement and in Exhibit A hereto.

1.26 "Sale Agreement" shall have the meaning set forth in Paragraph A of the recitals to this Agreement.

1.27 "Santa Clara/Lick Line" shall mean the Trackage and the right-of-way and real estate underlying said Trackage between Milepost 44.0 at or near Santa Clara Junction and Milepost 51.4 at or near Lick, all in Santa Clara County (including the fee ownership, easements (but excluding User's easements)), and franchises of the real estate and right-of-way underlying the Trackage) but excluding the New Coast Main, all as more fully described in the Sale Agreement and in Exhibit A hereto.

1.28 "Service(s)" shall mean Commuter Service, Freight Service and Intercity Passenger Service collectively or any of them individually, as applicable.

1.29 "SFGTF" shall have the meaning set forth in Section 9.2 and Exhibit D or as it may be amended by written agreement of the parties.

1.30 "Track Structure" shall mean rail and fastenings, switches and frogs complete, ties, ballast, and signals.

1.31 "Trackage" shall mean Track Structure and all appurtenances thereto, including without limitation, bumpers, roadbed, embankment, bridges, trestles, tunnels, culverts or any other structures or things necessary for support of and entering into construction thereof, and, if any portion thereof is located in a thoroughfare, the term shall include pavement, crossing planks and other similar materials or facilities used in lieu of pavement

or other street surfacing material at vehicular crossings of tracks, culverts, drainage facilities, crossing warning devices, and any and all work required by lawful authority in connection with construction, renewal, maintenance and operation of said Track Structure and all appurtenances thereof and Changes and/or Additions thereto now or in the future.

1.32 "Train(s)" shall mean a locomotive unit, or more than one such unit, coupled, with or without cars or caboose.

1.33 "User's Cahill/Lick Line" shall mean the existing single main Track Structure between Cahill Yard at or near Milepost 47.1 and Lick at or near Milepost 51.4.

Section 2. RIGHTS OF OWNER AND USER

2.1 **User's Reservation:** Subject to the terms of this Agreement, User reserves the perpetual and exclusive right to conduct Freight and Intercity Passenger Service over the Joint Facilities (excluding User's Cahill/Lick Line which User retains ownership of, and excluding Exclusive Commute Trackage exceptto the extent provided in Sections 1.10 and 2.4 hereof). Owner confirms User's reservation of said right in the Sale Agreement.

2.2 **Authority:** Owner represents that it has the right and authority to confirm User's reservation of perpetual and exclusive trackage rights (which rights do not include Exclusive Commute Trackage except as provided in Sections 1.10 and 2.4 hereof) over the Joint Facilities (excluding User's Cahill/Lick Line) as contemplated herein without the concurrence or approval of any other person or entity, except for regulatory approvals or exemptions contemplated by Section 8.1 hereof.

2.3 **Ownership:**

(a) Owner shall own all of the Peninsula Main Line and the Santa Clara/Lick Line, including Designated Freight Trackage, existing at the date of execution of this Agreement.

(b) User shall own the New Coast Main, but Owner shall own the real property underlying the New Coast Main.

(c) Owner shall own those Changes and/or Additions and capitalized maintenance to the New Coast Main made at its sole cost and expense. User shall own such Changes and/or Additions and capitalized maintenance to the New Coast Main made at its sole cost and expense. Owner and User shall jointly own such Changes and/or Additions and capitalized maintenance to the New Coast Main made at their shared cost and expense in the same proportion as the respective shares of the cost and expense bears to the total cost

and expense. Owner shall not remove any Changes and/or Additions or capitalized maintenance items to the New Coast Main without the written consent of User as long as User holds itself out to provide Freight or Intercity Passenger Service over the applicable portion of the New Coast Main or such Services have not been abandoned; provided, however, in the event that Owner has permanently ceased to provide Commuter Service over all or substantially all of the Santa Clara/Lick Line, User shall pay Owner for the unamortized value of such Changes and/or Additions made by Owner on the New Coast Main. At the time that User no longer holds itself out to provide Freight and Intercity Passenger Service and such Services have been abandoned, Changes and/or Additions or capitalized maintenance items shall be returned to Owner to the extent of Owner's interest in such Changes and/or Additions and capitalized maintenance items.

(d) Owner shall own all Changes and/or Additions to the Joint Facilities (other than User's Cahill/Lick Line) and all capitalized maintenance provided for in Section 9 hereof.

2.4 **User's Rights:** For the purpose of conducting Freight and Intercity Passenger Service, User has the perpetual right of access to and from and use of the Joint Facilities, except for the Exclusive Commute Trackage unless otherwise agreed to in writing by the parties. User shall also have perpetual rights, subject to the terms of this Agreement including the restrictions concerning the Exclusive Commute Trackage, solely to serve all existing and future industries, team or house tracks or branches located on or served off any existing or future turnouts or leads from or to the Joint Facilities or No. 1 Track. User shall have use of the Exclusive Commute Trackage for the sole purpose of obtaining necessary access to provide Freight Service to existing or future industries and branch lines served from the Joint Facilities or No. 1 Track. User's rights of use under this section, for the purposes specified in this section, shall be exclusive, and no other person or entity shall be entitled to or be granted any rights to such use for such purposes.

2.5 **Owner's Rights:** Subject to the limitations otherwise set forth in the Sale Agreement and in this Agreement, Owner (or any Operator designated by Owner) shall have the right to use existing and future Joint Facilities (excluding User's Cahill/Lick Line) for any purpose other than rail Freight and Intercity Passenger Service.

2.6 **Freight Trackage:** Except as may be otherwise agreed in writing by the parties, User retains the exclusive and perpetual ownership of and right to use and control the New Coast Main and User retains the exclusive and perpetual right to use and control the Designated Freight Trackage; however, User may allow Owner to use such portions of the South San Francisco Yard and other Designated Freight Trackage as User decides, from time to time, are

not needed by User to support its operations. User shall not unreasonably withhold, condition, or delay its permission for such use; provided, however, that during such use, User's operations shall have priority over Owner's use. In such case, maintenance and capital expenses will be apportioned on a basis agreed by the parties in writing notwithstanding the provisions of Sections 9.1 and 10.2 hereof.

2.7 **Intercity Passenger Service Agreement:** Intercity Passenger Service on the Joint Facilities (except for User's Cahill/Lick Line) shall be subject to the following provisions:

(a) Owner shall permit User to allow NRPC Intercity Passenger Service Trains to be operated over the Joint Facilities (except for User's Cahill/Lick Line) in accordance with the terms of the NRPC Agreement in effect as of the date of this Agreement with the understanding that any change subsequent to the date of this Agreement in Intercity Passenger Service, including but not limited to the number or schedule of Trains, shall be subject to Owner's consent under Section 2.7(b) hereof.

(b) User may amend its present or any subsequent NRPC Agreement and enter into any new agreements and amendments thereto with NRPC or with any other party for the provision of Intercity Passenger Service over the Joint Facilities (except User's Cahill/Lick Line) with the consent of Owner, which shall not be unreasonably withheld, subject to the provisions of Section 4.3 when Owner dispatches and controls the operations and provided that costs due to any such Intercity Passenger Service agreement, or amendment thereto or to Intercity Passenger Service operations pursuant thereto over the Joint Facilities (except for User's Cahill/Lick Line) and costs of changes necessitated by such agreements affecting line capacity, yard capacity, or the signal system shall be borne by User. The parties agree to negotiate in good faith with regard to any additional parties that may be engaged or User proposes to have engaged in Intercity Passenger Service.

(c) Notwithstanding the provisions of Section 2.7(b) above, no Intercity Passenger Service Trains shall operate on Exclusive Commute Trackage without a written agreement between Owner and User.

2.8 **Operator:** Either party may use an Operator or Operators to provide applicable Services pursuant to this Agreement.

2.9 **Owner's Bridge Trackage Rights:** User shall grant to Owner exclusive Bridge Trackage Rights, as defined in Section 1.2, over User's Cahill/Lick Line. User shall not enter into any agreement with or permit any additional Operator of Freight or Intercity Passenger Service Trains on User's Cahill/Lick Line which would materially impair or interfere with Owner's rights or use

pursuant to Section 4.5 hereof or under the Lick/Gilroy Trackage Rights Agreement. Upon completion of Owner's construction of its Trackage on the Joint Facilities between Auzerais Street at or near milepost 47.5 and Lick at or near milepost 51.4 and the commencement of Gilroy Commuter Service operations thereover, the Bridge Trackage Rights shall continue in effect only if User is granted access to and use of such newly constructed Owner's Trackage upon terms and conditions substantially similar to Owner's rights under the Bridge Trackage Rights and only so long as such access and use are made available to User (whether or not used by User).

2.10 **Physical Clearances:** Owner represents that the Joint Facilities (excluding User's Cahill/Lick Line) shall continue to have not less than existing clearances (as shown in User's records attached as Exhibit E) for the operation of Freight and Intercity Passenger Service. If User's Trains or Equipment require additional clearance, Owner agrees to provide said additional clearance in a timely manner at User's sole cost provided that such additional clearance would not materially impair or interfere with the usefulness or utility of the Joint Facilities (excluding User's Cahill/Lick Line) to Owner or Owner's operation or use of such Joint Facilities (excluding User's Cahill/Lick Line) or frustrate the purposes of this Agreement. In the event any work to be performed by Owner on the Joint Facilities (excluding User's Cahill/Lick Line) may affect the horizontal and vertical line clearances, Owner shall notify User and Owner shall cooperate with User to provide any such additional horizontal and vertical line clearances needed by User, provided that such additional clearances would not materially impair or interfere with the usefulness or utility of the Joint Facilities (excluding User's Cahill/Lick Line) to Owner or Owner's operation or use of such Joint Facilities (excluding User's Cahill/Lick Line) or frustrate the purposes of this Agreement and User shall pay the incremental costs required for such additional clearance requirements.

2.11 **Retention of Rights for Changes and/or Additions:** User retains the perpetual and exclusive right, for Freight and Intercity Passenger Service, to construct or reconstruct, with the consent of Owner (which shall not be unreasonably withheld, conditioned or delayed) Changes and/or Additions to the Joint Facilities (excluding User's Cahill/Lick Line and Exclusive Commute Trackage) consisting of railroad and railroad-related facilities necessary for and related to User's Freight and Intercity Passenger Service operations. Failure to reach agreement as to cost sharing for Changes and/or Additions subject to Section 10.3 shall constitute a reasonable basis for refusal of consent. Owner's consent will be given if such construction, reconstruction, or use shall not unreasonably interfere with Owner's existing or planned Commuter Service or with Owner's other planned or existing use of such portion of the Joint Facilities (excluding User's Cahill/Lick Line) and if the provisions of Section 8.3 are not otherwise

invoked by Owner. Changes and/or Additions consisting of Track Structure crossing other Track Structure at grade shall be treated as any other Changes and/or Additions under this Section; provided, however, that such Changes and/or Additions consisting of at grade crossings which do not result in a decrease in average Train speeds over the applicable Trackage shall not, absent other construction or reconstruction, be considered an unreasonable interference with Owner's use or planned use of the Joint Facilities (excluding User's Cahill/Lick Line). Notwithstanding the above, User may construct Changes and/or Additions which Owner has advised may unreasonably interfere with its planned use of the Joint Facilities (excluding User's Cahill/Lick Line), at User's sole risk. Such risk shall include the costs of removal of such newly constructed Changes and/or Additions at the time of actual use by Owner. User also retains the perpetual right to use, construct, reconstruct, or reimburse Owner for the construction or reconstruction of Changes and/or Additions to User's Cahill/Lick Line without the consent of Owner as long as the provisions of Section 9.3 would not be violated. All other Changes and/or Additions to User's Cahill/Lick Line shall be subject to Section 10.6 hereof. User also retains the perpetual and exclusive right to use, construct or reconstruct Changes and/or Additions to the New Coast Main (excluding User's Cahill/Lick Line) without the consent of Owner, except to the extent any such Trackage may be subject to Section 10.6 hereof. User retains the perpetual and exclusive right to use all such Changes and/or Additions to the Joint Facilities referred to in this Section 2.11 for Freight and Intercity Passenger Service, subject to Owner's rights of use thereof in accordance with the terms of this Agreement.

2.12 *Emergencies and Detours:* Either party may, at its sole discretion, allow the other party to use the Trackage of said first party in the Joint Facilities or No. 1 Track in emergency and detour situations. Any such use shall be subject to the prior written consent and upon the terms and conditions of the party granting such use.

2.13 Interim Operation Detour: Notwithstanding the provisions of Section 2.12, unless the parties otherwise agree in writing, during the period from the Effective Date until Owner completes the Changes and/or Additions to No. 1 Track pursuant to section 10.1(a) and (b) hereof, Owner grants its consent to allow User to use Owner's tracks consisting of Exclusive Commute Trackage between Santa Clara Jct. at or near Milepost 44.0 and the magnetic south end of Cahill Yard at or near Milepost 47.45. Such use shall be subject to the terms and conditions of this Agreement in the same manner and to the same extent as if User were operating over the Peninsula Main Line; provided, however, that, in lieu of Section 4.3, Owner shall establish reasonable terms and conditions for dispatching User's Trains in conjunction with Owner's Trains which shall minimize delays to both Owner's and User's operations; and further provided that notwithstanding the provisions of Section

9.2, the costs of ordinary and capitalized maintenance of the Trackage over which User will operate pursuant to this Section 2.13 for the first two years after the Effective Date shall be solely the responsibility of Owner and, thereafter, such costs shall be apportioned between the parties in accordance with Section 9.2(a) hereof.

2.14 **Authority and Enforceability:** Each party hereto respectively represents and warrants that it has the full power and authority to enter into this Agreement and to carry out the obligations contemplated hereby. Upon execution and delivery, this Agreement, including but not limited to the indemnification terms of Section 6 hereof, are enforceable against such party in accordance with its terms (except to the extent such enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium, or similar laws relating to creditor's rights generally and the availability of equitable remedies may be limited by equitable principles of general applicability).

2.15 **Retirement Limitations:** Subject to Section 8.3 hereof, neither Owner nor User shall make any retirement, withdrawal, elimination or disposal of any part of the Joint Facilities without the prior written consent of the other party which shall not be unreasonably withheld. The affected party will grant its consent under this Section if such retirement, withdrawal, elimination or disposal would not materially impair the usefulness of the Joint Facilities to such party or frustrate the purposes of this Agreement.

2.16 **Taxes:** Owner shall be responsible for all taxes assessed against it (or its Operators or other entities acting on its behalf or for its account), if any, as owner of the real and personal property which are part of the Joint Facilities (excluding User's Cahill/Lick Line) and of the real property underlying the New Coast Main and as holder of the Bridge Trackage Rights; provided, however, that User shall be responsible for any possessory interest tax assessed against it (or its Operators or other entities acting on its behalf or for its account), if any, as holder of the easement retained by User hereunder and under the Sale Agreement and as owner of the Track Structure and personal property which are part of the New Coast Main. Nothing contained in this Agreement shall be construed to make Owner liable to taxing authorities for any taxes which Owner, as a public entity, would not otherwise be liable; provided, however, that, for purposes of this Agreement, Owner shall indemnify User for all taxes assessed against any Operator for Owner or any other entity acting on Owner's behalf.

