

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 36433

NORTH COUNTY TRANSIT DISTRICT -
PETITION FOR DECLARATORY ORDER

SECOND SUPPLEMENTAL STATUS UPDATE

North County Transit District (“NCTD”) respectfully submits its Second Supplemental Status Update to advise the Surface Transportation Board (“STB”) of recent relevant events with respect to the above-captioned proceeding since its Supplemental Status Update on March 4, 2022 and Reply in Opposition to Request for Additional Briefing on March 14, 2022. These new recent events make NCTD’s request for expedited consideration of its petition for declaratory order even more urgent at this time for its safety fencing project in its rail right-of-way which the NCTD Board directed to commence following its January 20, 2022 Board meeting.

In review, the California Coastal Commission (“Commission”) issued a Cease and Desist Order to NCTD on March 7, 2022, demanding that NCTD cease and desist from any construction of the safety fencing project in its right-of-way before it obtained a Coastal Development Permit. The Commission noted therein that it was seeking to enforce the City of

Del Mar's Local Coastal Plan.¹ Shortly thereafter, on March 11, 2022, NCTD was served with a demand letter from the Friends of Del Mar Bluffs threatening to file a lawsuit to enjoin NCTD from implementing its stated plan to install safety fencing on the Del Mar Bluffs in its rail right-of-way unless NCTD agreed to suspend or terminate its plans to begin this work by March 18, 2022. NCTD did not agree to terminate its plans to build the safety fencing in its right-of-way.

For purposes of updating the STB, as threatened, Friends of Del Mar Bluffs filed a petition for writ of mandate and complaint for quiet title, invalidation of contract, and declaratory and injunctive relief, including preliminary injunctive relief, on March 21, 2022 in the Superior Court of the State of California for the County of San Diego. (A true and accurate copy of the complaint is attached hereto as Exhibit A.) Specifically, Friends of Del Mar Bluffs “seek a judicial determination under California real property law of the public’s right to continue to access and use portions of the Del Mar Bluffs in NCTD’s right-of-way for sitting, walking, running, meditating, observing the Pacific Ocean and other public uses, as the public has for over 100 years.” Friends of Del Mar Bluffs also seek declaratory relief establishing the invalidity of certain actions taken by NCTD on or around the January 20, 2022, at a general meeting of its Board of Directors when it approved a contract to construct a 6-foot wire mesh fence on the Del Mar’s upper bluff in the NCTD rail right-of-way without seeking a Coastal Development Permit under the California Coastal Act from the City of Del Mar.

While Friends of Del Mar Bluffs framed its pleading as requests under California law, it is quite clear that these claims to stop the construction of the safety fencing in NCTD’s right-of-

¹ This enforcement of Del Mar’s Local Coastal Plan demonstrates the “patchwork of local regulation” concern that NCTD has pointed out in prior filings. This means each city with a Local Coastal Plan on the coast could make similar demands on a railroad if the Commission is allowed to proceed with its Cease and Desist Order.

way and to obtain title to NCTD's property in the right-of-way are preempted under 49 U.S.C. § 10501(b). This is clearly an attempt by Friends of Del Mar Bluffs to bypass the STB and to seek relief through forum shopping in state court.²

On April 12, 2022, NCTD filed a notice of removal of this civil action to the United States District Court for the Southern District of California. (A true and accurate copy of this notice is attached hereto as Exhibit B.)

Based on the foregoing, NCTD respectfully urges the STB to issue a decision on the preemption issues it raised in its petition herein as soon as possible especially with respect to the safety fencing project which NCTD will commence construction of imminently.

² In fact, Shirli F. Weiss, who is listed of counsel on the complaint, has filed pleadings in this STB proceeding in opposition to NCTD.

Respectfully submitted,

/s/ Daniel R. Elliott

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Dated: April 13, 2022

Certificate of Service

I certify that I have, this 13th day of April 2022, served by email copies of the foregoing document on all parties of record in this proceeding.

/s/ Daniel R Elliott
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Attorney for North County Transit District

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11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **COUNTY OF SAN DIEGO, CENTRAL DIVISION**

13 FRIENDS OF DEL MAR BLUFFS, a
14 California nonprofit mutual benefit
15 corporation; and LAURA S. DEMARCO, an
individual,

16
17 Petitioners and Plaintiffs,

18 v.

19 NORTH COUNTY TRANSIT DISTRICT, a
California public agency; MATTHEW
20 TUCKER, as Executive Director of NORTH
COUNTY TRANSIT DISTRICT; ALL
21 PERSONS INTERESTED IN THE MATTER
OF NORTH COUNTY TRANSIT DISTRICT'S
22 APPROVAL ON JANUARY 20, 2022, OF A
CONTRACT WITH EXBON
23 DEVELOPMENT, INC. TO INSTALL
24 FENCING IN THE CITY OF DEL MAR
WITHOUT COMPLIANCE WITH
25 CALIFORNIA LAWS; ALL PERSONS
UNKNOWN, CLAIMING ANY LEGAL OR
26 EQUITABLE RIGHT, TITLE, ESTATE, LIEN,
OR INTEREST IN THE PROPERTIES
27 DESCRIBED IN THE COMPLAINT
28 ADVERSE TO PLAINTIFFS' TITLE, OR

ELECTRONICALLY FILED
Superior Court of California,
County of San Diego

03/21/2022 at 12:37:48 PM

Clerk of the Superior Court
By Emily Schilawski, Deputy Clerk

Case No. 37-2022-00011260-CU-WM-CTL

**VERIFIED PETITION FOR WRIT OF
MANDATE AND COMPLAINT FOR
QUIET TITLE, INVALIDATION OF
PUBLIC CONTRACT, AND
DECLARATORY AND INJUNCTIVE
RELIEF**

Dept:
Judge:

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ANY CLOUD UPON PLAINTIFFS’ TITLE
THERE TO; and DOES 1 to 50, inclusive,

Respondents and Defendants.

Petitioners and Plaintiffs FRIENDS OF DEL MAR BLUFFS and LAURA S. DEMARCO (“Plaintiffs”) allege as follows:

INTRODUCTION

1. On January 20, 2022, the Board of Directors of Defendant North County Transit District (“NCTD”) approved a contract with Exbon Development Inc. (“Exbon”) to construct 6-foot-high fences in a railroad right-of-way operated by NCTD on the coastal bluffs in the City of Del Mar (“Del Mar” and “Del Mar Bluffs”) without obtaining a coastal development permit (“CDP”) as required by the California Coastal Act of 1976, Public Resources Code, §§ 30000 *et seq.* (“Coastal Act”). The Del Mar Bluffs overlook the Pacific Ocean and are a scenic and geologically fragile coastal area, on which any development is strictly regulated by California’s environmental laws, including the Coastal Act. NCTD’s unilateral announcement of its imminent intent to install fencing without Coastal Act authorization is in defiance of a warning letter to NCTD by the California Attorney General (“Attorney General Letter”), and a Cease and Desist Order issued by the Executive Director of the California Coastal Commission (“Cease and Desist Order”), dated January 19, 2022, and March 7, 2022, respectively. (Exs. A & B.)

2. NCTD’s threatened violation would put the stability of the Del Mar Bluffs at risk and would interfere with public use of the Del Mar Bluffs and with public access to the beach. For reasons that will be explained, implementation of NCTD’s fencing plan would also be in breach of Master Agreement No. 64NCTDMA, entered into by the California State Transportation Agency (“CalSTA”), on behalf of the State of California, and NCTD on October 1, 2018, and effective on September 20, 2020, through Program Supplement No: 11NCTDPS-01 A1, copies of which are in NCTD’s possession (“Grant Agreement”).

3. NCTD has undertaken a campaign to avoid complying with California laws. In August 2020, NCTD filed a declaratory relief action with the Surface Transportation Board in Washington, D.C., against the Coastal Commission and the City of Del Mar, FD No. 36433 (“STB Action”). In the STB Action, NCTD seeks a declaration that *all* state and local laws and regulations are preempted by federal law with respect to any current or future projects it undertakes in the railway right-of-way in Del Mar.

4. NCTD's goal is to be immune from California's environmental laws and free to take any action in its sole discretion on the Del Mar Bluffs.

5. Plaintiffs seek declaratory relief on behalf of the public with respect to NCTD's obligations arising from the Grant Agreement. Plaintiffs do not seek a ruling regarding the issue of preemption pending in the STB Action.

6. Plaintiffs also seek a judicial determination under California real property law of the public's right to continue to access and use portions of the Del Mar Bluffs in NCTD's right-of-way for sitting, walking, running, meditating, observing the Pacific Ocean and other public uses, as the public has for over 100 years.

7. Plaintiffs also seek declaratory relief establishing the invalidity of certain actions taken by NCTD on or around the January 20, 2022, at a general meeting of its Board of Directors (“NCTD Board”) when it approved the contract with Exxon to construct as “Phase 1,” a 6-foot wire mesh fence on the Del Mar’s upper bluff, described herein, without seeking a CDP under the Coastal Act.

PARTIES AND NON-PARTIES

8. Plaintiff Friends of Del Mar Bluffs is a nonprofit mutual benefit corporation whose members are California citizens, taxpayers, and Del Mar residents devoted to protecting and preserving, for public access and use, the spectacular scenic ocean view trails and the environment along the Del Mar Bluffs. Plaintiff Friends of Del Mar Bluffs is an interested party with standing to bring this petition for writ and complaint as a private attorney general to enforce important rights affecting the public interest. Specifically, Friends of Del Mar Bluffs seeks to enforce the responsibilities under law of a California public agency, as herein described; and the rights of the public to continue to use and enjoy the Del Mar Bluffs for recreational activities including sitting, walking, running, meditating, and watching sunrises and sunsets.

9. Plaintiff Laura S. DeMarco (“DeMarco”) is a resident of Del Mar, California, an environmental activist, and a California taxpayer. DeMarco is an interested party with standing and brings this declaratory relief action as a private attorney general and taxpayer to enforce important rights affecting the public interest, specifically, to enforce the responsibilities under law of a

1 California public agency, as herein described; the rights of the public to continue to use and enjoy
2 the Del Mar Bluffs for recreational activities including sitting, walking, running, meditating, and
3 watching sunrises and sunsets; the rights of the public to protect the environment along the Del Mar
4 Bluffs. DeMarco is the President of Friends of Del Mar Bluffs.

5 10. Defendant North County Transit District (“NCTD”), formerly known as the North
6 San Diego County Transit Development Board, is a California public agency funded by, and
7 accountable to, California taxpayers. NCTD has its principal place of business at 810 Mission
8 Avenue, Oceanside, California 92054.

9 11. Defendant Matthew Tucker (“Tucker”) is and was the Executive Director of the
10 NCTD at all times pertinent to this complaint. He is sued in his capacity as Executive Director of
11 NCTD.

12 12. NCTD was established under the name North San Diego County Transit
13 Development Board in 1976 by California Senate Bill 802 to plan, construct and operate public
14 transit in North San Diego County. On January 1, 2003, the California Legislature enacted Senate
15 Bill 1703, which transferred North San Diego County Transit Development Board’s
16 responsibility for future transit planning, programming, development, and construction in North
17 County San Diego to a consolidated agency, the San Diego Association of Governments
18 (“SANDAG”), except for certain specific tasks such as bus stop planning and rail operation
19 within local jurisdictions, which functions stayed with transit district boards. In 2005, the
20 California State Legislature changed the name of North San Diego County Transit Development
21 Board to the North County Transit District.

