

**2017 OPERATING & COORDINATION AGREEMENT FOR THE
NORTHWESTERN PACIFIC LINE**

THIS OPERATING & COORDINATION AGREEMENT ("Agreement" or "2017 Operating Agreement"), dated as of the ~~20th day of June, 2014,~~ day of, 2017 (the "Effective Date") is by and between SONOMA-MARIN AREA RAIL TRANSIT DISTRICT, created under California law ("SMART"), and NORTH COAST RAILROAD AUTHORITY, created under California law ("NCRA").

RECITALS:

WHEREAS, pursuant to the JPA Agreement (defined below) and the Cooperative Agreement and set of Principles of Agreement (each dated as of April 30, 1996), all between NCRA and Northwestern Pacific Railroad Authority ("NWPRA"), various commitments were made, including (1) that NWPRA would acquire title to the Healdsburg and Lombard Segments (defined below) and that the NCRA would acquire title to the Willits Segment (defined below), (2) that upon acquisition of the Healdsburg and Lombard Segments NWPRA would convey a perpetual and exclusive easement for the operation of freight service and grant contract rights for the operation of passenger excursion service over the Healdsburg and Lombard Segments to NCRA, and (3) that upon acquisition of the Willits Segment NCRA would convey to NWPRA a permanent easement over the Willits Segment for operation of regularly scheduled passenger commuter service and for operation of certain intercity and other passenger service; and

WHEREAS, on April 30, 1996, NWPRA acquired ownership of the Healdsburg and Lombard Segments and NCRA acquired title to the Willits Segment; and

WHEREAS, NWPRA conveyed the aforementioned easement to NCRA covering the Healdsburg and Lombard Segments; and

WHEREAS, NCRA conveyed the aforementioned easement to NWPRA covering the Willits Segment; and

WHEREAS, on August 19, 1996, NWPRA and NCRA entered into an Operating Agreement for certain portions of the Northwestern Pacific Railroad line (the "Operating Agreement 1996"); and

WHEREAS, the 1996 Operating Agreement was a condition precedent to effectuate the Grant of Easement conveyed by NWPRA to NCRA and by entering into this new operating agreement, the parties do not intend to, in any way, revoke, rescind or otherwise nullify the effectuation of the Grant of Easements from NWPRA to NCRA or NCRA to NWPRA (or its successor, SMART); and

WHEREAS, the 1996 Operating Agreement provided that if NWPRA undertook to provide passenger commuter operations, the parties would enter into an agreement (referred to therein as the "Coordination Agreement") that described in detail the respective rights and obligations of the parties with respect to maintenance, capital expenditures, dispatching, scheduling of operations, environmental liability, taxes and other matters concerning the joint use of the Healdsburg Segment and the Lombard Segment; that passenger

commuter operations would receive operating priority over freight operations, provided that freight service continued to be provided on the Healdsburg Segment and the Lombard Segment in a manner that meets the needs of the shippers on the line; that passenger operations disrupt NCRA's freight operations to the minimum extent possible; and that the agreement would include provisions that address the issues set forth in Schedule 3.10 to the Operation Agreement 1996; and

WHEREAS, SMART is NWPRA's successor in interest; and

WHEREAS, SMART intends to undertake passenger commuter operations on the Healdsburg Segment and on a portion of the Willits Segment pursuant to its easement thereon (together defined more specifically below as the "Shared Track") and may later expand such operations to include some or all of the Lombard Segment and more or the rest of the Willits Segment covered by its easement thereon; and

WHEREAS, multi-use pathways are part of SMART's enabling legislation and integral to SMART's project and planned use of its property; and

WHEREAS, on September 13, 2006, NCRA and Northwestern Pacific Railroad Company ("NWPCo"), a California corporation, entered into a lease agreement for NWPCo to provide freight and excursion service over (inter alia) the Subject Segments;

WHEREAS, on June 22, 2011, the Parties ~~desire to enter~~ into ~~an~~ Operating & Coordination Agreement for the Northwestern Pacific Line ("2011 Operating Agreement") ~~is Agreement~~ setting forth terms and conditions for the use and management of the Subject Segments, superseding the Operating Agreement 1996 and all prior agreements between the parties relating in any way to the subject matter of the Operating Agreement 1996 (including, without limitation, the JPA Agreement, the Cooperative Agreement and the set of Principles Agreement), it being the express intent of the parties to have the 2011 Operating Agreement ~~is Agreement~~ govern exclusively, and to formalize SMART's consent to designation of NWPCo as NCRA's operator, pursuant to Section 16.04 of the Operating Agreement 1996.

WHEREAS, on February 15, 2017, the Parties entered into a Letter of Intent, Exhibit 7, (incorporated herein by reference), memorializing their desire to clarify, modify and amend certain provisions of the 2011 Operating Agreement.

WHEREAS, to accomplish the foregoing recital, the Parties agree to repeal and replace the 2011 Operating Agreement in its entirety, with this 2017 Operating Agreement.

NOW, THEREFORE, in consideration of the foregoing and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, NCRA and SMART hereby agree as follows:

ARTICLE I – DEFINITIONS

In addition to capitalized terms defined in the Agreement, Exhibit 1 (incorporated herein by reference) is a list of additional definitions used in this Agreement.

ARTICLE II – MULTI-USE PATHWAY AND OPERATING RIGHTS

SECTION 2.01 NCRA Passenger Excursion Service. In addition to the rights granted pursuant to the aforementioned easements granted to NCRA on the Healdsburg Segment and the Lombard Segment, but subject to the condition set forth in SECTION 7.08, NCRA shall have the right to use the Healdsburg Segment and the Lombard Segment to provide passenger excursion services intended primarily for entertainment and recreation and not primarily for transportation, provided that the service originates and terminates off of the Healdsburg Segment (except at Healdsburg Station, approximately NWP MP 68.00) and the Lombard Segment (except to the extent the Lombard Segment remains not part of the Shared Track) and does not provide intermediate stops on the Healdsburg Segment (except at Healdsburg Station) or the Lombard Segment (except to the extent the Lombard Segment remains not part of the Shared Track) (the "NCRA Passenger Excursion Service"); provided that NCRA may not use the Healdsburg Segment or the Lombard Segment for any other type of passenger service, except that NCRA may transport officers, employees and freight business invitees of NCRA. NCRA acknowledges that it shall have no right to conduct intercity passenger rail service on the Healdsburg Segment. NCRA shall have no right to appoint more than two (2) Passenger Excursion Service contract operators on any portion of the Shared Track during any twelve (12) month period.

SECTION 2.02 Industrial Track. ~~Subject to Section 7.05 (b)(v) below.~~ NCRA, at its own expense, shall have the exclusive right to manage all existing or later built track on the Healdsburg and Lombard Segments used solely for NCRA Freight Service (the "Industrial Track"). NCRA shall have the right to enter into new industrial track agreements on the Subject Segments that are necessary for NCRA to discharge its exclusive common carrier rail freight responsibilities, provided that all such agreements are subject to (and conterminous with) this Agreement (including but not limited to ARTICLE VI hereof) and, on the Lombard and Healdsburg Segments only, such agreements (i) include the standard agreement provisions provided by SMART and the requirements of SMART's Encroachment Policy adopted April 22, 1996, as may be amended from time to time; and (ii) are approved in advance by SMART (which approval shall not be unreasonably withheld, conditioned or delayed).

SECTION 2.03 SMART Pathway Rights. Subject to the terms of this Agreement, SMART shall have the right to design and construct Pathways on the portion of the Willits Segment that is part of the Shared Track.

ARTICLE III – NWPCO AS NCRA OPERATOR

SMART hereby consents to NWPCo as NCRA's designated operator. NCRA hereby acknowledges that any agreement it may have with NWPCo or any successor designated operator or any third party operator admitted to the Shared Track or the Lombard Segment (collectively defined herein as, the "Operator") is subject to and conterminous with this Agreement.

ARTICLE IV – MAINTENANCE

SECTION 4.01 ~~[Omitted] Inspections. Within thirty (30) days after the Execution Date of this Agreement, SMART plans to make an inspection of the Shared Track and the Lombard Segment, the result of which shall be contained in a written report. NCRA shall~~

Commented [JS1]: Omitted. Old language

~~have the right (but not the obligation) to participate in the inspection and shall be furnished with a copy of the inspection report. No more than thirty (30) days before the commencement of NCRA train operations, NCRA and SMART shall make a joint inspection of that portion of the Shared Track and the Lombard Segment on which NCRA plans to operate to document the actual condition and the FRA classification of such track, the result of which shall be contained in a written report (delineated by FRA track classification), reviewed and approved by both Parties within thirty (30) days after the completion of the inspection. This joint inspection may be waived if the parties agree (in their sole discretion) that a joint inspection is unnecessary due to the FRA inspections conducted in connection with the commencement of NCRA service.~~

SECTION 4.02 NCRA Maintenance Responsibility. Subject to SECTION 4.04, NCRA shall perform all ordinary inspection and maintenance functions (including the provision of security, emergency grade crossing notification and response, vegetation control within 15 feet of the center line of track and any additional vegetation control required by law) on any portion of the Lombard Segment and the Healdsburg Segment that it operates on, at its sole cost and expense. NCRA shall maintain such Track to at least FRA Class 1 standards, provided that NCRA's inspection, maintenance and security responsibilities shall not include any equipment and building used solely by SMART.

SECTION 4.03 Second Joint Inspection. At least ten (10) days before any Changeover Date as described in SECTION 4.04, NCRA and SMART shall make a joint inspection of the applicable segment of the Shared Track to document the actual condition and the FRA class of the Track thereon, the result of which shall be contained in a written report (delineated by FRA track classification), reviewed and approved by both Parties within ten (10) days after the completion of the inspection.

SECTION 4.04 SMART Maintenance Responsibility. SMART shall have the right to take over maintenance on any portion of the Shared Track at any time and an obligation to take over maintenance of any portion of the Shared Track before commencement of construction of Changes and/or Additions to facilitate SMART Commuter Operations. With at least one (1) month advance notice, SMART shall notify NCRA of the date on which it will take over maintenance of any particular portion of the Shared Track. The date of such take over with respect to any particular portion shall be the "Changeover Date" with respect to such portion. After the Changeover Date with respect to any particular portion of Shared Track, SMART shall perform all ordinary maintenance functions and shall inspect and maintain the Track to at least the same requirements set forth in SECTION 4.02. SMART shall maintain all Pathways from inception at its sole cost and expense.

SECTION 4.05 Maintenance Plans and Reports. Each Party shall, on an annual basis, provide such other Party with a maintenance plan (including vegetation control) and maintenance budget on any portion of the Track where such Party has a maintenance obligation. Each Party also will provide to the other Party annual reports of its actual maintenance expenditures on a schedule agreed to by the Parties.

ARTICLE V- OPERATIONS AND DISPATCHING

SECTION 5.01 Dispatching. SMART shall manage and control the Shared Track and the Lombard Segment. Subject to the ultimate authority of the dispatcher, SMART shall manage and control SMART Commuter Operations and Ancillary Passenger Service,

and NCRA shall manage and control NCRA Freight Service and NCRA Passenger Excursion Service. If SMART's dispatcher is not present and on duty, then upon three days notice to SMART, NCRA shall have the right to take over dispatching on the Shared Track and the Lombard Segment. Both parties have the right to seek injunctive relief with respect to any allegation that the SMART dispatcher is not present and on duty. This SECTION is not subject to ARTICLE XIV. This SECTION is not intended to apply in any situations where SMART's dispatcher is present and on duty, but NCRA has an objection regarding the dispatcher's conduct of his/her duty.