2.17 **Non-Use of Designated Freight Trackage:** In the event that all or any portion of the Designated Freight Trackage has not been used by User after the Effective Date for any continuous period of at least thirty-six (36) months, Owner may, during the

period of continuous non-use in excess of thirty-six (36) months, request in writing that User make application for and diligently pursue all necessary approvals or other actions to remove such unused Trackage, if such approvals or other actions are necessary, and if Owner so requests, (upon receipt of any necessary authority) to remove at its cost any and all such Trackage and Equipment and property of User thereon. Within ninety (90) days of such request, User shall make application for such approvals or other actions or, if no approvals or other actions are necessary, shall commence , at its cost, removal of such Trackage, Equipment and property and shall diligently progress completion of such removal. If approvals or applications are necessary, User shall commence removal of such Trackage, Equipment and property within ninety (90) days after receipt of such authorization and shall diligently progress completion of such removal. User shall not progress the above actions if it demonstrates justification for such non-use, which justification shall be provided to Owner in writing within ninety (90) days of the written request of Owner referred to above. Within ninety (90) days of receipt by Owner of such written justification, Owner shall notify User in writing as to whether it concurs in or disputes such justification. If Owner disputes such justification, the dispute shall be resolved by arbitration in accordance with Section 7 of this Agreement. If, however, such non-use continues so that such Trackage has not been used by User for a continuous period of five (5) years, then User, promptly upon notice from Owner shall apply for and diligently prosecute all governmental approvals or other actions necessary, if any, to remove said Trackage and (after receipt of such approvals or other actions), shall promptly at its cost remove said Trackage and Equipment and property of User thereon, if requested by Owner.

Section 3. <u>ASSIGNMENT</u>

This Agreement shall be binding upon and inure to the benefit of the parties hereto, their respective successors and assigns, provided, however, that:

(a) The rights and obligations of Owner hereunder may be assigned or sold in whole or in part without User's consent only to (i) Owner's successor agency; (ii) any one or more of Owner's member agencies or counties; (iii) the Peninsula Rail Transit District; (iv) the State of California Department of Transportation; or (v) an existing or to be formed public, quasi-public or nonprofit entity formed or authorized to own Owner's interest in the Joint Facilities (excluding User's Cahill/Lick Line), but only if such successors or assigns have the legal power and authority to undertake all of the rights and obligations of Owner hereunder including, but not limited to, the obligation to indemnify User pursuant to Section 6 hereof;

(b) User may assign or sell all or any part of its trackage rights hereunder without the consent of Owner only to: (i) any successor or affiliate of User, (ii) any other Class I railroad, or (iii) in connection with its trackage rights over the Santa Clara/Lick Line, to any Operator who is financially responsible and has a management team with a demonstrated record of reliable and safe railroad maintenance and operating experience; provided that such successors or assigns have the legal power and authority to undertake all of the rights and obligations of User hereunder including, but not limited to, the obligation to indemnify Owner pursuant to Section 6 hereof.

(c) User may assign or sell all or any part of its trackage rights hereunder to any person with the consent of Owner (which consent shall not be unreasonably withheld, conditioned or delayed) to any person and, in connection with its trackage rights over properties other than the Santa Clara/Lick Line, to any Operator who is financially responsible and has a management team with a demonstrated record of reliable and safe railroad maintenance and operating experience; provided that such party has the legal power and authority to undertake all of the rights and obligations of User hereunder including, but not limited to, the obligation to indemnify Owner pursuant to Section 6 hereof.

(d) Within ten (10) days after any assignment, the assignee shall execute and deliver to Owner and User a written instrument assuming all of the assignor's obligations hereunder, and an opinion of such assignee's counsel stating that such assignee is entitled to perform all of the assignor's obligations hereunder.

Section 4. OPERATIONS

4.1 **Management and Control:** Subject to Sections 4.2, 4.3, and 4.14 below, the management and operation (including dispatching) of the Joint Facilities (except for User's Cahill/Lick Line) shall be under the exclusive direction and control of Owner. User, at its sole cost and election may monitor dispatching operations over the Joint Facilities (excluding User's Cahill/Lick Line) on a reasonable basis. Owner, at its sole cost and election, may monitor dispatching operations over User's Cahill/Lick Line on a reasonable basis.

4.2 **Optional User Dispatching:** At Owner's option, User may continue to dispatch the Joint Facilities (excluding User's Cahill/Lick Line) in a manner that minimizes conflicts and is consistent with dispatching conditions existing prior to the Sale Agreement until Owner obtains dispatching capability; but, in no event later than December 31, 1993. Owner may, at its sole option, assume control and dispatching of the Joint Facilities (excluding User's Cahill/Lick Line) prior to December 31, 1993 by providing

thirty (30) days advance notice to User. Owner shall pay User a monthly rate of Eleven Thousand Five Hundred Dollars ($11,500) for each full month or pro rata for partial months that User provides such dispatching services. Such monthly payment shall be made not later than 45 days following the end of the month in which dispatching services were provided.

4.3 **User's Operating Windows:** Owner will provide User the ability to operate Freight Service on the Peninsula Main Line whenever there exists a period of at least thirty (30) minutes headway between passenger Trains including Owner's Commuter Service and/or User's Intercity Passenger Service. During the hours between 10 A.M. and 3 P.M., at least one thirty (30) minute headway "window" on each of the northbound and southbound main tracks of the Peninsula Main Line will be provided in Owner's scheduling for Trains in Freight Service that are capable of operating at Commuter Service Train speeds and will operate at such speeds when directed by Owner. Between midnight and 5 A.M., at least one main track of the Peninsula Main Line shall always be in service for Freight and Intercity Passenger Service, and User will be provided during that time an adequate number of thirty (30) minute headway windows for User to serve its Freight Service customers. Owner and User recognize that Intercity Passenger Service may also be conducted during other than times between midnight and 5 A.M. and that such Intercity Passenger Service may operate within less than a thirty (30) minute headway. Such headway shall be established by mutual agreement between the parties, their Operators and NRPC, as applicable. Neither party hereto shall unreasonably withhold its consent to such agreement. Owner's dispatching and operations on lines other than the Peninsula Main Line shall provide User with reasonable windows for operations to serve customers during non-peak hours based upon a schedule subject to mutual agreement. Neither party hereto shall unreasonably withhold its consent to such agreement.

4.4 **Use of Exclusive Commute Trackage:** Owner shall have the exclusive use and control of its Exclusive Commute Trackage unless otherwise agreed in writing by Owner and User and subject to Section 2.4 hereof.

4.5 **Use of New Coast Main:** Except to the extent of Owner's Bridge Trackage Rights, User shall have the exclusive use and control for Freight and Intercity Passenger Service operations of the New Coast Main provided, however, that Owner shall retain the control over that portion of the New Coast Main to the extent and at the location such Track Structure connects to or diverges from the Joint Facilities (excluding User's Cahill/Lick Line). To facilitate such control, User shall physically provide Owner with the capability to connect User's dispatching system with Owner's dispatching system, and User and Owner shall share equally in the costs thereof. User shall have exclusive authority to dispatch and control its Freight and Intercity Passenger Service Trains on the

New Coast Main and Gilroy Commuter Service Trains (which are operated over User's Cahill/Lick Line pursuant to Owner's Bridge Trackage Rights hereunder in conjunction with the Lick/Gilroy Trackage Rights Agreement). User shall dispatch all such Trains on User's Cahill/Lick Line on a "first-come, first served" basis, provided, however, that if User and Owner can reach agreement on a mutually satisfactory schedule for Gilroy Commuter Service Trains, pursuant to the Lick/Gilroy Trackage Rights Agreement, (and the parties expect to reach such agreement) User shall dispatch User's Cahill/Lick Line giving priority to those scheduled Gilroy Commuter Service Trains.

4.6 **Limitations on Liability:** Except as otherwise may be provided in Section 6, if the use of the Joint Facilities shall at any time be interrupted or traffic thereon or thereover be delayed for any cause, neither party shall have or make any claim against the other for loss, damage, or expense of any kind, caused by or resulting from such interruption or delay.

4.7 **Furnishing of Fuel, Train Supplies, Etc.:** Each party shall be responsible for furnishing, at its sole cost and expense, all labor, fuel, and Train supplies necessary for the operation of its own Trains over the Joint Facilities. In the event a party does furnish such labor, fuel, or supplies to another party hereto, the party receiving same shall promptly, upon receipt of billing therefor, reimburse the party furnishing same for its reasonable costs thereof, including Customary and Materials Additives.

4.8 **Operating Rules:** The operation by User on the Joint Facilities (excluding User's Cahill/Lick Line) shall at all times be in accordance with the rules, instructions, and restrictions of Owner. Except as otherwise provided herein, such rules, instructions, and restrictions shall be reasonable, just, and fair between the parties using the Joint Facilities and shall not unjustly discriminate against any of them.

4.9 **Communications:** The party using Trackage or Track Structure dispatched or controlled by the other party shall, at such using party's sole cost and expense, obtain, install and maintain in all Trains and Equipment used by it on such Trackage or Track Structure, such communication equipment as is necessary to allow the using party to communicate with dispatching and signaling facilities in the same manner as the dispatching party. The party in control of dispatching under the terms of this Agreement shall consult with the other party prior to adoption of new communication systems or signal systems for use on the Joint Facilities which theretofore have not been adopted generally in the railroad industry.

4.10 **Clearing Trains and Equipment:** If, by any reason of mechanical failure or for any other cause, the Trains or Equipment of Owner or User or their respective Operators become stalled or

disabled on the Joint Facilities and are unable to proceed, or fail to maintain the speed required of Trains or Equipment to meet normal schedules, or if in emergencies crippled or otherwise defective Equipment is set out from any such Trains on the Joint Facilities, then the party whose Trains or Equipment are involved in the incident shall be responsible for furnishing locomotive units or such other assistance as may be necessary to haul, help or push such Equipment or Trains, or to properly move the disabled Trains or Equipment. By mutual agreement of the parties or upon receipt of reasonable notice from the other party that the response of the party whose Trains or Equipment are involved in the incident has not been adequate relative to the scheduled uses of Joint Facilities, such other party may render such assistance as may reasonably be required in light of such scheduled uses, and the party whose Trains or Equipment are involved in the incident shall reimburse the other party, within forty-five (45) days after receipt of the bill therefor, for the reasonable cost and expense, including Customary and Materials Additives, of rendering any such assistance. The costs and expense of services referenced above in this Section 4.11, including without limitation liability (as that term is defined in Section 6) shall be treated in accordance with Section 6 hereof. If it becomes necessary to make repairs to crippled or defective Trains or Equipment of the Owner or User or their respective Operators in order to move Trains or Equipment from the Joint Facilities, such work shall be the responsibility of the party whose Trains or Equipment are involved in the incident. By mutual agreement of the parties or upon receipt of reasonable notice from the other party that the efforts of the party whose Trains or Equipment are involved in the incident to make the repairs are not adequate in light of the scheduled uses of Joint Facilities, such other party may take control of the repairs. If the repairs are performed by the other party, then the party whose Trains or Equipment are involved in the incident shall reimburse the other party for the cost thereof, within forty-five (45) days after receipt of the bill therefor, at the then current AAR dollar rate for labor charges found in the Office Manual of the AAR Interchange Rules.

4.11 Clearing Wrecks: Except as otherwise provided in Section 6, whenever the Owner's or User's Trains or Equipment on the Joint Facilities require rerailing, wrecking service or wrecking Train service, the party whose Train is involved shall be responsible for performing such service. Upon mutual agreement of the parties or upon receipt of reasonable notice from the other party that the response of the party whose Train is involved in the incident is not adequate in light of the scheduled uses of the applicable Trackage, the other party may take control of such rerailing, wrecking service or wrecking Train service as may be required. Whichever party has responsibility for maintenance and repair of the affected Trackage under the terms of Section 9 shall make such repairs to and restoration of the applicable Trackage as may be required. The cost and expense of services referenced above

in this Section, including without limitation, liability (as that term is defined in Section 6) shall be treated in accordance with Section 6 hereof. All Equipment and salvage shall be promptly picked up by the party whose Train is involved in the incident or such party's Operator or delivered to the party whose Train is involved in the incident or such party's Operator by the other party, and all costs and expenses, including Customary and Material Additives therefor, incurred by the other party shall likewise be paid to the other party by the party whose Train is involved in the incident. All costs and expenses to be borne under this Section by the party whose Train is involved in the incident shall be paid within forty-five (45) days after receipt of the bills therefor.

4.12 **Furnishing Power:** For the purposes of this Section 4.12 only, the term "stopped party" shall mean whichever of the following described entities whose Trains are stopped in the circumstances described in this Section: Owner, User, the Operator(s) of either Owner or User, NRPC, or any other entity permitted in accordance with the terms of this Agreement to operate Trains on the Joint Facilities. In the event Trains of a stopped party shall be forced to stop on the Joint Facilities for any reason including but not limited to, stoppage due to insufficient hours of service remaining among the stopped party's employees, and such Trains are unable to proceed, any entity referred to in this Section shall have the option to furnish motive power or such other assistance (including but not limited to the right to recrew stopped party's Trains) as may be necessary to haul, help or push such Trains, or to properly move Trains off the Joint Facilities. All cost and expense, including Customary and Materials Additives, to be borne by the stopped party under this Section shall be paid within forty-five (45) days to the party rendering motive power or other assistance after receipt of the bills therefor. Owner shall be responsible to the party rendering motive power for stoppage caused by its Operator(s) or other entities operating on its behalf and User shall be responsible to the party rendering motive power for stoppage caused by its Operator(s) or other entities operating on its behalf.

4.13 **Compliance with Laws:** Operations by Owner and User hereunder shall be in compliance in all material respects with all applicable laws and regulations including those relating to discharge of hazardous waste materials.

4.14 **Assumption of Dispatching:** In the event Owner becomes incapable of adequately performing dispatching functions on the Joint Facilities (excluding User's Cahill/Lick Line) for Freight and Intercity Passenger Service hereunder, arrangements will be made for the prompt and orderly transfer of such functions to User. In the event User becomes incapable of adequately performing dispatching functions on User's Cahill/Lick Line for Gilroy Commuter Service hereunder, arrangements will be made for the prompt and orderly transfer of such functions to Owner.

Section 5. EMPLOYEES

5.1 Owner's Employees: Owner shall employ all persons necessary to construct, maintain, repair, renew, and perform dispatching functions for the Joint Facilities excluding User's Cahill/Lick Line (but including signal system maintenance on the New Coast Main as provided in Section 9.1). Owner shall be bound to use reasonable and customary care, skill and diligence in the construction, maintenance, repair renewal, and dispatching functions respecting said Trackage and in managing same and User shall not (except as otherwise provided in Section 6 hereof), by reason of Owner's performing or failing or neglecting to perform any construction, maintenance, repair, renewal, dispatching functions, or management of said Trackage, have or make against Owner any claim or demand for any loss, damage, destruction, injury, or death whatsoever resulting therefrom.