22 13. Non-Party California Coastal Commission is a California public agency
23 established by voter initiative in 1972 and made permanent by enactment of the California
24 Coastal Act of 1976, Public Resources Code, §§ 30000 et seq. The Coastal Commission
25 is charged with the administration of the Coastal Act.

26 14. Non-Party CalSTA is a California public agency established in 2013 to develop
27 and coordinate the policies and programs of the state’s transportation entities to achieve the
28 state’s mobility, safety, and air quality objectives in its transportation system.

1 15. Non-Party Del Mar is a charter city in San Diego County, California, established
2 in 1885 and incorporated in 1959. The real property interests as to which Plaintiffs seek relief
3 herein pertain to a strip of land of varying width running north and south approximately 1.6 miles
4 along the coast in Del Mar, in which NCTD claims to possess a right-of-way interest for
5 operation of a railway (“Right-of-Way”). Pursuant to the Coastal Act, Del Mar has adopted a
6 Local Coastal Program and is authorized to issue CDPs for development within the Coastal Zone
7 in Del Mar. As described herein, NCTD’s planned fencing in or around the Right-of-Way is
8 “development” as defined by the Coastal Act. Both Del Mar and the Coastal Commission may
9 enforce the Coastal Act’s requirement for a CDP.

10 16. Upon information and belief, NCTD claims the Right-of-Way based on a transfer
11 of property from the Atchison, Topeka and Santa Fe Railway (“ATSF Railway”) to NCTD’s
12 predecessor pursuant to deeds recorded on December 15, 1992, as Documents # 1992-0802206
13 and # 1992-0802209 (the “1992 Deeds”) in the San Diego County Recorder’s Office.

14 17. Per the 1992 Deeds, the Right-of-Way is more particularly described as:

15 A right of way for railroad purposes over all that portion of Block 123 of Del Mar
16 Resubdivision No.1 in the City of Del Mar, in the County of San Diego, as per Map
17 thereof No. 1268 filed in the office of the County Recorder of said county, within the
18 boundaries of that certain right of way, varying in width, described in that certain deed to
19 the Atcheson, Topeka and Santa Fe Railway Company, recorded May 11, 1911 in Book
20 515 page 394, excepting therefrom said right of way those portions described in that
certain deed to Santa Fe Land Improvement Company recorded May 21, 1973 as
instrument No 73-136953, official records in that office.

21 18. The true names and capacities of the Defendants identified as DOES 1 through 50
22 are unknown to Plaintiffs, who will seek the Court's permission to amend this pleading in order to
23 allege the true names and capacities as soon as they are ascertained. Plaintiffs are informed and
24 believe and, on that basis, allege that each of the fictitiously named DOES 1 through 50 have
25 participated in the acts and omissions alleged herein.

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25. As can be seen from the above photograph, both the Upper Bluff and Lower Bluff contain trails and provide valuable scenic viewpoints. The current railway was built on the Lower Bluff in 1910.

26. Upon information and belief, NCTD is in possession of a survey of the Right-of-Way.

27. The Right-of-Way was transferred to NCTD for the operation of a railway for a token consideration.

28. Over time, the Del Mar Bluffs have suffered erosion and deterioration driven by storm water runoff, ground water intrusion, wind, tidal action, and train vibration from more than 50 heavy trains traveling on the tracks daily. There have been eight reported large bluff collapses of portions of the Lower Bluff just between 2018 and 2021.

29. Any “development” on the Del Mar Bluffs, such as reengineering of the slopes, drilling hundreds of 3-foot-deep fence post holes, and placing heavy concrete and fencing on the bluffs, can have significant geological and environmental impact and requires NCTD to obtain a CDP under the Coastal Act and the Del Mar Local Coastal Program. (See Pub. Res. Code, §§ 30103, 30106, 30210, 30251, 30253, 30600, subd. (a); Del Mar Municipal Code Section 30.75.040,

1 30.75.030.)

2 30. For over 100 years, the public has used the trails that exist on the Upper Bluff and
3 on the Lower Bluff to walk, run, and enjoy pristine, unobstructed ocean views, vegetation, and
4 wildlife. Over the years, members of the public placed benches on the Upper Bluff to facilitate
5 the enjoyment, use, and unobstructed coastal views from the Upper Bluff by the public. The
6 public's use of the Upper Bluff and Lower Bluff has been open, notorious, and continuous for
7 over 100 years. The Del Mar Bluffs are an important natural coastal resource which Del Mar has
8 sought to preserve and treasure.

9 31. A single train track runs on the Lower Bluff through Del Mar. No train tracks run
10 on the Upper Bluff. No train tracks are maintained on the Upper Bluff. No train tracks are
11 operated on the Upper Bluff.

12 32. In January 2018, NCTD, SANDAG, and the Los Angeles-San Diego-San Luis
13 Obispo ("LOSSAN") Rail Corridor Agency, applied for \$501,000,000 in grant funds from
14 CalSTA, through a California Transit and Intercity Rail Capital Program Grant Request ("2018
15 TIRCP Grant Request") for projects they seek to implement along the LOSSAN corridor and
16 advised CalSTA that it would seek additional state and federal funds for these projects. Plaintiffs
17 are informed and believe and thereupon allege that NCTD and SANDAG did obtain federal
18 grant(s) to fund these projects. Included in the 2018 TIRCP Grant Request was a request for
19 funding to stabilize the Lower Bluff.

20 33. Also included in the 2018 TIRCP Grant Request was a related request to fund two
21 separate fences, fencing on the Lower Bluff and fencing on the Upper Bluff. While the 2018
22 TIRCP Grant Request characterized the fencing as "safety fencing," fencing at each level has the
23 potential to cause great injury by increasing the likelihood of bluff collapses. For example, the
24 construction of 6-foot wire mesh fencing on the Upper Bluff, which will require drilling of holes
25 every 10 feet for about a mile, pouring of concrete, boring of 3-foot-deep fence post holes, and
26 installation of heavy fencing presents a geological risk of increased erosion, water intrusion, and
27 bluff destabilization.

28 34. NCTD's threatened fences would also adversely impact scenic views and impede,

1 or block entirely, the use of popular trails and public beach access in violation of the Coastal Act.
2 (Pub. Res. Code, § 30251 [“The scenic and visual qualities of coastal areas shall be considered
3 and protected as a resource of public importance.”]; Pub. Res. Code, § 30210 [“[M]aximum
4 access ... and recreational opportunities shall be provided for all the people consistent with public
5 safety needs and the need to protect public rights, rights of private property owners, and natural
6 resource areas from overuse.”].)

7 35. Most of the Upper Bluff has a natural barrier from the tracks because of height and
8 distance from the tracks. NCTD’s planned redundant Upper Bluff fence would block the trails
9 from pedestrian use, and thereby end over 100 years of the public’s use of the Del Mar Upper
10 Bluff trail for sitting, walking, running, meditating, and enjoying spectacular sunsets and views of
11 the Pacific Ocean.

12 36. NCTD’s planned fencing on the Lower Bluff would block public access to the
13 beach in Del Mar with fencing. NCTD has no plans to provide alternative public access to the
14 beach in violation of the Del Mar Bluff Stabilization Project 4 permit which requires “(in
15 coordination with North County Transit District and the City of Del Mar) a needed,
16 comprehensive long-term public access improvement plan for the Del Mar area, which will be
17 submitted to the Commission by February 2022.”

18 (<https://documents.coastal.ca.gov/reports/2020/7/F11a/f11a-7-2020-report%E2%80%8B.pdf>.)

19 37. The fencing described by NCTD that it planned for the Upper Bluff and Lower
20 Bluff would be damaging to the environment, including by permanently altering the bluffs,
21 accelerating erosion, and creating artificial physical barriers with a prison-like, industrial
22 appearance.

23 38. Public outrage against NCTD’s fencing plans has been swift and severe with
24 thousands of San Diego and other California residents signing petitions to stop NCTD from
25 installing its planned fencing on the Del Mar Bluffs.

26 39. A San Diego County Grand Jury was convened in 2018 to address the issue of
27 track relocation due to the inherent and growing risks caused by a railway on the Del Mar Bluffs.
28 The Grand Jury determined that SANDAG needs to relocate the tracks and instructed SANDAG

1 to “choose one plan and rank the other plans for rerouting the railroads through Del Mar to enable
2 the immediate participation of public agencies, environmental groups and the public in the
3 selection and approval process.” This was followed by the Coastal Commission’s agreement to
4 allow SANDAG to stabilize the Del Mar Bluffs with a directive that realistic plans be undertaken
5 to relocate the tracks.

6 40. Belying NCTD’s purported intent to improve public safety, its fencing plan defers
7 for several years fencing the area of the Right-of-Way on the Lower Bluff where all train strikes
8 have occurred, giving priority instead to an unnecessary, expensive, and trail-destroying fence on
9 the Upper Bluff, where there are no railway tracks, and no train accidents have occurred or could
10 occur.

11 41. NCTD has a pattern and practice whereby after raising the specter of pervasive
12 industrial and largely unnecessary fencing in the coastal cities within which it operates a right-of-
13 way, it offers to install a shorter, less lengthy, and less unsightly fence, in return for terms and
14 conditions including waivers of numerous rights by the coastal cities.

15 42. CalSTA approved the 2018 TIRCP Grant Request and NCTD entered into the
16 Grant Agreement with CalSTA dated October 1, 2018. A program supplement was approved on
17 September 20, 2020. Pursuant to the Grant Agreement, NCTD agreed to comply with all state and
18 federal laws and policies, specifically at Article II Section 2(D)(1), Article III Sections
19 3(A)(2)&(3), 3(C)(1), and 3(O) of the Grant Agreement. Thus, NCTD assumed a contractual
20 obligation, in addition to its existing obligations, to comply with California statutes and
21 regulations. In return, NCTD received all the benefits of the Grant Agreement.

22 43. Because the railway is located on a sensitive coastal bluff, NCTD’s threatened
23 fencing is subject to numerous environmental laws, including but not limited to the Coastal Act,
24 the California Environmental Quality Act (environmental impact report and mitigation), and Del
25 Mar’s Municipal Code and Local Coastal Program.

26 44. NCTD’s recent actions demonstrate a disregard for state and local laws and
27 regulations.

28 45. On January 19, 2022, California Attorney General Ron Bonta sent the Attorney

1 General Letter to the NCTD Board warning that a vote to approve the Exbon contract to fence the
2 Del Mar Bluffs, without first obtaining a CDP, would place NCTD in violation of California law
3 and contract.

4 46. On January 20, 2022, the majority of the NCTD Board, in defiance of the Attorney
5 General Letter, voted to approve the Exbon Job Order to construct as Phase 1, a 6-foot-high wire
6 mesh fence on the Upper Bluff without seeking a CDP. The NCTD Board also voted to grant
7 NCTD's Executive Director authority and discretion to negotiate a Phase 2 fencing contract and
8 defer for more than two years constructing the second fencing, to be located on the Lower Bluff.
9 The Lower Bluff is the area where all train strikes have occurred. NCTD announced that, in the
10 alternative, the NCTD Board would instruct Exbon to construct a less intrusive fence on the
11 Upper Bluff, but only if Del Mar agreed by February 28, 2022, to a license agreement proposed
12 by NCTD ("Proposed License Agreement").

