

## SHARED USE AGREEMENT -- PLACERVILLE BRANCH

This Shared Use Agreement -- Placerville Branch (this "Agreement") dated August \_\_, 1996, is made by and between the SACRAMENTO-PLACERVILLE TRANSPORTATION CORRIDOR JOINT POWERS AUTHORITY, a California joint powers agency (hereinafter referred to as "Owner"), and SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Delaware corporation (hereinafter referred to as "User");

### RECITALS:

A. Pursuant to the Sale Agreement by and between Owner and User, dated as of September 6, 1996 (the "Sale Agreement"), and those certain deeds granted by User to Owner executed on September 5, 1996 (the "Deeds"), Owner acquired the Nimbus Corridor (as defined in Section 1.16 hereof) for the purpose, in part, of providing Light Rail Transit Service (as defined in Section 1.15 hereof) and/or Other Passenger Service (as defined in Section 1.19 hereof) and for any purpose other than those purposes reserved exclusively to User in the Sale Agreement, and User retained for itself and its successors and assigns a perpetual and exclusive easement in and freight rights over the Nimbus Corridor for User's present and future Freight Service (as defined in Section 1.10 hereof). User has maintained the Freight Trackage (as defined in Section 1.11 hereof) at Federal Railroad Administration ("FRA") Class 1 standards.

B. Owner and User desire to set forth the terms of the freight rights for User's exclusive present and future Freight Service on the Nimbus Corridor and provide for (1) the continuation of Freight Service during and after the construction by Owner, at Owner's sole cost and expense, of any Project(s) (as defined in Section 1.25 hereof) on the Nimbus Corridor with Trackage (as defined in Section 1.36 hereof) designed for Freight Service and (2) at User's election, the review and approval (pursuant to Sections 7.1 and 7.2) of the plans of Projects constructed in the Nimbus Corridor.

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

### Section 1. DEFINITIONS

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

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

1.2 "Affiliate" shall mean (a) any person or entity that controls, is controlled by, or is under common control or ownership with User, or (b) any person or entity that purchases or succeeds to all or substantially all of the assets of User as a going concern of User's business as a Class I railroad, or (c) any entity which results from the merger or consolidation of any entity with User.

1.3 "Changeover Date" with respect to any Project shall mean the date specified in the Project Notice for said Project. *7/24/2006*

1.4 "Changes and/or Additions" shall mean any improvements constructed after the date first above written, including, without limitation, additions and betterments, and any construction, reconstruction, modifications and renewals thereof and additional facilities, but excluding maintenance items regardless of book treatment as an expense or capital item.

1.5 "Dispatch" shall mean the function of granting entrance authority and providing protection for Trains and Equipment entering onto and using the Freight Trackage or Shared-Use Trackage.

1.6 "Environmental Laws" as used herein, means any and all applicable laws, statutes, regulations, enforceable requirements, orders, decrees, judgments, injunctions, permits, approvals, authorizations, licenses, permissions or binding agreements issued, promulgated or entered by any governmental agency having jurisdiction over the environmental condition of the Nimbus Corridor, relating to the environment, to preservation or reclamation of natural resources, or to the management, release or threatened release of contaminants or noxious odors, including, in the case of persons subject to the laws of the United States, the Hazardous Materials Transportation Act, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986 ("CERCLA"), the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 and the Hazardous and Solid Waste Amendments of 1984, the Federal Water Pollution Control Act, as amended by the Clean Water Act of 1977, the Clean Air Act of 1970, as amended by the Clean Air Act Amendments of 1990, the Toxic Substances Control Act of 1976, and any similar or implementing state law, and all amendments or regulations promulgated thereunder.

1.7 "Equipment" shall mean, as applicable, light rail vehicles, locomotives, rail cars, cabooses, hi-rail vehicles, electric or diesel powered commuter cars, other vehicles, and machinery which are capable of being operated on the Trackage or are used in connection with the construction, operation, maintenance or repair of Trains or Trackage.

1.8 "Freight Rail Easement" shall mean the twenty (20) foot wide perpetual and exclusive easement for Freight Service within the Nimbus Corridor reserved by User in the Deeds.

1.9 "Freight Rail Easement Property" shall mean the twenty (20) foot wide strip of real property encumbered by the Freight Rail Easement as set forth schematically in Exhibit 1.9 and as the same may be relocated by Owner from time to time in accordance with Section 7 hereof.

1.10 "Freight Service" shall mean railroad operations in furtherance of transporting freight commodities of all types and descriptions in Trains (as defined in Section 1.37 hereof) to all present and future customers of User, whether loaded or empty, and shall

include without limitation (a) personnel training, (b) the use of all Equipment and Non-Revenue Equipment (as defined in Section 1.17 hereof) for such operations on the Freight Rail Easement Property, (c) the performance of User's maintenance obligations under Section 10.2, and (d) the construction of Changes and/or Additions in connection with such operations, including, without limitation, connections to Freight Service customers.

1.11 "Freight Trackage" shall mean Trackage used exclusively for Freight Service which Trackage now exists or is constructed in the future for the purpose of providing Freight Service.

1.12 "Freight Track Structure" shall mean Track Structure which is used exclusively for Freight Service on the Freight Rail Easement Property.

1.13 "Hazardous Materials" shall mean any material or substance: (a) the presence of which requires investigation or remediation under any Environmental Law; or (b) which is defined as a "hazardous waste," "hazardous substance," "pollutant" or "contaminant" under any Environmental Law; or (c) the presence of which on adjacent properties constitutes a trespass by the owner of the Nimbus Corridor and poses a hazard to the health or safety of persons on adjacent properties; or (d) the presence of which on the Nimbus Corridor causes a nuisance on adjacent properties and poses a hazard to the health or safety of persons on adjacent properties.

1.14 "Light Rail Transit" shall mean a mode of urban transportation employing light rail vehicles capable of operating on the alignment classification described in California Public Utilities Commission's ("CPUC") General Order 143A.

1.15 "Light Rail Transit Service" shall mean the operation by Owner or Owner's member entities (or an Operator for Owner or Owner's member entities) of Light Rail Transit for passengers and shall include, without limitation, (a) personnel training, (b) the use of all Equipment and Non-Revenue Equipment for such operations on the Nimbus Corridor, (c) the performance of Owner's maintenance obligations under Section 10.2, and (d) the construction of Projects and Changes and/or Additions in connection with such operations; provided that nothing herein shall be deemed to grant directly to any member entity of Owner the right to construct any Project. Such rights may be granted to Owner's member entities only by Owner, and User shall have the right to hold Owner responsible with respect to any Project for compliance with all the terms of this Agreement.

1.16 "Nimbus Corridor" shall mean two segments of the railroad right-of-way acquired by Owner under the Sale Agreement and described therein, which segments are separated by User's north-south main line near Brighton, and extend from Milepost 94.5 at Redding Avenue to Milepost 108.0 near Nimbus.

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

1.18 "Operator" shall mean any person, firm, corporation or other legal entity utilized by Owner or any of Owner's member entities or User to conduct, on such party's behalf and for its account, operations on the Nimbus Corridor in accordance with this Agreement. The term "Operator" shall include Owner, Owner's member entities and User, as applicable, when conducting operations on the Nimbus Corridor for their own accounts; provided that nothing herein shall be deemed to grant directly to any member entity of Owner the right to be an Operator. Such rights may be granted to Owner's member entities only by Owner, and User shall have the right to hold Owner responsible with respect to such operations by Owner's member entities for compliance with all the terms of this Agreement.

1.19 "Other Passenger Service" shall mean any mode other than Light Rail Transit (whether rail or non-rail modes and whether with passengers or not), used to provide passenger or commuter service and shall include, without limitation, (a) personnel training, (b) the use of all Equipment and Non-Revenue Equipment for such passenger or commuter service operations, (c) the performance of Owner's maintenance obligations under Section 10.2, and (d) the construction of Projects and Changes and/or Additions in connection with such operations.

1.20 "Owner" shall mean the Sacramento-Placerville Transportation Corridor Joint Powers Authority.

1.21 "Parallel-Use Portion" shall mean the segments of the Nimbus Corridor at any time that are subject to parallel Freight Service and Light Rail Transit Service or Other Passenger Service operations. For purposes of this definition, a given segment of the Nimbus Corridor shall be deemed to be subject to such parallel operations on and after the Changeover Date for a Project to construct Passenger Trackage parallel to the Freight Trackage in that segment. The parties hereto acknowledge that, as of the date of this Agreement, the segments of the Nimbus Corridor extending from Milepost 94.5, at Redding Avenue near Brighton, to Milepost 99.3, near Butterfield Way, are a Parallel-Use Portion.

1.22 "Passenger Trackage" shall mean Trackage which is used exclusively for Light Rail Transit Service or Other Passenger Service in the Nimbus Corridor.

1.23 "Passenger Track Structure" shall mean Track Structure which is exclusively used for Light Rail Transit Service or Other Passenger Service in the Nimbus Corridor.

1.24 "Pre-Project Period" with respect to any Project shall mean the time period between the effective date of this Agreement and the Changeover Date for that Project.

1.25 "Project" shall mean any construction project or projects undertaken by Owner or any of Owner's member entities in the Nimbus Corridor, including, without limitation, construction of single and/or double Passenger Trackage for Owner's or Owner's member entities' Light Rail Transit system, and relocation and/or upgrading of the Freight Rail Easement Property, Freight Trackage and/or Shared-Use Trackage, as applicable; provided that nothing herein shall be deemed to grant directly to any member entity of Owner the right to construct any Project. Such rights may be granted to Owner's member entities only

by Owner, and User shall have the right to hold Owner responsible with respect to any Project for compliance with all the terms of this Agreement.

1.26 "Project Construction Period" shall mean the period of time measured from the Changeover Date for any Project until the completion of that Project.

1.27 "Project Notice" with respect to any Project shall mean Owner's written notice to User that Owner or any of Owner's member entities will commence construction of such Project. Said notice shall (a) identify the general scope of such Project, (b) specify the milepost limits of such Project and (c) specify the commencement date for the construction of such Project, which date shall not be earlier than thirty (30) days after the date said notice is duly given. Owner may revoke any Project Notice by written notice delivered to User not less than ten (10) days prior to the commencement date specified in such Project Notice.

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

1.29 "Services" shall mean Light Rail Transit Service, Other Passenger Service and Freight Service together, or any of them individually, as applicable.

1.30 "Shared-Use Portion" shall mean any segment of the Nimbus Corridor at any time that contains Shared-Use Trackage. Any segment of the Nimbus Corridor which is both a Shared-Use Portion and a Parallel-Use Portion shall be deemed to be a Shared-Use Portion.

1.31 "Shared-Use Trackage" is Trackage that is used for the provision of both Freight Service and Other Passenger Service.

(a) For purposes of this definition, a given segment of the Freight Trackage shall be deemed to be subject to such shared use on and after the earlier of:

(i) The Changeover Date for a Project to prepare such segment of Freight Trackage for such shared use; provided, that upgrading the Freight Trackage in connection with any relocation thereof for parallel use shall not constitute a Project to prepare the Freight Trackage for shared use; or

(ii) If the Freight Trackage needs no further preparation, the date specified in Owner's written notice to User (which date shall not be less than thirty (30) days after such notice is duly given to User) that Owner intends to use such segment of Freight Trackage for such shared use.

(b) Special occasional uses of any given segment of the Freight Trackage shall not cause such segment to be deemed to be Shared-Use Trackage. By way of example, such special occasional uses may include, without limitation, the following:

(i) use for wreck removal;

(ii) use for laying subsurface fiber optics or any similar cable or conduits; or

(iii) use for delivering new Trains of deadhead Equipment for Other Passenger Service to the eastern end of the Nimbus Corridor.

(c) A given segment of Shared-Use Trackage shall be reclassified as Freight Trackage if and only if both of the following occur:

(i) Owner and Owner's member entities discontinue use of such segment of Shared-Use Trackage for the provision of Other Passenger Service for at least six (6) months. Owner shall give User written notice within thirty (30) days following such discontinuance of service. Said notice shall specify the date of discontinuance of service. In the event Owner untimely delivers said written notice, such discontinuance of service shall be deemed to have occurred thirty (30) days prior to the delivery of said written notice.