SECTION 5.02 Rule Book. After prior consultation with NCRA, wherein differences or disputes are reasonably addressed, SMART shall have the right to specify a rule book, employees timetable, special instructions, standard operating procedures, and/or any other rules it reasonably determines are necessary for the safe and efficient operation of the Shared Track and Lombard Segment, and upon receipt of copies thereof, NCRA and the Operator shall follow such rules. Without limiting the generality of SECTION 16.05, maximum allowable freight and passenger train speeds on any segment of track shall adhere to FRA regulations established for the Class of Track on that segment.

SECTION 5.03 Priority

(a) SMART Commuter Operations shall have reasonable priority over all other operations on the Shared Track, provided that such priority shall not materially adversely affect NCRA's performance of its common carrier obligation, NCRA's conduct of rail freight operations, or NCRA's ability to provide adequate service to shippers and receivers. SMART Commuter Operations will require blocks of time ("windows") during which there will be no NCRA Freight Service or NCRA Passenger Excursion Service on segments of the Shared Track. These windows may need to be widened in the future as passenger traffic develops and/or formalized in order to meet the FRA's requirements for temporal separation of freight and passenger service to support waiver or other relief from Positive Train Control requirements on the Shared Track. Notwithstanding the generality of the forgoing, SMART expects to have greater flexibility during midday periods, late evenings, nights and weekends/holidays. SMART will meet and confer with NCRA to schedule freight service slots on the Shared Track. A list of windows is attached hereto, for illustrative purposes only as Exhibit 2.

(b) ~~[Omitted.] After consultation with NCRA, SMART shall establish a schedule of all train operation and other activities on the Shared Track. Six months before commencement of SMART commuter Operations, SMART shall prepare and furnish to NCRA a draft definitive schedule for SMART Commuter Operations. NCRA shall have the right to provide SMART with comments on the draft definitive schedule and SMART shall consider any such comments before finalizing the definitive schedule. SMART shall finalize the definitive initial schedule at least ninety days before commencement of SMART Commuter Operations.~~

Commented [JS2]: Omitted. Old language.

(c) NCRA Passenger Excursion Service and SMART Ancillary Passenger Service shall (i) be subordinate to SMART Commuter Operations, (ii) be of equal dispatch priority (as between themselves) and (iii) shall have reasonable priority over NCRA Freight Service, subject to the standard set forth in the first sentence of SUBSECTION (a) of this SECTION and provided that NCRA shall have the right to subordinate the NCRA Passenger Excursion

Service (but not the SMART Ancillary Passenger Service) to NCRA Freight Service.

ARTICLE VI-MODIFICATIONS AND IMPROVEMENTS

Changes and/or Additions to the Subject Segments shall be subject to the following requirements:

SECTIONS 6.01 Right to Make Changes: Financial Responsibility. Each Party shall have the right to make Changes and/or Additions to the Subject Segments at its own cost and expense, except as provided in Exhibit 3, as amended. The Parties acknowledge that Changes and/or Additions to the Subject Segments may require alteration or modification of existing Track or other improvements and that the cost and expense of such alteration or modification would be the financial responsibility of the Party then making the Changes and/or Additions. SMART shall manage and control construction of Changes and/or Additions on the Shared Track, including SMART's construction pursuant to its Initial Design Plans; provided that NCRA shall manage and control construction of NCRA-funded and administered Changes and/or Additions on (i) the Lombard Segment or (ii) that portion of the Shared Track between Healdsburg (MP 68.22 and Cloverdale (MP 85.35) before any Changeover Date with respect to such portion; provided further that SMART shall reasonably consider NCRA proposals to manage and control construction of NCRA-funded and administered Changes and/or Additions on the Shared Track not meeting the requirements of subpart (ii) of the foregoing provision.

Commented [JS3]: Exhibit 3 has been amended per the Letter of Intent.

SECTIONS 6.02 Plans. The Party undertaking the Changes and/or Additions (the "Constructing Party") to the Subject Segments shall deliver to the other Party a set of the design plans (including available schematic drawings and specifications) for Changes and/or Additions at the conceptual stage, thirty percent (30%) completion stage, sixty percent (60%) completion stage and Final Plans. The Party reviewing plans (the "Reviewing Party") shall have thirty (30) days from receipt to review and comment on the conceptual plans and the 30% plans, fifteen (15) days from receipt to review and comment on the 60% plans and fifteen (15) days from receipt to review and approve the Final Plans.

SECTIONS 6.03 Review.

(a) If the Reviewing Party reasonably determines that the proposed design or location of Changes and/or Additions, as reflected in any such set of plans, would materially interfere with NCRA Freight Service or SMART Commuter Operations (as the case may be), the Reviewing Party shall provide written comments to the Constructing Party explaining its concerns in this regard within the applicable review period. The Reviewing Party shall have an obligation to identify material interference concerns at the plan review stages where they arise and the Constructing Party shall have no obligation to address concerns that could have been raised in an earlier plan review stage. The Parties shall then use their best efforts to agree on modifications to any such set of plans to resolve such expressed concerns. If the Reviewing Party fails to provide written comments to the Constructing Party on any set of plans within the applicable review period, such Party shall be deemed to have approved such set of plans. Once a set of plans is approved pursuant to this SECTION, or Material Modifications are approved pursuant to SECTION 6.04 such plans or Material Modifications shall be deemed to be final and part of the Subject Segments as though already constructed.

(b) ~~NCRA's review of the Initial Design Plans shall follow the review provisions in SUBSECTION (a), except that~~ NCRA and SMART hereby agree that the Siding and Spur Provisions (Exhibit 3, as amended) are the solution for all cost issues pertaining to freight siding and spur track connections (including without limitation material interference issues) and that (except as set forth in Exhibit 3, as amended) SMART shall have no obligation to pay for freight siding or spur track connections.

Commented [JS4]: Struck this old language related to Initial Design Plans.

SECTIONS 6.04 Construction; Modification. The Constructing Party shall construct Changes and/or Additions in accordance with the Final Plans approved by the other Party pursuant to this ARTICLE VI and subject to any modifications issued by the Constructing Party that are authorized by this subparagraph. The Constructing Party shall notify and obtain the other Party's advance written consent to any Material Modifications. The other Party shall use its best efforts to complete its review of such Material Modifications as soon as possible but in any event within three (3) business days of receipt of such Material Modifications from the Constructing Party. The other Party's approval shall not be unreasonably withheld, conditioned or delayed unless any such Material Modifications would materially interfere with the other Party's use of the involved property (as articulated in SECTION 6.03).

SECTION 6.05 Operations During SMART Construction. ~~For any construction of Changes and/or Additions for expanded SMART Commuter Operations, the Parties shall negotiate in good faith to establish reasonable accommodations for freight and SMART operations during SMART's construction. The Parties have agreed to the following reasonable accommodations for freight operations during SMART's initial and any subsequent construction of Changes and/or Additions for SMART Commuter Operations:~~

Commented [JS5]: Section 6.05 has been revised because initial construction is complete.

(a) ~~[Omitted.] SMART shall establish a schedule for NCRA Freight Service providing 12-hour daytime windows on Sundays and Thursdays on portions under construction or proximate to construction. During such times, NCRA shall have uninterrupted access to such segments for NCRA Freight Service and any construction activities will be subject to such uninterrupted access. During all other times, SMART shall have exclusive access to such segments.~~

~~Provided that for a single period not to exceed eighteen (18) weeks, when SMART is undertaking its primary track-laying project on its initial operating segment (presently expected to include, as relevant, the line from the Ignacio Wye to Santa Rosa Railroad Square), which might include using the mechanized track laying equipment (herein, the "Track Construction Period"), SMART shall establish a schedule for NCRA Freight Service providing 48-hour single window on Saturday and Sunday. During such times, NCRA shall have uninterrupted access to track segments under construction or proximate to construction and SMART construction activities will be subject to the requirement that NCRA be afforded such uninterrupted access. During all other times (i.e., 5 consecutive days), SMART shall have exclusive access to the track under construction. SMART shall give NCRA at least thirty (30) days' notice of the planned date for commencement of the Track Construction Period. For any subsequent construction of Changes and/or Additions for expanded SMART Commuter Operations, the Parties shall negotiate in good faith to establish an arrangement similar to the Track Construction Period.~~

~~(i) Provided further that for a single period not to exceed eighteen (18) days during SMART's construction of its initial operating segment (presently expected to include, as relevant, the line from the Ignacio Wye to Santa Rosa Railroad Square), there shall be no NCRA Freight Service~~

~~on the Shared Track (herein, the "Designated Shutdown Period"). During the Designated Shutdown Period, SMART shall have exclusive access to the Shared Track. SMART shall give NCRA at least sixty (60) days' notice of the planned date for commencement of the Designated Shutdown Period. For any subsequent construction of Changes and/or Additions for expanded SMART Commuter Operations, the Parties shall negotiate in good faith to establish an arrangement similar to the Designated Shutdown Period.~~

(b) ~~[Omitted.] During SMART's construction of its initial operating segment (presently expected to include, as relevant, the line from the Ignacio Wye to Santa Rosa Railroad Square), except for the Designated Shutdown Period, if SMART's construction renders the Shared Track out of service for freight for seven (7) days (herein, a "Shutdown Period"), SMART shall have the right to shut down the segment in issue and alternative service to NCRA freight customers shall be arranged, in accordance with this SUBSECTION:~~

~~SMART shall procure and pay for an on-call broker to arrange for truck transportation, truck transload or other alternative transportation service for rail freight customers (the "Broker"). NCRA shall notify the Broker if one of its customers wishes to receive such alternative transportation arranged by the Broker. Upon such notification, NCRA shall provide Broker with information pertaining to the alternative transportation, including the identity of the shipper, the shipper's contact information, the location of the shipper facility and the commodities and desired schedule for transportation. The Broker shall arrange alternative transportation and inform NCRA and SMART of the arrangements. The customer shall pay the cost of the alternative transportation. SMART shall reimburse the customer for the alternative transportation to the extent it exceeds the cost that the consumer would have paid to NCRA. SMART shall have the right to confer in advance with the Broker regarding the cost of alternative transportation in order to ensure that the cost is reasonable.~~

~~(i) To the extent NCRA arranges alternative transportation for one of its customers or a customer makes its own alternative transportation arrangements, the customer shall pay the cost of the alternative transportation. SMART shall reimburse the customer for the costs of the alternative transportation to the extent it exceeds the cost that the customer would have paid to NCRA, provided that SMART shall have the right to confer in advance with NCRA or the customer regarding the cost of alternative transportation and approve such additional costs in advance, in order to ensure that the cost is reasonable. SMART's approval shall not be unreasonably withheld, conditioned or delayed.~~

~~(ii) In either case, SMART also shall pay to NCRA an amount equal to the product of (i) the number of days in the Shutdown Period multiplied by (ii) the daily average number of loaded cars originated, terminated or moving over Shared Track calculated from the sixty-day period before the beginning of the Shutdown Period multiplied by \$500.~~

~~Alternative transportation service may not work for certain shippers. SMART will use commercially reasonable efforts to advise NCRA in advance of any Shutdown Period so that NCRA can inform these shippers of such cessations.~~

(c) [Omitted.]

~~For any subsequent construction of Changes and/or Additions for expanded SMART Commuter Operations, the Parties shall negotiate in good faith to establish an arrangement similar to the above for Shutdown Periods.~~

~~(e)(d)~~ Except as set forth in this Article VI, NCRA shall have no right to compensation of any kind or character for any interference with or interruptions in freight service during construction or for any extra costs or administrative burdens associated with freight operations or cessations during construction.

