

CHARLES H. MONTANGE
ATTORNEY AT LAW
426 NW 162ND STREET
SEATTLE, WASHINGTON 98177

(206) 546-1936

303498

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Cynthia T. Brown
Chief of the Section of Administration
Office of Proceedings
Surface Transportation Board
395 F Street, SW
Washington, D.C. 20423-0001

Re: North Coast Railroad Authority – Abandonment Exemption –
Mendocino, Trinity and Humboldt Counties, CA, AB 1305X

Dear Ms. Brown:

North Coast Railroad Authority (NCRA, an agency of the State of California) by this letter (a) supports granting California Coastal Commission's motion to late file a Reply to NCRA's motion for exemption from 49 U.S.C. 10904 ("OFA's"), (b) addresses some of the misstatements of fact and law set forth in the Letter dated January 4, 2022, submitted by Mendocino Railway in this proceeding, and (c) provides a notification of name change wrought by California's adoption of Senate Bill 69, and that legislation's corroboration of the valid public purpose that would be served by granting an exemption from offers of financial assistance (OFA's) in this proceeding.

If leave to file is required, NCRA so requests in order, inter alia, to complete, correct and clarify the record, and to update it with new developments. Inasmuch as the proceeding is in abeyance, no party is prejudiced.

Background. On March 9, 2021, NCRA filed (and circulated) a Combined Environmental and History Report in this proceeding (AB 1305X) in support of a contemplated two year out-of-service notice of exemption ("NOE") abandonment authorization (49 C.F.R. 1152.50) for approximately 170 miles of its line of railroad; namely, that portion from Willits at MP 139.5 north to end of all

branches. NCRA duly filed the actual NOE for same on May 14, 2021. The line plainly qualifies for an 1152.50 exemption: it has been out-of-service since 1998, the year the Federal Railroad Administration placed it under an emergency embargo [63 Fed. Reg. 67976-79 (Dec. 9, 1998)], and its condition has gravely deteriorated since due to floods, slides, earth movement, tunnel fires and the other things Nature does in the kind of terrain this right-of-way traverses.

In its NOE filing, NCRA forthrightly indicated uncertainty concerning whether the Board still had jurisdiction over the “Annie and Mary” segment (between Korblex and Korbel) at the extreme north end of NCRA’s Willits segment. NCRA requested that the Annie and Mary portion be included in the abandonment process if STB still had jurisdiction (this is necessary in practice before the agency in order to avoid a “stranded segment”).¹ On June 9, 2021, the Board stayed all proceedings in AB 1305X pending resolution of jurisdictional issues. On June 11, STB placed the environmental process in abeyance as well.

Because the City of Eureka and Humboldt County wished to remove rail and ties from the north end of the line primarily to elevate and/or armor the rail roadbed for flood control purposes (the railbed acts as a dike in various locations around Humboldt Bay to hold back the Pacific Ocean, and is inadequate to that purpose in storm events),² and because NCRA felt the jurisdictional issue could be handled without indefinite suspension of what otherwise seemed a straightforward NOE, NCRA on June 28, 2021, requested that the abeyance be lifted in AB 1305X. Mendocino Railway, a non-operating entity which does business as Skunk

¹ In addition, and in order to facilitate prompt resolution of the abandonment proceeding, NCRA had earlier filed a petition for waiver of certain filing requirements so it could file an adverse discontinuance application (AB 1313) to discontinue the moribund (never used) operating rights of a defunct (no longer in existence) entity (Northwestern Pacific Railway Company) over a portion of a line over which it still appeared to hold operating rights (namely, MP 142.5, Outlet Station, to end of branches in Humboldt County). Although the Board customarily grants waivers for adverse abandonment proceedings, the Board on June 7, 2021, instead instituted a proceeding in AB 1313 under 49 U.S.C. 10502(d). There has been no action in docket AB 1313 since that time.