(ii) User has not filed with the STB (as defined in Section 1.34) an application or petition or notice of exemption for the abandonment of the Freight Rail Easement, and the discontinuance of Freight Service, over the applicable segment of the Nimbus Corridor.

(d) In the event any segment of Shared-Use Trackage is reclassified as Freight Trackage, User shall only be required to maintain such Freight Trackage to the standards set forth in Section 10.1. User shall not be required to maintain such Freight Trackage to standards suitable for Other Passenger Service. User shall be entitled to reimbursement under Section 10.3 for any deferred maintenance items required to be performed by Owner under this Agreement.

(e) In the event Owner or any of Owner's member entities discontinue Other Passenger Service as provided in Section 1.31(c)(i), above, and later elect to reinstitute Other Passenger Service over any segment of the Freight Trackage that was formerly classified as Shared-Use Trackage, Owner shall give User not less than sixty (60) days prior written notice of such reinstatement of Other Passenger Service.

1.32 "Shared-Use Track Structure" shall mean Track Structure which is used for the provision of both Freight Service and Other Passenger Service, subject to the provisions of Sections 1.31(a), (b) and (c).

1.33 "Sole-Use Portion" shall mean any segment of the Nimbus Corridor at any time that is not used for Light Rail Transit Service or Other Passenger Service, or that is used exclusively for Freight Service. In the event Owner and Owner's member entities discontinue Light Rail Transit Service and Other Passenger Service over any segment of Parallel-Use Portion or Shared-Use Portion of the Nimbus Corridor, such segment shall again be classified as a Sole-Use Portion of the Nimbus Corridor; provided that the criteria of Section 1.31(c)(i) and (ii) have been satisfied.

1.34 "STB" shall mean the Surface Transportation Board or its successor agency.

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

1.36 "Trackage" shall mean all Track Structure in the Nimbus Corridor and all appurtenances thereto, including without limitation, bumpers, roadbed, embankment, bridges, trestles, culverts or any other structures or things necessary for support of and entering into construction thereof, and, if any portion thereof is located in a thoroughfare, the term shall include pavement, crossing planks and other similar materials or facilities used in lieu of pavement or other street surfacing material at vehicular and pedestrian crossings of tracks, culverts, drainage facilities, crossing warning devices, and any and all structures and facilities required by lawful authority in connection with construction, renewal, maintenance and operation of said Track Structure, and all appurtenances thereof and Changes and/or Additions thereto now or in the future.

1.37 "Train(s)" shall mean a light rail vehicle or a locomotive unit, or more than one such unit or vehicle, coupled or not coupled, with or without cars or caboose, including without limitation, electric or diesel powered commuter cars.

## **Section 2. RIGHTS OF OWNER AND USER**

### **2.1 User's and Owner's Rights Generally:**

(a) Pursuant to the Freight Rail Easement, User reserves and has the perpetual and exclusive right to conduct Freight Service over and upon the Nimbus Corridor; provided, that such right shall be exercised only within the boundaries of the Freight Rail Easement Property. User also has all of the other rights provided for in this Agreement and in the Deeds.

(b) (i) Except for the rights reserved by User under the Freight Rail Easement and this Agreement, Owner shall have all of the rights incident to ownership of the Nimbus Corridor, which rights include, without limitation, the right to use the Shared-Use Trackage and Freight Rail Easement Property for any purpose other than providing Freight Service on condition that such use is coordinated with User and does not unreasonably interfere with the provision of Freight Service. In addition, Owner may use the Freight Trackage for special occasional uses as set forth in Section 1.31, provided that such uses are coordinated with User and do not unreasonably interfere with the provision of Freight Service.

(ii) During any period of Owner's continued access to the Sole-Use Portion or Parallel-Use Portion of the Freight Rail Easement Property, User shall control and Dispatch User's Trains to avoid unreasonable conflict with Owner's and Owner's member entities' activities. Any access or activity by Owner or Owner's member entities pursuant to this Section 2 shall be coordinated with User to avoid unreasonable interference with Freight Service.

2.2 **Authority:** Owner represents that it has the right and authority to enter this Agreement and has obtained all necessary concurrences and approvals.

2.3 **Ownership:**

(a) Owner shall own all of the Trackage existing as of the date of this Agreement.

(b) Owner shall own all Projects, Changes and/or Additions and maintenance items added to the Nimbus Corridor that are not expressly made the property of User under the terms of this Section. User shall own such Changes and/or Additions that (i) are new siding tracks or spurs intended to serve new freight customers, or are otherwise readily severable from the Trackage without impairing the condition or useability thereof, and (ii) are made at its sole cost and expense. Owner shall not remove any Changes and/or Additions or capitalized maintenance items to the Freight Trackage or Shared-Use Trackage without the prior written consent of User as long as Freight Service has not been abandoned pursuant to STB proceedings and except in accordance with this subsection 2.3(b). If User, in its sole discretion, elects to discontinue Freight Service on the Nimbus Corridor or any portion thereof, User shall prepare and file with the STB an application or petition or notice of exemption for the abandonment of its Freight Rail Easement and the discontinuance of Freight Service on the Nimbus Corridor or the applicable portion thereof. Within one (1) year following such abandonment and the discontinuance of Freight Service on the Nimbus Corridor as evidenced by an order of the STB, User shall (i) remove any Changes and/or Additions owned by User, (ii) restore the Freight Rail Easement Property to a condition reasonably satisfactory to Owner and (iii) promptly take such additional steps as may be necessary to terminate the Freight Rail Easement. Any such Changes and/or Additions not removed by User within said one (1) year period shall be conveyed to Owner upon Owner's payment to User of the sum of Ten Dollars (\$10.00).

2.4 **Freight Service:** User currently provides and has the exclusive right to continue to provide Freight Service on the Nimbus Corridor. User shall retain and have the sole right and obligation to use the Freight Trackage and Shared-Use Trackage to provide Freight Service and neither Owner nor any person or entity other than User shall be permitted to provide Freight Service in the Nimbus Corridor. Unless otherwise required by law, User shall not make any physical modifications to the Freight Trackage or Shared-Use Trackage unless User shall have complied with the provisions of Sections 7.3 and 7.4 hereof. User expressly retains and Owner expressly declines to assume any obligation to provide Freight Service or to assume any common carrier obligation or any other obligation with respect thereto.

2.5 **Intentionally Omitted.**

2.6 **Project Construction Period:** Subject to Section 2.11(b) below, during any Project Construction Period, User shall control and Dispatch User's Trains so as to avoid unreasonable conflict with Owner or Owner's member entities' construction activities. Within ten (10) days after the end of any Project Construction Period, Owner shall advise User in writing of its completion of the Project.



**2.7 Intentionally Omitted.**

**2.8 Physical Clearances:** Owner covenants, represents and warrants that upon completion of any Project, the clearances for the Freight Rail Easement Property shall be in conformity with CPUC General Orders 26-D and 118 or any successor publication ("CPUC Clearance Requirements") or Owner, at its sole cost and expense, shall obtain a written variance from the CPUC. User covenants, represents and warrants that the Freight Rail Easement Property's existing clearances are in conformity with the CPUC Clearance Requirements.

**2.9 User's Rights:** User (or any Operator designated by User) has a perpetual right of way upon, over, under, and across the Nimbus Corridor to access the Freight Rail Easement Property for the purpose of conducting Freight Service; provided, that any access to the Freight Rail Easement Property over any portion of the Nimbus Corridor within ten (10) feet from the centerline of any Passenger Track Structure is subject to the customary notification, permit and emergency procedures of Owner or Owner's member entities. User also has the exclusive, perpetual right, subject to the terms of this Agreement, solely to provide Freight Service to all existing and future industries, team or house tracks or spurs located on or served off any existing or future turnouts or leads from or to the Nimbus Corridor. User's rights of use under this Section 2.9, for the purposes specified in this Section 2.9, shall be exclusive, and no other person or entity (except for User's Operators, successors and assigns permitted under this Agreement) shall be entitled to or be granted any rights to such use for such purposes.

**2.10 Operator:** Either party may use an Operator or Operators to provide applicable Services pursuant to this Agreement. Both parties and their respective Operators shall comply with any and all governmental regulations applicable to their respective operations on the Freight Trackage and Shared-Use Trackage, including, without limitation, the use of FRA-certified engineers, if required.

**2.11 User's Rights to Make Changes and/or Additions; Owner's Projects:**

(a) User shall have the perpetual right, at User's sole cost and expense, to construct or reconstruct, with the consent of Owner, which shall not be unreasonably withheld, delayed or conditioned, pursuant to Sections 7.3 and 7.4 hereof, Changes and/or Additions to the Freight Rail Easement Property consisting solely of railroad and railroad-related facilities reasonably necessary for and related to Freight Service operations. Such Changes and/or Additions may include, without limitation, a derail in the vicinity of milepost 94.7. User retains the perpetual and exclusive right to use all such Changes and/or Additions to the Freight Rail Easement Property for Freight Service, subject to Owner's and Owner's member entities' rights of use thereof in accordance with the terms of this Agreement and, if applicable, Owner's ownership thereof under the terms of Section 2.3(b).

(i) User and/or its contractors shall give forty-eight (48) hours written notice to Owner prior to commencing construction or reconstruction of any Changes and/or Additions and shall observe Owner's or Owner's member entities' customary rules and regulations with respect thereto. Except as necessary for the construction or

reconstruction of Changes and/or Additions required for the provision of Freight Service and subject to the provision of protection as provided below, all work upon the Freight Rail Easement Property shall be done at such times and in such manner as not to materially interfere with, delay or endanger the Light Rail Transit Service, Other Passenger Service, Trains, Equipment, Trackage or other facilities of Owner or Owner's member entities (collectively "Owner's Services and/or Facilities"), and such work shall be done to the reasonable satisfaction of Owner. User shall not proceed with any work which is likely to interfere with, delay or endanger the Owner's Services and/or Facilities until protection reasonably satisfactory to Owner has been provided by User; provided, that Owner's approval of such protection shall not relieve User from liability for damages resulting from such work. If, in the reasonable opinion of Owner, Owner's Services and/or Facilities are, or are likely to become, endangered by the construction or reconstruction of User, User shall promptly do such work as may reasonably be ordered by Owner to restore conditions and, upon failure of User to carry out such orders promptly, Owner or any of Owner's member entities shall take whatever steps are reasonably necessary to restore conditions. The reasonable cost and expense to Owner or Owner's member entities of restoring conditions shall be charged against User and paid by User. The cost of furnishing trainmen or flagmen reasonably deemed necessary at any time by Owner for the continuity and safety of Owner's Services and/or Facilities shall be borne by User. Any flagging protection requested by User for the benefit of User will be furnished by Owner or Owner's member entities at the expense of User.

(ii) User shall exercise reasonable care when performing work near, on, under or over pipelines, utilities, streets, highways, roadways, facilities, tracks and other structures. No blasting on the Nimbus Corridor by User will be permitted unless and until (A) said blasting has been authorized in writing by Owner which authorization shall not be unreasonably denied, delayed or conditioned and (B) proper precautions have been taken and arrangements made with Owner to protect Owner's Services and/or Facilities and to promptly clear all debris therefrom. Blasted material must be controlled and smothered whenever such material is likely to endanger Owner's Services and/or Facilities.

(b) Owner and Owner's member entities shall have the perpetual right, at their sole cost and expense, and subject to Sections 7.1 and 7.2 hereof, to construct or reconstruct Projects and Changes and/or Additions on the Freight Rail Easement Property. User acknowledges that the Projects anticipated by Owner and Owner's member entities include the relocation of the existing Freight Rail Easement Property, Freight Trackage and Shared-Use Trackage, and User hereby agrees to such relocation, subject to the provisions of Sections 7.1 and 7.2 hereof.