SECTION 6.06 Operations During NCRA Construction. The Parties do not anticipate that NCRA's Changes and/or Additions on the Shared Track would require cessation of SMART commuter Operations. Such cessations could, but for this SECTION, harm SMART's Commuter Operations. To avoid any such harm, NCRA's Changes and/or Additions on the Shared Track shall be conducted on weekends and during non-Rush Hour periods, as designated on the schedule established pursuant to SECTION 5.03. If NCRA determines that its Changes and/or Additions on the Shared Track would require cessation of SMART Commuter Operations, it shall so notify SMART thirty (30) days in advance of such cessation and SMART shall arrange for a bus bridge of its passengers around the affected Shared Track during NCRA construction. SMART shall consult with NCRA regarding the bus bridge and such additional operating costs and secure NCRA's approval in advance of commencing the bus bridge (or incurring related costs). NCRA's approval shall not be unreasonably withheld, conditioned or delayed. NCRA shall reimburse SMART for any such documented increased costs associated with the bus bridge for the duration of the cessation. Except as set forth in this SECTION, SMART shall have no right to compensation for such cessations.

SECTION 6.07 Construction Schedule. The Constructing Party shall deliver to the other Party on a weekly basis, (i) a schedule for the construction of Changes and/or Additions over the next four weeks showing both the sequence and location of such construction work and (ii) a general schedule of construction activity planned over the next 12 weeks. Upon request of the other Party, the Constructing Party shall meet to discuss and review the schedules.

SECTION 6.08 Ownership; Salvage. The Party that pays for Changes and/or Additions shall own such Changes and/or Additions and shall be entitled to sell or reuse the material removed but not reused in the Changes and/or Additions ("Salvage Materials") regardless of when or by whom such material was installed or paid for; provided that upon subsequent removal or replacement of such Changes and/or Additions by such Party, that Party shall have an obligation to restore the relevant portion of the track to at least the condition that existed immediately before the Changes and/or Additions; provided further that the Party removing the Salvage Materials shall give the other Party written notice of, and a right of first refusal for thirty (30) days from such notice on, any proposal to sell the Salvage Materials; provided further that SMART shall indemnify NCRA for any claims by counter-parties under the agreements listed on Exhibit 4 that Salvage Materials purchased by NCRA from the Healdsburg Segment or the Lombard Segment violated such agreements; provided further that NCRA shall be entitled to reuse Salvage Materials from the Willits Segment, but shall have an obligation to remove such Salvage Materials from the construction site within thirty (30) days of notice from SMART, which notice will state the time period when such Salvage Materials will be available

for removal. Except as set forth in this Article VI, neither Party shall have an obligation to Compensate the other Party for the costs of prior Changes and/or Additions, removal of prior Changes and/or Additions or Salvage Materials.

ARTICLE VII- OTHER RIGHTS AND OBLIGATIONS-OPERATIONS

SECTION 7.01 Expansion of Shared Track. If SMART wants to expand the geographic scope of the Shared Track to include any portion of the Lombard Segment or any additional portion of the Willits Segment, SMART shall notify NCRA and the Parties shall amend (effective on the date providing in the notice) this Agreement to expand the geographic scope of the Track that constitutes Shared Track under this Agreement and all provisions governing Shared Track shall control over other provisions pertaining to such portions. Such notice by SMART shall be not less than six (6) months in advance of SMART's designated effective date for expansion of the Shared Track. Notwithstanding the foregoing, for the duration of any transportation emergency or non-rail infrastructure outage, SMART shall have the right to conduct SMART Commuter Operations on any portion of the Subject Segments not already part of the Shared Track. In such emergencies, SMART shall give NCRA any advanced notice that is practicable and the Parties will make arrangements for SMART to assume management, control and dispatching of rail operations pursuant to ARTICLE V and maintenance responsibilities pursuant to ARTICLE IV.

SECTION 7.02 No Admission Of Third Parties. SMART acknowledges that it has no right to grant, and shall not attempt to grant, to any third party any rights whatsoever to conduct rail freight operations on the Healdsburg Segment, the Lombard Segment, or the Willits Segment. SMART and NCRA each (i) acknowledges that it has no right to grant any third party rights to conduct freight or passenger rail service of any kind on the portion of the Subject Segments owned by the other Party and (ii) agrees not to grant such rights (except as required by law) during the term of this Agreement on the portion of the Subject Segments owned by it. For the avoidance of doubt, bona fide contractors (including but not limited to NWPCo and its successors and entities operating trains pursuant to SECTION 7.09) are not third parties within the scope of this SECTION.

SECTION 7.03 Contractor. Each Party shall have the right to arrange for all or some of its rights and/or obligations under this Agreement to be performed by one or more contractors; provided that (i) neither Party shall admit a contractor to the Shared Track without first providing the other Party with an insurance certificate for Workers Compensation insurance for such contractor and an insurance certificate for liability insurance for such contractor naming the other Party as an additional insured, (ii) the contract shall be subject to the terms of this Agreement and (iii) each Party shall remain responsible for performance of this Agreement. The requirements of the SECTION apply to any successor Operator and to any contract operator of NCRA Passenger Excursion Service or any contract operator of SMART Ancillary Passenger Service.

SECTION 7.04 Track Modifications Required by Law: [PTC/ATC](#).

(a) SMART shall pay all of the cost and expense of Positive Train Control on the Shared Track, except SMART's obligation to pay for the cost and expense of capping up

NCRA's or Operator's locomotive fleet shall be limited as follows:

(i) ~~to (i)~~ The Parties acknowledge and agree that SMART has furnished NCRA's Operator's Locomotive No. 2009 with the appropriate PTC equipment and NCRA's Operator is required to make the locomotive available for testing and certification for operation on SMART's tracks pursuant to FRA regulations. SMART will furnish and install the on-board PTC/ATC equipment on one additional NCRA/Operator locomotive, and provide training/certification to NCRA's Operator's staff on the use of the on-board equipment. ~~the number of locomotives in regular freight operations on the day that the Positive Train Control system becomes operational or (ii) five (5) locomotives, whichever is lower~~ (For the avoidance of doubt, ~~SMART~~ SMART shall have no obligation to pay for the cost and expense of cabling up any additional locomotives, including additional locomotives that may be used for NCRA Passenger Excursion Service.) Once furnished and installed, NCRA shall be responsible for ongoing maintenance of the on-board equipment.

(ii) In recognition that the process set forth in paragraph 7.04(a)(i), above, will take several months and that SMART's contractor will only be available to test and install PTC equipment for a limited time period, NCRA/NWPCo. commit to full cooperation with SMART including, but not limited to the following: NCRA/Operator will: (1) identify and provide SMART with the additional locomotive and its technical schematics for the design and installation of the equipment no later than June 9, 2017; and (2) provide SMART with the locomotive and operating personnel for certification, testing and training no later than September 9, 2017, and thereafter as often as reasonably necessary. NCRA/Operator's failure to fully cooperate and meet these timelines shall terminate SMART's obligations as set forth in this section 7.04, and SMART will be deemed to have satisfied any and all its obligations as they relate to the cost and expense of cabling up NCRA or its Operator's locomotive fleet.

(iii) SMART shall assume the responsibility for performing ongoing and periodic inspection and data collection and analysis of the onboard equipment which may include the following:

- Inspect/calibrate wheel diameter
- Inspect receiver coil height
- Inspect electromagnet valve
- Inspect counter
- Inspect and test power supply voltage
- Perform system isolation tests
- Perform vital output tests
- Perform cab signal pickup/dropout tests
- Perform Alarm tests
- Perform Cut-Out test

(iv) The Parties acknowledge and agree that effective January 13, 2017, SMART activated its Automatic Train Control/Centralized Traffic Control system (ATC/CTC signal system) and initiated and placed into operation its Positive Train

Control testing program. In recognition that SMART has placed the PTC/ATC system into operation, NCRA and/or its Operator will make the equipped Locomotive No. 2009 available to SMART immediately, but no later than March 14, 2017, for testing of the PTC/ATC system, and for as many days as is necessary to complete testing of the PTC/ATC system at no cost to SMART.

(v) NCRA and/or its Operator will provide staff to train and/or operate its locomotive(s) during the PTC/ATC system testing at no cost to SMART.

(vi) SMART agrees to initially furnish, install, provide training and inspection for the onboard PTC/ATC equipment on NCRA and/or its Operator's two locomotives. Other costs and expenses, including Operator's staff, time, locomotive use and fuel, shall be at NCRA's and/or its Operator's sole cost and expense.

(vii) On an ongoing basis, NCRA/Operator will make the equipped locomotive(s) available to SMART immediately upon reasonable request, taking into account the operational needs of NCRA/Operator and SMART for the performance of routine inspections and data analysis of the ATC/PTC equipment a minimum of once per month, or more frequently as needed to inspect the equipment.

(viii) The parties understand that implementation and operation of the PTC/ATC system requires data, including "no code proceed counter value" to be submitted to dispatch prior to entry into the PTC/ATC territory. SMART shall inform NCRA/Operator of dispatch related data required for entry into PTC/ATC territory and NCRA/Operator shall provide the information to dispatch prior to entry.

(ix) NCRA/Operator shall perform and pass a PTC/ATC departure test and report results to dispatch prior to entering PTC/ATC controlled territory. NCRA/Operator agree that if the cab signals do not pass the departure test, they will not be able to proceed onto PTC/ATC territory until the equipment is inspected and passes the departure test. Nothing contained herein prevents the parties from agreeing to "protected" blocks of time wherein NCRA/Operator may operate without PTC/ATC control if authorized by the FRA.

(x) SMART is the owner of the installed PTC/ATC equipment. NCRA/Operator shall not transfer or assign the PTC/ATC equipment to any third party. NCRA/Operator shall return any installed PTC/ATC equipment to SMART prior to selling, transferring or returning any equipped locomotive to a third party. In the event reuse of equipment by NCRA/Operator is practicable, the parties shall negotiate in good faith to accommodate same.

(xi) NCRA/Operator shall be responsible for compliance with any future PTC requirements, including but not limited to ongoing maintenance, replacement, upgrades or FRA requirements at NCRA's/Operator's sole cost and expense.

(xii) In recognition of PTC and FRA regulations, NCRA/Operator and SMART agree that on an interim basis prior to SMART's pre-revenue testing and/or operation, SMART will provide NCRA's Operator with a "protected" operating window

between midnight to 8 a.m. on Thursdays and Sundays provided that NCRA/and or its Operator meets its obligations to deliver the Locomotive No. 2009 for all PTC/ATC system testing as set forth in paragraph 7.04 (a)(iv), above.

(b) Except as set forth in Exhibit 3, as amended, NCRA shall be responsible for the cost and expense of new freight siding and spur track connections required by law. Each Party shall pay for and perform any and all work required by lawful authority in connection with construction, renewal, maintenance and operation of the Track on the property it owns; provided that if the Party otherwise responsible for such work can reasonably demonstrate that such work would not be required in the absence of the other Party's operations or operating rights or that such work would be substantially lower in cost in the absence of the other Party's operations or operating rights, then the other Party shall be responsible for the cost and performance of all such work (in the first instance) or the Parties shall agree to an allocation of the cost of such work (in the second instance).

Commented [JS6]: Exhibit 3 has been amended per letter of intent

SECTION 7.05 Hazardous Materials.