² NCRA understands from the City of Eureka that in storm events, the current roadbed is inadequate to protect traffic on US Highway 101, the principal north south route along the Coast of California in the area in question.

Railroad, which in the past has provided tourist excursion and railbike services, opposed lifting the abeyance order on the ground that all jurisdictional issues should first be resolved, claiming it wished to file an “offer of financial assistance” (“OFA”) for all or a portion of the line. Mendocino/Skunk also argued that NCRA had not sought an exemption from the OFA process.

Mendocino/Skunk’s position in polite terms “surprised” NCRA, for Mendocino/Skunk had indicated in a letter to the California Transportation Commission (“CTC”), which sets California transportation policy, that Mendocino/Skunk (i) had no interest in the portion of the line north of Willits, (ii) viewed that portion as too costly to restore for rail operations, and (iii) supported railbanking of that portion.³ NCRA accordingly promptly filed a motion for exemption from OFA. NCRA noted that it was entitled to an exemption pursuant to 49 U.S.C. 10502(a) because the OFA process in this case is not necessary to implement transportation policy and the exemption is either of limited scope or the OFA “remedy” is not needed to protect any shipper. NCRA also showed, *inter alia*, that the line had been under an FRA emergency safety embargo since 1998; that since the embargo no shipper had sought or received service over the mileage in question; that the line in question traversed terrain incompatible with reliable and economic rail service; that the line historically suffered repeated catastrophic failures prohibiting service; that the cost to restore that segment was in excess of \$1.7 billion; that an OFA for this line would not interconnect with the national rail system because of additional embargoed line (and at least an additional \$600 million for the rehabilitation of segments of line) south of Willits; and that the California Transportation Commission (CTC), which oversees state transportation (including rail) policy, had determined that there was no need for rail service but that there was a compelling need to convert the line into a railbanked trail facility. NCRA also explained that Mendocino/Skunk had advised CTC it had no interest in the line in question, and that any OFA by Mendocino/Skunk is estopped in any event. In short, NCRA politely indicated that any OFA of the line in these

³ The letter is on file with STB. See Mitch Stogner Verified Statement (Exhibit C to NCRA’s Motion for OFA Exemption filed July 26, 2021, and attached letter to CTC at p. 50 of 56 on STB’s website (Mendocino/Skunk states to CTC: “Mendocino Railway agrees that the portion of the NWP north of Willits is too great of disrepair to allow for economic railroad operation at this time and should thus be railbanked to preserve such an opportunity for the future should it again become economic to operate over that portion of the line.”).

circumstances must be a ruse, not for purposes of serving actual shippers on the line, but explicable as a shake-down attempt [it is no secret that Mendocino/Skunk covets designation as operator of the NCRA (and SMART) lines south of Willits].

California Coastal Commission (CCC, which regulates various aspects of coastal development in California) on December 15, 2021, filed a motion to late-file comments in support of NCRA's motion for exemption from OFA. Mendocino/Skunk on January 4 filed an opposition to CCC's motion. Mendocino/Skunk did not represent that it was in fact prejudiced in any way.

Issues relating to California Coastal Commission. While STB has a rule against late-filed replies, NCRA as the abandonment applicant has no objection to CCC's motion to late-file a statement of support, and late-filing is generally permitted in the absence of objection (or even over the objection) of the abandonment applicant. As NCRA is the applicant, and has no objection, that should be more than enough to allow the Board to accept CCC's filing. Mendocino/Skunk can claim no prejudice from possible delay because it is on record in opposition to lifting the abeyance order in this proceeding, and thus admittedly has no need for speed.