(i) Owner and/or its contractors shall give forty-eight (48) hours written notice to User prior to commencing construction or reconstruction of any Project or Changes and/or Additions. Except as necessary for the construction or reconstruction of Projects or Changes and/or Additions, and subject to the provision of protection as provided below, all work upon the Freight Rail Easement Property shall be done at such times and in such manner as not to materially interfere with, delay or endanger the Freight Service, Trains, Equipment, Trackage or other facilities of User (collectively, "User's Services and/or Facilities"), and such work shall be done to the reasonable satisfaction of User. Owner shall

not proceed with any work which is likely to interfere with, delay or endanger User's Services and/or Facilities until protection reasonably satisfactory to User has been provided by Owner; provided, that User's approval of such protection shall not relieve Owner from liability for damages resulting from such work. If, in the reasonable opinion of User, User's Services and/or Facilities are or are likely to become endangered by the construction or reconstruction of Owner, Owner shall promptly do such work as may reasonably be ordered by User to restore conditions and, upon failure of Owner to carry out such orders promptly, User shall take whatever steps are reasonably necessary to restore conditions. The reasonable cost and expense to User of restoring conditions shall be charged against Owner and paid by Owner. The cost of furnishing trainmen or flagmen reasonably deemed necessary at any time by User for the continuity and safety of User's Services and/or Facilities shall be borne by Owner. Any flagging protection requested by Owner for the benefit of Owner will be furnished by User at the expense of Owner.

(ii) Owner shall exercise reasonable care when performing work near, on, under or over pipelines, utilities, streets, highways, roadways, facilities, tracks and other structures. No blasting on or near the Freight Rail Easement Property shall occur until proper precautions have been taken and arrangements made with User to protect User's Freight Services and/or Facilities and to promptly clear all debris therefrom. Blasted material must be controlled and smothered whenever such material is likely to endanger User's Freight Services and/or Facilities.

(c) The parties have reviewed the feasibility of constructing Freight Trackage crossing the Passenger Trackage and have concluded that while technically feasible, a myriad of problems preclude it. Accordingly, the parties agree that all Freight Trackage relocations shall be to the south side of the Nimbus Corridor to preserve all existing connections to User's freight customers and that all Freight Trackage crossings, if any, of the Passenger Trackage shall be grade separated and constructed at no cost to Owner.

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

**2.13 Retirement Limitations:** Owner shall not make any retirement, withdrawal, elimination or disposal of any part of the Freight Trackage or Shared-Use Trackage without the prior written consent of User, which consent shall not be unreasonably withheld, conditioned or delayed. User shall grant its consent under this Section 2.13 if such retirement, withdrawal, elimination or disposal would not materially impair User's ability to provide Freight Service over the Nimbus Corridor or frustrate the purposes of this Agreement.

2.14 **Taxes:** Owner shall be responsible for all taxes assessed against it (or its Operators or other entities acting on its behalf or for its account), if any, as owner of the real and personal property which are part of the Nimbus Corridor; provided, however, that User shall be responsible for any possessory interest tax or any other tax or assessment assessed against it (or its Operators or other entities acting on its behalf or for its account), if any, as holder of the Freight Rail Easement and as the provider of Freight Service in the Nimbus Corridor. Nothing contained in this Agreement shall be construed to make Owner liable to taxing authorities for any taxes which Owner, as a public entity, would not otherwise be liable. Each party shall indemnify the other for all taxes assessed against any Operator for such party or any other entity acting on such party's behalf.

2.15 **Equipment:** User's Trains and Equipment shall comply with applicable FRA requirements. Owner shall not otherwise require User to use signal or radio equipment which User does not currently use in its locomotives.

### Section 3. ASSIGNMENT.

This Agreement shall be binding upon and inure to the benefit of the parties hereto, their respective successors and assigns. Neither party hereto shall assign or sell any part of its rights or obligations under this Agreement without obtaining the prior written consent of the other party, which consent shall not be unreasonably withheld, conditioned or delayed; provided, however, that:

(a) Owner may assign or sell all of its rights and obligations under this Agreement without User's consent on condition that (i) such successor or assignee is the County of El Dorado, the County of Sacramento, the City of Folsom or the Sacramento Regional Transit District, or (ii) Owner has, not less than thirty (30) days prior to such assignment or sale, given User written evidence reasonably satisfactory to User (such as insurance not to exceed the policy limits set forth in Section 6) that such successor or assignee has (A) the legal power and authority to undertake all of the rights and obligations of Owner hereunder (to the extent such rights and obligations are assigned or sold), and (B) the financial capacity to pay for damages under this Agreement and, if applicable, correct deficiencies in Trackage in accordance with FRA and California Public Utilities Commission standards.

(b) User may assign or sell all of its rights and obligations under this Agreement and the Freight Rail Easement without the consent of Owner only to: (i) any Affiliate of User, (ii) any other Class I railroad, or (iii) any experienced shortline operator with a demonstrated record of reliable and safe railroad operating experience; provided that User, not less than thirty (30) days prior to such assignment or sale, has given Owner written evidence reasonably satisfactory to Owner (such as insurance not to exceed the policy limits set forth in Section 6) that such successors or assignees (A) have the legal power and authority to undertake all of the rights and obligations of User hereunder (to the extent such rights and obligations are assigned or sold), (B) have the financial capacity to pay for damages under this Agreement and, if applicable, correct deficiencies in Trackage in accordance with FRA and California Public Utilities Commission standards, and, if

applicable, (C) are Affiliates or Class 1 railroads or experienced shortline operators with demonstrated records of reliable and safe railroad operating experience.

(c) Within ten (10) days prior to any assignment, the assignee shall execute and deliver to the non-assigning party a written instrument, in form and substance reasonably acceptable to the non-assigning party, assuming all assignor's obligations hereunder and an opinion of such assignee's counsel, in form and substance reasonably acceptable to the non-assigning party, stating that such assignee is entitled to perform and has assumed all or any assigned portion of the assignor's obligations hereunder.

#### Section 4. OPERATIONS.

##### 4.1 Management and Control:

(a) **Sole-Use Portion and Parallel-Use Portion:** User shall, at User's sole cost and expense, manage, direct and control all operations (including Dispatching) on the Sole-Use Portion and on the Freight Trackage on the Parallel-Use Portion of the Freight Rail Easement Property. Owner and User, as applicable, shall notify the other party (i) at least seventy-two (72) hours prior to any anticipated need to interrupt the Service of the other party and (ii) promptly upon learning of any danger to the other party's operations on the Nimbus Corridor, by telephoning the other party at the following numbers:

##### Notification of User:

Transportation Service Center  
Denver Train Dispatcher's Office

Primary Contact: Western Regional Manager  
(303) 812-7744

If no answer above:

Secondary Contact: Manager Notification Administration  
(303) 812-7791

##### Notification of Owner:

Metro Control Center

Primary Contact: Supervisor on Duty  
(916) 648-8415

Owner or User, as applicable, shall indicate the nature of such interruption or danger, the railroad milepost location (if known) and the length of time any interruption is expected to last. Owner or User, as applicable, shall also notify the other party upon the cessation of

any such interruption. Persons calling on behalf of Owner or User shall identify themselves as representatives of Owner or User, as applicable, giving their names and titles.

Any access to, or activity on, the Freight Rail Easement Property by Owner or Owner's member entities shall be coordinated with User to avoid unreasonable interference with Freight Service.

(b) **Shared-Use Portion:** Owner shall, at Owner's sole cost and expense, manage, direct and control all Passenger Service operations (including Dispatching) on the Shared-Use Portion and shall conduct such Dispatching in a fair and reasonable manner, based on then-current industry practices. Owner shall also be responsible for providing telephonic or radio notification to User's Train crews or if unable to contact the crew, User's designated agents, when the Shared-Use Portion of the Freight Rail Easement Property is clear of Owner's Trains and Equipment. User's Train crews shall be responsible for providing telephonic or radio notification to Owner when the Shared-Use Portion of the Freight Rail Easement Property is clear of User's Trains and Equipment. User may, at its sole cost and expense, monitor any Dispatching operations of Owner on a reasonable basis. The parties hereto acknowledge that other operating and management issues may arise from time to time with respect to the Shared-Use Portion and agree to meet and confer in good faith to discuss and resolve such issues upon the written request of either party.

#### 4.2 User's Operating Windows for the Shared-Use Portion of Freight Rail Easement Property:

(a) Whereas the hours of User's use of the Sole-Use Portion and Parallel-Use Portion of the Freight Rail Easement Property are not restricted under this Agreement, the following provisions shall apply only with respect to the Shared-Use Portion, if any, of the Freight Rail Easement Property: Assuming that the Shared-Use Portion extends from Milepost 101.6 to Milepost 108.0, then Owner shall provide User with (a) no less than three (3) non-consecutive days per calendar week with a continuous period of at least six and one half (6½) hours during each such day (the "Main Operating Windows") for exclusive Freight Service during which time no Other Passenger Service shall be permitted on the Freight Rail Easement Property plus (b) no less than six (6) days per calendar week with a continuous period of ninety (90) minutes during each such day (the "Secondary Operating Windows") between milepost 94.5 and milepost 96.0 during which time no Other Passenger Service shall be permitted on the Freight Rail Easement Property between milepost 94.5 and milepost 96.0 (the Main Operating Windows and Secondary Operating Windows are hereinafter collectively referred to as the "Operating Windows"). The Main Operating Windows shall be set between 10:00 p.m. and 4:30 a.m. The Secondary Operating Windows shall be set between 11:00 p.m. and 12:30 a.m.

(b) In the event the Shared-Use Portion exceeds a total of 6.4 miles, for each half mile or fraction thereof added, the Main Operating Windows shall automatically be increased by fifteen (15) minutes. The parties shall determine by mutual agreement whether said fifteen (15) minute increase shall be added to the beginning or end of the Main Operating Windows. For example, if the Shared-Use Portion is extended to begin at

Milepost 100.2 and end at Milepost 108.0, then, since 1.4 miles have been added, forty-five (45) minutes would automatically be added to the Main Operating Windows. Either party may request in writing changes to the Operating Windows. Upon receipt of such a request by either party, Owner and User shall promptly meet and confer regarding requested changes to the Operating Windows and shall not unreasonably withhold, condition or delay their respective consents to such requested changes. Any agreed-upon changes to the Operating Windows shall be set forth in writing by the parties. The Main Operating Windows may be split into two periods of at least three (3) hours each or otherwise adjusted upon written agreement of the parties.

**4.3 Intentionally Omitted.**

**4.4 Furnishing of Fuel, Train Supplies for the Operation of Trains:** Each party shall be responsible for furnishing, at its sole cost and expense, all labor, fuel, and Train supplies necessary for the operation of its own Trains over the Nimbus Corridor.

**4.5 Operating Rules:** User's operations on the Freight Rail Easement Property shall at all times be in accordance with the General Code of Operating Rules, timetables, General Orders and Track Bulletins (all as amended from time to time) applicable to the operations on or along the Nimbus Corridor, and to the rules, instructions, and restrictions of Owner or Owner's member entities, as the same may be amended from time to time upon thirty (30) days' written notice to User. Except as otherwise provided herein, such rules, instructions, and restrictions of Owner or Owner's member entities shall be reasonable, just, and fair among the parties using the Nimbus Corridor and shall not unjustly discriminate against any of them.

**4.6 Intentionally Omitted.**

**4.7 Clearing Stalled or Disabled Trains and Equipment:** If, by any reason of mechanical failure or for any other cause, the Trains or Equipment of Owner, Owner's member entities or User or their respective Operators become stalled or disabled on the Freight Rail Easement Property and are unable to proceed, then the party whose Trains or Equipment are involved in the incident (the "Responsible Party") shall within a reasonable time furnish locomotive units or such other assistance as may be necessary to haul, help or push such Equipment or Trains, or to properly move the disabled Trains or Equipment and clear the Freight Rail Easement Property. In the event the Responsible Party does not clear the Freight Rail Easement Property within a reasonable time, the other party hereto may clear the Freight Rail Easement Property and obtain from the Responsible Party reimbursement of all reasonable costs incurred in so doing. As used in this Section 4.7, a "reasonable time" means the earlier of (a) (i) if User is the Responsible Party: any time prior to the end of the Operating Window in which the incident occurs, or (ii) if Owner is the Responsible Party: any time prior to the commencement of the next Operating Window after the incident occurs, or (b) one (1) week after the incident occurs.