(a) Except as provided in section 7.05(b), below, and approved by SMART, Neither Party shall use, generate, transport, handle or store Hazardous Materials on the Subject Segments other than as may be used by the Party in its operations in the normal course of business or, in the case of NCRA, as may be transported by NCRA in its capacity as a common carrier by rail and in all events in accordance with Applicable Laws. Neither Party shall dispose of Hazardous Materials of any kind on the subject Segments.

(b.) NCRA/Operator may store Liquid Petroleum Gas ("LPG") loaded tank cars on two 6,000 feet auxiliary tracks located at the Schellville yard on the Lombard Segment ("Schellville yard tracks") in accordance with applicable federal, state, and local law and under the following conditions:

Commented [JS7]: Added a definition for the Schellville yard tracks on Exhibit 1 at page 34

(i) NCRA shall assume the risk of and agrees to fully indemnify, defend and hold SMART harmless with respect to any claim, damage or liability arising out of acts or omissions (whether negligent or not) of NCRA or any operator, agent, contractor, lessee or licensee of NCRA occurring as a result of transporting hazardous materials on the Lombard/Healdsburg track(s) and/or storing LPG on the Schellville yard tracks.

(ii) Prior to storage of any LPG at the Schellville yard tracks, NCRA shall implement any and all applicable health and public safety measures at their sole cost and expense, including but not limited to, an emergency response plan, safety and security procedures and safety protocols.

(iii) Prior to said storage of any LPG at the Schellville yard tracks, NCRA and SMART will identify local fire and/or first responders. On an ongoing basis,

NCRA/its Operator shall consult with the identified first responders on public health and safety issues related to storage of LPG at the Schellville yard tracks.

(iv) As a condition of storage of LPG at the Schellville yard tracks, and to ensure the health and safety of the community, NCRA agrees that when transporting Hazardous Materials on the Healdsburg or Lombard Segments, NCRA/Operator shall disclose and provide to appropriate first responders and to SMART dispatch a copy of the manifest identifying the nature and type of Hazardous Material, identity and quantity of cargo, destination of railcars, total number of railcars, total tonnage and length of train.

(v) NCRA agrees that NCRA/Operator will not store or hold LPG or any other hazardous material (including temporarily storing awaiting final destination instructions, pending resumption or "forwarding orders") on any track, spur, siding, auxiliary or Industrial Track on the Healdsburg or Lombard segments, except as is authorized by 49 CFR 174.14 (generally within 48 hours) and for storage of LPG at the Schellville yard tracks as provided in this Section 7.05.

(vi) In the event the Schellville yard tracks are replaced or reconstructed at NCRA/Operator's cost, SMART shall review and approve of such replacement or reconstruction in accordance with Article VI herein. Approval shall not be unreasonably withheld.

SECTION 7.06 Locomotive Storage. At each location where a Party parks or stores its locomotive while not in use, the Party shall implement appropriate contamination containment procedures with respect to fuel or lubricant drippings

SECTION 7.07 Shared Track Blockages. Neither shall store or stop equipment or cars on the Shared Track (excluding Industrial Track or other Track designated for the storage, stoppage or passing of trains or equipment or cars) in a way that blocks or fouls the Shared Track. Both Parties shall have the right to help stalled trains or equipment of the other Party (or to move improperly stored or stopped equipment or cars).

SECTION 7.08 NCRA Passenger Excursion Service and SMART Ancillary Passenger Service. NCRA Passenger Excursion Service on any segment of the Healdsburg Segment shall not commence until ninety (90) days after commencement of SMART Commuter Operations on the same segment; provided that NCRA may operate NCRA Passenger Excursion Service on the portion of the Healdsburg Segment between Healdsburg Station and the northern end of the Healdsburg Segment at any time when such portion is not under construction. SMART may operate SMART Ancillary Passenger Service on the Willits Segment.

Specific plans for the operation of NCRA Passenger Excursion trains or SMART Ancillary Passenger Service shall be provided to and discussed with the other party at least 60 days in advance of their proposed date(s) of operation.

SECTION 7.09 Company Material. SMART (directly or through contractors) shall have the right to move its own company material on the Shared Track or the Lombard Segment, including but not limited to track material and passenger equipment in transport for use in the SMART Commuter Operations. If SMART elects to use a contractor to move such company material, NCRA shall have a right of first refusal for ten (10) days on the work at the contractor's quoted rate; provided that such right of first refusal shall not apply to passenger equipment in transport for use in the SMART Commuter Operations.

ARTICLE VIII- OTHER RIGHTS AND OBLIGATIONS – PROPERTY

SECTION 8.01 No Liens. Neither Party will take any action or fail to take any action which would cause the Subject Segments to be encumbered by any mortgage, indenture, bond, note or lien of any kind that would have a material, adverse effect on the other Party's conduct of rail operations thereon or that would require the payment of money by the other Party.

SECTION 8.02 Nuisance. Neither Party shall use nor permit the use of the Subject Segments in any manner that will tend to create a nuisance or would materially interfere with the continued commercial, industrial or transportation corridor uses of the Subject Segment.

SECTION 8.03 Future Easement. Each Party reserves the exclusive right to approve or deny any and all future easements, leases, licenses or rights of occupancy in, on, under, through, above, across or along the property it owns (the Willits Segment in the case of NCRA and the Healdsburg and Lombard Segments in the case of SMART), provided that approval of such future easements, leases, licenses or rights of occupancy by either Party does not unreasonably interfere with SMART Commuter Operations or NCRA Freight Service.

SECTION 8.04 Utilities. Before a Changeover Date for any particular segment, NCRA shall pay all bills for utilities, including without limitation those for water, sewer, gas and electric service to the Subject Segments, and the Parties shall negotiate in good faith for SMART's reimbursement to NCRA for any utility costs attributable to SMART's activities. After a Changeover date for any particular segment, each Party shall pay all bills for utilities used solely for such Party's consumption, including without limitation those for water, sewer, gas and electric service, and SMART shall pay all bills for all utilities on the Shared Track subject to the provisions of SECTION 9.01.

SECTION 8.05 Defeasance. Neither Party shall make any use of the Subject Segments that is inconsistent with the owning Party's right, title and interest therein and which may cause the right to use and occupy such property to revert to any third party.

SECTION 8.06 Right of Entry; Cooperation. Each Party hereby grants to the other Party a general right of entry to the Subject Segments owned by it for any lawful purpose related to the rights and obligations of the other Party (whether by law, easement or this Agreement), subject to reasonable advanced notice and safety procedures, and each Party agrees to

cooperate in the arrangement of such entry.

SECTION 8.07 Incorporation of Reserved Rights. SMART hereby reserves all of the reservations made by NWPRA with respect to the Lombard Segment and the Healdsburg Segment in Sections 1.02 and XV of the Operating Agreement 1996, as fully restated in Exhibit 5. NCRA hereby reserves all of the Certain Reserved Rights with respect to the Willits Segment, as stated in Exhibit 5.

SECTION 8.08 Settlement & Consent Agreements. Any and all settlement agreements of any kind or character (including but not limited to the agreement between NCRA and the City of Novato) whether executed before or after this Agreement are subordinate and subject to this Agreement. Each Party agrees to secure any necessary agreement amendments or estoppel certificates with respect to any such agreements executed before this Agreement.

ARTICLE IX- COST SHARING

SECTION 9.01 Dispatching/Haystack Bridge Operation Cost Sharing. ~~Subject to adjustments pursuant to SECTIONS 9.04 and 9.05 below, Commencing with the first month where there is NCRA Freight Service or NCRA Passenger Excursion Service (herein, "NCRA Trains") and for each month thereafter (regardless of whether there are NCRA Trains in any particular month) before there are any SMART Commuter Operations or SMART Ancillary Passenger Service (herein "SMART Trains"), NCRA shall pay SMART a fee of \$52,9500 per month for dispatching services and Haystack bridge operation. Commencing with the first month where there are NCRA Trains and SMART Trains (assuming that NCRA Trains have commenced), NCRA shall pay SMART a fee for dispatching services that is negotiated in good faith between the parties. If the parties are unable to reach an agreement, then the issue shall be submitted to arbitration. The arbitrator shall decide the appropriate equitable allocation of dispatch costs based upon the parties' use of the rail line. While arbitration is pending NCRA shall pay SMART the fee applicable before SMART commenced operations.~~

Commented [JS8]: Dispatching fees to be re-set per paragraph 9.05. Includes fees for Haystack bridge operation.

SECTION 9.02 Maintenance Cost Sharing. After SMART assumes responsibility for maintenance on a particular segment pursuant to SECTION 4.04, NCRA shall pay SMART for that segment the charges set forth on Exhibit 6.

Commented [JS9]: To be re-set per paragraph 9.05. Please see edits to Exhibit 6

SECTION 9.03 Reporting and Invoices for Dispatching and Maintenance. Within ten (10) days of the end of a month, NCRA shall send SMART a report of the prior month's carloadings showing carloadings that originated, terminated, or moved overhead on the track maintained by SMART. The report also shall identify any cars that weighed more than 263,000 pounds. By the end of the month in which the carloading report was due, SMART shall send NCRA an invoice for the above-described dispatching and maintenance fees.

SECTION 9.04 Annual Adjustment. The fees in SECTION 9.01 and SECTION 9.02 shall be adjusted annually on the anniversary of the Effective Date by the same

percentage as the percentage increase or decrease, if any, in the STB's rail cost adjustment factor, unadjusted for productivity. If the rail cost factor ceases to exist, the Parties shall use the Consumer Price Index for all Urban Consumers (CPI-U) issued by the U.S. Department of Labor's Bureau of Labor Statistics or substantially similar index.

SECTION 9.05 Five-Year Adjustment. The Parties have concluded that the above-referenced fees fairly reflect the dispatching, Haystack bridge operation and maintenance expenses that NCRA reasonably would have expended in the absence of SMART Commuter Operations. On the fifth Anniversary of the Effective Date and every five (5) years thereafter, the Parties will negotiate in good faith to re-set the dispatching, Haystack bridge operation and maintenance fees in accord with this rationale.

SECTION 9.06 No Other Related Compensation. Except as set forth above in this ARTICLE IX, or elsewhere in this Agreement, neither Party shall owe the other Party any compensation for maintenance, dispatching or operations on the other Party's property.

ARTICLE X – ALLOCATION OF LIABILITY; INDEMNITY

SECTION 10.01 Allocation of Liability

(a) It is the express intention of the Parties that NCRA assumes the risk of and agrees to indemnify, defend and hold harmless SMART, or any agent, contractor, lessee or licensee of SMART, from any orders, directives, judgments, causes of action, penalties, fees, claims, costs, liabilities, damages, losses and expense (including without limitation court costs and attorneys' fees and all costs of investigating, remediating, or responding to the existence of a claim), or demands of whatsoever nature for source for (i) personal injury to or death of persons whomsoever; (ii) property damage or destruction of whatsoever nature (including without limitation damage to property of SMART or NCRA, or property in NCRA's care, custody or control, and third party property), (iii) violation of any Applicable Laws; or (iv) breach of this Agreement (collectively, "Claims") when such Claims arise out of acts or omissions (whether or not negligent) of NCRA or any agent, the contractor, lessee or licensee of NCRA occurring on the Subject Segments after the Execution Date and before the termination of this Agreement; except that NCRA shall not indemnify, defend or hold harmless SMART, or any agent, contractor, lessee or licensee of SMART, to the extent that the Claim arises out of or in connection with acts, omissions or negligence of SMART, or any agent, contractor, lessee or licensee of SMART or is otherwise covered by SECTION 10.01 (b)

(b) It is the express intention of the Parties that SMART assumes the risk of and agrees to indemnify, defend and hold harmless NCRA, or any agent, contractor, lessee or licensee of NCRA, from any orders, directives, judgments, causes of action, penalties, fees, claims costs, liabilities, damages, losses and expense (including without limitation court costs and attorneys' fees and all costs of investigating, remediating, or responding to the existence of a claim), or demands of whatsoever nature or source for (i) personal injury to or death of

persons whomsoever; (ii) property damage or destruction of whatsoever nature (including without limitation damage to property of NCRA or SMART, or property in SMART's care, custody or control, and third party property); (iii) violation of any Applicable Laws; or (iv) breach of this Agreement (collectively, "Claims") when such Claims arise out of acts or omissions (whether or not negligent) of SMART or any agent, contractor, lessee or licensee of SMART occurring on the Subject Segments after the Execution Date and before the termination of this Agreement; except that SMART shall not indemnify, defend or hold harmless NCRA, or any agent, contractor, lessee or licensee of NCRA, to the extent that the Claim arises out of or in connection with acts, omissions or negligence of NCRA, or any agent, contractor, lessee or licensee of NCRA or is otherwise covered by SECTION 10.01 (a).