5.2 User's Employees: User shall employ or cause to be employed all persons necessary to construct, maintain, repair, renew, and perform dispatching functions for the New Coast Main. User shall be bound to use reasonable and customary care, skill, and diligence in the construction, maintenance, repair, renewal, and dispatching functions respecting the New Coast Main and in managing same; and Owner shall not (except as otherwise provided in Section 6 hereof), by reason of User's performing or failing or neglecting to perform any construction, maintenance, repair, renewal, dispatching functions, or management of said Track Structure, have or make against User any claim or demand for any loss, damage, destruction, injury, or death whatsoever resulting therefrom.

5.3 Fair Treatment: All officers, agents, and employees of Owner and of User engaged in the management, operation, and maintenance of the Joint Facilities or any portion thereof shall perform their duties in a fair, impartial, and just manner with respect to the rights and obligations between the parties as provided in this Agreement.

5.4 Examinations: User, or User's Operator, and Owner, or Owner's Operator, shall require their respective employees to pass periodic examinations on the General Code of Operating Rules effective October 29, 1989, (or any successor publication), timetables, General Orders and Track Bulletins (all as amended from time to time) which shall be applicable to the operations on or along the Joint Facilities.

5.5 Rules Violations:

(a) Owner, or Owner's Operator, shall notify User in writing specifying the circumstances in the event User, User's employees, or User's Operator or any other entity with which User contracts to provide Intercity Passenger Service fails to abide by the rules, instructions and restrictions of the Owner, or Owner's Operator, governing the operation on or along the Joint Facilities (other than User's Cahill/Lick Line). User, User's Operator, or any other entity with which User contracts to provide Intercity Passenger Service shall take prompt action to correct the failure to abide by the rules, instructions, and restrictions of the Owner, or the Owner's Operator, governing the operation on or along the Joint Facilities (excluding User's Cahill/Lick Line). In the event User, User's Operator, or any other entity with which User contracts to provide Intercity Passenger Service must hold a formal investigation pursuant to a collective bargaining agreement relating to the neglect, refusal or failure of User, User's employees, User's Operators or any other entity with which User contracts to provide Intercity Passenger Service to abide by the rules, instructions, and restrictions of the Owner, or Owner's Operator, governing the operation on or along the Joint Facilities, (excluding User's Cahill/Lick Line) Owner, or Owner's Operator, shall cooperate with User, User's Operator, or any other entity with which User contracts to provide Intercity Passenger Service and make available personnel of Owner, or Owner's Operator, as witnesses for User, or User's Operator, in such formal investigation at the cost and expense of User.

(b) For operations over User's Cahill/Lick Line, the provisions of Subsection (a) of this Section 5.5 shall apply with Owner subject to the obligations of User and User subject to the obligations of Owner.

Section 6. LIABILITY

6.1 Assumption of Responsibility:

(a) Except as otherwise provided in Section 4.11 each of the parties hereto shall assume, bear and pay all the liabilities allocated to it as the responsible party under the terms of this Section 6. For purposes of this Section 6, the term "liability" shall include all loss, damage, cost, expense (including costs of investigation and attorney's fees and expenses at arbitration, trial or appeal and without institution of arbitration or suit), liability, claims and demands of whatever kind or nature arising out of an incident described in the applicable provision of this Section 6. Except as otherwise expressly provided in Sections 6.2(b), 6.2(d), 6.2(e), and 6.4, the responsibility for liabilities undertaken by each party under this Section 6 is without respect to fault, failure, negligence, misconduct, malfeasance or misfeasance of any party or its employees, agents or servants.

(b) All costs and expenses incurred in connection with the investigation, adjustment and defense of any claim or suit shall be included as part of the liability for which responsibility is assumed under the terms of this Section 6, including salaries or wages and associated benefits of, and out-of-pocket expenses incurred by or with respect to, employees of either party engaged directly in such work and a reasonable amount of allocated salaries and wages of employees providing support services to the employees so engaged directly in such work.

6.2 Allocation of Responsibilities:

(a) Liability for personal injury (including bodily injury and death) to, or property damage suffered by, an invitee of either party shall be the responsibility of and borne and paid solely by that party regardless of the cause of such loss or the fault of either party or whose Train or Equipment was involved, except as specifically provided in Section 6.2(b) and Section 6.4 below. For purposes of this paragraph, and without limitation, consultants and contractors of a party and any person who is on a Train or Equipment operated by or for the account of a party (other than an employee of a party engaged in performing duties for that party) shall be deemed to be an invitee of that party. All persons at or adjacent to a passenger station or loading platform shall be deemed to be invitees of Owner (other than employees, contractors and consultants, including employees of such contractors, of User or Operator of User engaged in performing duties for User or for any such Operator of User).

(b) After Owner shall have incurred aggregate liability under this Agreement and the Lick/Gilroy Trackage Rights Agreement in an amount equal to $25.0 million for injury to or damage suffered by its invitees for incidents occurring in any one calendar year, User shall bear a share of that portion of the aggregate liability to the Owner's invitees for that year that is in excess of $25.0 million in proportion to the User's relative degree of fault, if any; provided, that the User shall not bear liability to Owner's invitees in an amount in excess of $125.0 million for incidents occurring under this Agreement and the Lick/Gilroy Trackage Rights Agreement in such calendar year. In computing the $25.0 million base amount payable by Owner prior to any participation by the User, there shall be excluded any liabilities incurred due to the Excluded Conduct (defined below in Section 6.4) of Owner. After User shall have incurred aggregate liability under this Agreement and the Lick/Gilroy Trackage Rights Agreement in an amount equal to the $25.0 million for injury to or damage suffered by its invitees for incidents occurring in any one calendar year, Owner shall bear a share of that portion of the aggregate liability to User's invitees for that year that is in excess of $25.0 million in proportion to Owner's relative degree of fault, if any; provided, that Owner shall not bear liability to

User's invitees in an amount in excess of $125.0 million for incidents occurring under this Agreement and the Lick/Gilroy Trackage Rights Agreement in such calendar year. In computing the $25.0 million base amount payable by User prior to any participation by Owner, there shall be excluded any liabilities incurred due to the Excluded Conduct of User. Liability shall be deemed incurred on the date of the incident giving rise to such liability regardless of the date on which liability is paid or established. The determination of the relative fault of the parties in any proceeding establishing the liability shall be binding on the parties.

(c) Liability for personal injury (including bodily injury and death) to, or property damage suffered by, persons other than invitees of either Owner or User and casualty losses to property owned by the Owner and/or User shall be the responsibility of and borne and paid by the parties as follows regardless of the cause of such loss or the fault of either party except as provided in paragraphs (d) and (e) of this Section 6.2 and Section 6.4 below:

(i) Loss to Trains, Equipment and other property owned by Owner shall be the responsibility of the Owner and borne by it.

(ii) Loss to Trains, Equipment and other property owned by and freight transported by the User shall be the responsibility of the User and borne by it.

(iii) Loss to property jointly used by both parties and property jointly owned by Owner and User shall be the responsibility of and borne (A) totally by the single party whose Train or Equipment was involved in the incident giving rise to the loss, (B) equally by the parties if the Trains or Equipment of both parties were involved in the incident, and (C) by the party or parties responsible for costs of maintenance of the property pursuant to the cost allocation principles of Section 9 hereof if no party's Train or Equipment was involved in the incident.

(iv) Liability for personal injury (including bodily injury and death) to, or property damage suffered by, any employee of either party which occurs during the course of employment or while traveling to or from employment (an "employee") shall be the responsibility of and borne solely by the party employing such employee.

(v) Liability for personal injury (including bodily injury and death) to, or property damage suffered by, any person who is not an employee or invitee of either party (including without limitation persons using vehicular and pedestrian crossings and trespassers) shall be the responsibility of and borne (A) totally by the party whose Train or Equipment was involved in such loss if the Train or Equipment of only one party was involved, and (B) by the Owner if no Train or Equipment was involved in the incident; provided, however, that if no Train or Equipment was involved and the incident occurred on User's Cahill/Lick Line, User shall be responsible.

(d) Liability for personal injury (including bodily injury and death) to, or property damage suffered by, a person who is not an employee or invitee of either party shall be the responsibility of and borne by both parties in proportion to their relative degrees of fault if Trains or Equipment of both parties were involved in the incident giving rise to such injury or damage.

(e) Except to the extent of any contrary provision in the Sale Agreement, each party shall indemnify and hold harmless the other party, and that party's directors, officers, employees, agents, successors and assigns, and defend them with counsel reasonably satisfactory to the indemnitee, from and against any and all Environmental Claims, Environmental Expenses, and any damages or liabililities arising out of the discharge or release of any Hazardous Materials in, on or about the Joint Facilities by such party, or its employees, contractors, lessees, invitees, representatives, agents, Operators (including, but not limited to, NRPC), successors, or assigns. User shall further indemnify and hold Owner harmless, and defend Owner with counsel reasonably satisfactory to Owner, against any damages or liability caused by or arising out of a release or discharge of Hazardous Materials in, on or about the Joint Facilities occurring prior to the Effective Date of this Agreement. For purposes of this Subsection, the capitalized terms not otherwise defined in this Agreement shall have the meaning as the definition given to these terms in that certain Environmental Indemnity Agreement between the parties which is part of the Sale Agreement. Nothing herein is intended to, nor shall abrogate the rights and responsibilities of the parties contained in the aforesaid Environmental Indemnity Agreement.

6.3 **Insurance:**

(a) Owner and User shall each maintain general liability insurance in the amount of at least $100,000,000 per occurrence and shall either include all of their respective Operators (other than NRPC) as insureds under their respective policies or furnish

evidence of separate insurance of the same amount and type for each Operator (other than NRPC). Insurance shall be placed with a company or companies authorized to conduct business in California. Owner and User (and any Operator of either party if such Operator demonstrates to the reasonable satisfaction of the Owner and User sufficient financial capacity) may self insure to a level not to exceed $10.0 million.

(b) The general liability insurance required by Section 6.3(a) shall provide coverage for personal injury, bodily injury, death and property damage with respect to all operations of the Owner, User, and Operators, respectively. Such insurance shall include blanket contractual coverage, including coverage for written, oral and implied contracts and specific coverage for the indemnity provisions set forth in this Section 6. Each policy of general liability insurance obtained by the Owner and User shall name the other as an additional insured with respect to any liability to be borne by the party obtaining such insurance pursuant to the provisions of this Section 6.

(c) For any claims arising out of activities, products or operations resulting from or related to this Agreement, the insurance obtained pursuant to Section 6.3(a) shall be primary with respect to the obligation under this Agreement of the party obtaining the insurance and with respect to the interests of all parties added as additional insureds. Any other insurance maintained by an additional insured shall be excess of this coverage herein defined as primary and shall not contribute with it.

(d) Unless otherwise agreed by the Owner and User, the insurance required by Section 6.3(a) shall be maintained by each of the parties specified therein for the full term of this Agreement and shall not be permitted to expire or be canceled or materially changed except upon sixty (60) days' written notice to the other parties. Each insurance policy required by Section 6.3(a) shall be endorsed to state that coverage shall not be suspended, voided, canceled by either party, or reduced in coverage or limits except after sixty (60) days' prior written notice has been given to all insureds.

(e) Each of Owner and User shall cause its and/or its Operator's (other than NRPC's) insurers to provide the other with certificates of insurance and endorsements evidencing the provisions specified above in this Section 6.3 prior to commencement of operations under this Agreement.

(f) A failure of any party to maintain the insurance required by this Section 6.3 shall not relieve such party of any of its liabilities or obligations under this Agreement.

6.4 Limitations on Indemnification:

(a) The provisions of this Section 6.4 shall apply notwithstanding the provisions of Section 6.2 above. "Excluded Conduct" shall mean (i) an entire failure of care or the exercise of so slight a degree of care as to raise a presumption that there was a conscious indifference to the things and welfare of others, (ii) conduct constituting a reckless or wanton disregard of the probable results of such conduct, (iii) wilful misconduct, or (iv) conduct which would permit the award of exemplary or punitive damages. Neither party shall be indemnified for any loss or liability resulting from its own Excluded Conduct, and in any such case such party shall be responsible for and bear loss or liability in proportion to its relative degree of fault and such party shall be responsible for and bear all exemplary or punitive damages, if any, resulting from its Excluded Conduct. If any of the provisions of Section 6.2 would otherwise indemnify a party against liability, loss or damage that would be prohibited by or unenforceable under the laws of the State of California (including a determination that indemnification under the circumstances involved is against the public policy of the state), the indemnity provided by such provision shall be deemed to be limited to and operative only to the maximum extent permitted by law. Without limitation, if it is determined that any law or public policy of the State of California prohibits the indemnification of a party for its own sole negligence in any instance covered by the provisions of Section 6.2, those provisions shall be deemed to exclude indemnification for such party's sole negligence but to permit full indemnification, as specified in Section 6.2, if both parties were negligent. In the case of any liability, loss or damage for which the provisions of this Section 6.4 would prevent the indemnification of a party, such party shall be responsible for and bear such liability, loss or damage.

(b) Notwithstanding Section 6.2 above, Owner and User shall bear liability in proportion to their relative degrees of fault if, but only if, the liability arises solely out of a collision between a Train of Owner and a Train of User that occurs on User's Cahill/Lick Line during a "peak commuter period", as hereinafter defined, on a day during which Owner operates scheduled Gilroy Commuter Service Trains. This Subsection 6.4(b) shall cease to apply upon completion of Owner's construction of its Trackage on the Joint Facilities between Azurais Street at or near Milepost 47.5 and Lick at or near Milepost 51.4 and the commencement of the Gilroy Commuter Service operations thereover. As used in this Section 6.4(b), the term "peak commuter period" shall mean a single uninterrupted period in the morning and a single uninterrupted period in the afternoon to be designated by Owner from time to time upon not less than 90 days written notice from Owner to User; provided, however, that neither of such periods shall exceed five (5) hours and the two periods together shall not exceed nine (9) hours in the aggregate.

6.5 Scope of Indemnification:

In any case where a party is required under the provisions of this Section 6 to bear a loss or liability, it shall pay, satisfy and discharge such liability and all judgments that may be rendered by reason thereof and all costs, charges and expenses incident thereto, and such party shall forever indemnify, defend and hold harmless the other party and its commissioners, directors, officers, agents, employees, shareholders, parent corporation and affiliated companies or governmental entities from, against and with respect to any and all liabilities which arise out of or result from the incident giving rise thereto. If a party asserts that the other was guilty of Excluded Conduct and denies liability for indemnification of the other party based thereon, the party asserting such Excluded Conduct shall have the burden of proof in establishing such conduct. It is the intent of the parties that the indemnification provisions of this Section 6 shall apply to both the passive negligence and the active negligence of an indemnified party.