**4.8 Intentionally Omitted.**

4.9 **Compliance with Laws:** Operations by Owner, Owner's member entities and User hereunder shall be in compliance in all material respects with all applicable laws and regulations including those relating to Hazardous Materials.

## Section 5. EMPLOYEES

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

5.2 **Rules Violations:** Owner, or Owner's Operator, shall notify User in writing specifying the circumstances in the event User, User's employees or User's Operator fails to abide by the rules, instructions and restrictions of the Owner, or Owner's Operator, governing User's operations on or along the Nimbus Corridor. User or User's Operator shall take prompt action to correct the failure to abide by the rules, instructions, and restrictions of the Owner, or the Owner's Operator, governing User's operations on or along the Nimbus Corridor. In the event User or User's Operator must hold a formal investigation pursuant to a collective bargaining agreement relating to the neglect, refusal or failure of User's employees or User's Operators to abide by the rules, instructions, and restrictions of the Owner, or Owner's Operator, governing User's operations on or along the Nimbus Corridor, Owner or Owner's Operator shall cooperate with User or User's Operator, and make available personnel of Owner, or Owner's Operator, as witnesses for User, or User's Operator, in such formal investigation at the sole cost and expense of User.

## Section 6. LIABILITY

### 6.1 **Assumption of Responsibility.**

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

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



allocated salaries and wages of employees providing support services to the employees so engaged directly in such work.

(c) The parties hereto recognize that a member entity of Owner (the Sacramento Regional Transit District) has previously acquired from User a railroad right-of-way immediately adjacent to, and on the north side of, the Nimbus Corridor west of Milepost 99.3, near Butterfield (the "RT Right-Of-Way"). The allocation of liabilities incurred on the RT Right-Of-Way is, and shall continue to be, governed by the terms of that certain Construction and Maintenance Agreement, dated December 5, 1985, between User and the Sacramento Regional Transit District.

(d) Owner may, with User's prior written approval, which approval shall not be unreasonably withheld, conditioned or delayed, delegate obligations under this Agreement (including, without limitation, obligations under this Section 6) to any member entity of Owner conducting Light Rail Transit Service or Other Passenger Service; provided, that Owner shall remain jointly and severally liable for all such delegated obligations. User hereby approves Owner's delegation of obligations to the Sacramento Regional Transit District ("RT").

(e) Concurrently with the execution of this Agreement, Owner and User, together with the RT, the City of Folsom ("Folsom") and the County of El Dorado ("El Dorado"), are entering into that certain First Supplement to Shared Use Agreement -- Placerville Branch. Said agreement governs claims made directly by RT, Folsom or El Dorado under this Agreement.

## 6.2 Allocation of Responsibilities.

(a) Liability for personal injury (including bodily injury and death) to, or property damage suffered by, an invitee of either party shall be the responsibility of and borne and paid solely by that party regardless of the cause of such loss or the fault of either party or whose Train was involved, except as specifically provided in paragraph (b) of this Section 6.2 and Section 6.4 below. For purposes of this paragraph, and without limitation, consultants and contractors of a party and any person who is on a Train operated by or for the account of a party (other than an employee of a party engaged in performing duties for that party) shall be deemed to be an invitee of that party. All persons at or adjacent to a passenger station or loading platform shall be deemed to be invitees of Owner (other than employees, contractors and consultants, including employees of such contractors, of User or of any tenant or Operator of User engaged in performing duties for User or for any such tenant or Operator of User). Any trackage tenant of either party shall be deemed to be bound by the provisions of this Section 6; provided, that if it is determined for any reason that such trackage tenant is not so bound, such trackage tenant shall be deemed to be an invitee of that party.

(b) After Owner shall have incurred aggregate liability in an amount equal to \$25.0 million for injury to or damage suffered by its invitees for incidents occurring between July 1st of any year and June 30th of the following year (a "Policy Year"), User shall bear

a share of that portion of the aggregate liability to Owner's invitees for that year that is in excess of \$25.0 million in proportion to User's relative degree of fault, if any; provided, that User shall not bear liability to Owner's invitees in an amount in excess of \$125.0 million for incidents occurring in such Policy Year. In computing the \$25.0 million base amount payable by Owner prior to any participation by User, there shall be excluded any liability incurred due to the Excluded Conduct (defined below in Section 6.4(a)) of Owner. After User shall have incurred aggregate liability in an amount equal to \$25.0 million for injury to or damage suffered by its invitees for incidents occurring between January 1st and December 31st of any year (a "Calendar Year"), Owner shall bear a share of that portion of the aggregate liability to User's invitees for that year that is in excess of \$25.0 million in proportion to Owner's relative degree of fault, if any; provided, that Owner shall nor bear liability to User's invitees in an amount in excess of \$125.0 million for incidents occurring in such Calendar Year. In computing the \$25.0 million base amount payable by User prior to any participation by Owner there shall be excluded any liabilities incurred due to the Excluded Conduct of User. Liability shall be deemed incurred on the date of the incident giving rise to such liability regardless of the date on which liability is paid or established. The determination of the relative fault of the parties in any proceeding establishing the liability shall be binding on the parties.

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

(i) Loss to equipment and other personal property owned by Owner shall be the responsibility of Owner and borne by it.

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

(iii) Loss to the Trackage shall be the responsibility of and borne (A) totally by the single party whose Train was involved in the incident giving rise to the loss, and (B) equally by the parties if no Train was involved in the incident or Trains of both parties were involved.

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

(v) Liability for personal injury (including bodily injury and death) to, or property damage suffered by, any person who is not an employee or invitee of either party (including, without limitation, persons using vehicular and pedestrian crossings and trespassers) shall be the responsibility of and borne (A) totally by the party whose Train was involved in such loss if the Train of only one party was involved, and (B) equally by the parties if no Train was involved in the incident.

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

(e) Liability due to the release of hazardous materials shall be the responsibility of and borne by the party who transported the hazardous materials unless Trains of both parties were involved, in which case the parties shall bear the loss or liability in proportion to their relative degrees of fault.

### 6.3 Insurance.

(a) (i) With respect to the Parallel-Use Portion and Sole-Use Portion of the Nimbus Corridor, Owner and User shall each maintain general liability insurance in the amount of at least \$25.0 million per occurrence and shall either include all of their respective Operators and trackage tenants as insureds under their respective policies or furnish evidence of separate insurance of the same amount and type for each Operator or trackage tenant.

(ii) With respect to the Shared-Use Portion of the Nimbus Corridor (if any), Owner and User shall each maintain general liability insurance in the amount of at least \$35.0 million per occurrence and shall either include all of their respective Operators and trackage tenants as insureds under their respective policies or furnish evidence of separate insurance of the same amount and type for each Operator or trackage tenant.

(iii) Insurance shall be placed with a company or companies authorized to conduct business in California. Owner and User (and an Operator or trackage tenant if such Operator or trackage tenant demonstrates to the reasonable satisfaction of Owner and User sufficient financial capacity) may self insure to a level not to exceed \$10.0 million.

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

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

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

(e) Each of Owner and User shall cause its and/or its Operator's and trackage tenant's insurers to provide the other with certificates of insurance and endorsements evidencing the provisions specified above in this Section 6.3 prior to commencement of operations (including, without limitation, maintenance operations) on the Nimbus Corridor under this Agreement.

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

#### **6.4 Limitations on Indemnification.**

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

**6.5 Scope of Indemnification.** In any case where a party is required under the provisions of this Section 6 to bear a loss or liability, it shall pay, satisfy and discharge such liability and all judgments that may be rendered by reason thereof and all costs, charges and expenses incident thereto, and such party shall forever indemnify, defend and hold harmless the other party and its commissioners, directors, officers, agents, employees, shareholders,

parent corporation and affiliated companies or governmental entities from, against and with respect to any and all liabilities which arise out of or result from the incident giving rise thereto. If a party denies liability for indemnification of the other party based upon the other party's Excluded Conduct, the party asserting such Excluded Conduct shall have the burden of proof in establishing such conduct. It is the intent of the parties that the indemnification provisions of this Section 6 shall apply to both the passive negligence and the active negligence of an indemnified party.

#### 6.6 Procedure.

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

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

(c) Any dispute between the parties as to the right to indemnification or the amount to which it is entitled pursuant to such right with respect to any matter shall be submitted to arbitration pursuant to Section 8.

**6.7 Trackage Tenants and Operators.** Any new trackage tenant or Operator on the Nimbus Corridor shall agree to be bound by the provisions of this Section 6 unless otherwise agreed by User and Owner.

## 6.8 Dollar Amount Adjustments.

(a) The dollar amounts set forth in Sections 6.2(b) and 6.3(a) shall be adjusted as follows until the insurance limits of Section 6.3(a) reach \$100 million:

Each of the dollar amounts set forth in Section 6.2(b) and Section 6.3(a) above shall be adjusted annually and every three years, respectively, for changes in the Consumer Price Index, but shall not be reduced below their initial levels. As used in this Section 6.8, the term "Consumer Price Index" shall mean the United States Department of Labor's Bureau of Labor Statistics' Consumer Price Index, All Urban Wage Earners and Clerical Workers, All Items, U.S. City Average (1967=100). If the base year for the Consumer Price Index is changed from 1967, the Consumer Price Index shall be converted in accordance with the conversion factor published by the United States Department of Labor's Bureau of Labor Statistics. If the Consumer Price Index is discontinued or revised, such other governmental index or computation with which it is replaced shall be used in order to obtain substantially the same result as would be obtained if the Consumer Price Index had not been discontinued or revised.

(b) The dollar amounts set forth in Sections 6.2(b) and 6.3(a) shall be adjusted as follows after the insurance limits of Section 6.3(a) reach \$100 million:

Every three (3) years after the date first above written, the parties hereto shall have the right to review the dollar amounts set forth in Sections 6.2(b) and 6.3(a), above, for the purpose of determining whether such dollar amounts should be adjusted in view of the circumstances then prevailing. Among the items which will be reviewed and considered by the parties shall be changes in the Consumer Price Index, changes of liability exposure indicated by the course of plaintiff's verdicts in personal injury actions in the Superior Court, State of California, the availability of insurance coverage and the cost of insurance coverage. In reviewing such dollar amounts, it shall be the goal of the parties to maintain the same relative protection which the minimum liability limits stated in this Agreement provide.

## Section 7. CONSTRUCTION

### 7.1 Design and Construction of Project by Owner:

(a) Owner shall, at Owner's sole cost and expense, design and construct any Projects and all Trackage, Track Structure, support structures and improvements necessary in connection therewith. All Project designs shall provide User with Freight Rail Easement Property, Freight Trackage and/or Shared-Use Trackage that includes (i) replacement or relocation of the now-existing turnouts, team tracks, runaround tracks and spurs identified on Exhibit 7.1 attached hereto, (ii) replacement or relocation of any then-existing rail connections to User's then-current freight customers (as defined in Subsection (c), below) (including the necessary turnouts from the Freight Trackage or Shared-Use Trackage), (iii) replacement or relocation of then-existing Freight Trackage and Shared-Use Trackage (including, without limitation, turnouts, team tracks, runaround tracks and spurs, but excluding rail connections to freight customers) with Trackage of at least equal quality to the Trackage replaced or relocated (including compliance with AREA track standards, FRA

and CPUC Requirements), and (iv) reasonable access for, without limitation, construction, maintenance and suitable signalization. In the event that a Project involves the relocation of the Freight Rail Easement Property and the Freight Trackage or Shared-Use Trackage, the relocation (i) shall be to the geographic south side of the Nimbus Corridor, (ii) in those locations where switches are reasonably necessary for Freight Service, shall place the centerline of the Freight Track Structure or Shared-Use Track Structure at least fifteen (15) feet from the southern boundary of the Nimbus Corridor or any additional adjacent real property which may be acquired by Owner, and (iii) shall be performed at no cost to User. All Projects shall be constructed in a manner which does not unreasonably interfere with the provision of Freight Service in the Nimbus Corridor.