SECTION 10.02 Procedure.

(a) Claims. If any claim or demand (short of a lawsuit) shall be made by any person against an indemnified Party under this ARTICLE X, the indemnified Party shall, within sixty (60) days after actual notice of such claim or demand, cause written notice thereof to be given to the indemnifying Party, provided that failure to notify the indemnifying Party shall not relieve the indemnifying Party from any liability which it may have to the indemnified Party under this ARTICLE X except to the extent that the rights of the indemnifying Party are in fact prejudiced by such failure. The indemnifying Party shall have the right, at its sole cost and expense, to participate in the defense of, any such claim or demand, and the Parties agree to cooperate fully with each other in connection with any such defense, such negotiation or claim settlement. In any event, the indemnified Party shall not make any settlement of any claims or demands which might give rise to liability on the part of the indemnifying Party under this ARTICLE X without either providing the indemnifying Party with a full release with respect to such liability or obtaining the prior written consent of the indemnifying Party, which consent shall not be unreasonably withheld, conditioned or delayed. If any claim or demand relates to a matter for which the Parties, under the terms of this ARTICLE X, are to share a Loss, each Party shall be entitled to select its own counsel and defend itself against the claim or demand at its sole cost and expense, and neither Party shall make any settlement of any such claim or demand without giving the other Party reasonable prior notice of the proposed settlement.

(b) Actions. In the event any lawsuit is commenced against either Party for or on account of any Loss for which the other Party may be solely or jointly liable under this Agreement, the Party thus sued shall give the other Party timely written notice that such action is pending, and thereupon the Party so notified may assume or join in the defense thereof. Neither Party shall be bound by any judgment against the other Party unless it shall have been so notified and shall have had reasonable opportunity to assume or join in the defense of the action. When so notified and the opportunity to assume or join in the defense of the action has been afforded, the Party so notified shall, to the extent of its liability under this Agreement, be bound by the final judgment of the court in such action.

SECTION 10.03 Insurance Not Limit on Indemnification. In no event shall the indemnification provisions of this ARTICLE X be limited to the insurance coverage required under ARTICLE X.

SECTION 10.04 No Delay Claims. Except as provided in SECTION 6.05, SECTION 6.06 or in instances of intentional or willful delays (in which case the Party asserting the claim shall have the burden of proof), neither Party shall have any claim against the other Party for interruption of or delay to such Party's business, and neither party shall have any claim against the other Party for loss of revenue or profit.

SECTION 10.05 Survival. Each Party hereto covenants and agrees that its obligations under this ARTICLE X shall continue in full force and effect notwithstanding the full payment of all sums due under this Agreement or the satisfaction, discharge or termination of this Agreement in any matter whatsoever.

SECTION 10.06 Claims. Notwithstanding Government Code Section 905(i) any claim arising out of this Agreement shall be subject to and governed by Government Code sections 900 et seq., commonly referred to as the Government Claims Act, provided that the filing of a demand for arbitration pursuant to ARTICLE XIV shall satisfy any requirement to file suit within the time specified by the Government Claims Act.

ARTICLE XI – INSURANCE

SECTION 11. 01 Insurance.

(a) NCRA shall, at its sole cost and expense, procure the following kinds of insurance for the term of this Agreement.

(i) Comprehensive Railroad Liability insurance including contractual liability, providing bodily injury, including death, personal injury and property damage coverage with limits as follow: (1) as of the Effective Date, a combined single limit of at least one million dollars (\$1,000,000) for each incident and a general aggregate limit of at least two million dollars (\$2,000,000); (2) as of the commencement of NCRA Freight Service, a combined single limit of at least ten million dollars (\$10,000,000) for each incident and a general aggregate limit of at least ten million dollars (\$10,000,000); and (3) as of the commencement of NCRA Excursion Service, a combined single limit of at least fifty million dollars (\$50,000,000).

(ii) Workers' compensation coverage and employer's liability coverage, with a minimum limit of \$2 million each accident, with coverage for Federal Employer's Liability Act exposure, each with a waiver of subrogation endorsement;

(iii) During any time when NCRA is engaged in construction on the Shared Track or the Lombard Segment: (1) railroad protective liability insurance, with liability limits of \$2,000,000 per occurrence and \$6,000,000 aggregate; (2) builders risk insurance, excluding coverage for rail vehicles, with a direct damage limit of \$100,000,000, and earthquake and flood limits of \$50,000,000 each; (3) general liability insurance, with limits of \$2,000,000 per occurrence, and \$4,000,000 aggregate; and (4) excess liability insurance, with limits of \$75,000,000 in excess of the underlying limits general liability limits.

(iv) Provided that, if NCRA can reasonably demonstrate that the cost of its Comprehensive Railroad Liability insurance was higher than it would have been but for the presence of the Pathways, then SMART shall reimburse NCRA for the difference in cost.

(b) SMART shall, at its sole cost and expense, procure the following kinds of insurance for the term of this Agreement.

(i) Prior to commencement of operations; Comprehensive Railroad Liability insurance including contractual liability providing bodily injury, including death, personal injury and property damage coverage with limits as follows: (i) as of the commencement of SMART Commuter Operations, a combined single limit of at least one hundred million dollars (\$100,000,000) for each incident and a general aggregate limit of at least one hundred million dollars (\$100,000,000).

(ii) Effective on the date of the first changeover Date and during any time when SMART is engaged in construction on the Shared Track: (1) railroad protective liability insurance, with liability limits of \$2,000,000 per occurrence and \$6,000,000 aggregate; (2) builders risk insurance, excluding coverage for rail vehicles, with a direct damage limit of \$100,000,000, and earthquake and flood limits of \$50,000,000 each; (3) general liability insurance, with limits of \$2,000,000 per occurrence, and \$4,000,000 aggregate; (4) excess liability insurance, with limits of \$75,000,000 in excess of the underlying limits general liability limits; and (5) workers' compensation coverage, with a minimum limit of \$2 million each accident, with a waiver of subrogation endorsement. SMART shall have the option to obtain and maintain such insurance in an owner controlled insurance program, in accordance with California law.

(c) The limits in SECTION 11.01(a) and (b) shall be reviewed every five (5) years to ensure that such limits are in accordance with industry standards, provided they shall not be lowered.

(d) This insurance shall contain Broad Form Liability covering the indemnity provisions contained in this Agreement, severability of interests and name the other Party as an additional insured with respect to liabilities arising out of the primary insured's obligations in this Agreement. If coverage is purchased on a "claims made" basis, it shall provide for at least a three (3) year extended reporting or discovery period, which shall be invoked should insurance covering the time period of this Agreement be cancelled unless replaced with a policy containing the same retroactive date as the policy being replaced. NCRA may self-insure to \$1,000,000; SMART may self-insure to \$5,000,000.

(e) Upon the failure of either Party to maintain insurance as provided herein, the other Party shall have the right after giving ten (10) days written notice, to obtain insurance and receive prompt reimbursement.

(f) Both Parties represent and warrant to the other Party that this Agreement has been reviewed with its insurance agent(s)/broker(s) and the agent(s)/brokers(s) has been instructed to procure the insurance coverage required herein and name the other Party as an additional insured.

(g) Each Party shall furnish to the other Party certificates of insurance evidencing the required coverage and endorsement(s) and upon written request shall provide certified duplicate copies of any policy. The insurance company(ies) issuing such policy(ies) to either Party shall notify the other Party in writing of any material alteration in the policy, including but not limited to any change in the retroactive date in any "claims made" policies or any reduction of aggregation limits, or cancellation thereof, at least thirty (30) days prior thereto.

(h) The insurance policy(ies) shall be written by an insurance company or companies with current Best's Insurance Guide Rating of A or better. Such insurance company shall be authorized to transact business in the State of California.

ARTICLE XII – REPRESENTATIONS AND WARRANTIES

SECTION 12.01 SMART. SMART represents and warrants that:

(a) SMART has full power and authority to enter into this Agreement and, subject to necessary regulatory authority, to carry out its obligations hereunder.

(b) This agreement has been duly authorized, executed and delivered by SMART and is a legal, valid and binding obligation of SMART, enforceable against SMART in accordance with its terms, including without limitation the terms of SECTION 15.03, except as such enforceability may be limited by (a) bankruptcy, insolvency, reorganization or other similar laws affecting the enforcement of creditors' rights generally and (b) general principles of equity (regardless of whether such enforceability is considered a proceeding in equity or at law). Neither the execution and delivery of this Agreement by SMART, the consummation by SMART of the transactions contemplated hereby, nor compliance or performance by SMART with any of the provisions hereof does or will violate any judgment, order, law, rule or regulation applicable to SMART or any provisions of the JPA Agreement or SMART's by-laws or result in any breach of, or constitute a default under, or result in the creation of any lien, charge, security interest or other encumbrance upon any assets of SMART (other than the encumbrances on the Subject Segments created by this Agreement).

SECTION 12.02 NCRA. NCRA represents and warrants that:

(a) NCRA has full power and authority to enter into this Agreement and, to carry out its obligations hereunder.

(b) This agreement has been duly authorized, executed and delivered by NCRA and is a legal, valid and binding obligation of NCRA enforceable against NCRA in accordance with its terms, including without limitation the terms of SECTION 15.03, except as such enforceability may be limited by (a) bankruptcy, insolvency, reorganization or other similar laws affecting the enforcement of creditors' rights generally and (b) general principles of equity (regardless of whether such enforceability is considered a proceeding in equity or at law). Neither the execution and delivery of this Agreement by NCRA, the consummation by NCRA of the transactions contemplated hereby, nor compliance or performance by NCRA with any of the provisions hereof does or will violate any judgment, order, law, rule or regulation applicable to NCRA or any provisions of NCRA's certificate of incorporation or by-laws or result in any breach of, or constitute a default under, or result in the creation of any lien, charge, security interest or other encumbrance upon any assets of NCRA (other than the encumbrances on the Subject Segments created by this Agreement).

ARTICLE XIII – COORDINATION COMMITTEE

SMART's General Manager and NCRA's Executive Director shall establish a Coordination Committee consisting of not more than two (2) representatives of each Party. NCRA may select representatives from the Operator. SMART may select representatives from its operator, if any. The Coordination Committee shall provide the functions set forth for it in SECTION 5.03, SECTION 6.05 and SECTION 6.06 and shall be a forum for the Parties to share information, discuss matters submitted by one Party to the other Party for review and/or approval, and seek resolution of any issues between the Parties with respect to this Agreement. The Coordination Committee shall meet regularly (in person or telephonically) and also as necessary to address issues between the Parties that require prompt resolution.