6.6 Procedure:

(a) If any claim demand shall be asserted by any person against an indemnified party under this Section 6, the indemnified party shall, within 30 days after notice of such claim or demand, cause written notice thereof to be given to the indemnifying party, provided that failure to notify the indemnifying party shall not relieve the indemnifying party from any liability which it may have to the indemnified party under this Section 6, except to the extent that the rights of the indemnifying party are in fact prejudiced by such failure. If any such claim or demand shall be brought against the indemnified party and it shall have given notice thereof to the indemnifying party, the indemnifying party shall have the right, at its own expense, to control (including the selection of counsel reasonably satisfactory to the indemnified party) or to participate in the defense of, negotiate or settle, any such claim or demand, and the parties hereto agree to cooperate fully with each other in connection with any such defense, negotiation or settlement. In any event, the indemnified party shall not make any settlement of any claims which might give rise to liability on the part of the indemnifying party under this Section 6 without the prior written consent of the indemnifying party, which consent shall not be unreasonably withheld, conditioned or delayed. If any claim or demand relates to a matter for which the parties, under the terms of Section 6.2, are to share liability equally or in proportion to their relative degrees of fault, each party shall be entitled to select its own counsel and defend itself against the claim at its own expense, and neither party shall make any settlement of any such claims without the prior written consent of the other party, which consent shall not be unreasonably withheld, conditioned or delayed.

(b) Subject to the provisions of Section 6.6(a), on each occasion that the indemnified party shall be entitled to indemnification or reimbursement under this Section 6, the indemnifying party shall, at each such time, promptly pay the amount of such indemnification or reimbursement. If the indemnified party shall be entitled to indemnification under this Section 6 and the indemnifying party shall not elect to control any legal proceeding in connection therewith, the indemnifying party shall pay to the indemnified party an amount equal to the indemnified party's reasonable legal fees and other costs and expenses arising as a result of such proceeding.

(c) Any dispute between the parties as to the right to indemnification or the amount to which it is entitled pursuant to such right with respect to any matter shall be submitted to arbitration pursuant to Section 7.

6.7 Operators:

Any Operator other than NRPC shall agree to be bound by the provisions of this section 6 unless otherwise agreed in writing by Owner and User. The parties will use reasonable efforts to extend the benefits of existing NRPC indemnities to Owner. For purposes of this Section 6, as between Owner and User, the Trains, Equipment, and actions of any Operator (including NRPC) or any other entity acting on behalf of and for the account of a party hereto shall be deemed to be the Trains, Equipment, and actions of such party. Nothing contained herein shall be construed to limit or waive the rights of a party hereto to seek indemnification or damages from its Operator(s) or other entities acting on its behalf, for actions of said Operator(s) or said entities.

6.8 Dollar Amount Adjustments:

Each of the dollar amounts set forth in Section 6.3(a) above shall be adjusted annually and every three years, respectively, for changes in the Consumer Price Index, but shall not be reduced below their initial levels. As used in this Section 6.8, the term "Consumer Price Index" shall mean the United States Department of Labor's Bureau of Labor Statistics' Consumer Price Index, All Urban Wage Earners and Clerical Workers, All Items, for the San Francisco area (1967=100). If the base year for the Consumer Price Index is changed from 1967, the Consumer Price Index shall be converted in accordance with the conversion factor published by the United States Department of Labor's Bureau of Labor Statistics. If the Consumer Price Index is discontinued or revised, such other governmental index or computation with which it is replaced shall be used in order to obtain substantially the same result as would be obtained if the Consumer Price Index had not been discontinued or revised.

6.9 **Not For Benefit Of Third Parties:**

The provisions of this Section 6 are not intended to confer any right, benefit, or cause of action upon any third party and are intended solely to deal with the allocation of liability, if any, as between the parties to this Agreement.

7. DISPUTE RESOLUTION AND BINDING ARBITRATION

7.1 **Settlement of Disputes:** Both of the parties hereto shall make every reasonable effort to settle any disputes arising out of their respective rights and obligations under this Agreement by prompt and diligent negotiations.

7.2 **Controversies Subject to Arbitration:** Any and all claims, disputes or controversies between Owner and User arising out of or concerning the interpretation, application or implementation of this Agreement, which cannot be resolved by the parties by negotiations, shall be submitted to binding arbitration as hereinafter provided.

7.3 **Arbitration Procedure:** The procedure for arbitration shall be as follows:

(a) In the event a claim, dispute or controversy subject to arbitration hereunder arises, either party may serve a written demand for arbitration in accordance with Section 7.3 of this Agreement upon the other party. If the claim, dispute or controversy is not resolved by the parties within thirty (30) calendar days after the service of the demand, the matter will be deemed submitted to arbitration.

(b) Within fifty (50) calendar days of service of a demand for arbitration, each party shall designate an arbitrator in writing and serve its designation upon the other party ("Noticed Party") in accordance with Section 7.3 of this Agreement. If the Noticed Party fails to timely designate the arbitrator to be designated by it, such arbitrator shall be appointed by the Presiding Judge (or Acting Presiding Judge) of the Superior Court of the County of Sacramento, State of California upon application of either party after ten (10) days' written notice to the other party. If each party has timely designated its arbitrator, or the Presiding Judge or Acting Presiding Judge has appointed an Arbitrator for one of the parties pursuant to the previous sentence, the two designated arbitrators shall, within seventy (70) calendar days of service of the demand for arbitration, designate a neutral third party arbitrator. The third party arbitrator shall be a qualified disinterested person, knowledgeable and experienced in rail operational matters and in the type of services contemplated by this Agreement. If the two arbitrators designated

by the parties fail to timely select a neutral third party arbitrator, either party may apply to the Presiding Judge (or Acting Presiding Judge) of the Superior Court of the County of Sacramento, State of California to select the neutral third party arbitrator.

(c) At any time, the parties may agree in writing on a sole arbitrator to decide the controversy.

7.4 **Rules of Arbitration:** The arbitration is to be conducted pursuant to Part 3, Title 9, of the Code of Civil Procedure, commencing with Section 1280, or to any successor or replacement provisions of said Code, and the arbitrators shall have all the powers and duties specified therein.

7.5 **Arbitration Schedule:** (a). The arbitration hearing shall commence no later than four months after service of the demand and shall be concluded no later than forty (40) calendar days after the hearing commencement date. The arbitration decision and award shall be rendered by the arbitrators within thirty (30) calendar days after conclusion of the arbitration hearing.

(b) The parties may extend any of the deadlines or time periods set forth above by mutual written stipulation. The arbitrators may extend the time for commencement of the arbitration hearings, conclusion of the arbitration hearings and/or the time for rendition of the arbitrators' decision and the award (but, with respect to rendition of the arbitration award, by no longer than an additional 30 calendar days), upon motion of either party or upon the arbitrator's own motion, upon a showing of good cause therefor.

7.6 **Pending Resolution:** During the pendency of such arbitration proceedings, the business, the operations to be conducted, physical plant to be used, and compensation for service under this Agreement, to the extent that they are the subject of such controversy, shall continue to be transacted, used, and paid in the manner and form existing prior to the arising of such controversy, unless the arbitrator shall make a preliminary ruling to the contrary. In the case of monetary disputes relating to amounts billed for the payment of operating, maintenance or capital costs and expenses under the terms of this Agreement, the party from whom a payment is allegedly owing shall make such payment notwithstanding such dispute and may submit the dispute to arbitration under this Section 7 only by seeking a refund through such arbitration.

7.7 **Cost of Arbitration:** Each party hereto shall bear the costs and expenses incurred by it in connection with such arbitration, including the cost of the arbitrator appointed by it, and both parties shall share equally the costs and expenses attributable to the services of the third arbitrator.

7.8 **Compliance:** For all purposes of this Agreement, each party is responsible for the compliance with all provisions of this Agreement by its Operator or Operators and User shall be responsible for compliance by NRPC.

Section 8. GOVERNMENTAL APPROVAL, TERM, AND ABANDONMENT

8.1 **Applications:** User shall, at its own cost and expense, initiate by appropriate application or petition and thereafter diligently prosecute any necessary proceedings for the procurement of consent, approval, or authority from any governmental agency for the sanction of this Agreement and the operations to be carried on by User hereunder. Owner, at its expense, shall assist and support said application or petition and will furnish such information and execute, deliver, and file such instrument or instruments in writing as may be necessary or appropriate to obtain such governmental consent, approval, or authority. User and Owner agree to cooperate fully to procure all such necessary consent, approval, or authority.

8.2 **Term:** Except as otherwise provided in Section 8.3 hereof, the term of the Agreement and the trackage rights provided for hereunder shall be perpetual.

8.3 **Abandonment or Discontinuance:**

(a) In the event that Owner contracts to sell all or substantially all of the Joint Facilities (other than User's Cahill/Lick Line) to a third party (other than those parties described in Section 3(a)), Owner may, at its sole cost and expense, file for permission from the ICC to abandon any Freight Service over the portion of the Joint Facilities (other than User's Cahill/Lick Line) that is to be sold. While User shall not object to such a filing, it shall be allowed to participate in the abandonment proceedings.

(b) In the event that Owner intends with reasonable certainty to commence construction of facilities on all or substantially all of the length of the Joint Facilities (other than User's Cahill/Lick Line) that are incompatible with the double mainline Freight Service, User shall consent to such diminished rights, provided that Owner shall have completed, at its sole cost and expense, the modification (whose plans and specifications have been approved by User) of the remaining single track (together with side track passing tracks and spur tracks) to be reasonably suitable for the volume and speed of the then existing Freight Service. Upon completion of such construction, User shall execute such documents as are reasonably necessary to extinguish the portion of the operating rights retained hereunder no longer required for Freight Service.

(c) In the event that Owner demonstrates a reasonably certain need to commence construction on all or substantially all of the length of the Joint Facilities (including User's Cahill/Lick Line) of a transportation system that is a significant change in the method of delivery of Commuter Service which would be incompatible with Freight Service on the Joint Facilities (other than User's Cahill/Lick Line), Owner may, at its sole cost and expense, file no sooner than nine months prior to the commencement of such construction for permission from the ICC to abandon the Freight Service over the portion of the Joint Facilities (excluding User's Cahill/Lick Line) upon which the construction is to occur. User shall not object to or oppose such a filing; however, it shall be allowed to participate in the abandonment proceedings.

(d) In the event that (1) Owner notifies User in writing that it has permanently ceased to provide Commuter Service on all or substantially all of the Joint Facilities (other than User's Cahill/Lick Line) and within six months after such notice, no other public or private entity has evidenced a willingness to provide such Commute Service, and (2) if Owner has not filed an ICC application to abandon under subsection (a) above, and (3) User desires to continue to provide Freight Service over such portion, then, within one year after Owner's notice, User shall purchase, and Owner shall sell, all of the applicable Joint Facilities at Net Liquidation Value including Owner's interest in the underlying real property at the mileage pro rata share of the purchase price in the Sale Agreement attributable to the portion of the Joint Facilities being purchased. Should the parties be unable to agree on the sale price within after sixty days after Owner has advised User of its proposed sale price, either party may submit the matter to binding arbitration under this Agreement. If neither party submits the matter to arbitration by the thirtieth day after such sixty-day period, Owner's contractual right to require User to purchase hereunder shall lapse.

8.4 Release: Upon termination of this Agreement, or any part thereof, each party shall forever release and discharge the other party of and from any and all manner of obligations, claims, demands, causes of action, or suits which it might have, or which might subsequently accrue to it growing out of or in any manner connected with, directly or indirectly, the contractual obligations under this Agreement in the involved Trackage, provided, however, the aforesaid relinquishment, abandonment, surrender, renunciation, release, and discharge of the parties shall not in any case affect any of the rights and obligations of either party which may have accrued, or liabilities accrued or otherwise, which may have arisen prior to such termination or partial termination. Upon any partial termination of the Agreement, however the same may occur, the terms and conditions hereof shall continue and remain in full force and effect for the balance of the Joint Facilities.

8.5 **Employees:** In the event of sale or of termination by abandonment pursuant to Section 8.3 hereof, Owner and User shall each be responsible for and shall bear labor claims of, and employee protection payable to, its own respective employees including any amounts that either Owner or User may be required to pay to its own respective employees pursuant to labor protective conditions imposed by the ICC.

8.6 **Limitation on Obligations:** Neither shall Owner have obligation to provide Freight or Intercity Passenger Service nor shall User have any obligation to provide Commuter Service. The abandonment of Freight or Intercity Passenger Service by User shall not create any obligation upon Owner to provide such Services, and the abandonment of Commuter Service by Owner shall not create any obligation upon User to provide such Service.

Section 9. **MAINTENANCE**

9.1 **Responsibility for Performance and Costs:** Owner shall physically perform the ordinary and capitalized maintenance on the Joint Facilities, (excluding User's Cahill/Lick Line) with the cost of such maintenance (other than for Exclusive Commute Trackage and Designated Freight Trackage) apportioned as described in Section 9.2 below. Owner shall physically perform the signal system maintenance on the New Coast Main. User shall pay the cost thereof with respect to the No. 1 Track, and the cost thereof with respect to User's Cahill/Lick Line shall be apportioned as provided in Section 9.2(b) below. Owner shall be responsible for all costs and expenses of the maintenance on Exclusive Commute Trackage except as provided in Sections 1.10 and 2.4 hereof. Owner shall perform the maintenance on Designated Freight Trackage, and all costs and expenses associated with such maintenance on Designated Freight Trackage shall be the responsibility of User except as provided in Sections 1.7 and 2.6 hereof. User shall either physically perform the maintenance on the New Coast Main (excluding signal system maintenance) or, upon written agreement of the parties, contract with Owner to perform such maintenance. All costs and expenses associated with such maintenance shall be apportioned pursuant to Section 9.2(b) hereof. No later than March 31 of each year, the party responsible for performing maintenance on any portion of the Joint Facilities (excluding User's Cahill/Lick Line) and the New Coast Main for which the other party has an obligation to pay or share the costs of hereunder will present such other party with a written estimated budget for costs and expenses for the applicable maintenance for the next-succeeding Fiscal Year. The party performing such maintenance may submit to the other party written proposed amendments, supplements or adjustments to said budget from time to time after submission of the initial estimated budget. Such initial estimated budget, and any amendments, supplements and adjustments shall be subject to the written consent of the

receiving party which shall not be unreasonably withheld, conditioned or delayed. The party performing such maintenance, during such next succeeding Fiscal Year shall bill the other party monthly on an estimated actual cost basis (including Customary and Materials Additives) for the other party's share of such maintenance costs. If it appears to the billed party that the monthly billing deviates substantially from that projected in the estimated budget, the billed party may request a written explanation from the party performing maintenance as to the reason for such deviation and such party shall provide such written explanation within fifteen (15) days after receipt of the request. If the parties are in disagreement as to any such monthly billings or the amounts claimed for such maintenance, such disputes shall be resolved in accordance with Section 7 of this Agreement. At the end of each Fiscal Year there shall be an adjustment if billed costs deviate from actual costs. To the extent possible, the parties shall negotiate appropriate flat rates for such maintenance costs within twelve months of the Effective Date unless extended in writing by the parties.