13 47. On February 28, 2022, Del Mar's City Council rejected the Proposed License
14 Agreement. The Proposed License Agreement would have required Del Mar to waive numerous
15 rights and protections, relinquish any claims arising from the effects of train vibration, and
16 assume certain costs of paying NCTD's staff. The Proposed License also would have required
17 Del Mar to allow the removal of the Upper Bluff if NCTD ever deems that it wants the space in
18 connection with a SANDAG project or there is a "conflict" with SANDAG projects approved
19 under NCTD's "sole and absolute discretion confirmed consistent by SANDAG."

20 48. On March 3, 2022, the Coastal Commission's Executive Director, Jack Ainsworth,
21 sent a Notice Prior to Issuance of Executive Director Cease and Desist Order and Notice of Intent
22 to Commence Proceedings for the Coastal Commission's Issuance of a Cease and Desist Order to
23 Defendant Tucker, Executive Director of the NCTD, outlining NCTD's violations of the Coastal
24 Act ("Commission Notice Letter").

25 49. On March 7, 2022, Executive Director Tucker responded in a letter to Coastal
26 Commission Executive Director Ainsworth stating "NCTD disagrees with the fundamental
27 premise of your assertions of authority over both the District and the safety fencing project
28 located on the Del Mar portion of the NCTD railroad right-of-way."

1 50. On March 7, 2022, Executive Director Ainsworth issued the Cease and Desist Order.

2 51. NCTD's approval of the Exbon contract is consistent with NCTD's pattern and
3 practice. With respect to the Upper Bluff, NCTD proposed to stop contending that the public's
4 use of the Upper Bluff is illegal and to "license" the Upper Bluff to Del Mar for public use, and to
5 place a fence that was shorter in height and on the west side of the Del Mar Upper Bluff instead
6 of a 6-foot-high chain link fence on the east side of the Upper Bluff. But in return, NCTD
7 demanded that Del Mar enter into the Proposed License Agreement, whereby it would agree that
8 NCTD could remove the Upper Bluff entirely, in connection with its future projects with
9 SANDAG, that Del Mar waive rights and protections it had or might have under numerous laws,
10 and relinquish claims to ever sue NCTD for the ill effects of its train vibrations, as well as other
11 conditions.

12 52. After receiving the Attorney General Letter warning that a vote to approve Exbon's
13 Job Order would be a violation of law and contract, NCTD attempted to avoid its obligations under
14 the Grant Agreement by retroactively changing the funding source for construction of the Upper
15 Bluff fence.

16 53. In its Agenda published on January 14, 2022, for the NCTD Board's January 20,
17 2022, general meeting, NCTD Staff acknowledged:

18 **FISCAL IMPACT:** The fiscal impact of the proposed [Exbon] contract action is
19 \$1,479,918 which is funded with California Department of Transportation State Transit
20 and Intercity Capital Rail Program (TIRCP) and local Transportation Development Act
funds programmed in Project 522016 which has a total budget of \$1,479,918.

21 54. Upon information and belief, after receiving the Attorney General Letter on January
22 19, 2022, NCTD's staff revised the above language with an errata sheet on its website stating that
23 NCTD would not use TIRCP funding for the Exbon contract after all. The changes to the pertinent
24 paragraph characterized the grant funds for the Del Mar fencing as "encumbered" by prior fencing
25 projects under the Grant Agreement:

26 **FISCAL IMPACT:** The fiscal impact of this proposed contract action is \$1,479,918,
27 which was initially funded with California Department of Transportation State Transit and
28 Intercity Capital Rail Program (TIRCP) and local Transportation Development Act (TDA)

1 funds. With the Board approvals in prior projects (Encinitas and Oceanside) the TIRCP
2 funds have been encumbered, therefore, funding for the Del Mar fencing project will be
3 entirely from local TDA funds programmed in Project 522016, which has a total budget of
\$1,479,918.

4 55. NCTD's attempt to circumvent its obligations under the Grant Agreement is an
5 admission that it is in breach of the Grant Agreement by not complying with state law.

6 56. NCTD undertook the obligation to comply with state law yet has failed and refused
7 to do so. NCTD's compliance with California's environmental laws is a fundamental and necessary
8 consideration for the benefits of the entire Grant Agreement.

9 57. NCTD's change in the accounting of a portion of the funds does not change that
10 NCTD is in breach of the entire Grant Agreement.

11 **FIRST CAUSE OF ACTION**

12 Declaratory Relief: Breach of the Grant Agreement between NCTD and CalSTA
13 (Against DEFENDANT NCTD)

14 **NCTD APPLIES FOR STATE FUNDS AND PROMISES TO ABIDE BY STATE LAW**

15 58. Plaintiffs incorporate the allegations contained in Paragraphs 1 through 57, as
16 though fully set forth herein.

17 59. At all times pertinent to this action, NCTD was and is headed by the NCTD Board,
18 which is composed of members of the city councils of the incorporated cities of Oceanside,
19 Encinitas, Solana Beach, Carlsbad, Escondido, San Marcos, Vista, and Del Mar and the Fifth
20 District County Supervisor representing the unincorporated areas of Northern San Diego County.

21 60. NCTD Board members are requested to serve as members of NCTD in order to
22 share each of their respective city's insights regarding matters that come before NCTD. They are
23 officials duly elected to represent their respective cities; they are not elected to NCTD.

24 61. Management of NCTD are not elected officials.

25 62. In its 2018 Grant Request for funds with which to build fences, NCTD referred to
26 all of its proposed fencing plans on the Upper Bluff and Lower Bluff as a "safety" fence. NCTD's
27 term "safety" fence used with respect to its proposed fencing on the Upper Bluff served as a
28 marketing term deployed by NCTD to construct a narrative to obtain state funding to fence the

1 Del Mar Upper Bluff, which does not need fencing for the safe operation or maintenance of the
2 railway. The planned “safety” fence instead is hazardous as alleged herein.

3 63. The Grant Agreement provides in pertinent part that NCTD must comply with “all
4 state and federal laws and policies.” It also specifically provides that NCTD must comply with
5 California’s environmental laws, including the Coastal Act. These conditions were material to
6 any grant of funds by CalSTA, not just funding for fencing in Del Mar.

7 64. The obligation to comply with California laws, including specifically its
8 environmental laws, are made a part of CalSTA grant agreements to ensure that every fund
9 grantee complies with state laws to protect California citizens and taxpayers against would-be
10 grantees who secure California taxpayer dollars for their projects and then fail or refuse to comply
11 with California laws. California citizens are the intended beneficiaries of the grant agreements.
12 The conditions requiring NCTD to comply with California laws including environmental laws is a
13 valid exercise of California’s self-governance powers.

14 65. NCTD’s proposed fencing submitted for NCTD Board approval on January 20,
15 2022, would also block 1.6 miles of public access to the scenic bluffs and beach in violation of
16 the Coastal Commission’s permit requirement for SANDAG’s Bluff Stabilization Plan 4
17 previously approved in February 2019. Specifically, that permit required SANDAG to “prepare
18 (in coordination with the North County Transit District and the City of Del Mar) a needed,
19 comprehensive long-term public access improvement plan for the Del Mar area, which will be
20 submitted to the Commission by February 2022.” NCTD’s proposed fencing plan is in violation
21 of the spirit and intent of the permit requirement previously agreed to by SANDAG and NCTD to
22 improve coastal access.

23 66. NCTD’s agreement and representation that it would comply with all California
24 laws was a contractual undertaking that bound NCTD, regardless of principles of preemption.
25 NCTD could have sought funding elsewhere but chose to seek taxpayer funding from CalSTA
26 through the Grant Agreement. As a result, NCTD bound itself to comply with state laws, as terms
27 and conditions of the Grant Agreement. NCTD continues to seek hundreds of millions of dollars
28 from CalSTA.

1 67. After NCTD entered into the Grant Agreement, rather than endeavor to comply
2 with California environmental and other laws with respect to its proposed projects on the Del Mar
3 Bluffs, NCTD embarked on a systematic plan to evade compliance with California's
4 environmental laws that has resulted in a breach of the Grant Agreement.

5 68. NCTD Board members and management excluded the City of Del Mar Council
6 member who also served on the NCTD Board from meetings in which NCTD staff and Board
7 members discussed secret plans to file an action against the Coastal Commission and Del Mar
8 with the STB to evade California's environmental laws.

9 69. NCTD's Board's vote on January 20, 2022, to approve the Exbon contract to fence
10 the Del Mar Bluffs with 6-foot-high wire mesh fencing if Del Mar did not accede to the
11 conditions of its Proposed License Agreement by February 28, 2022, and to proceed regardless of
12 NCTD's failure to comply with California's environmental laws, including the laws specifically
13 referenced in the January 19, 2022, Attorney General Letter and the March 7, 2022, Executive
14 Director's Cease and Desist Order was a breach of the Grant Agreement.

15 70. NCTD's attempts to evade and circumvent its obligations under the Grant
16 Agreement by switching funding sources for fencing of Del Mar are ineffective and void.
17 Plaintiffs seek a declaration and order that these obligations cannot be overridden or
18 circumvented by any ruling outside of the contract.

19 71. There is currently a dispute between Plaintiffs and NCTD over the Grant
20 Agreement's legal force and effect. Plaintiffs contends that NCTD is obliged to comply with state
21 law. NCTD contends otherwise. An adjudication by the Court is needed to resolve the dispute.

22 **SECOND CAUSE OF ACTION**

23 Declaratory Relief: Breach of the Covenant of Good Faith and Fair Dealing
24 Arising from the Grant Agreement
25 (Against DEFENDANT NCTD)

26 72. Plaintiffs incorporates the allegations contained in Paragraphs 1 through 71, as
27 though fully set forth herein.

28 73. The Grant Agreement carried with it a covenant of good faith and fair dealing for

1 the benefit of California citizens that requires NCTD not to deprive or even seek to deprive
2 CalSTA or California citizens of the benefits of the conditions of the Grant Agreement that
3 NCTD comply with all California and federal laws and policies.

4 74. After executing the Grant Agreement, NCTD Board members and management
5 embarked on a plan to attempt to deprive California of the benefits of the Grant Agreement. First,
6 NCTD excluded the City of Del Mar Council member who also served on the NCTD Board from
7 meetings in which NCTD staff and Board members discussed secret plans to file an action against
8 the Coastal Commission and Del Mar with the STB to evade California's environmental laws, in
9 violation of NCTD's obligation of good faith and fair dealing under the Grant Agreement.

10 75. NCTD's plans to avoid California's environmental laws with respect to the Del
11 Mar Bluffs were triggered in part by the displeasure of some of the NCTD Board members and
12 management over the reasonable requests of Del Mar communicated by the then-Mayor of Del
13 Mar in or about April 2020. The requests were designed to make NCTD accountable for its
14 environmentally destructive plans and mitigate their adverse environmental effects, and to also to
15 focus NCTD on moving the tracks off the Del Mar Bluffs.

16 76. On or about August 28, 2020, NCTD filed a Petition for Declaratory Order with
17 the STB, seeking a declaration that NCTD could act unilaterally in the Right-of-Way with respect
18 to both current and future projects, unfettered by California's environmental laws.