(b) User hereby acknowledges that it is not currently serving freight customers on the north side of the Nimbus Corridor. User hereby agrees that Owner shall not be required to reconstruct any now-existing rail connections to the north side of the Nimbus Corridor in connection with any Project. Any future construction or reconstruction of rail connections to the north side of the Nimbus Corridor shall be in accordance with Section 2.11(c).

(c) Other than for team track and runaround tracks, for purposes of this Section 7.1, "then-current freight customer" shall mean any freight customer that has received Freight Service within the latest continuous period of thirty-six (36) months.

(d) Owner shall, at its sole cost and expense, construct a runaround track with a minimum of one thousand feet between clearance points at or near milepost 108 only if and only when Owner (i) constructs a Project that requires relocation or reconstruction of Freight Trackage or Shared-Use Trackage at or near milepost 108, or (ii) removes the existing runaround tracks near milepost 105.

(e) All replaced or relocated Freight Trackage and Shared-Use Trackage installed by Owner under this Section 7.1 shall, at a minimum, be of equal quality to the Trackage replaced or relocated.

## **7.2 Owner's Plans and Specifications:**

(a) Owner shall engage qualified engineering firms and/or architects and consultants (which shall be selected by Owner) or use qualified staff members to prepare for any Project (and each portion and phase thereof) schematic designs, preliminary and final engineering, structural and mechanical plans, and preliminary and final construction plans and specifications (collectively, the "Plans"). Owner agrees that the portion of any Project in the Nimbus Corridor will be designed consistently and in conformance with the guidelines and standards set forth in the Manual for Railway Engineering promulgated by the American Railway Engineering Association in effect at the time of such design or shall obtain User's prior written consent (which shall not be unreasonably withheld, conditioned or delayed) to any deviations therefrom.

(b) The following provisions of this subsection and subsection (c), below, shall apply only to Projects which encroach upon the Freight Rail Easement Property or

involve the relocation and reconstruction of Freight Trackage or Shared-Use Trackage or might unreasonably restrict the provision of Freight Service or would materially increase User's costs in providing Freight Service. Owner shall consult with User and User's engineers and consultants in connection with the preparation and revision of the Plans for any Project and each phase thereof (and User shall make its engineers and consultants reasonably available for such purposes, at User's sole cost and expense). Owner and User shall reasonably and in good faith cooperate with each other in connection with the preparation and revision of such Plans. Owner shall deliver to User for User's review and comment copies of each such set of Plans during the planning and design process. User shall notify Owner in writing within ten (10) business days of receipt of the Plans whether it wishes to review the Plans. If so, then User shall have the right to provide Owner, within thirty (30) days after User's receipt of any such set of Plans, User's written comments and suggestions regarding such set of Plans. Owner shall evaluate and consider such comments and suggestions in good faith; provided, that Owner shall have no obligation to incorporate such comments or suggestions into the Plans, or make any revisions or modifications to the Plans in response thereto, except when such comments or suggestions show that the design of the Project (i) fails to comply with any applicable law or (ii) does not provide User with Freight Trackage or Shared-Use Trackage that conforms with Section 7.1 or unreasonably restricts User's ability to provide Freight Service. If User fails to timely deliver such notice of review or such comments and suggestions, User shall be deemed to have approved such Plans. If User timely disapproves such Plans for the reasons set forth in clauses (i) and (ii), above, the parties shall promptly meet and negotiate in good faith to mutually agree on acceptable Plans.

(c) Upon completion of final Plans, Owner shall deliver a copy of the final Plans to User for User's inspection to ensure the incorporation of all agreed-upon changes to the Plans.

**7.3 Design and Construction of Changes and/or Additions by User:** User shall, at User's sole cost and expense, design and construct any Changes and/or Additions related to Freight Service operations and all support structures and improvements necessary in connection therewith. Except as reasonably necessary for the continued provision of Freight Service, the design of any Changes and/or Additions shall not interfere with Owner's or Owner's member entities' existing or planned Light Rail Transit Service or Other Passenger Service or with Owner's or Owner's member entities' other planned or existing uses of such portion of the Nimbus Corridor.

#### **7.4 User's Plans and Specifications:**

(a) User shall engage qualified engineering firms and/or architects and consultants (which shall be selected by User) or use qualified staff members to prepare Plans for any Changes and/or Additions. User agrees that any Changes and/or Additions will be designed consistent and in conformance with the guidelines and standards set forth in the Manual for Railway Engineering promulgated by the American Railway Engineering Association in effect at the time of such design.



(b) User shall consult with Owner and Owner's engineers and consultants in connection with the preparation and revision of the Plans for any Changes and/or Additions (and Owner shall make its engineers and consultants reasonably available for such purposes, at Owner's sole cost and expense). User and Owner shall reasonably and in good faith cooperate with each other in connection with the preparation and revision of such Plans. User shall deliver to Owner for Owner's review and approval copies of each such set of Plans during the planning and design process. Owner shall approve or disapprove such Plans in writing within thirty (30) days after receipt thereof; provided, that such approval shall not be unreasonably withheld, delayed or conditioned. Owner shall not be deemed to be unreasonable if, in Owner's good faith judgment, (i) the design of the Changes and/or Additions is unsafe or fails to comply with any applicable law or (ii) the design of the Changes and/or Additions violates the provisions of Section 7.3. If Owner fails to timely approve or disapprove such Plans, Owner shall be deemed to have approved such Plans.

(c) Upon Completion of Final Plans, User shall deliver a copy of the Final Plans to Owner. Any material changes to the previously approved Plans shall be subject to Owner's written approval in the manner described in Subsection (b), above.

7.5 **Completion of Projects:** Each party shall notify the other within ten (10) days after the completion of a Project.

## Section 8. DISPUTE RESOLUTION AND BINDING ARBITRATION

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

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

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

(a) In the event a claim, dispute or controversy subject to arbitration hereunder arises, either party may serve a written demand for arbitration in accordance with Section 8.3 of this Agreement upon the other party. If the claim, dispute or controversy is not resolved by the parties within twenty-five (25) calendar days after the service of the demand, the matter shall be deemed submitted to arbitration.

(b) Within thirty (30) calendar days of service of a demand for arbitration, each party shall designate an arbitrator in writing and serve its designation upon the other party ("Noticed Party") in accordance with Section 8.3 of this Agreement. If the Noticed Party fails to timely designate the arbitrator to be designated by it, such arbitrator shall be appointed by the Presiding Judge (or Acting Presiding Judge) of the Superior Court for the County of Yolo, upon application of either party after ten (10) days' written notice to the

other party. If each party has timely designated its arbitrator, or the Presiding Judge or Acting Presiding Judge has appointed an arbitrator for one of the parties pursuant to the previous sentence, the two designated arbitrators shall, within forty (40) calendar days of service of the demand for arbitration, designate a neutral third party arbitrator. The third party arbitrator shall be a qualified disinterested person, knowledgeable and experienced in (i) Class 1 railroad operational matters, (ii) the type of services contemplated by this Agreement and railroad operating agreements and (iii) public transit operations. If the two arbitrators designated by the parties fail to timely select a neutral third party arbitrator, either party may apply to the Presiding Judge (or Acting Presiding Judge) of the Superior Court for the County of Yolo to select the neutral third party arbitrator.

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

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

**8.5 Arbitration Schedule:**

(a) The arbitration hearing shall commence no later than four (4) months after service of the demand and shall be concluded no later than forty (40) calendar days after the hearing commencement date. The arbitration decision and award shall be rendered by the arbitrators in writing within thirty (30) calendar days after conclusion of the arbitration hearing.

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

**8.6 Expedited Arbitration Schedule:**

(a) In the event either party hereto reasonably finds that the issues of any claim, dispute or controversy are likely to directly, imminently, materially and adversely affect human health or safety, such party may request, in the arbitration demand delivered pursuant to Section 8.3(a), an expedited arbitration procedure as set forth in this Section solely for the purpose of obtaining a provisional remedy that by law or in equity could be imposed in a court proceeding against a rail carrier subject to the jurisdiction of the STB (e.g., temporary restraining order, preliminary injunction or injunction).

(b) Within five (5) calendar days after service of a demand for expedited arbitration, each party shall designate an arbitrator in writing and serve its designation upon

the other party ("Noticed Party"). If the Noticed Party fails to timely designate the arbitrator to be designated by it, such arbitrator shall be appointed by the Presiding Judge (or Acting Presiding Judge) of the Superior Court for the County of Yolo, upon application of either party after twenty-four (24) hours' written notice to the other party. If each party has timely designated its arbitrator, or the Presiding Judge or Acting Presiding Judge has appointed an arbitrator for one of the parties pursuant to the previous sentence, the two designated arbitrators shall, within seven (7) calendar days after service of the demand for expedited arbitration, designate a neutral third party arbitrator. The third party arbitrator shall be a qualified disinterested person, knowledgeable and experienced in (i) Class 1 railroad operational matters, (ii) the type of services contemplated by this Agreement and railroad operating agreements and (iii) public transit operations. If the two arbitrators designated by the parties fail to timely select a neutral third party arbitrator, either party may apply to the Presiding Judge (or Acting Presiding Judge) of the Superior Court for the County of Yolo to select the neutral third party arbitrator.

(c) The expedited arbitration hearing shall commence no later than ten (10) calendar days after service of a demand for expedited arbitration and shall be concluded on the same day. The arbitration decision shall be rendered by the arbitrator(s) in writing on or before the calendar day following the arbitration hearing.

(d) Prior to rendering any decision, the arbitrator(s) must find that the issues of the claim, dispute or controversy are likely to directly, imminently, materially and adversely affect human health or safety. In the event the arbitrators find that the foregoing criteria have not been met, the proceeding shall be dismissed without prejudice and the parties shall proceed with the arbitration procedure and schedule set forth in Sections 8.3 and 8.5; provided, however, that no new demand for arbitration need be served by the party demanding arbitration. In the event only one or two arbitrator(s) is/are present at the hearing, the hearing shall proceed, and a provisional remedy may be granted, without the absent arbitrator(s); provided, that in the event only two arbitrators are present at the hearing, any decision granting a provisional remedy must be made by both arbitrators.

**8.7 Pending Resolution:** During the pendency of such arbitration proceedings, the business and the operations to be conducted, physical plan to be used, and compensation for service under this Agreement, to the extent that they are the subject of such controversy, shall continue to be transacted, used, and paid in the manner and form existing prior to the arising of such controversy, unless the arbitrator shall make a preliminary ruling to the contrary. In the case of monetary disputes relating to amounts billed for the payment of operating, maintenance or capital costs and expenses under the terms of this Agreement, the party from whom a payment is allegedly owing shall make such payment notwithstanding such dispute and may submit the dispute to arbitration under this Section 8 only by seeking a refund through such arbitration.

**8.8 Cost of Arbitration:** Each party hereto shall solely bear the attorney's fees, costs and expenses incurred by it in connection with such arbitration, including the cost of the arbitrator appointed by it, and both parties shall share equally the costs and expenses attributable to the services of the third arbitrator. Notwithstanding the foregoing, the arbitrators shall have the power to award attorney's fees and costs to either party if the

arbitrators determine in their reasonable discretion that the position of the other party to the arbitration was frivolous.

8.9 **Compliance:** For all purposes of this Agreement, each party is responsible for the compliance with all provisions of this Agreement by its Operator or Operators and its member or controlling entities.

## **Section 9. GOVERNMENTAL APPROVAL, TERM, AND ABANDONMENT**

### **9.1 Intentionally Omitted.**

9.2 **Term:** This Agreement shall terminate with respect to any portion of the Nimbus Corridor upon the earlier of (a) one (1) year following the effectiveness of an order of the STB authorizing the abandonment of Freight Service in such portion of the Nimbus Corridor, or (b) immediately following User's removal of User's Changes and/or Additions and restoration of the Freight Rail Easement Property in accordance with Section 2.3(b) in such portion of the Nimbus Corridor (which removal and restoration shall occur only after the effectiveness of such order of the STB).