9.2 **Apportionment of Costs:** Costs of ordinary and capitalized maintenance (but not the costs of Changes and/or Additions themselves) of the Peninsula Main Line (other than Exclusive Commute Trackage and Designated Freight Trackage) for the first four (4) years after the Effective Date shall be solely the responsibility of Owner. Otherwise, Owner and User will share ordinary maintenance costs and capitalized maintenance costs for the Joint Facilities (excluding Exclusive Commute Trackage and Designated Freight Trackage) on the basis of the SFGTF, for which purpose User shall provide Owner with required data regarding User's Freight and Intercity Passenger Service operated on the Joint Facilities within ninety (90) days after the end of each Fiscal Year of this Agreement. Owner and User shall each respectively bear responsibility for the costs attributable to its respective Operator(s) and other entities acting on its behalf and for its account. The SFGTF shall be applied to the traffic on said Joint Facilities as follows:

(a) On the Peninsula Main Line. The SFGTF will be applied with Owner as the "dominant user." However, capital expenditures which are unique for Commuter Service only (e.g., electrification or station platforms) will be paid solely by Owner and not included in the SFGTF. Similarly, capital expenditures which are unique for Freight and Intercity Passenger Service (e.g., a gauntlet track in tunnels for oversized intermodal traffic) will be paid solely by User and not included in the SFGTF.

(b) On User's Cahill/Lick Line. The SFGTF will be applied with User as the "dominant user" until the total number of Owner's Trains in Gilroy Commuter Service in any Fiscal Year exceeds the number of User's Trains in Freight and Intercity Passenger Service in that Fiscal Year, in which case Owner will

become the "dominant user" as defined in the SFGTF for that Fiscal Year. Thereafter, the determination as to who is the "dominant user" shall be made for each Fiscal Year, with the party having the greater number of Trains designated as the "dominant user" for the applicable Fiscal Year. The same provisions prevail for applying capital expenditures which are unique to Gilroy Commuter Service or unique to Freight and Intercity Passenger Service to the SFGTF as stated in Section 9.2(a).

(c) On the main track portion of Exclusive Commute Trackage between Cahill Yard and Lick. During any period that User is provided access to and use of such Trackage pursuant to Section 2.9 hereof the SFGTF will be applied in the same manner as provided in Subsection 9.2(b) hereof, except that Owner shall be the initial "dominant user" instead of User, and the same conditions will prevail for applying capital expenditures which are unique to Commuter Service or unique to Freight and Intercity Passenger Service to the SFGTF as stated in Section 9.2(a).

9.3 **Level of Maintenance:** The Joint Facilities (other than Exclusive Commute Trackage) shall be maintained at the levels necessary to accommodate User's present and future Freight and Intercity Passenger Train operations, to allow User to maintain competitive service levels. The maintenance of Designated Freight Trackage shall be pursuant to an annual maintenance program mutually agreed by the parties. User shall maintain User's Cahill/Lick Line to a minimum of the existing condition as reflected in train speeds shown in User's Timetables, General Orders and Track Bulletins in effect as of the date of this Agreement, as attached hereto as Exhibit F. If Owner makes Changes and/or Additions to the User's Cahill/Lick Line in accordance with Section 10.8 below, User shall maintain User's Cahill/Lick Line as provided in Section 10.8 below.

9.4 **Protection of Operations:** Owner further agrees that maintenance and Changes and/or Additions activities affecting the Joint Facilities (excluding User's Cahill/Lick Line) shall not be scheduled to unreasonably delay or impair User's rights under Section 4.3 to provide Freight or Intercity Passenger Service on the Joint Facilities (excluding User's Cahill/Lick Line). User shall be given the same advance notice of maintenance plans and schedules as is provided to Owner's personnel. User further agrees that maintenance and Changes and/or Additions activities affecting User's Cahill/Lick Line shall not be scheduled to unreasonably delay or impair Owner's rights under Section 4.5 to provide Gilroy Commuter Service on User's Cahill/Lick Line. Owner shall be given the same advance notice of maintenance plans as is provided to User's personnel.

9.5 **Assumption of Maintenance:** In the event Owner becomes incapable of adequately performing maintenance functions hereunder for Freight and Intercity Passenger Service, arrangements will be

made for the prompt and orderly transfer of such functions to User. In the event User is physically performing maintenance on User's Cahill/Lick Line and becomes incapable of adequately performing maintenance functions hereunder for Gilroy Commuter Service, arrangements will be made for the prompt and orderly transfer of such functions to Owner.

Section 10. CAPITAL IMPROVEMENTS

10.1 **Owner Responsibility:** Owner shall provide, at its sole cost and expense, or reimburse User for the following Changes and/or Additions: (a) upgrading the present No. 1 Track to main line standards to not less than current Federal Railroad Administration Class 4 for the segment from Santa Clara Jct. at or near Milepost 44.0 to the magnetic north end of Cahill Yard at or near Milepost 46.75; (b) installation of a bidirectional centralized traffic control system for the No. 1 Track; and (c) all Changes and/or Additions on the Joint Facilities, excluding User's Cahill/Lick Line, (including but not limited to grade separations on the Peninsula Main Line) other than those Changes and/or Additions subject to Section 10.2 or Section 10.3. The Changes and/or Additions described in (a) and (b) above, which shall be owned by Owner, are set forth in Exhibit G and shall be completed within twenty-four (24) months of the Effective Date subject to the provisions of Section 2.13 hereof. The costs payable by Owner to User for the Changes and/or Additions described in (a) and (b) above shall be $1,980,000. Payment shall be due and payable by Owner upon the later of: (1) the ninetieth (90th) day after completion of such Changes and/or Additions; or (2) the second anniversary of the Effective Date. If payment is not made by Owner within the period above specified, Owner will pay to User interest on the amounts due at a rate equal to the interest rate paid by User during the then current applicable period to its major bank lenders under its principal financing facility. Such interest shall be payable monthly in arrears and shall be due on the first day of each calendar month with the final interest payment due on the day that the remaining principal balance is paid in full. Notwithstanding anything to the contrary above, the full amount of principal and interest due and payable by Owner hereunder shall be paid not later than forty-eight (48) months after the Effective Date.

10.2 **User Responsibility:** User shall bear the costs of Changes and/or Additions on Joint Facilities (excluding User's Cahill/Lick Line), including Designated Freight Trackage, which User has requested to be effected and which are not used in connection with Commuter Service.

10.3 **Shared Responsibility:** The cost of Changes and/or Additions on the Joint Facilities (excluding User's Cahill/Lick

Line) which User has requested and, based thereon, which Owner has agreed to undertake and has actually undertaken and which are used for both User's and Owner's operations shall be shared on a basis to be agreed by the parties.

10.4 **Grade Separations and Crossing:** Notwithstanding any other provisions of Section 10 of this Agreement (other than Section 10.9), the cost of new and upgraded grade separations and new or upgraded pedestrian or vehicular road crossings at grade on the Santa Clara/Lick Line and the New Coast Main (but not including the cost of maintenance or capitalized maintenance of any of the foregoing) shall be borne by the parties as follows:

(a) **Owner Responsibility:** Owner shall be solely responsible for the cost and expense of those separations and crossings covered hereunder which (i) it has instituted and undertaken for its benefit and which were not requested by User, (ii) Owner has requested, and based thereon, User has actually undertaken, or (iii) were requested, required or funded by any other party and which Owner has instigated, induced, actively and substantially supported, or solely caused.

(b) **User Responsibility:** User shall be solely responsible for the cost and expense of those separations and crossings covered hereunder which (i) it has instituted and undertaken for its benefit and which were not requested by Owner, (ii) User has requested, and based thereon, Owner has actually undertaken, or (iii) were requested, required or funded by any other party and which User has instigated, induced, actively and substantially supported, or solely caused.

(c) **Shared Responsibility:** Owner and User shall share the costs and expenses for all other grade separations and crossings not subject to Subsections (a) and (b) above on the basis of the number of Trains of each party operated over the applicable grade separation or crossing during the twelve calendar month period immediately preceding the approval of the final plans for construction of such grade separation or crossing.

(d) **Identity of Parties:** For purposes of this Section 10.4, Owner shall include any one or more of Owner's member agencies, its Operator(s) or other entities acting on Owner's behalf or for its account, and its respective successors or assigns; and User shall include User's Operator(s) or other entities acting on User's behalf and for its account and its respective successors and assigns.

10.5 **User's Improvements:** Changes and/or Additions which are User's responsibility pursuant to Section 10.2 (if it decides to make such improvements) shall include, but are not limited to, the following: (i) two storage tracks and turnouts between Bayshore at Milepost 4.9 and Brisbane at Milepost 7.1, on the

westerly side of and no less than twenty (20) feet from Owner's eastward main track and trackage necessary to construct the wye and tail tracks at Brisbane and Bayshore (however, the twenty (20) foot space shall not be used for motor vehicles); (ii) a gauntlet track from the north end of Tunnel No. 3 (at Milepost 3.1) to the south end of Tunnel No. 4 (at Milepost 5.3) along with an interlocking signal protection system; (iii) four (4) new power operated crossovers between Owner's main tracks in connection with the construction of (i) and (ii) above; and, (iv) upon the approval of Owner (which shall not be unreasonably withheld), such additional support trackage and other facilities to meet User's Freight Service needs. Such construction, reconstruction, or use shall not unreasonably interfere with Owner's Commuter Service and the completion of the above projects shall not result in the degradation of the track and signal system of the Joint Facilities.

10.6 **User Requests:** Engineering and design plans for the construction of any Changes and/or Additions requested by User on Joint Facilities (other than User's Cahill/Lick Line) and on the New Coast Main (but only to the extent and at the location diverging from or connecting to those portions of the Joint Facilities other than User's Cahill/Lick Line) must be submitted to and approved by Owner prior to any construction. Owner's approval for such construction shall not be unreasonably withheld, conditioned or delayed.

10.7 **Caltrans Improvements:** Owner will arrange for Caltrans to waive any and all rights to receive payment for unamortized capital improvements on the Joint Facilities which Owner has funded and Owner shall continue the State of California's current participation in capital improvement programs without User's participation.

10.8 **Changes and/or Additions to User's Cahill/Lick Line:** Owner shall have the right to request Changes and/or Additions to User's Cahill/Lick Line. Any such Changes and/or Additions requested by Owner shall be subject to the approval of User (which shall not be unreasonably withheld, conditioned or delayed), and shall be at Owner's sole cost and expense. If Owner and User agree to the Changes and/or Additions, they shall further agree in writing as to the nature of such Changes and/or Additions, as to the level of utility to the line effected by the Changes and/or Additions, and the consequent level of maintenance required under Section 9.3, above, by reason of such Changes and/or Additions. Any Changes and/or Additions to User's Cahill/Lick Line effected by User pursuant to its rights under this Agreement shall be at User's sole cost and expense. The parties may, but are not required to, agree on a cost sharing for Changes and/or Additions to User's Cahill/Lick Line that are mutually beneficial.

10.9 **Necessary Changes and/or Additions:** Notwithstanding any other provisions of Section 10 of this

Agreement, if Changes and/or Additions are determined to be necessary to reinstate Service or are then currently necessary to maintain the integrity of the Trackage or Track Structure for its then current utility to both parties on User's Cahill/Lick Line, on the Trackage over which User's Cahill/Lick Line is situated, or, during any period that User is provided access to and use of such Trackage pursuant to Section 2.9 hereof, the main Trackage portion of Exclusive Commuter Trackage between Cahill Yard and Lick, the party owning the element of the affected Trackage or Track Structure ("responsible party") shall be responsible for undertaking the necessary Changes and/or Additions and Owner and User shall share the costs of such Changes and/or Additions on a mutually agreeable basis taking into account the benefits to each party derived from the continued use of the Trackage or Track Structure. (Notwithstanding use of the SFGTF elsewhere in this Agreement, there shall be no presumption that the SFGTF is the appropriate basis for allocating costs under this Section 10.9 in any given situation.) Changes and/or Additions effected pursuant to this Section shall be subject to the procedures set forth in Subsections (a) through (e) below.

(a) In the event of an occurrence (other than that for which a party is liable under Section 6) resulting in (i) cessation or interruption of Service and damage to the Trackage or Track Structure, and the costs of Changes and/or Additions to reinstate Service and to bring the Trackage and Track Structure to the then current level of utility is in excess of $15,000,000, or (ii) significant disruption of Service and damage to the Trackage or Track Structure, and the costs of Changes and/or Additions to reinstate Service and to bring the Trackage and Track Structure to the then current level of utility is in excess of $5,000,000 for the first twenty (20) years after the Effective Date and $10,000,000 thereafter, the responsible party will elect whether to make the necessary Changes and/or Additions to reinstate Service and to bring the line to its then current level of utility. If the responsible party elects to abandon Service in lieu thereof, it will notify the other party, in which case the notified party will have the option to acquire the applicable Trackage or Track Structure at a value to be agreed upon; and, if the parties cannot agree on the value, the issue of the value will be submitted to arbitration pursuant to Section 7 hereof. If the responsible party elects to effect the Changes and/or Additions, it will so notify the other party, and the notified party will have the option of agreeing to share the costs of such Changes and/or Additions on the basis described above or to abandon its Service on the affected Trackage or Track Structure. If either party elects to abandon Service pursuant to this Subsection and is prevented from such abandonment by regulatory authority, it will share the costs of Changes and/or Additions with the party making any Changes and/or Additions under this Subsection on the basis described above.

(b) In the event of an occurrence (other than that for which a party is liable under Section 6) resulting in (i) cessation or interruption of Service and damage to the Trackage or Track Structure, and the costs of Changes and/or Additions to reinstate Service and to bring the Trackage and Track Structure to the then current level of utility does not exceed $15,000,000, or (ii) significant disruption in service and damage to the Trackage or Track Structure, and the costs of Changes and/or Additions to reinstate Service and bring the Trackage and Track Structure to the then current level of utility does not exceed $5,000,000 for the first twenty (20) years after the Effective Date and $10,000,000 thereafter, the responsible party shall notify the other party and shall immediately undertake such Changes and/or Additions. The cost of such Changes and/or Additions shall be shared on the basis described above.

(c) In the event that either party determines that Changes and/or Additions are then currently necessary to maintain the integrity of the Trackage or Track Structure at its then current level of utility and Service thereover, such party shall notify the other party of its decision. If the notified party agrees with said decision, the responsible party shall undertake the necessary Changes and/or Additions and the costs of such Changes and/or Additions shall be shared on the basis described above. If the notified party does not agree with the notifying party's decision, the issue of whether the Changes and/or Additions are then currently necessary to maintain the integrity of the Trackage or Track Structure and Service thereover shall be arbitrated pursuant to Section 7 hereof. If it is determined that such Changes and/or Additions are then currently necessary, the costs of such Changes and/or Additions shall be shared on the basis described above.

(d) If the Changes and/or Additions subject to Subsections (a), (b) or (c) above result in Trackage or Track Structure of greater utility than that in place prior to such Changes and/or Additions, the incremental costs thereof, if any, attributable to such greater utility shall be borne as follows:

(i) If the increased utility results from the fact that the particular Change and/or Addition resulting in such increased utility was required by then current standards imposed by law, regulations or applicable codes in order to restore the Track or Track Structure to the level of utility existing prior to effecting the Change and/or Addition, the incremental costs shall be borne in the manner provided in Subsections (a), (b) or (c) above, whichever is applicable.