19 77. In its Petition seeking to avoid California environmental laws, NCTD did not
20 disclose to the STB the fact that it had bound itself by contract to comply with state laws
21 including environmental laws.

22 78. Plaintiffs are informed and believe and thereupon allege that Does 1-10 were
23 officers or officials of NCTD responsible for expending taxpayer funds to prepare, file, and
24 maintain the STB Action to seek to evade NCTD's responsibility for complying with state
25 environmental laws and that this was and is not an appropriate use of taxpayer funds and in
26 violation of California Code of Civil Procedure section 526a.

27 79. NCTD's filing and pursuit of the STB Action is a violation of the covenant of
28 good faith and fair dealing arising from the Grant Agreement. Rather than undertake to comply

1 with California law as it promised and represented it would, NCTD, a state agency funded by
2 California taxpayers, has used taxpayer funds to file suit to seek to evade California law and the
3 regulation of the California agency specifically charged under California law with the mandate to
4 protect California's coast, including the Del Mar Bluffs.

5 80. NCTD's statements in response to the Attorney General Letter and the NCTD
6 Board's vote on January 20, 2022, to approve the Exbon contract to fence the Del Mar Bluffs if
7 Del Mar did not accede to the conditions of its Proposed License Agreement by February 28,
8 2022, and to proceed regardless of NCTD's failure to comply with California's environmental
9 laws, including the laws specifically referenced in the January 19, 2022, Attorney General Letter
10 was a breach of the covenant of good faith and fair dealing.

11 81. NCTD's efforts to evade and circumvent its obligations under the Grant
12 Agreement by switching funding sources for fencing of Del Mar are ineffective and void and the
13 attempt was a further violation of the covenant of good faith and fair dealing. Plaintiffs seek a
14 declaration and order that the filing of the STB Action in these circumstances was a breach of the
15 covenant of good faith and fair dealing and that NCTD's obligations under the Grant Agreement
16 cannot be overridden or circumvented by any ruling outside of this Court.

17 **NCTD'S PROPOSED FENCING WILL CAUSE IRREPARABLE**
18 **INJURY TO THE UPPER BLUFF**

19 82. The Coastal Act and Del Mar's Local Coastal Program require a CDP because the
20 drilling of hundreds of 3-foot-deep fence post holes in order to install over a mile of heavy
21 fencing with concrete footings would have permanent impacts to the Del Mar Bluffs that could
22 never be undone. The construction process also would require the operation of heavy trucks and
23 machinery that threatens additional damage to the fragile bluffs located near the Rose Canyon
24 Fault that the California Earthquake Authority estimates could generate a magnitude 6.5 to 6.9
25 earthquake.

26 83. The installation of a continuous six-foot high wire mesh fence on the Upper Bluff
27 would violate provisions protecting coastal views and other natural resources. (Pub. Res. Code,
28 §§ 30251, 30253, 30210.)

84. NCTD seeks to avoid Coastal Act review because it understands its fencing plans would require the Coastal Commission's geological review and are out of compliance with the Coastal Act.

85. If NCTD is allowed to circumvent the Grant Agreement's requirements for compliance with California's environmental laws and Coastal Commission regulations and allowed to construct fencing on the Upper Bluff, NCTD will cause irreparable damage to the Upper Bluff and the public's interest in preserving this precious resource.

86. NCTD's planned 6-foot-high fencing requires drilling of 3-foot-deep post holes (2 every 10 feet), inserting an 8-foot-high post, filling it with cement, adding the top and bottom rails, and hanging the heavy hogwire mesh fence on the unstable edges of the Upper and Lower Bluffs. This is expected to fracture the sandstone, add stress points on the most vulnerable edges of the Upper Bluff, and create a multitude of new sources of corrosive water intrusion.

87. The placement of heavy concrete fence footing and fencing weighing tens of thousands of pounds on the Upper Bluff will add more stress to the fragile sandstone, accelerate erosion of the Del Mar Bluffs, act like perforations on a roll of paper towels, cause more frequent bluff failures, and increase the risk of bluff collapse.

88. If fencing were to be erected by NCTD and then ordered to be removed by the determination of this Court after the fact, the removal of the fencing will cause irreparable damage to the Bluffs.

89. In contrast, NCTD will suffer no injury if fencing on the Upper Bluff is enjoined pending the outcome of this case because there has been no fencing for over 100 years on the Del Mar Bluffs and NCTD has added signs warning of the hazards of the cliffs, which are also obvious to all.

THIRD CAUSE OF ACTION

Quiet Title: Public Easement to Use Trails on Upper Bluff
(Against ALL DEFENDANTS)

90. Plaintiffs incorporate the allegations contained in Paragraphs 1 through 89, as though fully set forth herein.

1 91. The public has been using and enjoying the trails on the Upper Bluff for accessing
2 the beach and for activities including sitting, walking, running, meditating, and watching sunrises
3 and sunsets for at least five years continuously during the time that ATSF Railway owned the
4 Right-of-Way and continues to use it for those purposes to this day.

5 92. The public's use has been open and notorious.

6 93. The public has not sought permission to use the Upper Bluff.

7 94. NCTD and its agents have characterized members of the public who walk on the
8 Upper Bluff as "trespassers."

9 95. The public has a prescriptive easement to use the Upper Bluff in the Right-of-Way
10 for use and enjoyment including sitting, walking, running, meditating, and watching sunrises and
11 sunsets, which ripened during the time period that ATSF Railway owned the Right-of-Way
12 because the public used the Upper Bluff for such purposes for at least 5 years continuously while
13 ATSF owned it. ATSF is not a public agency.

14 96. In the alternative, the public has a right to use the trail on the Upper Bluff because
15 it is and has always been a public way, and it cannot be blocked by NCTD.

16 97. In the alternative, the original grantor of the Right-of-Way, the South Coast Land
17 Company, intended that the public retain the right to use the Upper Bluff trail portion of the
18 Right-of-Way as shown by a perpetual reservation in the grant deed originally transferring the
19 Right-of-Way.

20 98. There is currently a dispute between Plaintiffs and NCTD over the public's right to
21 continue to use the Upper Bluff. Plaintiffs contend that they and the public have the right to sit,
22 walk, run, enjoy scenic views, meditate and otherwise continue to use the Upper Bluff because:
23 (a) a prescriptive easement ripened on behalf of the public during the time that the Right-of-Way
24 was owned by the ATSF Railway, and/or (b) the public always had and continues to have the
25 right to use the trails on the Upper Bluff as a public way, and/or (c) the grantor intended the
26 public to continue to have the right to use trails in the Right-of-Way. NCTD contends otherwise.
27 An adjudication by the Court is needed to resolve the dispute.
28

1 **FOURTH CAUSE OF ACTION**

2 Invalidity and Illegality of NCTD Actions

3 (Against ALL DEFENDANTS NCTD, TUCKER, AND ALL PERSONS INTERESTED IN THE
4 MATTER OF NORTH COUNTY TRANSIT DISTRICT'S APPROVAL ON JANUARY 20,
5 2022, OF A CONTRACT WITH EXBON DEVELOPMENT, INC. TO INSTALL FENCING IN
6 THE CITY OF DEL MAR WITHOUT COMPLIANCE WITH CALIFORNIA LAWS).

7 99. Plaintiffs incorporate the allegations contained in Paragraphs 1 through 98, as
8 though fully set forth herein.

9 100. On January 20, 2022, NCTD's Board held a general public meeting. In connection
10 with Item 13 of the Agenda for that meeting, the majority of the Board voted to approve and
11 authorize a contract to Exbon, Job Order No. 21009-005, for the construction of certain fencing
12 on Del Mar Bluffs, the particulars of which varied depending upon whether Del Mar continued to
13 reject the terms and conditions of a License Agreement which NCTD wanted Del Mar to approve.

14 101. Plaintiffs are informed and believe and, on that basis allege, that the NCTD Board
15 vote taken and award of the Job Order 21009-005 on January 20, 2022, was invalid and illegal for
16 reasons including but not limited to the following:

- 17 a. The NCTD proposed License Agreement, the rejection of which by Del Mar was
18 the condition for the Board's vote to contract with Exbon to construct specific
19 types of fencing without permits required by law, was not published in the Board
20 packet prior to the meeting and the Board's vote, so the NCTD Board did not see it
21 and the public could not provide comments on it;
- 22 b. The NCTD proposed License Agreement described above, lacked material terms at
23 the time the Exbon Job Order was voted on, including, but not limited to, a written
24 description of the License Area in its Exhibit A. Accordingly, the Board purported
25 to vote on a contract with Exbon for fencing, conditioned on Del Mar's continued
26 rejection of a proposed License Agreement that lacked material terms;
- 27 c. The Board failed to include in the published Board packet, or address in the NCTD
28 Staff Report, the Attorney General Letter, informing the NCTD Board that an
NCTD vote to approve Job Order 21009-005 would be in violation of law and
contract;

- 1 d. For the reasons stated in Attorney General Letter, including: (1) disruption of
2 public coastal access; (2) using State funds for a project without complying with
3 CEQA; (3) the project changing over time without compliance with state
4 environmental laws; and (4) the unsuitability of wire mesh agricultural fencing in
5 the bluff location;
- 6 e. For the reasons stated in the Commission Notice Letter, sent to NCTD's Executive
7 Director Tucker outlining NCTD's violations of law;
- 8 f. For the reasons stated in the Cease and Desist Order, sent to NCTD's Executive
9 Director Tucker outlining NCTD's violations of law;
- 10 g. Awarding of a sole source fencing contract to a contractor which did not have at
11 that time required state contractor license C-13 for fencing nor A-General
12 Engineering, without the benefit of engineering drawings, or competitive formal or
13 informal bids on the specific fencing work sought violates Public Contract Code
14 sections 22032 and 22034, and Public Utilities Code section 125222;
- 15 h. The Leighton Consulting Letters on which NCTD relied in failing to obtain a
16 geological analysis of the Upper Bluff were not supplied to the Board or the public
17 for comment before the NCTD Board's vote and do not contain any analysis with
18 respect to damage that may be caused by the installation of 6-foot-high wire mesh
19 fencing on the Upper Bluff;
- 20 i. NCTD's Staff attempted to change the source of funding for the Exxon Job Order.

21 102. Plaintiffs are informed and believe and thereupon allege that NCTD's Executive
22 Director Tucker is the officer charged with implementing the NCTD' Board's vote and has taken
23 steps to do so within CCP 526a.

24 103. This is also an action pursuant to CCP 526a to obtain a judgment restraining and
25 preventing an illegal expenditure and waste of funds of NCTD, a local public agency, and is
26 maintained against an officer thereof, and Does 1-10, all acting in NCTD's behalf.

27 ///

28 ///

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for relief as follows:

AS TO THE FIRST CAUSE OF ACTION:

1. For an order and judgment declaring that NCTD is required to comply with California law as a result of the of the obligations it undertook and those imposed by law under the Grant Agreement, regardless of any ruling on preemption in the STB Action;
2. For a preliminary and permanent injunction preventing NCTD from erecting a fence on the Upper Bluff in Del Mar;
3. For attorneys' fees pursuant to Cal. Code of Civ. Proc. Sections 1021.5 and/or 526a;
4. For costs;
5. For such other relief as the Court deems just and proper.