9.3 **Release:** Upon termination of this Agreement, or any part thereof, each party shall forever release and discharge the other party of and from any and all manner of obligations, claims, demands, causes of action, or suits which it might have, or which might subsequently accrue to it growing out of or in any manner connected with, directly or indirectly, the terminated contractual obligations under this Agreement in the involved Trackage; provided, however, the aforesaid release, and discharge of the parties shall not in any case affect any rights, obligations, claims, demands, causes of action or suits which may have accrued or which relate to operations conducted prior to such termination or partial termination. Upon any partial termination of the Agreement, however the same may occur, the terms and conditions hereof shall continue and remain in full force and effect for the remaining portion of the Nimbus Corridor.

## **Section 10. MAINTENANCE AND REPAIR**

10.1 **Maintenance Standards:** Unless otherwise agreed by the parties hereto in writing, the Freight Rail Easement Property, Freight Trackage and Shared-Use Trackage shall be maintained by the party having responsibility therefor (as set forth in Section 10.2 hereof) at such level as to allow for the continuation of Freight Service at a minimum speed of ten (10) miles per hour but in no event less than the FRA Class 1 standard. User may contract with a qualified railroad maintenance and engineering consultant (the "Consultant") to provide a report of the condition of the Freight Trackage as of the date first above written. The selection of the Consultant shall be subject to Owner's prior written approval, which approval shall not be unreasonably withheld or delayed. All written reports produced by the Consultant shall be submitted to Owner concurrently with the submission of the same to User. Prior to the issuance of a final report by the Consultant, Owner shall be given the

opportunity to ask questions, make comments and offer recommendations to the Consultant. Upon its completion, the Consultant's final report shall be attached hereto and incorporated herein as Exhibit 10.1.

## 10.2 Maintenance Responsibilities:

(a) **Sole-Use Portion:** User shall, at User's sole cost and expense, maintain and repair the Freight Rail Easement Property (including, without limitation, any drainage improvements located thereon) that lies within the Sole-Use Portion of the Nimbus Corridor and all Freight Trackage (including, without limitation all grade crossings and signals) located within the Sole-Use Portion of the Nimbus Corridor. Owner shall at its sole cost and expense, maintain and repair the remaining width of the Sole-Use Portion of the Nimbus Corridor.

(b) **Parallel-Use Portion:** User shall, at User's sole cost and expense, maintain and repair the portion of the Freight Rail Easement Property (including, without limitation, any drainage improvements located thereon) that lies within the Parallel-Use Portion of the Nimbus Corridor and all Freight Trackage (excluding grade crossings and signals) located thereon; provided, however, that Owner shall reimburse User for the reasonable cost of repairs of damage caused by Owner's operations, excluding normal wear and tear. Owner shall, at Owner's sole cost and expense maintain and repair the remaining width of the Parallel-Use Portion of the Nimbus Corridor (including, without limitation, any drainage improvements located thereon), and all Passenger Trackage (including grade crossings and signals) in the Parallel-Use Portion of the Nimbus Corridor; provided, however, that User shall reimburse Owner for the reasonable cost of repairs of damage caused by User's operations, excluding normal wear and tear. Notwithstanding the foregoing, User shall continue to maintain the grade crossings and signals located in the Parallel-Use Portion of the Nimbus Corridor west of Milepost 99.3, near Butterfield Way, for a period of sixty (60) days following the date first above written. During said sixty (60) day period, Owner shall train personnel as necessary to assume maintenance responsibilities for such grade crossings and signals. User shall make its maintenance personnel available, at no cost to User, to assist in such training of Owner's personnel.

(c) **Shared-Use Portion:** Owner shall, at Owner's sole cost and expense, maintain and repair the Shared-Use Portion of the Nimbus Corridor (including, without limitation, any drainage improvements located thereon), and all Shared-Use Trackage and Passenger Trackage (including, without limitation, all grade crossings and signals) located thereon; provided, however, that User shall reimburse Owner for the reasonable cost of repairs of damage caused by User's operations, excluding normal wear and tear.

**10.3 Failure to Maintain:** In the event User or Owner (as applicable, the "Maintaining Party") fails to perform its maintenance obligations under this Section 10, the other party hereto shall give written notice of such failure to the Maintaining Party. If the Maintaining Party has not performed such maintenance obligations within thirty (30) days after receipt of such notice, the other party hereto may perform such obligations and shall be entitled to full reimbursement from the Maintaining Party within thirty (30) days after

submission of a written invoice therefor. In the event User's failure to perform its maintenance obligations under this Section 10 results in an imminent and material danger to human health or safety, Owner or Owner's member entities may perform such obligations immediately upon giving telephonic notice to User and shall be entitled to reimbursement as set forth in the preceding sentence.

**10.4 FRA Petition:** User shall cooperate with Owner in filing a petition with the FRA pursuant to 49 CFR Section 213.5, which petition will request the FRA's acknowledgment of User's maintenance responsibilities under this Agreement. Such cooperation shall include, without limitation, signing a statement acknowledging User's maintenance responsibilities under this Agreement.

## **Section 11. CAPITAL IMPROVEMENTS**

**11.1 Responsibility for Costs:** Each party shall bear the costs of all Changes and/or Additions constructed by it on the Nimbus Corridor.

**11.2 User and Shared Responsibility:** User shall bear the costs of any Changes and/or Additions on the Freight Rail Easement Property that Owner has constructed at User's request and are not required or used in connection with Light Rail Transit Service or Other Passenger Service. The cost of Changes and/or Additions on the Freight Rail Easement Property that User has requested and Owner has agreed to undertake, and has actually undertaken, and which are used for both User's and Owner's operations shall be shared on a basis to be agreed by the parties in writing prior to any work being performed. Nothing in this Section shall be construed to require Owner to construct any Changes and/or Additions on behalf of User, except for the replacement of Freight Trackage and Shared-Use Trackage as may be required by Section 7.1.

**11.3 Grade Separations and Crossings:** Notwithstanding any other provisions of this Section 11, the cost of new and upgraded rail-rail or rail-road grade separations (excepting any grade separations which are required solely by reason of Freight Service operations) and new or upgraded pedestrian or vehicular road crossings at grade on the Freight Rail Easement Property (but not including the cost of maintenance or capitalized maintenance of any of the foregoing, which maintenance responsibilities are governed by Section 10 hereof) shall be borne solely by Owner.

## **Section 12. MISCELLANEOUS**

**12.1 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 (a) obligations involving the payment hereunder of money to the other party or to a third party or (b) obligations arising under Section 4.7 or 4.8 hereof, during the time when such non-performance is occasioned by events beyond the control of such party, including fire, earthquake, flood, explosion, casualty, strike, riot, insurrection, civil disturbance, act of public enemy, embargo, war, act of God, inability to

obtain labor, materials or supplies or any other similar cause beyond the party's reasonable control; provided, that if either party suffers a work stoppage due to a labor dispute, such party shall make such reasonable efforts, if practicable, to staff its operations so as to minimize disruptions to the Service provided by the other party on the Freight Rail Easement Property.

## 12.2 Billing:

(a) Billing shall be accomplished on the basis of data contained in a billing form mutually agreed to between the parties. Such billing forms shall contain sufficient detail to permit computation of payments to be made hereunder. Unless otherwise specifically provided herein, billing shall be prepared in accordance with the schedules of the rules, customary additives, materials additives, material prices and equipment rental rates as agreed upon by the chief accounting officers of the parties hereto (or their designees) from time to time. User shall pay to Owner at the office of the treasurer of Owner, or at such other location as Owner may from time to time designate, all the compensation and charges of every name and nature which in and by this Agreement User is required to pay in lawful money of the United States within forty-five (45) days after the rendering of bills therefor by Owner. Bills shall contain a statement of the amount due on account of the expenses incurred and services rendered during the billing period.

(b) Errors or disputed items in any bill shall not be deemed a valid excuse for delaying payment, but shall be paid subject to subsequent adjustment; provided, no exception to any bill shall be honored, recognized or considered if filed after the expiration of two (2) years after the last day of the calendar month during which the bill is rendered and no bill shall be rendered later than two (2) years (i) after the last day of the calendar month in which the expense covered thereby is incurred, or (ii) if in connection with a project for which a Roadway Completion Report (as that term is presently understood by the railroad industry) is required, two (2) years after the last day of the calendar month in which the Roadway Completion Report is made covering such project, or (iii) in the case of claims disputed as to amount or liability, after the amount is settled and/or the liability is established. This provision shall not limit the retroactive adjustment of billing made pursuant to exception taken to original accounting by or under authority of the STB or retroactive adjustment of wage rates and settlement of wage claims.

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

(d) Should any payment become payable by Owner to User under this Agreement, the above provisions of this Section shall apply with User as the billing party and owner as the paying party; provided, however, that should any bill or exception to any

bill be rendered later than one (1) year after the events set forth in Subsection (b) (i), (ii) and (iii) of this Section 12.2, Owner shall have until forty-five (45) days following the beginning of Owner's next fiscal year to make payment therefor.

(e) In the event that either party fails to make any payment required to be made to the other party in accordance with the provisions of this Agreement by the date upon which it is due, interest shall accrue from the due date until payment is made at the Federal discount rate in effect on the due date plus three (3) percentage points; provided, however, that no interest shall be due and payable on any amounts in dispute which are determined, either by subsequent review or by arbitration, to be not validly due hereunder.

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

If intended for Owner:

Sacramento-Placerville Transportation Corridor JPA  
2811 "O" Street  
Sacramento, California 95816  
Attention: John Segerdell, Chief Executive Officer  
Phone No.: (916) 321-3853  
Telecopy No.: (916) 454-6016

With a copy to:

Hyde, Miller & Owen  
428 "J" Street, Suite 400  
Sacramento, California 95814  
Attention: Kirk E. Trost, Esq.  
Phone No.: (916) 447-7933  
Telecopy No.: (916) 447-5195

If intended for User:

Executive Vice President - Operations  
Southern Pacific Transportation Company  
1860 Lincoln Street, Suite 1400  
Denver, CO 80295  
Phone No.: 303-812-5049  
Telecopy No.: 303-812-5092



With a copy to:

Managing Director-Contracts and Joint Facilities  
Southern Pacific Transportation Company  
1860 Lincoln Street, Suite 1200  
Denver, CO 80295  
Phone No.: 303-812-5148  
Telecopy No.: 303-812-5157

And to:

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

A party may change its person designated to receive notice, its telecopy number, or its address from time to time by giving notice to the other party in accordance with the procedures set forth in this Section 12.3.

#### 12.4 Intentionally Omitted.

12.5 **Preferences:** Except as hereafter determined by the mutual agreement of the parties, neither of them shall, seek in any administrative, legislative or judicial proceeding or otherwise, to obtain rights in the use of the properties subject to this Agreement in excess of those provided to it hereunder, or seek to diminish such rights provided to the other. Notwithstanding the provisions of Section 8, the parties shall have recourse to the courts or any governmental agency having jurisdiction in the event of a violation of this Section 12.5, and, in addition to any available remedies for damages, the remedy of specific performance shall be available with respect thereto. Furthermore, Owner shall not join or aid any such action undertaken by Owner's member entities. The provisions of this Section 12.5 shall expire ten (10) years after the date first above written.

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

12.7 **Entire Agreement:** This Agreement and its Exhibits together with the Sale Agreement and the Freight Rail Easement reserved in the Deeds represent the entire Agreement between Owner and User concerning the terms of the freight rights retained and confirmed hereby.

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

12.9 **Not for the Benefit of Others:** This Agreement and each and every provision herein is for the exclusive benefit of the parties hereto and not for the benefit of any third party. Nothing herein shall be construed to create or increase any right in any third person to recover by way of damages or otherwise against any of the parties hereto.

12.10 **Access:** Subject to any restrictions expressly set forth in this Agreement, each party, its employees, agents, and designees, shall have access to the Freight Rail Easement Property and to the operating and maintenance records of the other concerning the movement of Trains or Equipment on and maintenance of the Freight Rail Easement Property for the purpose of monitoring conformance to the principles and standards expressed in this Agreement.

12.11 **Effective Date:** This Agreement shall become effective only upon receipt of all necessary regulatory approvals or exemptions with respect thereto.

