

204694

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February 4, 2002

VIA FEDERAL EXPRESS

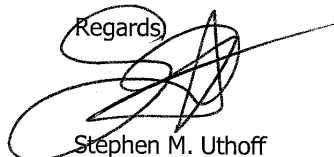
Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: *North San Diego County Transit Development Board*
Finance Docket No. 34111
Our File No. 2612

Dear Secretary Williams:

Enclosed please find an original and ten copies of the City of Encinitas' Request for Leave to File Comment/Reply. An additional copy is enclosed to conform which can be returned to us in the enclosed self-addressed, stamped envelope.

Regards



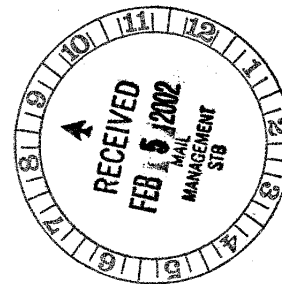
Stephen M. Uthoff

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Enclosures

cc: Client

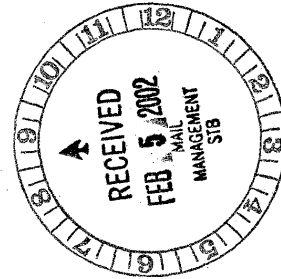
All Parties on Certificate of Service



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Part of
Public Record

204694

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



FINANCE DOCKET NO. 34111

**NORTH SAN DIEGO COUNTY TRANSIT DEVELOPMENT BOARD
-PETITION FOR DECLARATORY ORDER-**

**REQUEST FOR LEAVE TO FILE COMMENT/REPLY TO THE NORTH
SAN DIEGO COUNTY TRANSIT DEVELOPMENT BOARD'S COMMENTS
CONCERNING THE CITY OF ENCINITAS V. NCTD CASE NO 01-CV-1734**

Communications with respect to this
document should be addressed to:

Glen Sabine
City Attorney, City of Encinitas
Stephen M. Uthoff
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Counsel for CITY OF ENCINITAS

DATED: February 4, 2002

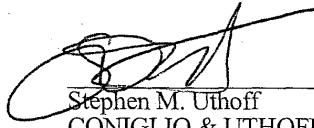
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Office of the Secretary**

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**Part of
Public Record**

The City of Encinitas ("City") hereby requests leave to file the attached comment/reply regarding the North San Diego Transit Development Board ("NCTD") representations concerning the *City of Encinitas v. North San Diego Transit Development Board*, Case N. 01-CV-1734-J. The NCTD submitted a copy of a recent decision in that case and its own argument characterizing the court's decision to the STB. The City requests an opportunity to respond.

Respectfully submitted,



Stephen M. Uthoff
CONIGLIO & UTHOFF
A Professional Law Corporation
Attorneys for
CITY OF ENCINITAS

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34111

**NORTH SAN DIEGO COUNTY TRANSIT DEVELOPMENT BOARD
-PETITION FOR DECLARATORY ORDER-**

**REPLY/COMMENTS TO THE NORTH SAN DIEGO COUNTY TRANSIT
DEVELOPMENT BOARD'S COMMENTS CONCERNING
CITY OF ENCINITAS v. NCTD CASE NO. 01-CV-1734-J**

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(562) 491-4644

Counsel for CITY OF ENCINITAS

DATED: February 4, 2002

By its letter dated January 16, 2002, the NCTD submitted to the STB an Order Dismissing Case for Lack of Subject Matter Jurisdiction in the matter of *City of Encinitas v. North San Diego County Transit Development Board*, Case No. 01-CV-1734-J then pending in the United States District Court for the Southern District of California.

By way of background, this federal court case has its genesis as a state court action filed by the City. Upon learning that the NCTD filed a Notice of Exemption from certain California environmental statutes, the City, within the thirty-five day statute of limitations period, commenced a civil action in the San Diego County Superior Court styled *City of Encinitas v. North San Diego County Transit Development Board*, Case No. GIN015191 challenging, *inter alia*, the exemption. Thereafter, the NCTD removed the case to federal court on the premise that the ICCTA¹ completely preempted the claims made by the City. In response to the removal the City filed a motion to remand. Thereafter the NCTD filed a motion to stay. Instead of ruling on these two motions, the court issued its order dismissing the case.

The California Coastal Commission ("Commission"), a party to the instant action, requested leave to file comments concerning the reasoning of the court in reaching its decision. The City agrees with the Commission's position and we adopt and incorporate the Commission's comments by this reference.

It is not the purpose of this comment/reply to further show the faults in the court's reasoning (which are more numerous than reflected by the Commission² and which will be the subject of an appeal to be filed with the Ninth Circuit Court of Appeals by the City). Instead, the City wishes to clarify the effect of the court's ruling, contrary to the assertions of the NCTD.

¹ 49 U.S.C. §10101 et seq.

² Indeed, the City believes it has adequately briefed the reasons why the ICCTA does not preempt the City's actions concerning this passing track and thus, the relevant legal arguments are already before the STB.

The operative motion before the federal court at the time of this ruling was a motion to remand the entire case back to state court. In that context, the court found that it did not have subject matter jurisdiction and dismissed the complaint. The court itself acknowledged "a dismissal for subject matter jurisdiction is not a judgment on the merits and therefore is a dismissal without prejudice."

Any reasoning that the court used to reach that decision does not have collateral estoppel or res judicata effect as to the City.³ Like a remand order, the court's order to dismiss in lieu of remand in this instance is final and preclusive only as to the issue of the federal court's subject matter jurisdiction. See *In Re Loudermilch*, 158 F.3d 1143, 1146 (11 Cir. 1998). The order does not affect the issues before the STB since any reasoning therein does not have preclusive effect.

The only part of this court's order that is final and preclusive is its order that it does not have jurisdiction. However, any reasoning about the applicability of the ICCTA or the STB's exclusive jurisdiction is not final and binding. Instead, the STB is free to decide for itself what it finds to be persuasive. See *In Re Loudermilch*, *supra*, 158 F.3d at 1146-1147 (11th Cir. 1992).

The substantive issues concerning this specific passing track have been briefed by all parties concerned and the evidence, (to the extent it was available), is before the STB for its ruling.

The NCTD's characterization of the court's ruling should be disregarded and instead, the court's ruling should be seen for what it is: simply a ruling by the court that it lacked jurisdiction to hear the City's claims.

Respectfully submitted,



Stephen M. Uthoff
CONIGLIO & UTHOFF
A Professional Law Corporation
Attorneys for
CITY OF ENCINITAS

³ It cannot be res judicata or collateral estoppel as to the California Coastal Commission which is also a party to the STB action in any event since they were not parties to the federal court action.

CERTIFICATE OF SERVICE

I certify that I have this date served a copy of the foregoing REQUEST FOR LEAVE TO FILE COMMENT/REPLY TO THE NORTH SAN DIEGO COUNTY TRANSIT DEVELOPMENT BOARD'S COMMENTS CONCERNING THE CITY OF ENCINITAS V. NCTD CASE NO 01-CV-1734 on the persons listed below by Federal Express, prepaid and properly addressed.

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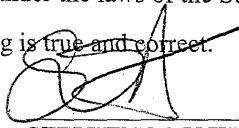
Governor Gray Davis
State Capitol Building
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Attorney General Bill Lockyer
California Department of Justice
1300 I Street
Sacramento, CA 95814

California Public Utilities Commission
Docket Office
505 Van Ness Avenue, Room 2001
San Francisco, CA 94102-3298

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

DATED: February 4, 2002



STEPHEN M. UTHOFF