AS TO THE SECOND CAUSE OF ACTION:

1. For an order and judgment declaring that NCTD's actions alleged herein attempting to circumvent its obligations arising from the Grant Agreement are a violation of the covenant of good faith and fair dealing arising from the Grant Agreement and are invalid and void;
2. For a preliminary and permanent injunction preventing NCTD from erecting a fence on the Upper Bluff in Del Mar;
3. For attorneys' fees pursuant to Code of Civil Procedure sections 1021.5 and/or 526a;
4. For costs;
5. For such other relief as the Court deems just and proper.

AS TO THE THIRD CAUSE OF ACTION:

1. For an order and judgment as of the date of this complaint or such other date as deemed appropriate by the Court declaring and establishing that Plaintiffs on behalf of the public have a right and title to continue to use the trails on the Upper Bluff in the Right-of-Way for walking, running, viewing the ocean, sitting, meditating and other recreational purposes against all adverse claims by Defendants;

2. For a preliminary and permanent injunction preventing NCTD from proceeding to erect a fence on the Upper Bluff in Del Mar;
3. For attorneys' fees pursuant to Cal. Code of Civ. Proc. 1021.5 and/or 526a;
4. For costs;
5. For such other relief as the Court deems just and proper.

AS TO THE FOURTH CAUSE OF ACTION:

1. For an order and judgment declaring that the NCTD Board's approval and award of the Job Order 21009-005 to Exbon on January 20, 2022, was invalid and illegal and is void;
2. For a preliminary and permanent injunction preventing NCTD from proceeding to erect a fence on the Upper Bluff in Del Mar;
3. For attorneys' fees pursuant to Cal. Code of Civ. Proc. Sections 1021.5 and/or 526a;
4. For costs;
5. For such other relief as the Court deems just and proper.

Dated: March 21, 2022

AANNESTAD ANDELIN & CORN LLP

s/ Anders Aannestad

Anders T. Aannestad

Lee M. Andelin

Shirli F. Weiss, Of Counsel

Attorneys for Plaintiffs

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

Joe S. DeMa

Laura S. DeMarco, President
FRIENDS OF DEL MAR BLUFFS

EXHIBIT A



600 West Broadway, Suite 1800, San Diego, CA 92101
P.O. Box 85266
San Diego, CA.92186-5266
Telephone: (619) 738-9329
E-Mail Address: jamee.patterson@doj.ca.gov

January 19, 2022

Board of Directors
North County Transit District
via email clerk@nctd.org and publiccomment@nctd.org

Re: Agenda Item 13: Approve Job Order No. 21009-005 to Exbon Development
For Fencing In Del Mar

Dear Board of Directors of the North County Transit District:

This letter is submitted on behalf of the California Coastal Commission with regard to Agenda Item 13 on the Board's agenda for January 20, 2022. The Commission objects to the NCTD staff recommendation to approve a job order contract with Exbon Development for the fencing proposed along the bluffs in Del Mar. The Commission bases its objections on the following grounds.

First, the proposed fencing would significantly disrupt or eliminate pedestrian access on existing, informal access trails along the bluffs and down onto the beach that have been heavily used by the public for decades to traverse the blufftop, enjoy scenic coastal views and access the beach and ocean. The proposed fencing would have additional impacts to other coastal resources, including but not limited to visual and biological resources. In its approval of the SANDAG Del Mar Bluffs Stabilization 4 Project (CC-0004-18), the Commission found that public access planning and coordination with other agencies and the public to identify appropriate access improvements was the best way to provide maximum, long-term public access. SANDAG agreed with this approach and committed to organize and participate in the development of a plan for long-term public access improvements in Del Mar, as well as potential funding sources for those public access improvements, that would be submitted to the Commission by February 2022. This plan, identified as Coastal Connections Conceptual Planning Study (Study), is currently underway but is not expected to be complete until the summer of 2022. NCTD was a direct beneficiary of that approval since the Del Mar Bluffs Stabilization 4 Project would directly benefit NCTD's interests in maintaining the tracks on the bluff. It is entirely premature for NCTD to approve the fencing project at this time without complying with the law and without awaiting the completion of the Study.

Second, the proposed project as described in Agenda Item 13 does not comport with state law. Phase 1 proposes 3,723 feet of 4-foot and 6-foot fencing with construction commencing within three to four months of approval of the item in an amount not to exceed \$1,479, 918.

Phase 2 consists of additional fencing at a later date within two years of completion of the next bluff stabilization project in an amount not to exceed \$1,646,419.

Phase 1 of the fencing will be funded with state transportation grant money. As the staff report states,

“The fiscal impact of this proposed contract action is \$1,479,918, which is funded with California Department of Transportation State Transit and Intercity Capital Rail Program (TIRCP) and local Transportation Development Act funds programmed in Project 522016, which has a total budget of \$1,479,918. If the Board approves this proposed contract action, the balance available in Project 522016 will be reduced to \$0. The contract for the Phase 2 right-of-way fencing for a not-to-exceed amount of \$1,646,419 will be awarded subject to future funding availability.”

The Commission is informed and believes that, as a condition of the TIRCP and other funds that will be used on this project, NCTD agreed to comply with state law, including but not limited to the California Environmental Quality Act and Coastal Act. As a state-funded publicly created entity, the decision of the California Supreme Court in *Friends of the Eel River v. North Coast Railroad Authority* (2019) 3 Cal.5th 677, also requires NCTD to comply with state environmental laws. Given NCTD’s contractual and legal obligations to comply with state environmental laws, NCTD should reject its staff recommendation to approve the job order contract and direct its staff to first comply with the California Environmental Quality Act and the Coastal Act.

Third, NCTD’s proposal for fencing has changed numerous times. NCTD first proposed one iteration when it filed its petition with the Surface Transportation Board. NCTD proposed a different version in October 2021 that it posted on its website and made publicly available. Now, NCTD’s staff proposes yet another version of fencing in the staff report posted on NCTD’s website for this item. Indeed, the Commission has been in discussions with NCTD over the past year and a half or more regarding the proposed fencing and has discussed alternatives to fencing as well as alternative designs, none of which are presented in Agenda Item 13. Throughout this process, NCTD has repeatedly declined to comply with the California Environmental Quality Act and the California Coastal Act. Given the changing project, the lack of environmental review, the project’s inconsistency with the resource and scenic view protection policies of the Coastal Act, and the serious adverse impacts the project would pose to public access in Del Mar, the Commission strongly objects to NCTD proceeding with the fencing project in the absence of compliance with state environmental laws.

The Commission has additional concerns about the proposed project including the proposal to use welded wire fencing in portions of the project location. Welded wire fencing is unsuitable for the current use, given that it is a type of fencing primarily used in agriculture. Limited barriers, signs, horns, warning lights, better enforcement and other alternative solutions are far preferable to welded wire fencing (colloquially known as hog wire fencing).

North County Transit District

January 19, 2022

Page 3

For all of the foregoing reasons, the Commission strongly urges the Board to reject its staff recommendation. The Board should decline to enter into the job order contract at this time given the lack of compliance with the law.

Sincerely,

A handwritten signature in cursive script that reads "Jamee Jordan Patterson".

Jamee Jordan Patterson

Supervising Deputy Attorney General

For ROB BONTA
Attorney General

Cc: Lori Winfree, NCTD General Counsel, via email

EXHIBIT B

CALIFORNIA COASTAL COMMISSION

455 MARKET STREET, SUITE 228
SAN FRANCISCO, CA 94105
FAX (415) 904-5400
TDD (415) 597-5885

**VIA ELECTRONIC MAIL AND CERTIFIED MAIL**

March 7, 2022

Mathew Tucker
Executive Director
North County Transit District
810 Mission Avenue
Oceanside, CA 92051
(Certification No. 7019 1640 0001 5124 2355)

Subject: Executive Director Cease and Desist Order No. ED-22-CD-01

Date Issued: March 7, 2022

Expiration Date: June 5, 2022

Property Location: The North County Transit District right-of-way along the LOSSAN railroad between Coast Boulevard (Mile Post 244.1) and North Torrey Pines Road (Mile Post 245.7) in the City of Del Mar in San Diego County. This area includes the properties currently identified by the San Diego County Assessor's Office as APNs 299-240-24-00, 300-073-01-00, 300-95-01-00, 300-175-01-00, 300-183-03-00, and 300-174-14-00.

Threatened Violation: The proposed installation of a large-scale fencing project along the Del Mar bluffs without a Coastal Development Permit.

I. ORDER

Pursuant to my authority under California Public Resources Code ("PRC") Section 30809, and as the Executive Director of the California Coastal Commission ("Commission"), I hereby order the North County Transit District ("NCTD") to cease and desist from undertaking any development, as that term is defined in the Coastal Act (see PRC § 30106), including, but not limited to, the installation of fencing, in NCTD's right-of-way along the LOSSAN railroad between Coast Boulevard (Mile Post 244.1) and North Torrey Pines Road (Mile Post 245.7) in the City of Del Mar in San Diego County ("the Property"), including along the Del Mar bluffs, without first obtaining Coastal Act authorization or confirmation from the Coastal Commission that the development is exempt.

II. PERSONS SUBJECT TO THE ORDER

The persons subject to this Executive Director Cease and Desist Order (“EDCDO”) are the following: NCTD; their employees, agents, and contractors; and anyone acting in concert with any of the foregoing, including anyone or any entity conducting development related to the threatened violations described below, on its or their behalf.

III. IDENTIFICATION OF THE PROPERTY

The property that is the subject of this EDCDO is the NCTD right-of-way along the LOSSAN railroad between Coast Boulevard (Mile Post 244.1) and North Torrey Pines Road (Mile Post 245.7) in the City of Del Mar in San Diego County. This area includes the properties currently identified by the San Diego County Assessor’s Office as Assessor’s Parcel Numbers 299-240-24-00, 300-073-01-00, 300-95-01-00, 300-175-01-00, 300-183-03-00, and 300-174-14-00.

IV. DESCRIPTION OF THE THREATENED VIOLATIONS AND THE PARTIES THREATENING TO UNDERTAKE THE ACTIVITIES

The issuance of this EDCDO is in response to NCTD’s representations that it intends to commence the construction of a fencing plan along the Del Mar bluffs without first obtaining a Coastal Development Permit (“CDP”) or any other type of Coastal Act authorization.

V. AUTHORITY TO ACT

The Executive Director of the Commission is issuing this Order pursuant to his authority under PRC Sections 30809(a)(1) because the activities addressed by this EDCDO constitute a threat to undertake activity without first securing Coastal Act authorization and because the local government with a certified local coastal program has requested the Commission assume responsibility for the enforcement of the Coastal Act, including issuance of this EDCDO to address the threat of unpermitted development.

VI. FINDINGS

The threatened violation in this matter includes, but is not necessarily limited to, NCTD’s represented intent to implement a fencing plan along the Del Mar bluffs without a CDP or any other form of Coastal Act review, despite Commission staff’s warning that the fencing plan cannot be implemented without such a CDP.

In October 2020, Commission staff received formal notice that on August 28, 2020, NCTD had filed a Petition for Declaratory Order (Petition) with the federal Surface Transportation Board (STB). In the Petition, NCTD sought an order to prohibit the Commission and the City of Del Mar from being able to regulate NCTD’s development along the Del Mar bluffs, including projects such as the fencing plan at issue here. On

October 5, 2020, the Commission, along with the City of Del Mar, concerned Del Mar residents, and the Surfrider Foundation, filed oppositions to NCTD's Petition.