12.12 **Priority Among Agreements:** This Agreement is entered into by the parties pursuant to and in furtherance of the Sale Agreement and the Deeds. In the event that there are terms in this Agreement which are inconsistent with the terms of the Sale Agreement, the terms of this Agreement shall govern. In the event that there are terms in this Agreement which are inconsistent with the terms of the Deeds, the terms of the Deeds shall govern.

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

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

12.15 **No Rental or Maintenance Charges:** User's use of the Freight Rail Easement Property shall not be subject to any rental charges or, except as otherwise expressly set forth in Section 10, maintenance charges.

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

**SOUTHERN PACIFIC  
TRANSPORTATION COMPANY**

By: Michael D. Ongerth  
Name: MICHAEL D. ONGERTH  
Title: VICE PRESIDENT

**SACRAMENTO-PLACERVILLE  
TRANSPORTATION CORRIDOR JOINT  
POWERS AUTHORITY**

By: Robert Holderness  
Robert Holderness, Chair

By: John Segerdell  
John Segerdell, CEO

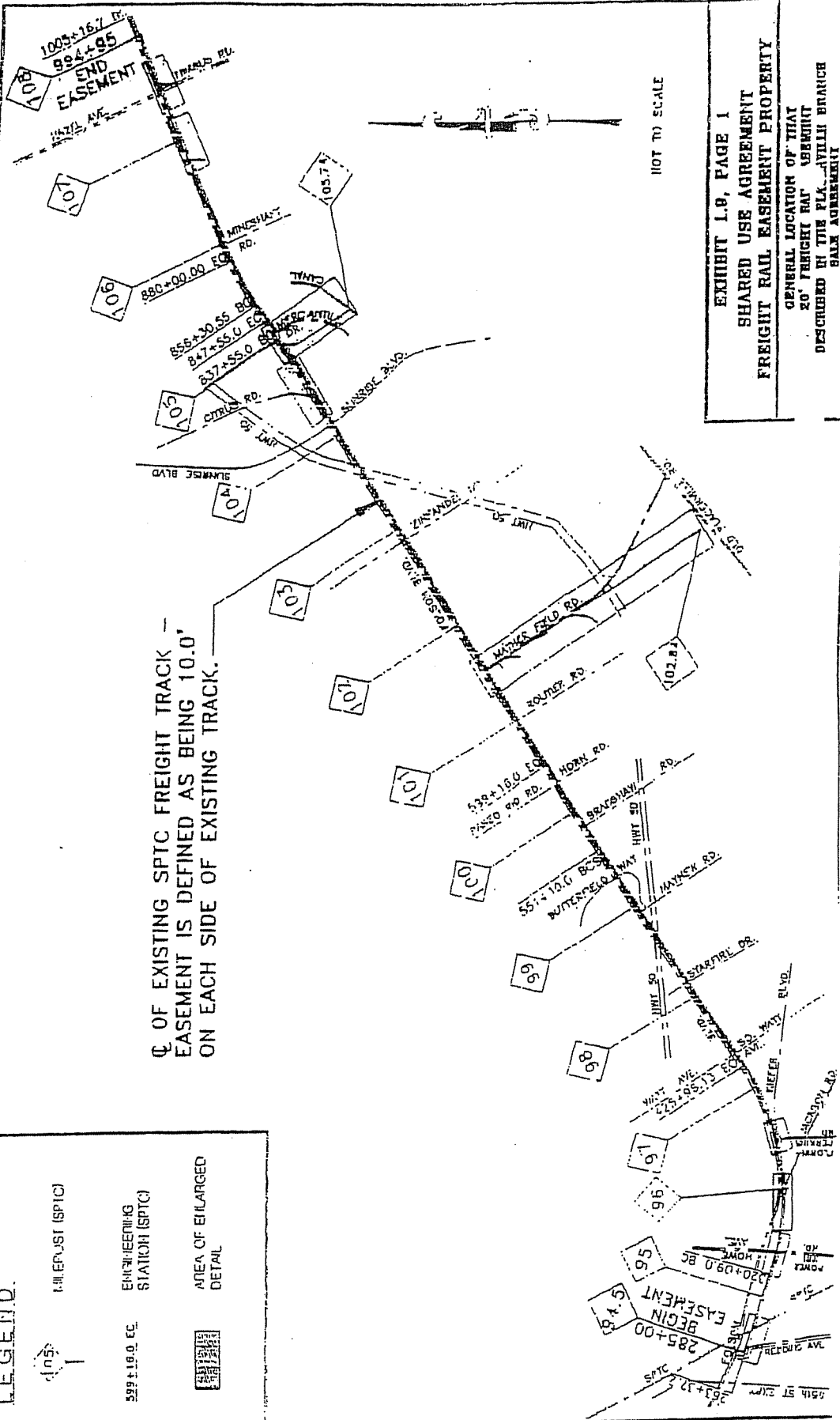
APPROVED AS TO LEGAL FORM:

By: Kirk E. Trost  
Kirk E. Trost,  
Authority's Legal Counsel

**LEGEND.**

- MILEPOST (SPIC)
- ENGINEERING STATION (SPIC)
- AREA OF ENLARGED DETAIL

⊕ OF EXISTING SPTC FREIGHT TRACK --  
EASEMENT IS DEFINED AS BEING 10.0'  
ON EACH SIDE OF EXISTING TRACK.



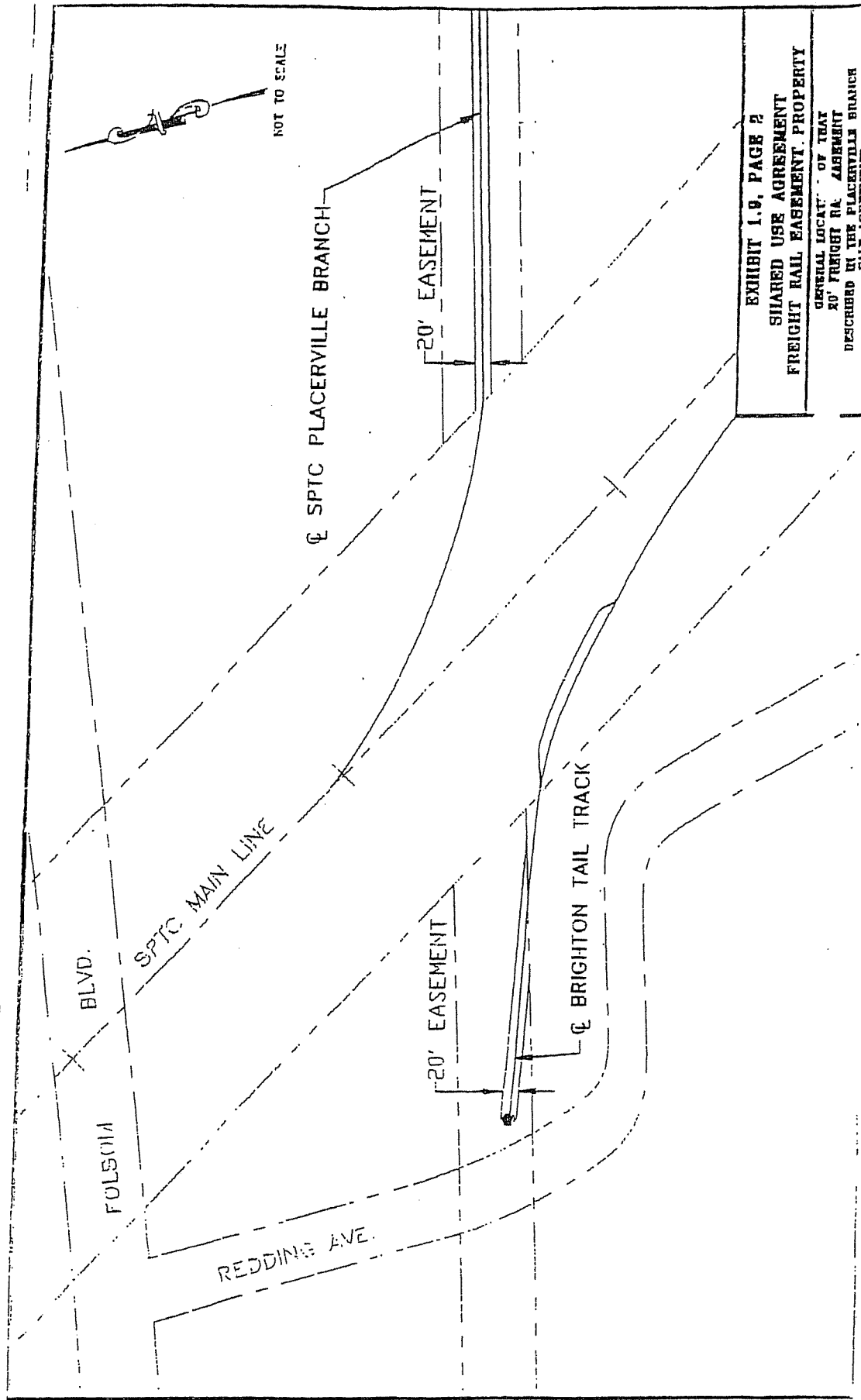
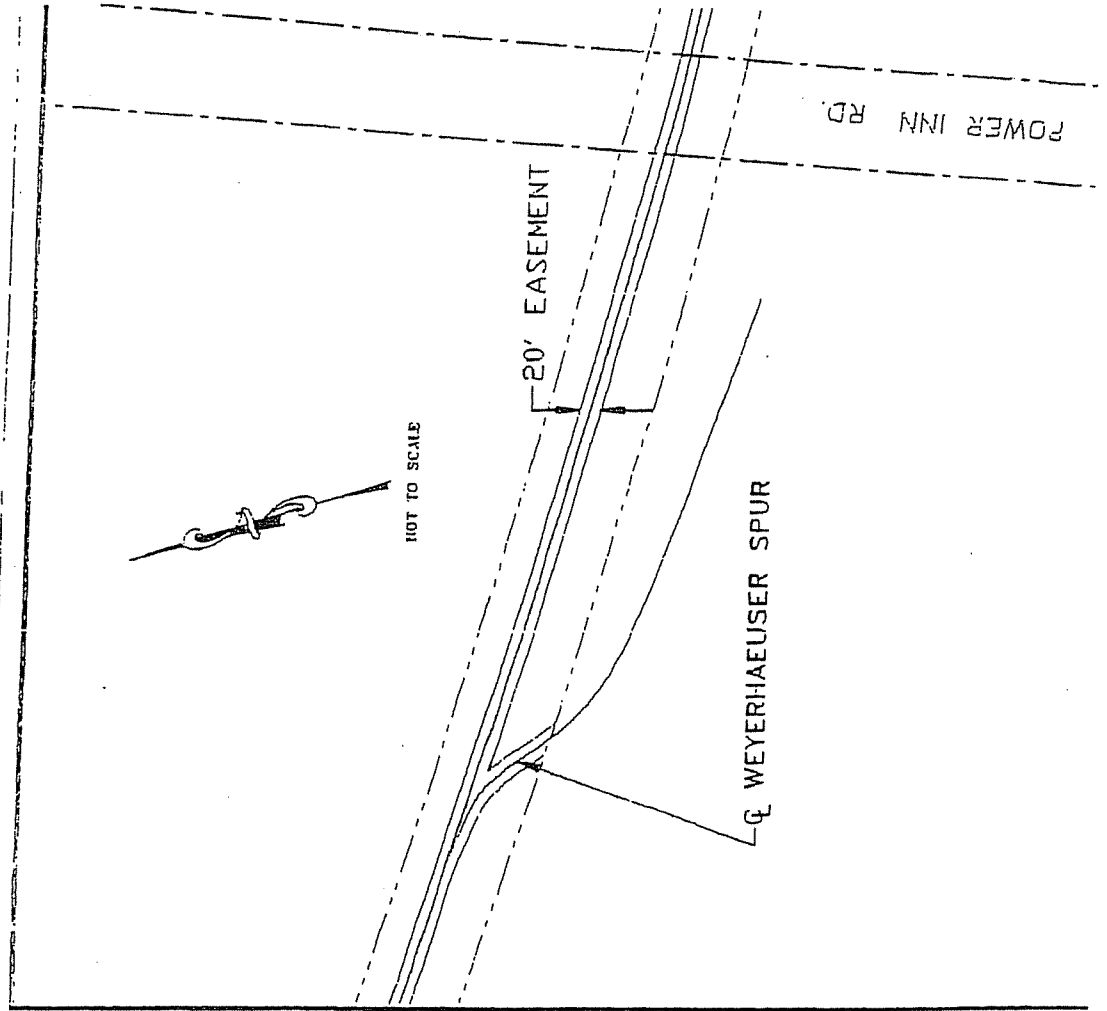