ARTICLE XIV – ARBITRATION

SECTION 14.01 Controversies Subject to Arbitration. The Parties hereby agree that any failure to pay money when due under the Agreement, any failure to maintain insurance as required under this Agreement, and any disputes arising under SECTION 5.01 or SECTION 16.09 are not subject to arbitration. Otherwise, any and all claims disputes or controversies between SMART and NCRA arising out of or concerning the interpretation, application, or implementation of this Agreement that cannot be resolved by the Parties through the Coordination Committee or by negotiations shall be submitted (subject to SECTION 14.02) to binding arbitration administered by the American Arbitration Association ("AAA") under its Commercial Arbitration Rules. If the AAA discontinues promulgation of the Commercial Arbitration Rules, the Parties shall use the AAA's designated successor rules, and if the AAA does not designate successor rules, the Parties shall agree on other rules. The judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

SECTION 14.02 Controversies Subject to "Baseball" Style Arbitration.

(a) ~~[Omitted.] Any and all claims, disputes or controversies between SMART and NCRA regarding the number of turn-outs on the portion of the Shared Track north of Santa Rosa Railroad Square (MP 53.8) (or any portion thereof) shall be determined by the arbitrator picking, between the list submitted by NCRA and the list submitted by SMART, which Party's list comes closest the standard set forth in the applicable paragraphs of Exhibit 3. The arbitrator shall not be authorized to award a composite or blend of the two lists. The judgment of the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.~~

Commented [JS10]: Omitted. This language no longer applicable as new terms agreed to in the letter of intent. Please see Exhibit 3 to this agreement, as amended.

(b) Any and all claims, disputes or controversies between SMART and NCRA regarding the amount NCRA shall pay SMART for dispatching services after commencement of SMART trains pursuant to SECTION 9.01 shall be determined by the arbitrator picking, between the amount submitted by NCRA and the amount submitted by SMART, which Party's amount is most reasonable. The arbitrator shall not be authorized to award a composite or blend of the two amounts. The judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

SECTION 14.03 Expedited Arbitration Schedule. The Parties hereby agree that the expedited arbitration procedures set forth in the AAA Commercial Arbitration Rules, Optional Rules for Emergency Measures of Protection, shall apply to any disputes arising under ARTICLE IV, ARTICLE VI or SECTION 7.07 and accordingly the Party applying to the AAA for such emergency relief pursuant to this SECTION shall not be required to set forth in its application the reasons why the Party is entitled to such relief or the reasons why such relief is required on an emergency basis.

SECTION 14.04 Pending Resolution. During such arbitration proceedings, the business and the operations to be conducted under this Agreement, to the extent that they are the subject of such controversy, shall continue to be transacted, used and paid in the manner and form existing prior to the arising of such controversy, unless the arbitrator shall make a preliminary ruling to the contrary.

SECTION 14.05 Party Expenses. Except as otherwise set forth in this SECTION, attorneys' fees, costs and expenses incurred by the Parties in connection with such arbitration shall be apportioned as set forth in the AAA Commercial Arbitration Rules. Any administrative fees imposed by the AAA, including but not limited to the initial filing fee, case service fee, proceed fee, and final fee, shall be apportioned evenly between the Parties. The arbitrator shall have the power to award attorneys' fees and costs to either Party if the arbitrator determines in its reasonable discretion that the position of the other Party to the arbitration was frivolous or otherwise an abuse of the arbitration process.

ARTICLE XV – TERM AND TERMINATION

SECTION 15.01 Term. This Agreement shall have a term of forty (40) years and shall automatically renew for three successive terms of ten (10) years each, unless either Party gives notice (at least six [6] months before expiration of the then current term) of its intention to not renew.

SECTION 15.02 Default. An “Event of Default” by either Party shall have occurred if any of the following shall occur:

(a) if either Party fails to pay an amount of money due under this Agreement in excess of \$5,000 and such failure continues thirty (30) days after written notice from the other Party of such failure.

(b) if either Party fails to meet its insurance obligation under this Agreement.

(c) for other obligations not subject to arbitration, if either Party fails to meet any such obligation and such failure continues ninety (90) days after written notice from the other Party of such failure.

(d) for obligations subject to arbitration, if an arbitrator finds that either Party has failed to meet any material obligation under this Agreement.

SECTION 15.03 Remedies Upon Events of Default. If a Party causes an Event of Default to occur (the “Defaulting Party”), the other Party may, at its option:

(a) proceed by appropriate judicial proceeding, either at law or in equity, to enforce performance or observance by the Defaulting Party of the Applicable provisions of this Agreement, to enforce the award of an arbitrator and/or to recover damages (together with attorneys’ fees and such Party’s other costs) for a breach thereof, or to seek other remedies, which may include, but are not limited to:

- (i) for default under Section 15.02(a), monetary damages;
- (ii) for default under Section 15.02(b), injunctive relief suspending operations of the Defaulting Party until such time as the default is cured and appropriate measures are taken to ensure that future defaults will not occur;
- (iii) for default under Section 15.02(c), injunctive relief or monetary damages;
- (iv) for cessation of all NCRA Freight Service or of all SMART commuter Operations lasting more than 24 months where the party who has ceased such operations cannot reasonably demonstrate that such operations will recommence within 36 months, or for sustained or persistent Events of Default, termination of this Agreement; provided that in the case of such cessation of NCRA Freight Service or SMART Commuter Operations, the 24 month period shall be tolled for a maximum of 12 months if the party that has ceased such operations is prevented from re-starting such operations by the existence of an injunction. In the event of termination, the non-Defaulting Party shall continue to operate under its easement rights substantially as contemplated by this Agreement as if it were in effect and the Defaulting

Party shall have no right to operate but shall maintain its statutory and easement rights. Nothing in this Agreement shall be construed as a forfeiture of the property easement rights held by either party, which are described in the Recitals. In the event the Defaulting Party is NCRA, NCRA shall take all actions necessary and expedient before the STB to secure abandonment and/or discontinuance of service authority on behalf of NCRA and the Operator.

(b) cure the default by making any such payment or performing any such obligation, as applicable, at the Defaulting Party's sole expense, without waiving or releasing the Defaulting Party from any obligation.

(c) The foregoing rights and remedies are and shall be deemed to be cumulative and the exercise of any of them shall not be deemed to be an election excluding the exercise at any time of a different or inconsistent remedy.

(d) Any waiver by either Party of any Event or Default under this Agreement or any delay of either Party in enforcing any remedy set forth herein shall not constitute a waiver of the right to pursue any remedy at a later date or terminate this Agreement for any subsequent Event or Default, nor shall any such waiver in any way affect either Party's right to enforce the Agreement.

(e) The Operator may, in its sole discretion, perform any of the obligations imposed upon NCRA hereunder and cure any default on behalf of NCRA and such performance or cure shall have the same effect as if it had been performed or cured by NCRA; however, nothing in this subsection shall reduce or relieve NCRA of any rights or obligations under this Agreement.

ARTICLE XVI – MISCELLANEOUS TERMS

SECTION 16.01 Reports, Records and Inspections.

(a) FRA and CPUC Reports. The Party responsible for maintenance on a particular segment of Track shall provide a copy of all reports (including) all notices or citations alleging deficiencies from FRA track standards of track inspections by FRA or California Public Utilities Commission inspectors on such segment to the other Party promptly upon receipt of such reports, but in no case more than ten (10) business days after receipt.

(b) Records. Each party shall maintain full and complete records of all maintenance, rehabilitation, track relocation or removal performed on the Subject Segments and shall keep all track profiles and track charts up to date so as to show all program maintenance and rehabilitation performed on the Track. Copies of updated records and track charts on the Subject Segments shall be provided by each Party to the other Party promptly upon request. NCRA/Operator will provide SMART with the below records as follows:

(i) Track inspector qualifications and designations required by 49 CFR 213: Immediately, but no later than 30 days from the Effective Date of this Agreement for

Commented [JS11]: Please note the proposed schedule for providing SMART with each category of records.

current employees, and thereafter within 30 days of additional employees being qualified and receiving designations.

(ii) Complete maintenance/inspection records for the Subject Segments, including all "track" as defined herein: Quarterly.

(iii) Bridge safety standards records including the Bridge Management Program, bridge inspection reports, and bridge ratings required by 49 CFR 237: Annually upon completion of required annual inspections.

(iv) A list of certified and qualified engineers and supporting documentation required by 49 CFR 240 and 242: Immediately, but no later than 30 days from the Effective Date of this Agreement for current employees, and thereafter within 30 days of certifying new employees.

(v) Accident and incident reports as required by 49 CFR 225: Monthly, by the 20th of each month following the reporting month.

(vi) Documentation of employee training on hazardous materials, safety and security: Immediately, but no later than 30 days from the Effective Date of this Agreement for current employees, and thereafter within 30 days of training new employees.

(vii) Alcohol and drug use control programs required by 49 CFR 219: Immediately, but no later than 30 days from the Effective Date of this Agreement and when amended.

(c) Inspections. Each Party shall have the right at any time, upon reasonable notice (except for emergencies, where no notice is required) to inspect the Track then maintained by the other Party for conformity with the standards of maintenance contained in this Agreement and to verify compliance with this Agreement; provided that such inspections shall not unreasonably interfere with the other Party's operations; that all persons conducting such inspections shall execute appropriate releases and indemnity acknowledgements; and that the other Party may accompany the inspecting Party during such inspections. Each Party shall be notified by the other of, and have the right to attend, any FRA or CPUC inspection of any Track on the Subject Segments.

(d) Inspection of Records. Each Party shall have the right at any time upon reasonable notice to inspect the other Party's books, records, or any other reports or supporting documents or materials necessary to determine compliance with any provisions of this Agreement. The inspecting Party will conduct inspections during normal business hours and the other Party shall make its facilities available to the inspecting Party's inspectors to permit such inspection without undue interference with the other Party's operations. Any direct expense arising from making the inspection shall be borne by the inspecting Party.

SECTION 16.02 Billing and Payment. Invoices submitted to the Parties under this Agreement (“Invoices”) must be itemized with a detailed description of the charges. Invoices shall be paid within thirty (30) days after receipt thereof by the payor. If a Party disputes any items on an Invoice, that party may not deduct the disputed item from the payment, but shall notify the payee of the disputed item and the Parties shall use best efforts to resolve the disputed items within thirty (30) days after receipt of the disputed payment. No Invoice shall be submitted later than on hundred twenty (120) days after the last day of the calendar month in which the expense or cost covered thereby is incurred.

SECTION 16.03 Employee Matters. The Parties agree that the employees of each Party are not the employees of the other Party. Each Party assumes exclusive responsibility for compliance with all employment laws and regulations applicable to its operations, as well as the terms of any collective bargaining agreements to which each Party may, from time to time, be a party. During the term of and following termination of this Agreement, each Party shall bear any and all costs of protection of its current or future employees, arising from any labor protective conditions imposed on such Party by the STB or any other regulatory agency or statute as a result of such Party’s use, operation or maintenance of the Subject Segments and any related agreements or arrangements, including collective bargaining agreements, or arising as a result of the termination of this Agreement. Nothing contained herein is intended to be for the benefit of any such employee nor should any employee be considered a third party beneficiary hereunder.

SECTION 16.04 Offers of Financial Assistance. If either NCRA or the Operator elect to abandon/discontinue common carrier operations on all or any portion of the Healdsburg Segment or the Lombard Segment and SMART or a party designated by SMART files an offer of financial assistance under 49 U.S.C. §10904, NCRA shall agree to negotiate with SMART or SMART’s designee regardless of whether another party files such an offer.