In October 2020, NCTD presented its intention to the City of Del Mar ("City") to construct a 6-foot tall chain link fence at the track level and also along the upper bluffs in Del Mar based on a "Trespasser Risk Reduction Study" that NCTD had recently published. NCTD did not seek approval for the project; rather, NCTD informed the City that it would be agreeable to negotiating with the City to construct a different type and size of fencing if the City would pay for the modified fence and if the City would fully assume liability and indemnify NCTD for incidents that occur within the area of the modified fencing.

On October 15, 2020, I sent a letter to the NCTD Board of Directors expressing my surprise and disappointment that NCTD, suddenly and without any notice except for the formal service of a copy of NCTD's Petition, took action to end its practice of collaboration with the Coastal Commission on transportation projects in the San Diego region. I noted the long cooperative history between NCTD and the San Diego Association of Governments (SANDAG) on the planning, review, and approval of numerous transportation projects in San Diego related to railroad infrastructure and the value of this coordination to all parties. I additionally expressed my concern regarding NCTD's representation to the City of Del Mar that it would unilaterally proceed with a project to fence the Del Mar bluffs without any state or local review. At this time, I requested that NCTD withdraw its Petition before the STB and work with the Commission on the fencing plan to find alternatives that would protect public safety, ensure public access to bluff trails and the beach, and protect coastal resources.

NCTD's refusal to obtain state or local authorization is also problematic because the Caltrans grant which provided funding to NCTD for this project required NCTD to comply with all applicable laws, including environmental regulations.

On December 10, 2020, the City, NCTD, and the Commission entered into a Settlement Discussions Agreement for the purpose of facilitating confidential negotiations and discussions to reach a Settlement Agreement regarding the STB matter. And in March 2021, in order to continue good faith discussions, the parties agreed to a stay of the STB matter through December 31, 2021.

From March 2021 to November 2021, Commission staff met with NCTD staff on a monthly or bimonthly basis in an attempt to come to an agreement on how Commission staff and NCTD would collaborate on NCTD LOSSAN corridor development projects, including a Del Mar bluff fencing plan to ensure public safety, in order to ensure that these projects are consistent with the Coastal Act and receive all necessary authorizations. Commission staff also attempted to work with NCTD specifically on the design of the fencing plan for the Del Mar bluffs in an attempt to limit the project's negative impacts to coastal resources protected by the Coastal Act, including public views, stability of bluffs, public access and other coastal resources.

Despite Commission staff's extensive efforts, on December 30, 2021, NCTD filed a report with the STB seeking to reopen and expedite its Petition against the Commission and Del Mar. On January 14 and 18, 2022, Del Mar and the Commission each respectively filed responses, including a motion for the STB to move the matter into its mediation program. On January 19, 2022, NCTD opposed the request for mediation, stating that it does not believe an agreement could be reached. The STB has not yet issued any ruling on this matter.

The very next day, on January 20, 2022, NCTD's Board of Directors approved Job Order No. 21009-005, to hire general contractor Exbon Development Inc. for the installation of the Del Mar bluffs fencing plan. The NCTD Board approved the fencing project to go forward without any Coastal Act authorization, despite the fact that NCTD had been advised for several years by Commission staff that such development requires Coastal Act authorization before any such work can commence, and offers by Commission staff to attempt to find a resolution that was consistent with the Coastal Act.

Despite Commission staff's warning that the fencing plan cannot be implemented without Coastal Act authorization, NCTD has indicated its intent to move forward with the fencing plan without such Coastal Act authorization.

NCTD's representation that it will move forward with the installation of fencing along the Del Mar bluffs without a CDP constitutes a threat to undertake unpermitted development. Under the Coastal Act (PRC § 30600(a)), and the City of Del Mar Municipal Code (Section 30.75.040), any person wishing to perform or undertake development in the Coastal Zone must obtain a CDP, in addition to any other permit required by law. Development is broadly defined by PRC Section 30106 and, similarly, by Section 30.75.030 of the City of Del Mar Municipal Code, as follows:

"Development" means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of the use of land ... change in the intensity of use of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility; and the removal or harvest of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations....

NCTD has represented that it intends to construct fencing along the Del Mar bluffs without obtaining a CDP, clearly "threatening" to undertake development without a CDP. The installation of this fence constitutes development as defined in the Coastal Act, as the placement of solid material and a change in the intensity of use of land, and therefore is subject to the permit requirements of the Coastal Act and the Del Mar Local

Coastal Program ("LCP"). Additionally, in a March 2, 2022 telephone conversation and confirmed in writing on the same day, the City of Del Mar has requested that the Commission assume responsibility for enforcement in this matter.

On March 3, 2022, as the Executive Director of the Commission, I gave NCTD notice of my intent to issue an EDCDO. The letter I sent to NCTD that day, captioned "Notice Prior to Issuance of Executive Director Cease and Desist Order and Notice of Intent to Commence Proceedings for the Coastal Commission's Issuance of a Cease and Desist Order" ("NOI"), is attached hereto as Exhibit A. The NOI cited the relevant legal provisions of the Coastal Act defining development needing authorization under the Coastal Act and gave NCTD the opportunity to provide assurances that would obviate the need to issue this EDCDO by responding in writing by noon on Monday, March 7, 2022, with a response that includes the following (a "satisfactory response" as referred to in Coastal Act 30809):

1. A commitment that NCTD will not begin work for the installation of fencing along the Del Mar bluff without a Coastal Development Permit that is in full force and effect.
2. A plan detailing the steps NCTD will take in order to receive a Coastal Development Permit, including a date by which NCTD will submit a Coastal Development Permit application.

Later in the day on March 3, you, as the Executive Director of NCTD, sent an email message to me confirming receipt of my letter and indicating that you would review the letter and determine a response. We are in receipt of your letter of today's date in which you declined to provide a satisfactory response as indicated above.

Since NCTD failed to respond to my notice in a "satisfactory manner," as that phrase is defined in PRC section 30809(b), I am issuing this EDCDO to direct you to cease and desist from undertaking unpermitted development on the Property.

Your March 7 letter also raised two points to which I would like to respond. First, you assert that the Commission's authority here is preempted by the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), 49 U.S.C. § 10101 *et seq.*, and you claim that this preemption was established by what you refer to as the 2002 STB Decision. The Commission is well aware of that decision, having participated in the proceeding. However, the 2002 STB Decision was primarily about the threshold question of whether NCTD's operations were subject to the STB's jurisdiction. Because that matter involved a proposal to build actual track, the decision did not address whether Coastal Act review would be preempted for more ancillary types of development by a common carrier.

Moreover, much has transpired since the 2002 STB Decision. Two critical examples of subsequent developments limiting the extent to which federal law can preempt states' regulation of their own political subdivisions include the U.S. Supreme Court's decision

Nixon v. Missouri Municipal League, 541 U.S. 125 (2004), and the California Supreme Court's recent decision *Friends of Eel River v. North Coast Railroad Authority*, 3 Cal.5th 677 (2017). Given NCTD's status as a creature of state law, these cases establish the principle that NCTD is required to comply with the Coastal Act.

The second point you raised in your March 7 letter that could benefit from some clarification is your statement that the Commission is not "the proper entity to impose a CDP" because the project would occur within the City of Del Mar's certified LCP jurisdiction. My March 3 letter does not assert that NCTD would need a CDP *from the Commission*, nor does this Order require that NCTD obtain a CDP from the Commission. The order in the first section of this letter directs NCTD to "cease and desist from undertaking any development . . . without first obtaining Coastal Act authorization or confirmation from the Coastal Commission that the development is exempt." Thus, this Order indicates the need to comply with the Coastal Act, without specifying the permitting entity.

We do not disagree that the City of Del Mar ("City") has primary permitting jurisdiction in areas that are both covered by its LCP and not subject to the Commission's retained jurisdiction pursuant to PRC section 30519(b). However, as we explained, PRC section 30809 allows the Commission to enforce the requirements of the City's LCP, including the requirement that one secure a permit prior to commencing development, as long as such assistance is requested by the certified local government. As is explained above, the City asked the Commission to take this action. Thus, the Commission is authorized to issue this Order even if the City would be the entity to conduct the initial review of any CDP application.

VII. COMPLIANCE OBLIGATION

Strict compliance with the terms of this order by all parties subject thereto is required. Failure to comply strictly with any term or condition of this order may result in the imposition of civil penalties of up to Six Thousand Dollars (\$6,000) per day for each day in which each violation persists, pursuant to PRC section 30821.6, and may result in other such penalties and relief as provided for in the Coastal Act.

VIII. APPEAL

Pursuant to PRC section 30803(b), any person or entity against whom this order is issued may file a petition with the Superior Court seeking a stay of this order.

IX. EFFECTIVE DATE

This order shall be effective upon its issuance on March 7, 2022 and shall expire 90 days from the date this Order was issued.

X. EXECUTIVE DIRECTOR

The phrase "Executive Director" refers to the Executive Director of the Commission unless otherwise indicated. For purposes of any Commission approvals described in this EDCDO, or any requested revisions necessary for such an approval, approval by the Executive Director shall include the approval of the Commission's Executive Director, Chief of Enforcement, or Deputy Chief of Enforcement, and such approvals may be relayed by other Commission staff members.

XI. NOTICE OF INTENT TO COMMENCE FURTHER PROCEEDINGS

The parties identified in this letter have been notified that the Executive Director also intends to commence cease and desist order proceeding pursuant to section 30810 before the California Coastal Commission as set forth in my letter of March 3, 2022. Should a cease and desist order be necessary, staff intend to bring this matter before the Commission at the Commission hearing in June 2022. In addition to these enforcement actions, if NCTD moves forward with its plan to construct fencing along the Del Mar bluffs without a Coastal Development Permit, the Commission may, among other remedies, also commence Restoration Order proceedings pursuant to Section 30811 of the Coastal Act, Administrative Penalty proceedings pursuant to Section 30821 and/or 30821.3 of the Coastal Act, and proceedings to record a Notice of Violation of the California Coastal Act against the Property, pursuant to Section 30812 of the Coastal Act. Through my letter of March 3, the parties identified in this letter were alerted to their right to respond to staff's allegations by completing a Statement of Defense form (SOD) and returning it by March 23, 2022, or a future date if an extension is granted.

Executed in San Francisco, California on March 7, 2022.



JOHN AINSWORTH,
Executive Director

Encl. Exhibit A - Notice Prior to Issuance of Executive Director Cease and Desist Order and Notice of Intent to Commence Proceedings for the Coastal Commission's Issuance of a Cease and Desist Order

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Attorney for Defendants
NORTH COUNTY TRANSIT DISTRICT, and
MATTHEW TUCKER

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
SAN DIEGO DIVISION

FRIENDS OF DEL MAR BLUFFS, a
California nonprofit mutual benefit
corporation; and
LAURA S. DEMARCO, an individual,

Plaintiffs,

v.