(ii) If the increased utility was requested by one of the parties, or effected by the party for its benefit, but otherwise would not have been required by then current standards to restore the Track Structure or Trackage to the level of utility

existing prior to the Change and/or Addition, then the incremental cost shall be borne by the party requesting or effecting the increased utility.

(e) In the event that the parties cannot agree on their respective share of costs for Changes and/or Additions described in (a), (b), and (c) above, the matter will be submitted to arbitration pursuant to Section 7 hereof. A decision from the arbitrator must be rendered prior to the commencement of any Changes and/or Additions effected pursuant to Subsection (c) hereof.

Section 11. MISCELLANEOUS

11.1 Other Costs: Costs of operations and administration will be borne by the party incurring such costs (unless one party's duty to perform the operations and to bear the costs thereof under the terms of this Agreement was undertaken by the other party pursuant to this Agreement because of the first party's failure to perform its obligations hereunder in which event the failing party shall reimburse the other party for such costs) and any costs which cannot be identified as a cost solely applicable to one party will be apportioned between the parties on the basis of the SFGTF applied in the same manner as in Section 9.2.

11.2 Force Majeure: Neither party shall be liable to the other in damages nor shall a default be deemed to have occurred, and each party shall be excused from performance of any of its obligations hereunder, except obligations involving the payment hereunder of money to the other party or to a third party, during the time when such non-performance is occasioned by fire, earthquake, flood, explosion, wreck, casualty, strike, unavoidable accident, riot, insurrection, civil disturbance, act of public enemy, embargo, war, act of God, inability to obtain labor, materials or supplies, or any other similar cause beyond the party's reasonable control; provided, that if either party suffers a work stoppage due to a labor dispute, such party shall make such reasonable efforts, if practicable, to staff its operations so as to minimize disruptions to the Service provided by the other party on the Joint Facilities.

11.3 Billing: Billing shall be accomplished on the basis of data contained in a billing form mutually agreed to between the parties. Such billing forms shall contain sufficient detail to permit computation of payments to be made hereunder. Unless otherwise specifically provided herein, billing shall be prepared in accordance with the schedules of the rules, Customary Additives, Materials Additives, material prices and equipment rental rates as agreed upon by the chief accounting officers of the parties hereto (or their designees) from time to time. User shall pay to Owner at

the office of the Treasurer of Owner, or at such other location as Owner may from time to time designate, all the compensation and charges of every name and nature which, in and by this Agreement User is required to pay in lawful money of the United States, within forty-five (45) days after the rendering of bills therefor by the Owner. Bills shall contain a statement of the amount due on account of the expenses incurred and services rendered during the billing period.

Errors or disputed items in any bill (including disputes arising under Section 9.1 but excluding disputes arising under Section 10.9) shall not be deemed a valid excuse for delaying payment, but shall be paid subject to subsequent adjustment; provided, no exception to any bill shall be honored, recognized or considered if filed after the expiration of three years from the last day of the calendar month during which the bill is rendered and no bill shall be rendered later than three years (i) after the last day of the calendar month in which the expense covered thereby is incurred, or (ii) if in connection with a project for which a Roadway Completion Report (as that term is presently understood by the railroad industry) is required, three years after the last day of the calendar month in which the Roadway Completion Report is made covering such project, or (iii) in the case of claims disputed as to amount or liability, after the amount is settled and/or the liability is established. This provision shall not limit the retroactive adjustment of billing made pursuant to: (a) exception taken to original accounting by or under authority of the ICC or (b) retroactive adjustment of wage rates and settlement of wage claims.

So much of the books, accounts and records of each party hereto as are related to the subject matter of this Agreement shall at all reasonable times be open to inspection by the authorized representatives and agents of the parties hereto and by the Auditor General of the State of California pursuant to Government Code Section 10532. If work relating to this Agreement is funded in whole or in part by a federal grant, the Comptroller General of the United States and authorized representatives of the federal agency furnishing the grant shall have the right to examine and audit such books, accounts and records in accordance with applicable federal laws and regulations.

Should any payment become payable by Owner to User under this Agreement, the above provisions of this Section shall apply with User as the billing party and Owner as the paying party.

In the event that either party fails to make any payment required to be made to the other party in accordance with the provisions of this Agreement by the date upon which it is due, interest shall accrue from the due date until payment is made, at the Federal Discount Rate in effect on the due date plus three (3) percent; provided, however, that no interest shall be due and

payable on any amounts in dispute which are determined, either by subsequent review or by arbitration, to be not validly due hereunder.

11.4 Notices: All notices and other communications under this Agreement shall be in writing and shall be deemed to have been duly given (i) on the date of delivery, if delivered personally to the party to whom notice is given, or if made by telecopy directed to the party to whom notice is to be given at the telecopy number listed below, or (ii) on receipt, if mailed to the party to whom notice is to be given by registered or certified mail, return receipt requested, postage prepaid and properly addressed as follows:

If intended for Owner:

Peninsula Corridor Joint Powers Board
1250 San Carlos Avenue
San Carlos, CA 94070-1306
Attention: Gerald T. Haugh
Phone No.: 415-508-6221
Telecopy No.: 415-508-0281

With a copy to:

Hanson, Bridgett, Marcus, Vlahos & Rudy
333 Market Street, Suite 2300
San Francisco, CA 94105
Attention: David J. Miller
Phone No.: 415-777-3200
Telecopy No.: 415-541-9474

If intended for User:

Executive Vice President-Operations
Southern Pacific Transportation Company
One Market Plaza
San Francisco, CA 94105
Phone No.: 415-541-2125
Telecopy No. 415-541-1829

With a copy to:

Director-Contracts & Joint Facilities
Southern Pacific Transportation Company
One Market Plaza, Room 1004-P
San Francisco, CA 94105
Phone No.: 415-541-2772
Telecopy No. 415-541-1802

And to:

Vice President & General Counsel
Southern Pacific Transportation Company
One Market Plaza
San Francisco, CA 94105
Phone No.: 415-541-1781
Telecopy No. 415-495-5436

A party may change its person designated to receive notice, its telecopy number, or its address from time to time by giving notice to the other party in accordance with the procedures set forth in this Section 11.4.

11.5 Preferences: Except as hereafter determined by the mutual agreement of the parties, neither of them shall seek in any administrative, legislative or judicial proceeding or otherwise to obtain rights in the use of the properties subject to this Agreement in excess of those provided to it, or seek to diminish such rights provided to the other. Notwithstanding the provisions of Section 7, the parties shall have recourse to the courts or any governmental agency having jurisdiction in the event of a violation of this Section 11.5, and, in addition to any available remedies for damages, the remedy of specific enforcement shall be available with respect thereto.

11.6 Headings: The section and subsection headings in this Agreement are for convenience only and shall not be used in its interpretation or considered part of this Agreement.

11.7 Recording: Either party may, at its sole election and expense, record this Agreement with the appropriate governmental authorities. The parties agree that, should it be necessary to modify or amend any property description for such recording purposes, they shall cooperate in making said modifications or amendments.

11.8 Entire Agreement: This Agreement and its Exhibits together with the Sale Agreement represent the entire Agreement between Owner and User concerning the terms of the trackage rights retained and confirmed hereby.

11.9 Amendments: No modification, addition or amendment to this Agreement shall be effective unless and until such modification, addition or amendment is reduced to a writing executed by authorized officers or agents of each party and delivered to the other party.

11.10 Not For The Benefit Of Others: This Agreement and each and every provision herein is for the exclusive benefit of the parties hereto and not for the benefit of any third party. Nothing herein shall be construed to create or increase any right in any

third person to recover by way of damages or otherwise against any of the parties hereto.

11.11 Access: Each party, its employees, agents, and designees, shall have access to the Joint Facilities and to the operating and maintenance records of the other concerning the movement of Trains or Equipment on and maintenance of the Joint Facilities for the purpose of monitoring conformance to the principles and standards expressed in this Agreement.

11.12 Effective Date: The Effective Date of this Agreement shall be contingent upon receipt of all necessary regulatory approvals or exemptions and, assuming such receipt, shall be the earlier of (i) the date that an Operator commences Commuter Service for Owner or (ii) June 30, 1992; provided, however, that portion of this Agreement involving Bridge Trackage Rights, Gilroy Commuter Service and the use by Owner of User's Cahill/Lick Line in connection therewith (including any rights of User pursuant to Section 2.9 hereof), shall be effective only as of the "Effective Date" of the Lick/Gilroy Trackage Rights Agreement (as said term is defined in such Agreement). Any necessary regulatory approvals or exemptions for such Bridge Trackage Rights, Gilroy Commuter Service, and the use of User's Cahill/Lick Line shall be sought concurrent with any necessary approvals or exemptions of the Lick/Gilroy Trackage Rights Agreement. During that period between receipt of necessary regulatory approvals or exemptions and the Effective Date, User shall have the right to conduct Freight and Intercity Passenger Service and operations in support thereof over the Joint Facilities (excluding User's Cahill/Lick Line) but only in the same manner and to the same extent as providedas of the date hereof. User agrees during such period to indemnify and defend Owner against all liability in connection with User's Freight and Intercity Passenger Service except to the extent caused by Owner's willful or negligent acts or omissions. During the interim period, User shall provide Commuter Service for Owner as interim Operator pursuant to its service contract with the State of California Department of Transportation.

11.13 Track Agreements. As a condition precedent to the effectiveness of this Agreement, User shall deliver to Owner documentation satisfactory to Owner, assigning to Owner as an additional beneficiary, User's rights and benefits of the indemnity provisions contained in the track agreements identified in Exhibit H. User will cooperate with Owner to jointly call on parties with whom User has track agreements to have such parties assign the indemnity provisions of such agreements directly to Owner.

11.14 Sale Agreement Controlling. This Agreement is entered into by the parties pursuant to and in furtherance of the Sale Agreement. In the event that there are terms in this Agreement which are inconsistent with the terms of the Sale Agreement, the terms of the Sale Agreement shall govern. Except as may be

otherwise specifically stated herein, nothing contained in this Agreement shall be construed to limit or otherwise modify the rights and obligations of the parties under the Sale Agreement.

11.15 Survival of Rights. The rights of a party under this Agreement shall survive the bankruptcy or other insolvency of the other party to the maximum extent permitted by law.

11.16 Quitclaim of User's Easement. From time to time, Owner may desire to develop portions of the Joint Facilities (excluding the New Coast Main) which are not being used by User for Freight or Intercity Passenger Service. In connection with such developments, Owner may desire User to release its easement with respect to specified portions of the Joint Facilities (excluding the New Coast Main) in order to permit such development. Any such quitclaim shall be subject to the procedures set forth below and shall be further subject to any necessary regulatory approvals or exemptions:

(a) At any time after the Effective Date, and from time to time thereafter, Owner may request User to release a portion of its railroad easement. User shall release such easement upon the following terms and conditions:

Each request (a "Request") shall be in writing and shall contain (i) a legal description of the portion of the Joint Facilities (excluding the New Coast Main) to be released (the "Requested Portion"); (ii) a survey of the Requested Portion prepared by an engineer licensed by the State of California and showing the location of all railroad lines within 25 feet of the Requested Portion; (iii) a reasonably detailed description of the improvements to be constructed by Owner on the Requested Portion; (iv) to the extent available, the latest plans and specifications, conceptual drawings, renderings or similar graphic material regarding the proposed development; (v) an estimate of the costs of the development and the manner in which funds therefor will be provided; and (vi) the proposed times for commencement and completion of the development.

(b) Within 60 days after the receipt of the information requested by Subsection (a) above, User will, except as set forth in Subsection (c) below, execute and deliver to Owner a quitclaim deed in form and substance reasonably satisfactory to Owner releasing the Requested Portion from User's easement. Such quitclaim deed shall reserve to User any fiber optic easement executed pursuant to Section 7.1(a) of the Sale Agreement.

(c) User shall not be required to execute or deliver such quitclaim deed if (i) any part of the Requested Portion lies within 25 feet of any property (A) then used by User for its Freight or Intercity Passenger Service operations, or (B) for which User has a reasonable certainty of using for such purposes, as

further described below, or (ii) Owner's proposed development will not be commenced within twelve (12) months of the Request. The provisions of Subsection (c)(i)(B) hereof shall not apply to Trackage which has not been used for a continuous five-year period and is thereby subject to the provisions of Section 2.17.

(d) If within 60 days after receiving a Request User determines that under Subsection (c) it is not required to execute and deliver a quitclaim deed for a Requested Parcel, User shall, within such period, notify Owner of such fact in writing stating the reason therefor (a "Refusal Notice"). If User's reason for refusing to execute and deliver a quitclaim deed is based upon the fact that User has a reasonable certainty that all or a portion of the Requested Parcel will be used for its Freight or Intercity Passenger Service operations, it shall provide Owner with (i) a reasonably detailed statement of such planned use, (ii) the most recent plans or specifications, conceptual drawings or other graphic materials with respect to such planned use, (iii) an estimate of the cost of constructing any improvements needed for such planned use, (iv) a statement of the source of funds for such planned use, and (e) the proposed time for commencement of the planned use. The provisions of the preceding sentence shall not apply to Trackage which has not been used for a continuous five-year period and is thereby subject to the provisions of Section 2.17. Any planned use of the property by User for its Freight or Intercity Passenger Service operations will not be considered a reasonably certain planned use, if it is unlikely that construction of the improvements therefor will not commence within twelve (12) months after the Refusal Notice.

(e) If Owner disagrees with User's determination that it is not required to deliver a quitclaim deed with respect to any request, Owner may submit such matter to arbitration pursuant to Section 7 hereof within 60 days after receiving a Refusal Notice.

11.17 Counterparts: This Agreement may be executed in any number of counterparts, each of which shall be and shall be taken to be an original, and all such counterparts shall together constitute one and the same instrument.

11.18 User's Separate Property: Trackage and/or other facilities owned by User that are located on real property owned by User shall not be part of the Designated Freight Trackage, Joint Facilities, or Exclusive Commute Trackage.

IN WITNESS WHEREOF, Owner and User have executed this Agreement as of the day and year first written above.

PENINSULA CORRIDOR STUDY JOINT POWERS BOARD	SOUTHERN PACIFIC TRANSPORTATION COMPANY
By: TM Nolan	By:
Name:	Name:
Title:	Title:

Approved as to Form: Hanson, Bridgett, Marcus, Vlahos and Rudy by John J. Vlahos	Approved as to Form:

(C:\jg\jpb) (Main11.TRA)

IN WITNESS WHEREOF, ~~SPB~~ Owner and ~~SPT~~ User have executed this Agreement as of the day and year first written above.

PENINSULA CORRIDOR STUDY
JOINT POWERS BOARD

By: _____
Name:
Title:

SOUTHERN PACIFIC
TRANSPORTATION COMPANY

By: _____
Name: Robert F. Starzel
Title: Vice Chairman

Approved as to Form:

_____

Approved as to Form:

_____

(C:\jg\jpb)

(Lick-g/7.ins)

EXHIBIT B

AGREEMENT

THIS AGREEMENT is by and between the California High Speed Rail Authority (hereinafter referred to as "CHSRA") and the Peninsula Corridor Joint Powers Board (hereinafter referred to as "PCJPB").