SECTION 16.05 Compliance with Laws. During the term of the Agreement, each Party shall comply with all Applicable Laws on the Subject Segments, including but not limited to those controlling air, water, noise, hazardous waste, solid waste, and other pollution, or relating to the use, generation, storage, transport, release, or disposal of Hazardous Materials.

SECTION 16.06 Entire Agreement; Effect of Prior Agreements. It is the intention of the Parties that this Agreement shall govern use of their respective rights under their respective easements. This Agreement contains the entire agreement between the Parties, and supersedes all other prior oral or written agreements, commitments, or understanding with respect to the matters provided herein as of the Execution Date, including but not limited to the 2011 Operating Agreement, Operating Agreement 1996, the Cooperative Agreement and the Principles Agreement. (For the avoidance of doubt, the Parties intend by the prior sentence to terminate, annul, replace and make void all of the terms of all prior agreements including any terms that purport to survive termination.) The Parties hereby waive all claims of any kind or character arising out of or under or during the pendency of any of the prior

agreements, including without limitation, claims which but for this sentence would survive under California Code Section 1542. THE PARTIES INTEND THIS WAIVER TO COVER ANY CLAIMS THEY DO NOT KNOW OF AGAINST EACH OTHER. For the avoidance of doubt, as of the execution of this Agreement, the Parties have no claims against each other.

~~Notwithstanding the foregoing, at the time of executing this agreement, the parties have not yet resolved and finalized the reconveyance of a deed of trust, to NCRA, encumbering certain property located in Mendocino County commonly referred to as the Ukiah Depot Property. A promissory note executed by NCRA in favor of SMART's predecessor, NPWRA, has been cancelled by SMART, but the reconveyance of the deed of trust has not occurred. Accordingly, this section is not intended to release any obligations SMART may have in regard to effectuating the reconveyance of the deed of trust.~~ No modification of this Agreement shall be binding upon the Party affected unless set forth in writing and duly executed by the Party to be charged; provided that nothing in this agreement shall affect the rights and obligations of the Parties under the Operating Agreement 1996 or the 2011 Operating Agreement with respect to matters arising prior to the Effective Date of this Agreement.

SECTION 16.07 Notices. All notices, demands, request, or other communications which may be or are required to be given, served or sent by either Party to the other pursuant to this Agreement shall be in writing and shall be deemed to have been properly given or sent:

(a) If intended for SMART, by mailing by registered or certified mail, return receipt requested with postage prepaid, or by national overnight delivery service, prepaid, addressed to SMART at:

SMART District Office
~~5401 Old Redwood Hwy, Suite 200750 Lindero Street, Suite 200~~
~~Petaluma, CA 94954 San Rafael, CA 94901~~
Attention: General Manager

With a copy to:

~~SMART District Office Office of Sonoma County Counsel~~
~~5401 Old Redwood Hwy, Suite 200575 Administration Drive, Room 105~~
~~Petaluma, CA 94954 Santa Rosa, CA 95403~~
Attention: ~~General Counsel County Counsel.~~

(b) If intended for NCRA by mailing by registered or certified mail, return receipt requested with postage prepaid, or by national overnight delivery service, prepaid, addressed to NCRA at:

North Coast Rail Authority
419 Talmage Road, Suite M
Ukiah, CA 95482
Attn: Executive Director

With a copy to:

Christopher J. Neary, Esq.
110 S. Main Street, Suite C
Willits, CA 954990

And to:

The Northwestern Pacific Railroad Company
20 Cambridge Avenue, Suite 104
Palo Alto, CA 94306-1554

Each notice, demand, request or communication which shall be mailed by registered or certified mail to either party in the manner aforesaid shall be deemed sufficiently given, served or sent for all purposes at the time such notice, demand, request or communication shall be either received by the addressee or refused by the addressee upon presentation. Either Party may change the name of the recipient of any notice, or his or her address, at any time by complying with the foregoing procedure.

SECTION 16.08 Successors and Assigns. This Agreement shall be binding upon and inure to the benefit of SMART and NCRA, and shall be binding upon the successors and assigns of SMART and NCRA, subject to the limitation hereinafter set forth. NCRA may not assign its rights under this Agreement or any interest herein, attempt to have any other person assume its obligations under this Agreement, or permit the Operator to assign its lease of NCRA's ownership or operating easement on the Subject Segments without the prior written consent of SMART, which consent may not be unreasonably withheld or delayed. SMART may not assign its rights under this Agreement or any interest therein, attempt to have any other person assume its obligations under this Agreement, or permit any operator to assign its rights of the Subject Segments without prior written consent of NCRA, which consent may not be unreasonably withheld or delayed. NCRA may not change the Operator or change/engage a contract operator of NCRA Passenger Excursion Service without the prior written consent of SMART, which consent shall not be unreasonably withheld, conditioned or delayed. SMART may not change/engage a contract operator of SMART Ancillary Passenger Service without the prior written consent of NCRA, which consent shall not be unreasonably withheld, conditioned or delayed. Prior to a proposed change in the Operator, NCRA shall secure any necessary approvals from the STB and such other regulatory approvals as may be then required.

SECTION 16.09 Severability. If fulfillment of any provision hereof or any transaction related hereto shall involve transcending the limit of validity prescribed by law, then the obligation to be fulfilled shall be reduced to the limit of such validity; and if any clause or provision herein contained operates or would prospectively operate to invalidate this Agreement in whole or in part, then such clause or provision only shall be held ineffective, as though not herein contained, and the remainder of this Agreement shall remain operative and in full force and effect.

SECTION 16.10 Headings: Interpretation. The section and subsection headings in this Agreement are for convenience only and shall not be used in its interpretation or considered part of this Agreement. With respect to interpretation of this Agreement and resolution of any ambiguities, neither Party shall be deemed to be the drafter of the Agreement.

SECTION 16.11 Waiver. No waiver of any provision of this Agreement shall be deemed, or shall constitute, a waiver of any other provisions, whether or not similar, nor shall any waiver constitute a continuing waiver. No waiver shall be binding unless executed in writing by the Party making the waiver.

SECTION 16.12 Counterparts. This Agreement may be executed in counterparts both of which, when executed and delivered, shall be deemed to be an original and both counter parts taken together shall constitute but one and the same instrument.

SECTION 16.13 Governing Law. This Agreement shall be construed and interpreted in accordance with the laws of the State of California.

SECTION 16.14 Agreement Runs with Land; Recordation. This Agreement shall run with the land, except that any parcel transferred by a Party to an unaffiliated person or entity for purposes other than rail operations or rail use that does not contain any facilities used in connection with the rail operations of the other Party, shall be deemed removed from the property as applicable. This Agreement may be recorded.

SECTION 16.15 Not for the Benefit of Others. This Agreement and each and every provision herein is for the exclusive benefit of the Parties hereto and not for the benefit of any third party. Nothing herein shall be construed to create or increase any right in any third party to recover by way of damages or otherwise against either of the Parties hereto. Notwithstanding the fact that it has certain direct obligations under this Agreement, NWPCo is not a party to this Agreement and this Agreement shall not be construed to create or increase any right in NWPCo to recover by way of damages or otherwise against either of the Parties hereto.

SECTION 16.16 Survival. The Parties agree that their respective rights, duties and obligations under any provision which by its terms imposes an obligation on either Party that is continuing in nature shall survive the expiration or termination of this Agreement.

SECTION 16.17 Force Majeure. Neither Party shall be liable to the other in damages nor shall a default be deemed to have occurred, and each Party shall be excused from performance of any of its obligations hereunder, except obligations involving the payment hereunder of money to the other Party or to a third Party, during the time when such non-performance is occasioned by fire, earthquake, flood, explosion, wreck, casualty, strike, riot, insurrection, civil disturbance, act of public enemy, embargo, war, act of God; provided, that if either Party suffers a work stoppage due to a labor dispute, such Party shall make such reasonable efforts to staff its operations so as to minimize disruptions.

SECTION 16.18 Participation In Proceedings. If either Party asks the other Party

in writing to participate in regulatory proceedings or public hearings of any kind concerning the first Party, the first Party shall reimburse the other Party for the reasonable expenses incurred (including without limitation attorneys' fees) as a result of such participation. Absent such written request, neither Party shall have an obligation to participate in any such regulatory proceedings or public hearings.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed in duplicate as of the day and year first herein written.

SONOMA-MARIN AREA RAIL
TRANSIT DISTRICT

NORTH COAST RAILROAD
AUTHORITY

By: _____

By: _____

Title: _____

Title _____

By: _____

Title: _____

Approved as to form:

Approved as to form:

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EXHIBIT 1 – CERTAIN DEFINITIONS & CROSS-REFERENCES TO TERMS

DEFINED IN THE AGREEMENT

“Agreement” shall mean this Operating & Coordination Agreement.

“Applicable Laws” shall mean all federal, state, and local laws, rules, regulations, directives, orders and judgments applicable to the Subject Segments, regardless of scope.

“Changes and/or Additions” shall mean any material improvements (including Pathways) to the Subject Segments constructed after the Execution Date (including but not limited to material additions, betterments and capital projects, for railroad highway grade crossing separations, quiet zones, CTC Signal Systems), and any construction, reconstruction, alteration and modification thereto, and any retirements therefrom, but excluding ordinary maintenance and repair.

“Changeover Date” shall have the meaning set forth in SECTION 4.04

“Cooperative Agreement” shall mean the Agreement dated April 30, 1996 by and between NWPRA and NCRA.

“CPUC” shall mean California Public Utility Commission or any successor agency.

“CTC Signal Systems” Shall mean any signal systems with a bi-directional block signal system under which train movements are authorized by block signal indications with the absolute signals and power switches controlled by the dispatcher from a remote console (including the wayside block signals, power operated switch machines, electronic coded track circuits, relays, and underground cable), including such systems with positive train control.

“Dispatching shall have the meaning set forth in 49 C.F.R. § 241.5.

“Event of Default” shall have the meaning set forth in SECTION 15.02.

“Execution Date” shall mean the date of execution of this Agreement, as set forth on the first page hereof.

“Final Plans” shall mean design plans for all Changes and/or Additions at the one hundred percent (100%) completion stage, covering all signals and signaling systems.

“FRA” shall mean the Federal Railroad Administration of the United State Department of Transportation or any successor agency.

“Hazardous Materials” shall mean:

- (i) Any substances defined, regulated or listed (directly or by reference) as “hazardous substances,” “hazardous materials,” “hazardous wastes,” “toxic waste,” “pollutant” or “toxic substances” or similarly identified as hazardous to human health or the environment, in or pursuant to:
 - (A) the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §9601 et seq.;
 - (B) the Hazardous Material Transportation Act, 49 U.S.C. §1802, et seq.;

- (C) the Resource Conservation and Recovery Act, 42 U.S.C. §6901 et seq.;
 - (D) the Clean Water Act, 33 U.S.C. §1251 et seq.;
 - (E) California Health and Safety Code §§25115-25117, 25249.5, 25249.8, 25281, and 25316;
 - (F) the Clean Air Act, 42 U.S.C. §7091 et seq.; and
 - (G) California Water Code §13050;
- (ii) any amendments to such enumerated statutes or acts; and
 - (iii) any other hazardous or toxic substance, material, chemical waste or pollutant identified as hazardous or toxic or regulated as of the Closing Date under any other applicable federal, state or local environmental laws, including without limitation, friable asbestos, polychlorinated biphenyls, petroleum (or any fraction thereof), natural gas and synthetic fuel products and by products.