NORTH COUNTY TRANSIT DISTRICT,
a California public agency; MATTHEW
TUCKER, as Executive Director of
NORTH COUNTY TRANSIT DISTRICT;
ALL PERSONS INTERESTED IN THE
MATTER OF NORTH COUNTY
TRANSIT DISTRICT'S APPROVAL ON
JANUARY 20, 2022, OF A CONTRACT
WITH EXBON DEVELOPMENT, INC.
TO INSTALL FENCING IN THE CITY
OF DEL MAR WITHOUT COMPLIANCE
WITH CALIFORNIA LAWS; ALL
PERSONS UNKNOWN, CLAIMING
ANY LEGAL OR EQUITABLE RIGHT,
TITLE, ESTATE, LIEN, OR INTEREST
IN THE PROPERTIES DESCRIBED IN
THE COMPLAINT ADVERSE TO
PLAINTIFFS' TITLE, OR ANY CLOUD
UPON PLAINTIFFS' TITLE THERETO;
and DOES 1 to 50, inclusive,

Defendants.

Case No. '22CV503 BEN BGS

**DEFENDANT'S NOTICE OF
REMOVAL OF CIVIL ACTION
TO DISTRICT COURT**

(FEDERAL QUESTION)

*[Filed concurrently with Civil Case
Cover Sheet and Fed.R.Civ.P. 7.1
Notice of Party with Financial
Interest]*

TO THE CLERK OF THE ABOVE-ENTITLED COURT AND TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Defendants North County Transit District (“NCTD”), and Matthew Tucker, in his capacity as Executive Director of NCTD, (collectively, “Defendants”) based on claims arising under federal law, hereby remove to this Honorable Court, the United States District Court for the Southern District of California, the state court action described below. In removing this action, Defendants allege as follows:

I. COMPLAINT FILED IN STATE COURT

1. On March 21, 2022, Petitioners and Plaintiffs (referred to herein as “Plaintiffs”) commenced this action by filing a petition for writ of mandate and complaint (the “Complaint”) in the Superior Court of the State of California for the County of San Diego entitled, *Friends of Del Mar Bluffs, a California nonprofit mutual benefit corporation; and Laura S. Demarco, an individual v. North County Transit District, a California public agency; Matthew Tucker, as Executive Director; All Persons Interested in the Matter of North County Transit District’s Approval on January 20, 2022, of a Contract with Exbon Development, Inc. to Install Fencing in the City of Del Mar Without Compliance with California Laws; All Persons Unknown, Claiming Any Legal or Equitable Right, Title, Estate, Lien, or Interest in the Properties Described in the Complaint Adverse to Plaintiffs’ Title, or any Cloud upon Plaintiffs’ Title Thereto; and Does 1-50, inclusive*, against Defendants in Case No. 37-2022-00011260-CU-WM-CTL (the “Action”). (Declaration of L. John Nelson IV (“Nelson Decl.”), ¶ 2; Ex. A.)

2. As of the date of this Notice of Removal, Exhibit A constitutes all of the pleadings received or filed in the Action. (Nelson Decl., ¶ 2; Ex. A.)

3. Plaintiffs are opposed to NCTD’s January 20, 2022 approval of a contract with Exbon Development Inc. to construct six-foot safety fences within the railroad right-of-way operated by NCTD, without obtaining a coastal development permit

1 pursuant to the California Coastal Act of 1976, Public Resources Code, §§ 30000 *et*
2 *seq.* (the “Coastal Act”).

3 4. In the Action, Plaintiffs expressly assert four causes of action under
4 California state law: (1) Declaratory Relief: Breach of the Grant Agreement between
5 NCTD and the California State Transportation Agency (“CalSTA”) (against
6 Defendant NCTD); (2) Declaratory Relief: Breach of the Covenant of Good Faith and
7 Fair Dealing Arising from the Grant Agreement (against Defendant NCTD); (3) Quiet
8 Title: Public Easement to Use Trails on Upper Bluff (against all Defendants); and (4)
9 Invalidity and Illegality of NCTD Actions (against all Defendants).

10 5. Plaintiffs’ Complaint does not allege or cite to any alleged violations of
11 federal law, although it does reference the fact that in August 2020, NCTD filed a
12 declaratory relief action in Washington, D.C. with the Surface Transportation Board
13 (“STB”), a federal independent regulatory agency charged with the economic
14 regulation of the national railroad system, Finance Docket No. 36433 (filed Aug. 28,
15 2020) (the “STB Action”). (Nelson Decl., ¶ 5; Ex. B.) The California Coastal
16 Commission and the City of Del Mar are parties to the STB Action, and have opposed
17 NCTD’s request for declaratory relief. (Nelson Decl., ¶ 5.) In this currently pending
18 STB Action, NCTD seeks a declaration that all state and local laws and regulations,
19 including the Coastal Act, are preempted by federal law with respect to any current or
20 future projects that NCTD undertakes in the railway right-of-way in the City of Del
21 Mar, including for the fencing project that is the subject of the present Action. (Nelson
22 Decl., ¶ 5; Ex. B.)

23 **II. GROUNDS FOR REMOVAL**

24 6. In 1992, Defendant NCTD acquired a 60-mile long portion of the San
25 Diego Main Line (“the Line”) from The Atchison, Topeka and Santa Fe Railway
26 Company (“Santa Fe”).¹ (Nelson Decl., ¶ 6; Ex. B, p. 5.) Part of the Line runs through
27 the City of Del Mar. (Nelson Decl., ¶ 6; Ex. B, p. 5.) Although this transaction

28 ¹ The Santa Fe was a predecessor to BNSF.

transferred ownership of the track and related physical assets from Santa Fe to NCTD, Santa Fe retained the right to conduct interstate freight operations on the Line pursuant to a permanent easement granted by NCTD, which is now handled by Burlington Northern Santa Fe Railway (“BNSF”). (Nelson Decl., ¶ 6; Ex. B, p. 5.) In 1994, the Interstate Commerce Commission (“ICC”), the STB’s predecessor agency,² issued a decision that authorized NCTD’s acquisition of the Line, concluding, by the transaction, that NCTD had acquired sufficient power over Santa Fe’s operations on the Line to require a finding that NCTD controlled the rail freight operations (including control over maintenance, dispatching, new track construction, and scheduling of service on the Line) and had thus become a common carrier by railroad subject to the jurisdiction of the ICC. *See Orange Cty. Transp. Auth. et al.—Acquisition Exemption—The Atchison, Topeka and Santa Fe Ry. Co.*, 10 I.C.C.2d 78, 90-91 (1994).

7. NCTD itself provides about 10.3 million passenger trips per year, primarily in North San Diego County. (Nelson Decl., ¶ 7; Ex. B, p. 4.) Its services include the BREEZE bus, SPRINTER hybrid rail, COASTER commuter rail, FLEX demand response service, and LIFT ADA paratransit service. (*Id.*)

8. Amtrak holds a statutory right to operate on the Line under the Rail Passenger Service Act. *See* 49 U.S.C. § 24308. Amtrak heavily uses the Line for interstate passenger service. (Nelson Decl., ¶ 7; Ex. B, p. 5-6.)

9. BNSF also heavily uses the Line for freight service. (Nelson Decl., ¶ 7; Ex. B, p. 5-6.)

10. Pursuant to two separate operating agreements with Amtrak and BNSF, NCTD is required to maintain the Line to allow these two rail carriers to provide these crucial interstate services. (Nelson Decl., ¶ 7; Ex. B, p. 5-6.)

11. The San Diego coastal rail corridor is the southern terminus of the 351-mile Los Angeles-San Diego-San Luis Obispo (“LOSSAN”) Rail Corridor. The

² The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, (hereinafter, “ICCTA”) abolished the ICC, and transferred all remaining rail regulatory functions to the STB, effective January 1, 1996.

1 LOSSAN Rail Corridor is Amtrak's second busiest intercity passenger rail corridor in
2 the nation, and it is shared by commuter and intercity passenger and interstate freight
3 rail services. (Nelson Decl., ¶ 8.)

4 12. The San Diego coastal rail corridor is also designated as part of the
5 Strategic Rail Corridor Network due to its importance for national defense. (Nelson
6 Decl., ¶ 9.)

7 13. Defendants remove this Action pursuant to 28 U.S.C. § 1331 (federal
8 question jurisdiction) and 28 U.S.C. §§ 1441(a), 1446(a). The Action is a civil action
9 over which this Court has original jurisdiction pursuant to 28 U.S.C. § 1331, one that
10 may be removed to this Court by Defendants because it is a civil action arising under
11 the laws of the United States.

12 14. Removal of this action to the United States District Court for the Southern
13 District of California is proper under 28 U.S.C. § 1331, which provides that district
14 courts have original jurisdiction over all civil actions arising under the laws of the
15 United States; 28 U.S.C. § 1336, which provides that the district court has jurisdiction
16 to enforce an order of the STB under the circumstances provided therein; and 28
17 U.S.C. § 1441(a), which provides that any civil action over which a federal district
18 court has original jurisdiction shall be removable.

19 15. Although Plaintiffs' Complaint attempts to allege only state law claims,
20 at least some, if not all, of the claims at issue are completely preempted by the
21 Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), 49 U.S.C. §§
22 10101 *et seq.* The ICCTA's preemptive force completely displaces any potential state
23 law cause of action and leaves room only for federal claims. *See Ass'n of Am. R.R. v.*
24 *S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094 (9th Cir. 2010). "[A] Plaintiff cannot
25 avoid complete preemption . . . by artfully pleading a complaint so as to omit facts that
26 include federal jurisdiction." *Parino v. FHP Inc.*, 146 F.3d 699, 704 (9th Cir. 1998)
27 (citation omitted), *superseded by statute on other grounds*, Class Action Fairness Act
28 of 2005, Pub. L. No. 109-2, § 5, 119 Stat. 4, 12 (codified at 28 U.S.C. § 1453(b)), as

1 *recognized in Abrego v. Dow Chemical Co.*, 443 F.3d 676, 681 (9th Cir. 2006). In
 2 other words, what Plaintiffs tried to plead as state-law claims must be re-characterized
 3 as federal claims, and, as such, the action is removable to federal court. *See, e.g., Elam*
 4 *v. Kansas City S. Ry. Co.*, 635 F.3d 796 (5th Cir. 2011). Specifically, § 10501(b) of
 5 the ICCTA provides as follows:

6 The jurisdiction of the [Surface Transportation] Board over[:]

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

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

14 is exclusive. Except as otherwise provided in this part, *the remedies*
 15 *provided under this part with respect to regulation of rail*
 16 *transportation are exclusive and preempt the remedies provided under*
Federal or State Law.

17 49 U.S.C. § 10501(b) (emphasis added).

18 16. The Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887), which, as
 19 amended, still governs federal regulation of railroads, has been recognized as “among
 20 the most pervasive and comprehensive of federal regulatory schemes.” *City of Auburn*
 21 *v. United States*, 154 F.3d 1025, 1029 (9th Cir. 1998) (quoting *Chicago & N.W.*
 22 *Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981)). For more than a
 23 century, the United States Supreme Court has made it clear that, under the United
 24 States Constitution’s Supremacy Clause, art. VI, cl. 2, state laws or regulations that
 25 are inconsistent with the agency’s plenary authority, or with the Congressional policy
 26 reflected in the Interstate Commerce Act, are preempted. *See Chicago & N.W. Transp.*
 27 *Co.*, 450 U.S. at 317-18. As acknowledged by the Ninth Circuit Court of Appeals in
 28 *City of Auburn*, “It is difficult to imagine a broader statement of Congress’s intent to

preempt state regulatory authority over railroad operations.” *City of Auburn*, 154 F.3d at 1030 (citation omitted). As the agency authorized by Congress to administer the ICCTA, the STB is “uniquely qualified to determine whether state law should be preempted by the [ICCTA].” *Emerson v. Kansas City S. Ry. Co.*, 503 F.3d 1126, 1130 (10th Cir. 2007) (quoting *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 642 (2d Cir. 2005)); see also *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 331-32 (5th Cir. 2008).