Moreover, CCC clearly has an interest in this proceeding. On examination, that interest is sufficient for CCC to make its own motion for exemption from OFA. CCC is charged with conservation and protection of coastal resources in California. The NCRA line in question has a major impact on those resources due to its location on the Eel River and Humboldt Bay. If any entity proposed ab initio a major rail construction project on the Eel River or into Humboldt Bay,⁴ this Board would not -- and lawfully could not -- license the project without prior completion of an Environmental Impact Statement ("EIS") under NEPA. See 49 C.F.R. 1105.6(a). Although any OFA applicant for NCRA's line (or a segment thereof) must engage in equivalent "EIS-level" construction due to the dire condition of the NCRA line, this Board's environmental regulations purport to exempt OFA procedures from any environmental review requirements. See 49

⁴ Because the line is so degraded, rehabilitation for rail amounts to a huge new rail construction project (in excess of \$1.7 billion north of Willits and an additional \$600 million south of Willits to reach any viable interchange). See D. Anderson V.S., attached as Exhibit B to NCRA's motion for OFA exemption filed July 26, 2021.

C.F.R. 1105.5(c)(3). Moreover, the Board takes the position that its regulations preempt state environmental review laws as well. See Northwestern Pacific RR Co – Pet. for Dec. Order, F.D. 35977, served April 25, 2016, at pp. 2-3, n. 3. But here the entire rail corridor is owned by an agency of the State of California (namely, NCRA), which is bound to comply with California equivalents to federal environmental laws under California law. Friends of the Eel River v. NCRA, 3 Cal. 5th 677, 399 P.3d 37 (Cal Sup. Ct. 2017). In the circumstances, any STB order requiring an OFA transfer amounts to licensing a private party to engage in a huge “EIS-level” construction project on the Eel River and around Humboldt Bay without any environmental review of any sort, by exempting it from NEPA and then cloaking it in federal preemption to evade state environmental law.

CCC not surprisingly would be “upset” if an inactive (non-operating) purported freight carrier (such as Mendocino/Skunk) -- or would-be carrier like the mysterious North Coast Railroad Company LLC (whose owners, managers, and backers are under disguise) -- were allowed to manipulate STB regulations to evade essentially all state and federal environmental review in connection with a huge transportation project. The one here not only would degrade the Eel River and threaten Humboldt Bay, but also sever the City of Eureka from its waterfront and detrimentally impact the conservation areas of northern California. In the circumstances, it is entirely appropriate for CCC to support an exemption from OFA, for an OFA exemption would eliminate the problem.⁵ In short, the exemption serves the vital public purpose of protecting a Wild and Scenic River (the Eel) and the sensitive environment of the area traversed generally.

⁵ Mendocino/Skunk is a bit coy about what it intends to OFA (Mendocino/Skunk hint that they may not go all the way to Humboldt Bay), but the mysterious Wyoming LLC (North Coast Railroad Company, LLC) that has appeared in this proceeding is evidently a front or would-be front for unspecified Utah (maybe Montana as well) coal interests. See Comments of League of Women Voters and Friends of the Eel River, AB 1305X, filed Sept. 14 and 15, 2021, respectively. According to news accounts, those interests purportedly wish to export coal to Asia over the entire route (American Canyon all the way to Willits through Napa and Sonoma County vineyards all the way up to Humboldt Bay) on rail lines the bulk of which are currently owned by either NCRA or SMART, both entities of the State of California and thus bound by California environmental law.

Change of name and supplemental (new) information: Senate Bill 69. This Board's staff has advised NCRA that renaming a railroad does not require Board authorization, but that the Board wishes to be advised in the event of renaming. Accordingly, please be advised that the California legislature adopted "Senate Bill No. 69," approved by the Governor of California on September 30, 2021 and duly filed with the California Secretary of State. For a copy of the legislation, see https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB69. Insofar as relevant here, the State of California is changing the name of NCRA to Great Redwood Trail Agency ("GRTA") effective March 1, 2022. The new legislation is carefully crafted so as not to interfere with NCRA's rail obligations under STB regulation. The adoption of Senate Bill 69 is germane here because it amounts to affirmation by the California Legislature and Governor of the determination of the California Transportation Commission that NCRA's line north of Willits is no longer appropriate, or needed, for rail service and instead should be a railbanked trail.