RECITALS

WHEREAS, in January, 2004, the California High Speed Rail Authority and the Peninsula Corridor Joint Powers Board entered into a Memorandum of Understanding, the purpose of which was to establish a framework for future cooperation between the agencies relative to the proposed development of a high speed train system for California that would share the rail corridor between the City of San Jose and the City and County of San Francisco owned by PCJPB (the "Caltrain Rail Corridor") to the mutual benefit of the parties; and

WHEREAS, that agreement provided that any future implementation of the shared corridor concept would require the preparation of a comprehensive agreement setting forth the roles and responsibilities of each party and addressing design, construction and operation issues; and

WHEREAS, since the execution of the Memorandum of Understanding in 2004, several actions have been taken and developments have transpired that have served to confirm the wisdom and propriety of establishing a long-term partnership between CHSRA and PCJPB to coordinate and harmonize the planning, design and implementation of their respective inter-city high speed and commuter rail programs in a manner that provides for shared use of the Caltrain Rail Corridor. More specifically, among the key planning decisions and actions undertaken by each agency are the following:

A. CHSRA has designated as preferred and selected the San Jose to San Francisco corridor along the Caltrain Rail Corridor as part of the route for the California High Speed Train System ("HST System") based on its Final Program Environmental Impact Report for the Bay Area to the Central Valley portion of the system, certified in July 2008; ~~CHRSA~~ **CHSRA** issued an updated California High Speed Rail Business Plan in November, 2008 indicating that the system would share the existing rail corridor with the Caltrain commuter rail system between San Francisco and San Jose; the CHSRA endorsed a phasing plan to implement sections of the HST system in and around the Los Angeles basin and in the San Francisco Bay Area in order to provide immediate benefit to local commuter rail service; and Proposition 1A, as passed by the voters of California in November 2008, authorizes bond financing for Phase One of the HST System from San Francisco to Los Angeles/Anaheim.

B. PCJPB has planned for and implemented various improvements which are consistent with accommodation of high speed rail in the Caltrain Rail Corridor, including implementation of its Baby Bullet program, environmental study and preliminary design of electrification program, formulation of Project 2015, pursuit of Federal Railroad Administration approval of mixed rail operations that will fully integrate Caltrain and high speed rail systems; and

WHEREAS, recent events have created an opportunity to establish a new and unprecedented level of cooperation and partnership between the PCJPB and the CHSRA predicated on the assumption of shared use of the existing Caltrain Rail Corridor for both Caltrain commuter rail rapid transit services and inter-city high speed train service; and

WHEREAS, the PCJPB's readiness to proceed to electrify the Caltrain Rail Corridor and to implement various other state-of-the-art improvements, including signal and control system improvements (CBOSS) and the acquisition of new state-of-the-art electric motorized unit rolling stock, creates an immediate opportunity for phased implementation of the high speed rail system utilizing the Caltrain Rail Corridor in keeping with CHSRA's decisions and adopted business plan; and

WHEREAS, the benefits associated with the partnership and the sharing of personnel resources as described herein include, but are not limited to, the promotion of efficiency and economy in the formulation and implementation of actions to achieve integrated high speed inter-city train service and Caltrain commuter rail rapid transit service, including enhanced signaling and train control equipment; the promotion of efficiency and economy in working with federal agencies to achieve such integrated rail service in the Caltrain Rail Corridor; and the promotion of early action steps for the HST system to the benefit of the Caltrain Corridor;

WHEREAS, based upon the foregoing, the parties desire to coordinate and to the extent appropriate to consolidate their separate organizations, to share resources and information, and otherwise to concentrate and to direct their joint efforts to effectuate as a joint project fully compatible inter-city high speed rail and commuter rail rapid transit systems utilizing the Caltrain Rail Corridor and to memorialize their joint objectives and understandings in a new Agreement.

NOW, THEREFORE, in consideration of the foregoing, the parties hereby agree as follows:

I. PURPOSE OF AGREEMENT

The purpose of this agreement is to establish an initial organizational framework whereby CHSRA and PCJPB engage as partners in the planning, design and construction of improvements in the Caltrain Rail Corridor that will accommodate and serve both the near-term and long-term needs of CHSRA inter-city high speed rail service and PCJPB commuter rail rapid transit service. As the parties embark upon this partnership and begin working together more closely, it is expected that their experience will illustrate ways in which this agreement should be amended or replaced in order better to address specific roles and responsibilities of the parties and other terms and conditions necessary to assure successful achievement of the goals of each party, that have motivated the parties to enter into this initial agreement.

II. ORGANIZATIONAL STRUCTURE AND GOVERNANCE

To enable CHSRA and PCJPB programs to be planned, designed and implemented to the extent possible as a joint project, it is the objective of the parties effectively to share, to coordinate, and/or jointly to direct their resources toward the implementation of a single joint program/project, including various personnel resources.

At the outset, the Executive Director of CHSRA and the Executive Director of the PCJPB (hereafter "Executive Officers") shall jointly designate an individual to serve as the Program Director. The Program Director shall report to each of the Executive Officers. Independent consultants engaged by CHSRA and PCJPB and the respective staffs of each of the parties, as designated by that party's Executive Officer, will report to the Program Director. The Executive Officers will also determine the manner in which the CHSRA's Program Manager will coordinate and oversee the work of the consultants.

The Executive Officers shall create one or more working groups to initiate work under this agreement on the tasks listed below in Section IV and elsewhere in this Agreement.

III. PARTNERSHIP PRINCIPLES

A. To enable CHSRA and PCJPB programs to be planned, designed and implemented to the extent possible as a joint project, it is the objective of the parties to incorporate high speed rail in the Caltrain Rail Corridor on a phased basis.

B. It is recognized that construction of the high speed rail system will have to take place while PCJPB rail service remains in regular operation. The customers of the PCJPB must continue to be served throughout the high speed rail construction program. In furtherance of this principle, the parties acknowledge that some alterations or improvements in the Caltrain corridor will be required before construction of many of the high speed rail components can occur.

C. High speed rail must be designed, constructed and operated in a manner fully consistent with the operational requirements of the Caltrain commuter rail rapid transit service and with consideration of the cities on the Peninsula through which the high speed rail system will be constructed and operated.

D. Ultimate configuration of the Caltrain corridor will ~~be a four-~~consist of a multiple track, grade-separated high speed rail system, with mixed traffic from Caltrain commuter rail and the high speed train service capable of operation on all ~~four~~ tracks to enable Caltrain to achieve service levels of no less than eight trains per hour in each direction. ~~In some places the corridor may consist of more than four tracks~~Track configuration analyses will consider both horizontal and vertical alignments in the Caltrain corridor.

E. The parties recognize the investments already made by PCJPB, including the intrinsic value of the rail corridor owned by PCJPB and expenditures made by PCJPB in pursuit of signal and control center, electrification and related projects. The parties further recognize that the existing right of way and existing improvements are solely owned by PCJPB.

IV. ACTIONS

It is the intention of the parties to incorporate high speed rail in the Caltrain Rail Corridor on a phased basis. At the outset, various PCJPB projects, sized and designed to facilitate eventual construction of high speed rail, will be undertaken. Accordingly, both initial and longer term action plans will be developed by one or more working groups established by the Executive Officers to implement the objectives of the parties. Study of both the initial actions and tasks and of the longer term actions and tasks will begin as soon as possible.

A. *Initial Actions and Tasks*

- Formulation of a detailed organizational structure for the joint program, including the designation or alteration of position titles, reporting relationships, and the manner in which decisions shall be made.

- Formulation of a plan for community outreach to the affected community, counties and governmental and regulatory agencies, and other operating entities in the corridor;

- Development of a systems engineering integration plan for the joint program;

- Determination of fundamental conceptual design of track alignments, elevations, station platform configuration and associated issues;

- Aggressively planning the implementation, in a manner consistent with the eventual shared use of the corridor, of various PCJPB projects currently under design or otherwise nearly ready for implementation, including but not limited to a new signal and control system, electrification of the Caltrain Rail Corridor, grade separations, and rolling stock acquisition, necessary to maximize system resilience during future high speed rail construction in the Caltrain corridor; including determinations as to the extent to which these projects will be pursued jointly or will be pursued separately by PCJPB. This planning will include determining which party is the appropriate lead agency for purposes of environmental review.

- Development of financial systems and a detailed financial plan for pursuit of the projects in the initial action plan.

B. ***Longer Term Actions and Tasks***

- Development of a phased implementation plan which supports both Caltrain operations and HST operations;

- Determination of the proper means of pursuing environmental clearance for the various projects in the corridor based, to the extent feasible, on a comprehensive service assessment and conforming design requirements;

- Completion of designs based on the combined technical requirements for interoperability with all users and mixed traffic assurance other than freight;

- Determination of construction sequencing that equally represents the most efficient and cost effective execution of the work while making every effort to preserve and improve current levels of service.

- Development of financial systems, budget processes, and a detailed financial plan for pursuit of the projects in the longer term action plan.

- Assessment of liability risks and means to address those risks.

V. OWNERSHIP OF ASSETS

The Executive Officers shall establish a working group to examine issues surrounding potential rights and interests of the parties, including ownership interests, in the facilities in the corridor after the overall project is completed.

VI. DUMBARTON SERVICE

The parties also agree to the establishment by the Executive Officers of a working or technical group to share information concerning the possibility of Caltrain service over the Dumbarton Bridge and possible interconnections between such service and high-speed rail service on the east side of the San Francisco Bay.

VII. THIS AGREEMENT IS SUBJECT TO REVISION AS CONDITIONS WARRANT

The parties agree that the structure of the relationship between the PCJPB and the CHSRA as described in this agreement is not intended to remain static, but that it will evolve as time goes on and as the parties confront various challenges. Consequently, it is understood that all or portions of this memorandum will be modified to accommodate the needs of the parties as planning work progresses, either through direct amendment of this memorandum or through supplemental memoranda, as suits the convenience of the parties.

VIII. EFFECTIVE DATE AND TERMINATION

This agreement is effective upon execution by both parties' Executive Officers and shall continue in effect until and unless terminated by both parties through mutual agreement or upon 30 days' written notice delivered by the party seeking to terminate the agreement to the other party.

IN WITNESS WHEREOF, CHSRA and PCJPB have executed this Agreement.

California High Speed Rail Authority

BY:_____

Name:_____

Title:_____

Date:_____

Resolution No.: HSRA 09-004

Approved as to form:

_____

Peninsula Corridor Joint Powers Board

BY:_____

Name:_____

Title:_____

Date:_____

Resolution No.:_____

Approved as to form:

_____

EXHIBIT C

Jerry Wilmoth
General Manager Network Infrastructure

February 23, 2009

California High-Speed Rail Authority
Attn: San Francisco to San Jose HST Project EIR/EIS
925 L Street, Suite 1425
Sacramento, CA 95814

Re: Union Pacific Railroad Scoping Comments For Joint EIR/EIS

Dear High-Speed Rail Authority:

Union Pacific Railroad Company submits the following comments in response to the High-Speed Rail Authority's (Authority) Notice of Preparation pursuant to CEQA dated January 8, 2009, concerning the Project Environmental Impact Report/Environmental Impact Statement for the San Francisco to San Jose segment of the high-speed train system (HSR). These comments also respond to the Notice of Intent pursuant to NEPA published by the Federal Railroad Administration in the Federal Register on December 29, 2008. Union Pacific understands that the Authority and the FRA will jointly prepare the EIR/EIS for this project.

Union Pacific Railroad Company (Union Pacific) is a Delaware corporation that owns and operates a common carrier railroad network in the western half of the United States, including the State of California. Specifically, Union Pacific owns and operates rail main lines connecting the San Francisco Bay Area to Sacramento and points east and north, and to Los Angeles and points east and southeast. Union Pacific is the largest rail carrier in California in terms of both mileage and train operations. Union Pacific's rail network in the Bay Area is vital to the economic health of California and the nation as a whole. Union Pacific's rail service to customers in the Bay Area is crucial to the future success and growth of those customers.

Union Pacific previously submitted comments on the Bay Area to Central Valley HST Program EIR/EIS by letter dated July 7, 2008, from Mr. Scott Moore to Mr. Quentin L. Kopp of the Authority's Board (copy attached). Union Pacific reaffirms these comments and hereby incorporates them within this letter. By letter dated May 13, 2008, to Mr. Mehdi Morshed, the Authority's Executive Director (copy attached), the undersigned stated that it was not in Union Pacific's best interests to permit any proposed high-speed rail alignment on our rights of way. This remains Union Pacific's position on this matter.

Union Pacific submits the following comments with reference to the scoping of the joint EIR/EIS for the San Francisco to San Jose segment of the light rail system.

1) Union Pacific formerly owned and operated the Caltrain (PCJPB) right of way between San Francisco and San Jose that is proposed for the HSR system. Union Pacific sold the right of way to PCJPB in 1991 and retained a permanent and exclusive easement for the operation of freight trains and for the delivery of common carrier rail service over the entire line. Union Pacific also retained all rights and obligations relating to intercity passenger service provided by Amtrak or any other operator, at Union Pacific's sole election, operating over this line (currently no Amtrak or intercity passenger service trains operate over this right of way except between San Jose and Santa Clara). Union Pacific's permanent easement for freight and Amtrak service over this line is a valuable property and operational right that must not be impaired by construction and operation of the HSR. The Authority must protect such rights and mitigate all adverse impacts to Union Pacific's satisfaction.

2) In addition to retention of the easement rights outlined above, Union Pacific entered into an operating contract with the PCJPB at the time of sale setting forth Union Pacific's rights with respect to freight services on the line. Union Pacific has notified the PCJPB that it expects the PCJPB to protect Union Pacific's rights under this contract in any arrangement that might be made with HSR. The Authority must be aware of and protect Union Pacific's rights under this contract as well. All adverse impacts must be mitigated to Union Pacific's satisfaction.

3) As a common carrier railroad, Union Pacific is subject to the requirements of federal law governing abandonment or discontinuance of freight operations. Specifically, the Interstate Commerce Commission Termination Act (49 USC §10501 et seq.) prohibits a railroad from abandoning or discontinuing freight services over main or branch lines of railroad without authority from the federal Surface Transportation Board (STB). In the sale of the PCJPB right of way, Union Pacific retained all common carrier freight service rights and obligations. Therefore, Union Pacific's operations over the San Francisco – San Jose line are subject to STB jurisdiction. Neither the PCJPB nor the Authority may take any action that effectively requires or causes Union Pacific to abandon or discontinue freight service unless prior authority from the STB has been obtained. Union Pacific will deem any attempt by HSR to interfere with Union Pacific's property and contract rights on the San Francisco to San Jose line as an attempt to force a de facto abandonment of freight service in violation of federal law.

4) Union Pacific currently operates freight trains over the PCJPB right of way from San Jose to the Quint St. lead in San Francisco. The Quint St. lead diverges from the main line immediately north of Tunnel 3, near Jerrold St. Union Pacific's right to operate freight trains over the PCJPB extends to the entire width of the right of way over all available trackage. Union Pacific freight operations must not be adversely impacted by construction or operation of the HSR. All significant impacts must be mitigated to Union Pacific's satisfaction.