17. Categorically preempted actions are preempted “regardless of the context or rationale for the action.” *CSX Transp., Inc.—Pet. for Declaratory Order*, Finance Docket No. 34662, 2005 WL 1024490, at *2-*3 (S.T.B. May 3, 2005). The STB and courts have found that ICCTA § 10501(b) categorically prevents states or localities from intruding into matters that are directly regulated by the STB (e.g., rail carrier rates, services, construction, and abandonment). The ICCTA also categorically prevents states and localities from imposing requirements that, by their nature, could be used to deny a rail carrier’s ability to conduct rail operations. Thus, state or local permitting or preclearance requirements, including zoning ordinances and environmental and land use permitting requirements, are categorically preempted as to any facilities that are an integral part of rail transportation. See *Green Mountain R.R. Corp.*, 404 F.3d at 642-43.

18. Moreover, even if Plaintiffs’ claims are not completely preempted by the ICCTA, removal is still required because Plaintiffs’ claims are necessarily federal in character, and the resolution of these claims depends upon the resolution of substantial federal questions. That is, for state or local actions that are not preempted on their face, § 10501(b) preemption analysis requires a factual assessment of whether that action would have the effect of preventing or unreasonably interfering with rail transportation. See *Franks Inv. Co. LLC v. Union Pac. R.R. Co.*, 593 F.3d 404, 414 (5th Cir. 2010) (en banc). Among other matters, the basis of Plaintiffs’ claims and the relief sought can only be addressed by reference to federal laws that require federal

1 jurisdiction. In fact, currently pending before the STB is an action to determine the
2 right and obligation of NCTD to proceed without the permits that the present Action
3 seeks to burden NCTD with obtaining. Furthermore, an attorney for Plaintiffs, Shirli
4 F. Weiss, is a party of record in the federal STB Action. Any action to derogate the
5 determination of the STB on this issue would substantially interfere with rail
6 transportation.

7 19. Plaintiffs' first and second causes of action seek declaratory relief with
8 Plaintiffs as alleged third-party beneficiaries in regard to a purported contract between
9 NCTD and CalSTA, for a breach of contract and an alleged violation of the covenant
10 of good faith and fair dealing between CalSTA and NCTD, with the stated intent of
11 forcing NCTD's compliance with the Coastal Act. In doing so, Plaintiffs attempt to
12 bypass the pending STB Action and litigate federal preemption and environmental
13 issues in a state court that has no jurisdiction to force NCTD to obtain permits under
14 state and local laws, where those laws are preempted by prior decisions of this Court
15 and the STB. Because of the ICCTA's all-encompassing breadth of rail regulation
16 discussed herein, Plaintiffs' claims are "completely preempted" for purposes of
17 removal.

18 20. Plaintiffs' third cause of action seeks to quiet title to an alleged public
19 easement on the Line and the property of NCTD. Notably, federal courts consistently
20 have found similar claims for prescriptive easements burdening railroad property to
21 be completely preempted by the ICCTA. *See, e.g., Skidmore v. Norfolk S. Ry. Co.*, 1
22 F.4th 206 (4th Cir. 2021); *Cedarapids, Inc. v. Chicago, Cent. & Pac. R.R. Co.*, 265 F.
23 Supp. 2d 1005 (N.D. Iowa 2003); *B & S Holdings, LLC v. BNSF Ry. Co.*, 889 F. Supp.
24 2d 1252 (E.D. Wash. 2012) (discussing Ninth Circuit precedence requiring deference
25 to STB determinations that ICCTA preemption applies to adverse possession claims
26 that are preempted under both express preemption and "as applied" preemption based
27 on the degree of interference that a particular action would have on railroad
28 transportation). Preemption is required in the present Action because not only would

1 Plaintiffs’ assertion of an alleged public easement substantially interfere with railroad
2 operations, but it also would divest NCTD and other federally regulated users of the
3 Line “of the very property with which it conducts its operations,” creating an
4 unworkable patchwork of common carrier railroad ownership. *B & S Holdings, LLC*,
5 889 F. Supp. 2d at 1258.

6 21. Plaintiffs’ fourth cause of action seeks invalidation of NCTD’s approval
7 of the fencing in the City of Del Mar. Plaintiffs base the invalidation claim on a variety
8 of grounds, centrally related to NCTD “invalidly” acting to authorize the fencing
9 project, and include an alleged failure by NCTD to obtain certain “required” permits
10 from the California Coastal Commission. Although this claim is state law based, it
11 also does explicitly involve the same alleged permitting that is preempted by the
12 ICCTA and that is subject to the pending STB Action. As such, this claim is both
13 categorically and completely preempted for removal purposes.

14 22. To the extent that the invalidation claim is not preempted by federal law,
15 the Court is authorized under 28 U.S.C. § 1367(a) to exercise supplemental jurisdiction
16 over the invalidation claim, given the Court’s original jurisdiction over Plaintiffs’
17 other preempted claims. Title 28, § 1367(a) of the United States Code provides that,
18 where a district court has original jurisdiction over a civil action, it “shall have
19 supplemental jurisdiction,” subject to certain exceptions, “over all other claims that
20 are so related to claims in the action within such original jurisdiction that they form
21 part of the same case or controversy under Article III of the United States
22 Constitution.” *See also Arroyo v. Rosas*, 19 F.4th 1202, 1209 (9th Cir. 2021).

23 23. Here, Plaintiffs’ claims all “derive from a common nucleus of operative
24 fact and are such that a plaintiff would ordinarily be expected to try them in one
25 judicial proceeding.” *Arroyo*, 19 F.4th at 1209-10 (quoting *Trustees of the Constr.*
26 *Indus. & Laborers Health & Welfare Tr. v. Desert Valley Landscape & Maint., Inc.*,
27 333 F.3d 923, 925 (9th Cir. 2003)). Plaintiffs’ invalidation claim is based on the same
28 alleged NCTD action that forms the basis for Plaintiffs’ remaining claims, namely,

1 NCTD's act of authorizing the fencing project. As a result, Plaintiffs' invalidation
 2 claim and other federal claims form part of the "same case or controversy" for
 3 purposes of supplemental jurisdiction under 28 U.S.C. § 1367(a). *Id.* Given that no
 4 exceptions to the Court's exercise of supplemental jurisdiction would apply here, the
 5 Court has supplemental jurisdiction over Plaintiffs' invalidation claim, to the extent
 6 the Court holds that such claim is not categorically and completely preempted by
 7 federal law.

8 **III. PROCEDURALLY CORRECT**

9 24. Defendants timely filed this Notice of Removal "within 30 days after the
 10 receipt by the defendant, through service or otherwise, of a copy of the initial pleading
 11 setting forth the claim for relief upon which such action or proceeding is based, or
 12 within 30 days after the service of summons upon the defendant if such initial pleading
 13 has then been filed in court and is not required to be served on the defendant,
 14 whichever period is shorter." 28 U.S.C. § 1446(b)(1); (Nelson Decl., ¶ 4; Ex. A.)

15 25. Pursuant to 28 U.S.C. § 1446(a), Defendants are filing this Notice of
 16 Removal in the United States District Court for the Southern District of California,
 17 located in the County of San Diego. This is the proper district for removal because
 18 the Action is pending in the Superior Court of the State of California for the County
 19 of San Diego.

20 26. Section 1446(b)(2)(A) states that "[w]hen a civil action is removed solely
 21 under section 1441(a), all defendants who have been properly joined and served must
 22 join in or consent to the removal of the action." This rule has been referred to by the
 23 Ninth Circuit as the "rule of unanimity." *See United Comput. Sys., Inc. v. AT&T Corp.*,
 24 298 F.3d 756, 762 (9th Cir. 2002). Defendants NCTD and Matthew Tucker join in and
 25 consent to the removal of this Action to federal court. However, "[t]he 'rule of
 26 unanimity' does not apply to 'nominal, unknown or fraudulently joined parties.'" *Id.*
 27 A defendant is considered a "nominal party where his [or her] role is limited to that of
 28 a stakeholder or depository." *Hewitt v. City of Stanton*, 798 F.2d 1230, 1233 (9th Cir.

1986). The Third Circuit has held that John Doe defendants are “unknown” and therefore are not required to join or consent to a notice of removal. *Green v. America Online (AOL)*, 318 F.3d 465, 470 (3d Cir. 2003). The Fourth Circuit also has held that a party was unknown where “there is nothing in the record to show the existence of any such juristic person or persons.” *Perpetual Bldg. & Loan Ass’n v. Series Directors of Equitable Bldg. & Loan Ass’n*, Series No. 52, 217 F.2d 1, 6 (4th Cir. 1954). The United States District Court for the Central District of California has stated that the “exception for ‘unknown’ parties includes a party that has not been served at the time of removal.” *Goldenberg v. Vantage Travel Servs., Inc.*, 2021 WL 2002430, at *2 (C.D. Cal. 2021) (quoting *Beltran v. Monterey Cty.*, 2009 WL 585880, at *2 (N.D. Cal. 2009)).

27. Defendant “All Persons Interested in the Matter of North County Transit District's Approval on January 20, 2022, of a Contract with Exbon Development, Inc. to Install Fencing in the City of Del Mar without Compliance with California Laws,” Defendant “All Persons Unknown, Claiming Any Legal or Equitable Right, Title, Estate, Lien, or Interest in the Properties Described in the Complaint Adverse to Plaintiffs’ Title or any Cloud Upon Plaintiffs’ Title Thereto,” and Defendant “Does 1 to 50, inclusive” are each either “nominal” or “unknown” defendants, whose joinder or consent to the Notice of Removal is not required. Such parties are not specifically identified in the record and have not been served prior to this notice of removal.

IV. NOTICE TO ALL PARTIES AND STATE COURT

28. In accordance with 28 U.S.C. § 1446(d), the undersigned counsel certifies that a copy of this Notice of Removal along with all supporting pleadings will be promptly served on counsel for Plaintiffs, and also filed with the Clerk of the Superior Court of California, County of San Diego, Central Division. All procedural requirements for notice under 28 U.S.C. § 1446, therefore, will be followed and satisfied.

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1 **V. CONCLUSION**

2 Defendants respectfully give notice that the Action now pending in the Superior
3 Court of California, County of San Diego, is hereby removed to this United States
4 District Court, Southern District of California.

5 DATED: April 12, 2022

PROCOPIO, CORY, HARGREAVES &
SAVITCH LLP

7
8 By: /s/ L. John Nelson IV

L. John Nelson IV
(Bar No. 216613)

9
10 Attorney for Defendants NORTH
11 COUNTY TRANSIT DISTRICT and
12 MATTHEW TUCKER, as Executive
13 Director of the North County Transit
14 District
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