“Healdsburg Segment” shall mean that portion of the Northwestern Pacific Railroad Right-of-Way as particularly defined in the JPA Agreement, generally extending from NWP MP 68.22 near Healdsburg, CA to NWP MP 26.96 near Novato, CA, a distance of approximately 41.2 miles; and between MP 26.96 in Novato and MP 25.57 at Ignacio, together with all Track located thereon, except for Industrial Track or stations, track and other facilities constructed exclusively for SMART Commuter Operations.

“Industrial Track” shall have the meaning set for in Section 2.02.

“Initial Design Plans” shall mean all Changes and/or Additions to be constructed on the Shared Track (or any portion thereof) prior to the initiation of SMART Commuter Train Service.

“Invoices” shall have the meaning set forth in SECTION 16.02.

“JPA Agreement” shall mean the Agreement dated May 24, 1995 by and between the Golden Gate Bridge, Highway and Transportation District, the County of Marin, and NCRA.

“Lombard Segment” shall mean that portion of the Northwestern Pacific Railroad Right-of-Way as particularly defined in the JPA Agreement, generally extending from NWP MP 25.6 near Ignacio, CA to Brazos Junction Station in Napa County, CA at the former Southern Pacific Transportation Company MP 63.4, a distance of approximately 25.3 miles, together with all Track located thereon, except for Industrial Track or stations, track and other facilities constructed exclusively for SMART Commuter Operations.

“Loss” or “Losses” shall mean orders, directives, judgments, causes of action, penalties, fees, claims, costs, liabilities, damages, and expenses (including without limitation court costs and attorneys’ fees and all costs of investigating, remediating, or responding to the existence of a claim) of whatsoever nature or source.

"Material Modifications" shall mean a change order issued by the Constructing Party to the approved Final Plans that, in the Constructing Party's reasonable judgment, is material to the overall design and construction of the Changes and/or Additions.

"NCRA" shall mean the North Coast Railroad Authority.

"NCRA Freight Service" shall mean the freight service conducted pursuant to NCRA's perpetual and exclusive easement over the Healdsburg and Lombard Segments and the freight service conducted on the Willits Segment.

"NCRA Passenger Excursion Service" shall have the meaning set forth in SECTION 2.01.

"NWPRA" shall mean the Northwestern Pacific Railroad Authority.

"NWPCo" shall mean Northwestern Pacific Railroad Company, a California corporation.

"Operating Agreement 1996" shall mean the Agreement dated August 19, 1996, by and between NWPRA and NCRA.

"Operator" shall have the meaning set forth in ARTICLE III.

"Party" or "Parties" shall mean SMART and NCRA or one of them.

"Pathway(s)" shall mean ancillary bicycle and pedestrian pathways on the Shared Track.

"Principles Agreement" shall mean the Agreement dated April 30, 1996 by and between NWPRA and NCRA.

"Schellville yard tracks" shall mean two auxiliary tracks approximately 6,000 feet, located in the County of Sonoma in Schellville at Milepost B39.12 to Milepost B40.28.

"Shared Track" shall mean and include the Healdsburg Segment and that portion of the Willits Segment from Healdsburg to Cloverdale (MP 85.35,) and as modified as provided in Section 7.01.

"SMART" shall mean the Sonoma-Marin Area Rail Transit District.

"SMART Ancillary Passenger Service" shall mean any SMART passenger service (e.g., intercity or excursion passenger service) other than SMART Commuter Operations.

"SMART Commuter Operations" shall mean regularly scheduled passenger service.

"STB" shall mean the Surface Transportation Board of the United States Department of Transportation or any successor agency.

"Subject Segments" shall mean the Lombard Segment, the Healdsburg Segment and the Willits Segment, collectively, and shall not include Industrial Track.

"Track" shall mean and include all rail and fastenings, switches and frogs complete, ties, ballast and signals and all appurtenances thereto, including without limitation bumpers, roadbed, embankment, bridges, trestles, tunnels, culverts and any other structures or things necessary for

support or construction thereof, and, if any portion thereof is located in a thoroughfare, pavement, any crossing planks and other similar materials or facilities used in lieu of pavement or other street surfacing material at vehicular crossings of tracks, culverts, drainage facilities, and crossing warning devices.

"Willits Segment" shall mean that portion of the Northwestern Pacific Railroad Right-of-Way as particularly defined in the JPA Agreement, generally extending from NWP MP 142.5 near Outlet Station to NWP MP 68.22 near Healdsburg, CA, a distance of approximately 74.3 miles, together with all Track located thereon, except for Industrial Track or track and facilities constructed exclusively for SMART Commuter Operations.

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EXHIBIT 2 – PASSENGER WINDOWS EXAMPLE

Station (Milepost)	AM	PM
Cloverdale (84.7) – Healdsburg (68.0)	6:15 - 7:43*	17:34 -19:02*
Healdsburg (68.0) – Guerneville Road (55.4)	5:40 – 8:59	16:24 – 19:58
Santa Rosa (53.8) – Petaluma (38.5)	4:42 – 10:00	15:12 – 20:35
Petaluma (38.5) – Ignacio North (25.8) vs (25.57)?	5:16 – 9:31	15:46 – 20:01

Assumes pro-forma passenger timetable of 6-30-10, and ten-minute clearance time by freight trains in advance of scheduled passenger movements.

*In the Cloverdale-Healdsburg segment freight trains may have access to the mainline during the morning passenger window after passage of the southbound 7:25 AM train from Cloverdale (#113), and during the afternoon passenger window after passage of the northbound 18:44 PM train (#124) from Healdsburg.

During passenger-only windows, where gaps of more than ten minutes may exist between successive passage of passenger trains, and where feasible operationally, short freight movements may be permitted on or across the mainline at the discretion of the SMART dispatcher.

During the midday, at night, and on weekends and holidays, no passenger-only windows are considered necessary under the current operating concept. Passenger and freight trains will be dispatched by SMART with the objective of minimizing or eliminating delays to either passenger or freight trains.

EXHIBIT 3- SIDING/SPUR CONNECTION PROVISIONS

For the portion of the Shared Track between the Ignacio Wye (MP 25.57) and Santa Rosa Railroad Square (MP 53.8) or any portion thereof:-

1. SMART shall pay the Incremental Cost (as defined below) of a turn-out at the following locations (MPs are approximate):
 - Burdell South (MP 30.5)
 - Burdell North (MP 31.7)
 - Park South (MP 39.2)
 - Park North (MP 39.7)
2. In addition, SMART shall pay the Incremental Cost (as defined below) of a turn-out where NCRA can reasonably demonstrate, on or before January 31, 2014, the presence of a bona fide freight rail customer that requires service from a location requiring such a turn-out (i.e., service from the line where the turn-out would be installed).
3. The foregoing obligation is subject to an absolute maximum of 12 turn-outs.
4. "Incremental Cost" means any cost that would not be required if there were no SMART Commuter Operations.
1. SMART will pay up to one hundred thousand dollars (\$100,000) towards the cost of one additional spur located at or near MPs 45.2 and 45.3 near the Sonoma Mountain Village provided: (1) NCRA/Operator enters into an Industrial Track Agreement with a shipping customer by January 1, 2018; (2) the spur construction is completed by January 1, 2019; and (3) the spur/siding and connections can be designed, signalized and constructed at a safe and appropriate location.
2. SMART has otherwise fully satisfied any and all duties and obligations with respect to the payment of Costs for Sidings/Spurs connections as set forth in Section 6.01, 7.04 and this Exhibit 3, as amended.
- 5-3. Parties other than SMART shall pay (i) the difference between full cost and Incremental Cost on all tie-ins where SMART is responsible for Incremental Cost (as described above) and (ii) the full cost (including for the more expensive turn-out and for signal system tie-in) of any additional turn-outs regardless of whether such cost includes elements that would not be required if there were no SMART Commuter Operations.
6. To the extent NCRA's commencement of NCRA Freight Service is delayed solely as a result of an injunction, the date set forth above (January 31, 2014) shall be extended; provided that the extension is subject to an absolute maximum of one year.

For the portion of the Shared Track north of Santa Rosa Railroad Square (MP 53.8) or any portion thereof):

- ~~7. SMART shall pay the Incremental Cost (as defined above) of a turn-out where NCRA has a bona fide freight rail customer receiving service by such turn-out on the date that SMART issues for review thirty percent (30%) plans pursuant to SECTION 6.02. Any dispute about the number of such turn-outs shall be submitted to "baseball-style" arbitration pursuant to SECTION 14.02(a).~~
- ~~8. Parties other than SMART shall pay the full cost (including for the more expensive turn-out and for signal system tie-in) of any additional turn-outs, including for any freight rail customers identified after SMART issues for review thirty percent (30%) plans pursuant to SECTION 6.02 and regardless of whether such cost includes elements that would not be required if there were no SMART Commuter Operations.~~

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EXHIBIT 4 – LIST OF CERTAIN NCRA GRANT AGREEMENTS

[NCRA List provided 6/2/11; SMART needs to review agreements]

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EXHIBIT 5 – CERTAIN RESERVED RIGHTS

SMART reserves all of the following reservations made by NWPRA in the Operating Agreement 1996 with respect to the Lombard and Healdsburg Segments:

- Reservation or exceptions of minerals or mineral rights, and all private and public easements and rights-of-way, however created, for crossings, pipelines, wirelines, fiber optics facilities, roads, streets, highways and other legal purposes;
- Existing and future building, zoning, subdivision and other applicable federal, state, county, municipal and local laws, ordinance and regulations;
- Encroachments or other conditions that may be revealed by a survey, title search or inspection;
- All existing ways, alleys, privileges, rights, appurtenances and servitudes, however created, liens of mortgage or deeds of trust, and
- The exclusive right to approve or deny any and all future easements, leases, licenses or rights of occupancy in, on, under through, above, across or along the Healdsburg and Lombard Segments, or any portion thereof, so long as such future easements, leases, licenses or rights of occupancy do not unreasonably interfere with NCRA's rail operations.

NCRA shall not make any use of the Healdsburg and Lombard Segments which is inconsistent with SMART's right, title and interest therein and which may cause the right to use and occupy the Healdsburg and Lombard Segments to revert to any party other than SMART.

NCRA reserves all of the following reservations with respect to the Willits Segment:

- Reservation or exceptions of minerals or mineral rights, and all private and public easements and rights-of-way, however created, for crossings, pipelines, wirelines, fiber optics facilities, roads, streets, highways and other legal purposes;
- Existing and future building, zoning, subdivision and other applicable federal, state, county, municipal and local laws, ordinance and regulations;
- Encroachments or other conditions that may be revealed by a survey, title search or inspection;
- All existing ways, alleys, privileges, rights, appurtenances and servitudes, however created, liens of mortgage or deeds of trust, and
- The exclusive right to approve or deny any and all future easements, leases, licenses or rights of occupancy in, on, under, through, above, across or along the Willits Segments, or any portion thereof, so long as such future easements, leases, licenses or rights of occupancy do not unreasonably interfere with SMART Commuter Operations.

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- SMART shall not make any use of the Willits Segment which is inconsistent with NCRA's right, title and interest therein and which may cause the right to use and occupy the Willits Segment to revert to any party other than NCRA.

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EXHIBIT 6 – MAINTENANCE CHARGES

Commented [JS12]: Note proposed fees

Charge per car mile for cars (loaded or empty) weighing Less than or equal to 263,000 pounds.....	\$0. 75 5
Charge per car mile for cars (loaded) weighing more than 263,000 pounds.....	\$0. 86 5
Charge per month for maintenance of freight-only turn-outs.....	\$2 5000 per freight turn-out

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