5) Union Pacific currently serves the Port of San Francisco via the Quint St. lead track. The port has advised Union Pacific that it intends to continue existing rail freight services and to encourage future growth in rail freight to and from Piers 80-96. Union Pacific is informed and believes that the port intends to enter into arrangements with tenants and pier operators that will cause future growth in rail operations. Union Pacific has means of serving the port other than via the Quint St. lead. The Authority must not undertake any action that interferes with freight operations via the tunnels and the Quint St. lead without mitigation of all significant impacts and prior approval from Union Pacific and the port.

6) Union Pacific currently serves a number of customers at or near the Port of Redwood City via the Redwood Jct. lead track. These customers, including Granite Rock and the port, have advised Union Pacific that they intend to continue all existing rail freight services and likely will demand additional freight services in the future. Union Pacific has no means of serving the port and the adjacent customers except via the PCJPB main line and the Redwood Jct. lead track. The Authority must not undertake any action that interferes with operations via this lead track without prior approval from Union Pacific, the port and the customers at this location.

7) Union Pacific currently serves a number of customers at other locations on the PCJPB San Francisco to San Jose line, including Granite Rock at South San Francisco. The existing yard at South San Francisco is crucial to Union Pacific's ability to provide

freight service to the Port of San Francisco and to Granite Rock and other customers adjacent to the yard. The Authority must not undertake any action that interferes with

8) operations at the yard and adjoining trackage without prior approval from Union Pacific, the port and the customers at this location.

9) Union Pacific owns and has primary operating rights on Main Track No. 1 between Santa Clara (CP Coast) and Diridon Station (San Jose). This track currently is shared with Amtrak's Capitol Corridor and Coast Starlight services and with Altamont Commuter Express's Stockton – San Jose commuter service. Union Pacific's rights to this track are crucial to continued operation of these passenger services. Use of this track also is crucial to freight service on the line to San Francisco. Further, these rights support continued operation of freight service on the main line south of San Jose to Los Angeles. The Authority must not undertake any action that interferes with Union Pacific's ownership and operation of Main Track No. 1 without prior approval from Union Pacific and the commuter agencies identified above. All adverse impacts must be mitigated to Union Pacific's satisfaction.

10) PCJPB owns the right of way south of Diridon Station to a point called Lick (approximately three miles south of the station). Union Pacific's rights with regard to Main Track No. 1 extend southward to Lick. All comments in (8) above are applicable to the Diridon – Lick portion.

11) Union Pacific has complete ownership of and control over the railroad right of way from Lick to Gilroy (and southward to San Luis Obispo and Los Angeles (Moorpark)). The PCJPB and the Santa Clara Valley Transportation Authority have a contract right to operate up to ten commuter trains to and from Gilroy over Union Pacific's right of way. Neither agency has any ownership rights in this line and no contractual rights to allow third parties to use this line. Union Pacific has no intention of allowing or permitting the Authority to build or operate the HSR within Union Pacific's right of way southward of Lick. The Authority should take this into account as part of the EIR/EIS for the San Francisco – San Jose segment.

12) The Authority must study the following matters as part of the EIR/EIS and all necessary mitigation measures must be implemented:

    (i) Slow speed freight trains and high-speed trains are incompatible on the same tracks at any time, including cross-overs. Union Pacific requires overhead clearance of 23 feet 6 inches, which is higher than the Authority contemplates for its electrical system. The Authority must provide grade-separated cross-overs for freight trains at necessary locations. The Authority must not contemplate operation of freight trains on any HSR trackage at any time (and vice-versa). If necessary, completely separate freight trackage must be provided. HSR must comply with all applicable FRA regulations.

    (ii) Mitigation measures for the HSR may include construction of new freight trackage for Union Pacific. Such trackage must meet Union Pacific's construction and operation standards, and must be compliant with FRA and California Public Utilities Commission applicable standards.

13) The construction and operation of HSR in the San Francisco to San Jose right of way must not cause increased operating costs or operating inefficiencies for Union Pacific. The Authority must assume Union Pacific's liability exposure and risk arising from current and future freight operations in the same corridor as the HSR. The Authority should fully study means to indemnify and insure Union Pacific against all such liability or risk, including liability to HSR patrons.

February 23, 2009

Union Pacific is confident that its concerns listed herein will be fully addressed and mitigated by the Authority and FRA during the EIR/EIS process. Union Pacific is willing to meet with the Authority and FRA to discuss its concerns about high-speed rail operation and to better understand the Authority's intentions regarding use of Union Pacific rights of way. Following such meeting, Union Pacific will be glad to consider all future requests by the Authority for information, construction standards and mapping data.

Please direct all requests and correspondence to the undersigned.

Sincerely,

Jerry Wilmoth

Enclosures (2)

EXHIBIT 4

DEPARTMENT 53

FILED
~~ENDORSED~~
10 JUL 19 AM 11:01
SACRAMENTO COURTS
DEPT. #53

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Attorneys for Defendants
PENINSULA CORRIDOR JOINT POWERS BOARD and DON GAGE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

RUSSELL PETERSON, et al., Plaintiffs, v. CALIFORNIA HIGH SPEED RAIL AUTHORITY, et al., Defendants.	No. 34-2010-00069687 [~~PROPOSED~~] JUDGMENT Date: June 22, 2010 Time: 2:00 p.m. Judge: Kevin R. Culhane Dept: 53 Reservation No. 1349245

The Court, having on June 22, 2010, sustained without leave to amend the Demurrer to Plaintiffs Russell J. Peterson and Halstead Nursery Inc.'s (collectively, "Plaintiffs") First Amended Complaint for Declaratory Relief of Defendants Peninsula Corridor Joint Powers Board and Don Gage (collectively, "JPB") and California High Speed Rail Authority and Executive Director Mehdi Morshed (collectively, "HSRA"), now enters judgment as follows:

IT IS ORDERED, ADJUDGED AND DECREED THAT:

1. Pursuant to the Court's Order Sustaining Defendants JPB and HSRA's Demurrers to Plaintiffs' First Amended Complaint, on file in this matter, the First Amended Complaint of Plaintiffs Russell Peterson and Halstead Nursery, Inc. for Declaratory Relief is hereby dismissed with prejudice in its entirety as to JPB and HSRA, without leave to amend.

2. Plaintiff shall take no relief or remedy.

3. And costs in the sum of $ _____.

IT IS SO ORDERED.

DATED: June 19, 2010

By: _____
HONORABLE KEVIN R. CULHANE
Judge of the Superior Court

Approved as to Form:

Dated: June 30 2010

_____
Attorney for Plaintiffs

Dated: June 30, 2010

_____
GEORGE SPANOS
Attorney for California High Speed Rail Authority

PROOF OF SERVICE

Russell J. Peterson, et al. v. California High Speed Rail Authority, et al.
Case No 34-2010-00069687

I, Maria A. Ramirez, declare that I am a resident of the State of California I am over the age of 18 years and not a party to the action entitled Russell J Peterson, et al v. California High Speed Rail Authority, et al , that my business address is 425 Market Street, 26th Floor, San Francisco, California 94105 On July 7, 2010, I served a true and accurate copy of the document(s) entitled

[Proposed] Judgment

on the party(ies) in this action by placing said copy(ies) in a sealed envelope, each addressed to the last address(es) given by the party(ies) as follows

Attorneys for Plaintiff **Zachary Tyson, Esq.** 800 West El Camino Real, Suite 180 Mountain View, CA 94040 Tel· (650) 814-8090 zacharytyson@novalawgroup com	***Attorneys for Plaintiff*** **Michael J. Brady, Esq.** 1001 Marshall Street, Suite 300 Redwood City, CA 94063 Tel. (650) 780-1724 mbrady@ropers com
Attorneys for Defendants George C Spanos Deputy Attorney General Amy Winn Deputy Attorney General 1300 I Street, Suite 125 P. O Box 944255 Sacramento, CA 94244-2550 Tel: (916) 324-7862 George Spanos@doj ca gov	

x	(By First Class Mail pursuant to Code of Civil Procedure section 1013) I am readily familiar with Hanson Bridgett's practices for collecting and processing documents for mailing with United States Postal Service Following these ordinary business practices, I placed the above referenced sealed envelope(s) for collection and mailing with the United States Postal Service on the date listed herein at 425 Market Street, 26th Floor, San Francisco, California 94105. The above referenced sealed envelope(s) will be deposited with the United States Postal Service on the date listed herein in the ordinary course of business

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and was executed on July 7, 2010 at San Francisco, California

Maria A. Ramirez

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE

MINUTE ORDER

Date: 06/22/2010 Time: 02:00:00 PM Dept: 53

Judicial Officer Presiding: Kevin Culhane
Clerk: T. West
Reporter/ERM: P. Clausen CSR# 3750
Bailiff/Court Attendant: V. Carroll

Case No: **34-2010-00069687-CU-MC-GDS** Case Init. Date: 08/11/2009
Case Title: **Russell J Peterson VS California High Speed Rail Authority et al**

Case Category: Civil - Unlimited

EVENT TYPE: Hearing on Demurrer - Civil Law and Motion - Demurrer/JOP

APPEARANCES
Zachary Tyson, counsel, present for Plaintiff(s).
George Spanos, counsel, present for Defendant,Plaintiff(s).

Michael Brady, counsel, present for Plaintiff
Amy Winn, counsel, present for Defendant
Jenica Mariani, counsel, present for Defendant
Adam Hoffman, counsel, present for Defendant

Nature of Proceeding: Hearing on Demurrer (Peninsula Corridor Joint Powers Board)

TENTATIVE RULING

Defendant Peninsula Corridor Joint Powers Board (JPB) and Chairman Don Gage's Demurrer to the 1st Amended Complaint is sustained without leave to amend for failure to state a cause of action.

Plaintiffs, taxpayers in San Mateo County, seek to prevent defendant public entities California High Speed Rail Authority ("HSRA")and the JPB from entering any agreement for the construction of a high speed rail facility from San Francisco to San Jose unless the public entities obtain the express written consent of Union Pacific Railroad ("UPRR"). UPRR is party to the "Trackage Agreement" which controls the right of way ("ROW") over which a future high speed rail train would likely run and that under that agreement UPRR must give permission before construction can begin.

Plaintiffs allege a single cause of action for waste under CCP 526a. Plaintiffs allege that HSRA and JPB have entered into an MOU regarding the proposed construction of high speed rail facilities on the ROW, and that this planned construction constitutes a waste of public funds that may be enjoined under CCP 526a unless UPPR consents. (See MOU Ex. B to 1st amended complaint)

JPB and UPPR's predecessor in interest, Southern Pacific, entered into a "Trackage Agreement" in 1991. (Ex. A to the 1st amended Complaint). Under that agreement, JPB is the owner of the ROW, however the Southern Pacific, and now Union Pacific, retained certain rights in the ROW for freight and common carrier purposes.

All parties agree that the Trackage Agreement requires that any construction of high speed rail along the ROW requires the approval of UPPR, and JPB states it has no intention of violating the Trackage Agreement. Plaintiff contends that the fact that UPPR has stated in the past that it is not in their best interest to permit any proposed high-speed rail alignment on their rights of way constitutes an imminent threat of waste. (See letter from UPPR to HSRA Ex. C to 1st amended complaint)

JPB demurs to the Complaint on the ground it fails to state a cause of action for waste pursuant to CCP 526a.

JPB's demurrer to the Complaint is sustained without leave to amend for failure to state facts sufficient to state a cause of action for waste. The claim is purely speculative. Plaintiffs merely contend that if defendants act in derogation of the Trackage Agreement, a waste of public funds will occur if UPRR successfully litigates its rights under the agreement, and that if any construction undertaken along the ROW in derogation of the TA is illegal, it would possibly have to be removed with resulting negative impacts to the public fisc. Plaintiffs' theory involves too many "ifs" to state a cause of action.

The cases relied on by plaintiff are distinguishable. In *Page v. MiraCosta Comm. Coll. Dist.* (2009) 180 Cal.App.4th 471, 496-497, and *Imagistics Int , Inc. v. Dept. of General Svcs.* (2007) 150 Cal. App.4tii 581, 584, the plaintiffs
alleged that a public agency's contract with a private party violated a specific statute. The third case plaintiffs cite, *Vasquez v. State of Cal. (2003) 105*
8 Cal.App.4th 849, 856, did not invalidate a contract or otherwise declare contractual rights between a public agency and a private party, as Plaintiffs contend. Instead, that case found waste in the Department of Corrections' failure to collect prevailing wages for inmate work as required by both controlling statutes and its contract with a third-party manufacturer.

Under *Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, "[g]eneral allegations, innuendo and legal conclusions" cannot support a waste cause of action." (79 Cal.App.4th at p, 1240.) .) The expenditure § 526a contemplates must be an "actual" one, or "at least the threat of an actual expenditure of public funds." *Fiske v. Gillespie* (1980)
25 200 Cal.App.3d 1243,1246.)

Plaintiffs impliedly concede there is no actual expenditure at this time. Plaintiffs allege that JPB "imminently" intends to enter into non-specific, future contracts to allow HSRA to construct a portion of the high speed rail system in the ROW. Plaintiffs claim these future contracts will be wasteful because they will violate UPPR's rights under the "Trackage Rights Agreement between JPB and UPPR. Plaintiffs allegations are not sufficient to show a ripe claim for waste against JPB. Plaintiffs have not alleged facts, even assuming that defendants intend to breach the agreement, that satisfy the requirement for the threat of an actual or imminent actual expenditure.

The Court rejects plaintiffs' argument that a general demurrer cannot challenge a claim for waste under CCP 526a.

Since Plaintiffs have offered no facts to cure the defect, no leave to amend is granted.

Defendant JPB and Don Gage's evidentiary objection to Ex. A to the Opposition is sustained. However, the Court has considered the letter to the extent it is relevant to plaintiffs' argument that the defect in the Complaint is curable. The Court finds that even if plaintiff could plead that Union Pacific had made the objections in that letter with respect to other areas of the Right of Way, these facts would not state a cause of action for waste.

Defendants to prepare a formal order and proposed judgment pursuant to CCP 3. 1312.

COURT RULING

The matter was argued and submitted. The Court affirms the tentative ruling.

DECLARATION OF SERVICE BY E-MAIL and OVERNIGHT COURIER

Case Name: **California High-Speed Rail Authority, et al. v. Sacramento Superior Court**
No.: **C076042**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for overnight mail with the **Golden State Overnight (GSO)**. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the overnight courier that same day in the ordinary course of business.

On April 11, 2014, I served the attached **PETITIONERS' REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF REPLY TO PRELIMINARY OPPOSITION** by transmitting a true copy via electronic mail, and by placing a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, for overnight delivery, as shown below.

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 11, 2014, at Sacramento, California.

Eileen A. Ennis	Eileen A. Ennis
Declarant	Signature

SERVICE LIST

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Presiding Judge
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The Honorable Michael Kenny
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