In its substantive rebuttal of the CCC, Mendocino/Skunk claimed (e.g., Jan. 4 letter at p. 2) that STB precedent such as 1411 Corporation – Abandonment Exemption, AB 581X (served Sept. 6, 2001) stands for the proposition that Congress so prefers continued rail use of any sort that OFA applicants necessarily trump environmental concerns and trail projects.⁶ The heavy presumption in favor of rail service that Mendocino/Skunk conjures from cases like 1411 Corporation is undercut by the Board's subsequent rulemaking in Offers of Financial Assistance, Ex Parte 729.⁷ The purpose of the EP 729 rulemaking was "to revise the Board's outdated regulations regarding the OFA process and make changes to streamline the OFA process and protect it from abuse." Offers of Financial Assistance, EP 729, slip op. at p. 20, served June 29, 2017. The rule changes are designed, among other things, to weed out ill-conceived, unlikely and spurious filings. The 2017 rule changes render Mendocino/Skunk's reliance on prior precedent that seems to favor what amount to contrived OFA's ill-advised. Mendocino/Skunk also cites⁸

⁶ North Coast Railroad Company, LLC (the mysterious Wyoming LLC without any known owners, managers, or executives) has also based its arguments on 1411 Corporation, *supra*.

⁷ STB undertook the EP 729 rulemaking as an alternative to a petition for rulemaking docketed as Ex Parte 727, which Norfolk Southern filed to address and to prevent abuse of the OFA process.

⁸ Jan. 4 letter, p. 2 n.4

Roaring Fork Railroad Holding Authority – Abandonment Exemption, AB 547X, served October 16, 1998, for the proposition that the Board denied an OFA exemption “even though local government had plans to establish trail use pending future reactivation of rail service.” Suffice it to say that the Board subsequently dismissed the Kulmer/Schumacher OFA at issue in that proceeding, stating that “based on the additional information we now have concerning both RFRHA’s plans for this line and the lack of interest in continued freight rail service, **we believe that it would have been appropriate to exempt this line from the OFA process.** An exemption from the OFA provisions of 49 U.S.C. 10904 is appropriate where the right-of-way is needed for a valid public purpose and there is no overriding public need for continued (freight) rail service.”

Roaring Fork Railroad Holding Authority – Abandonment Exemption, AB 547X, served May 21, 1999, slip op. at 6 (emphasis added).⁹ Here, any OFA that is predicated on freight rail service between Willits and Eureka (or between those points and Mendocino/Skunk’s terminus in Fort Bragg¹⁰) in all events makes no sense because such an alignment has no connection to the national rail system: the line south of Willits is embargoed and/or needs at least \$600 million in repairs to be used for freight. A fortiori, there can be “no overriding public need for continued (freight) rail service” on either the whole of the line at issue here, or any segment thereof.

CCC’s comments as well as the action of the California legislature (enactment of SB 69) show that the right of way north of Willits is needed for a valid public purpose (environmental preservation and railbanked trail use), and all the evidence to date indicates no public need for continued freight rail service. In addition, the cost to re-construct the right of way in question for rail use and then to maintain it would essentially bankrupt any carrier that pursued service on the line in question (see note 4), as it effectively has all who have tried since its sale by the Southern Pacific system to Eureka Southern.

⁹ Failure to comment further on claims or arguments by Mendocino/Skunk should not be construed as an admission that any have merit or a waiver of any arguments.

¹⁰ The Mendocino/Skunk line from Willits to Fort Bragg is severed by tunnel collapse which Mendocino/Skunk has so far lacked funds to repair.

Certificate of service. By my signature below, I certify service of this Letter by email attachment on January 9, 2022, on all parties to this proceeding at their email addresses of record.

Respectfully submitted,

s/ *Charles H. Montange*

Charles H. Montange

Counsel for North Coast Railroad Authority

cc. Elizabeth Coleman, Esq. and Mitch Stogner (NCRA)

All parties of record