EXHIBIT 1.9, PAGE 2  
 SHARED USE AGREEMENT  
 FREIGHT RAIL EASEMENT, PROPERTY  
 GENERAL LOCAT. OF THAT  
 20' FREIGHT RA. EASEMENT  
 DESCRIBED IN THE PLACERVILLE BRANCH  
 SALES AGREEMENT

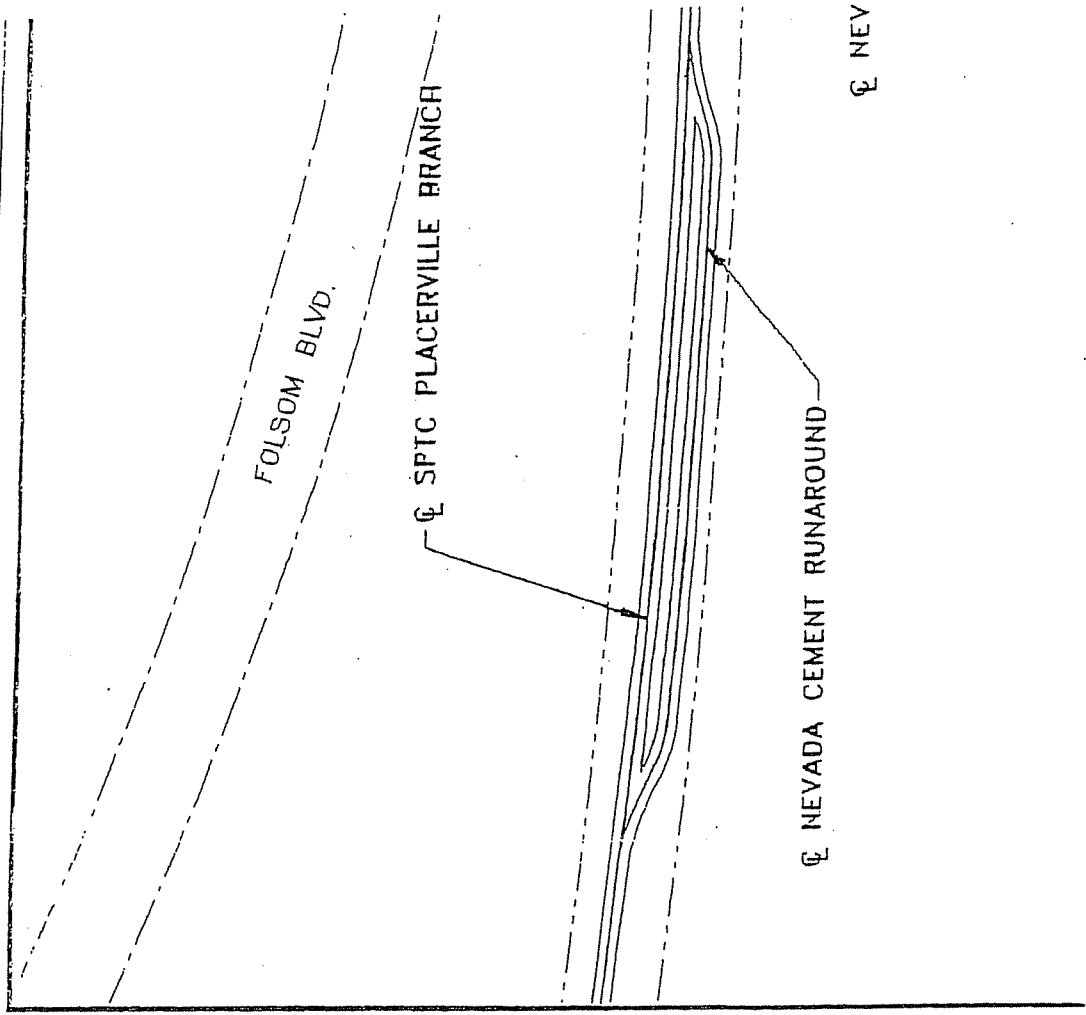


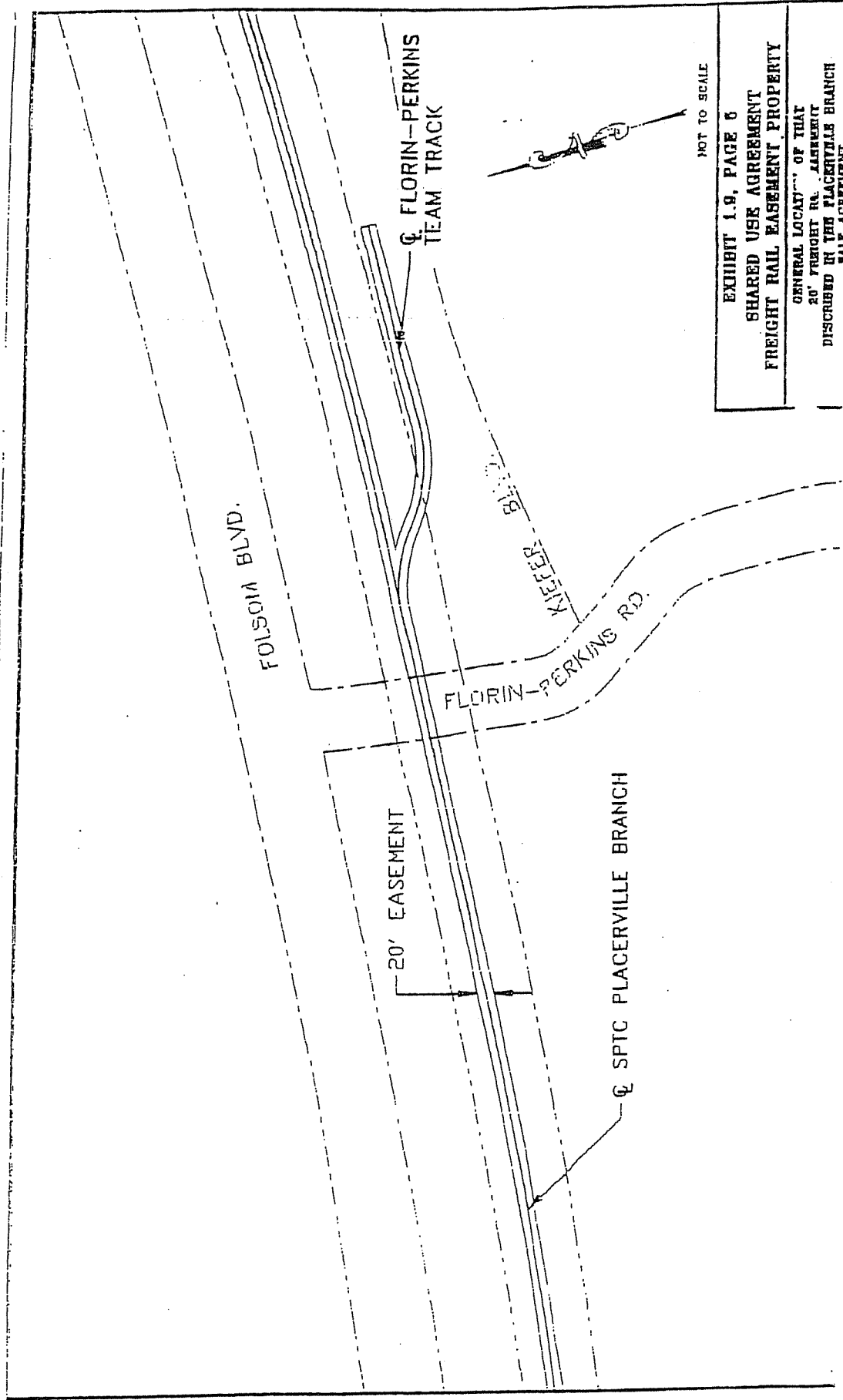
FOLSOM BLVD.

☉ SPTC PLACERVILLE BRANCH

☉ NEVADA CEMENT RUNAROUND

☉ NEV

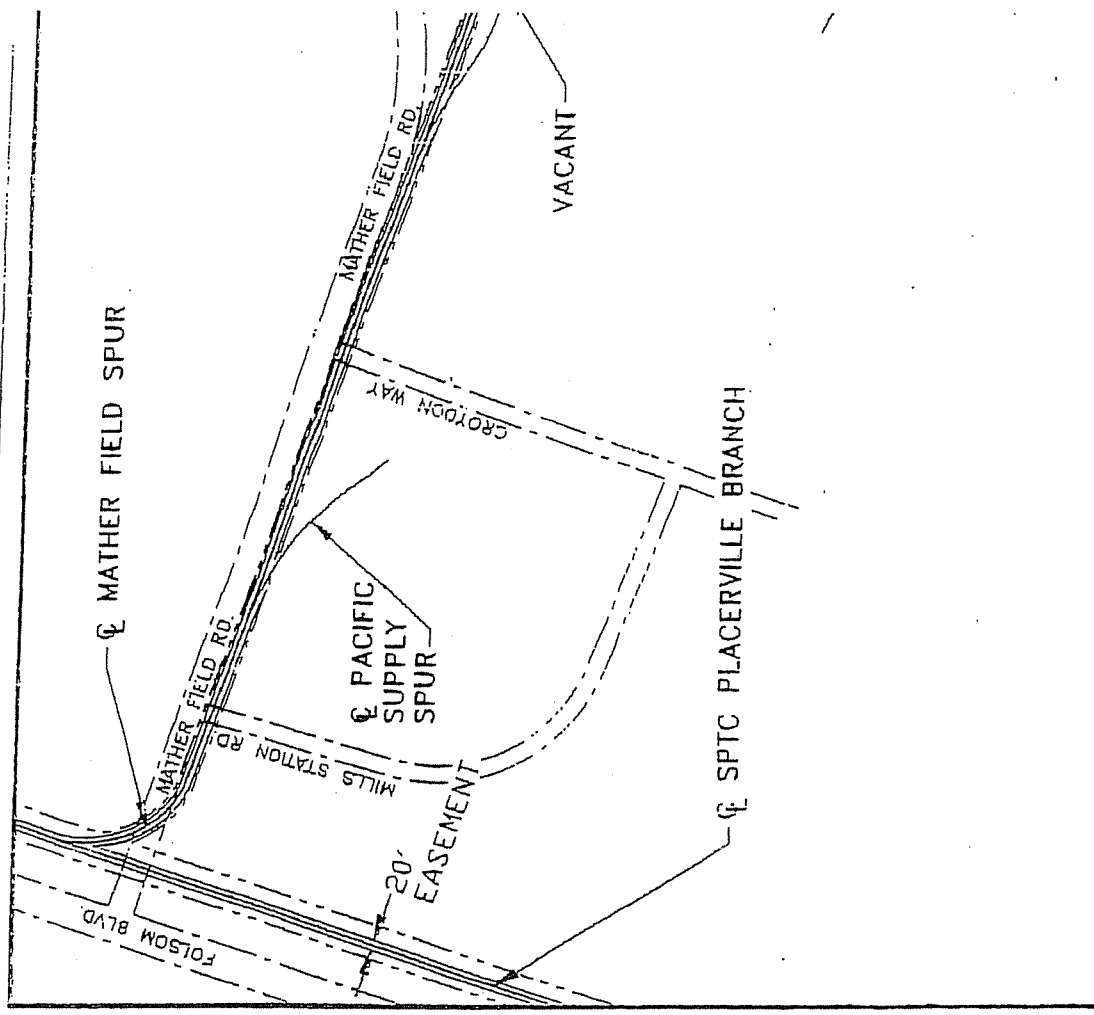


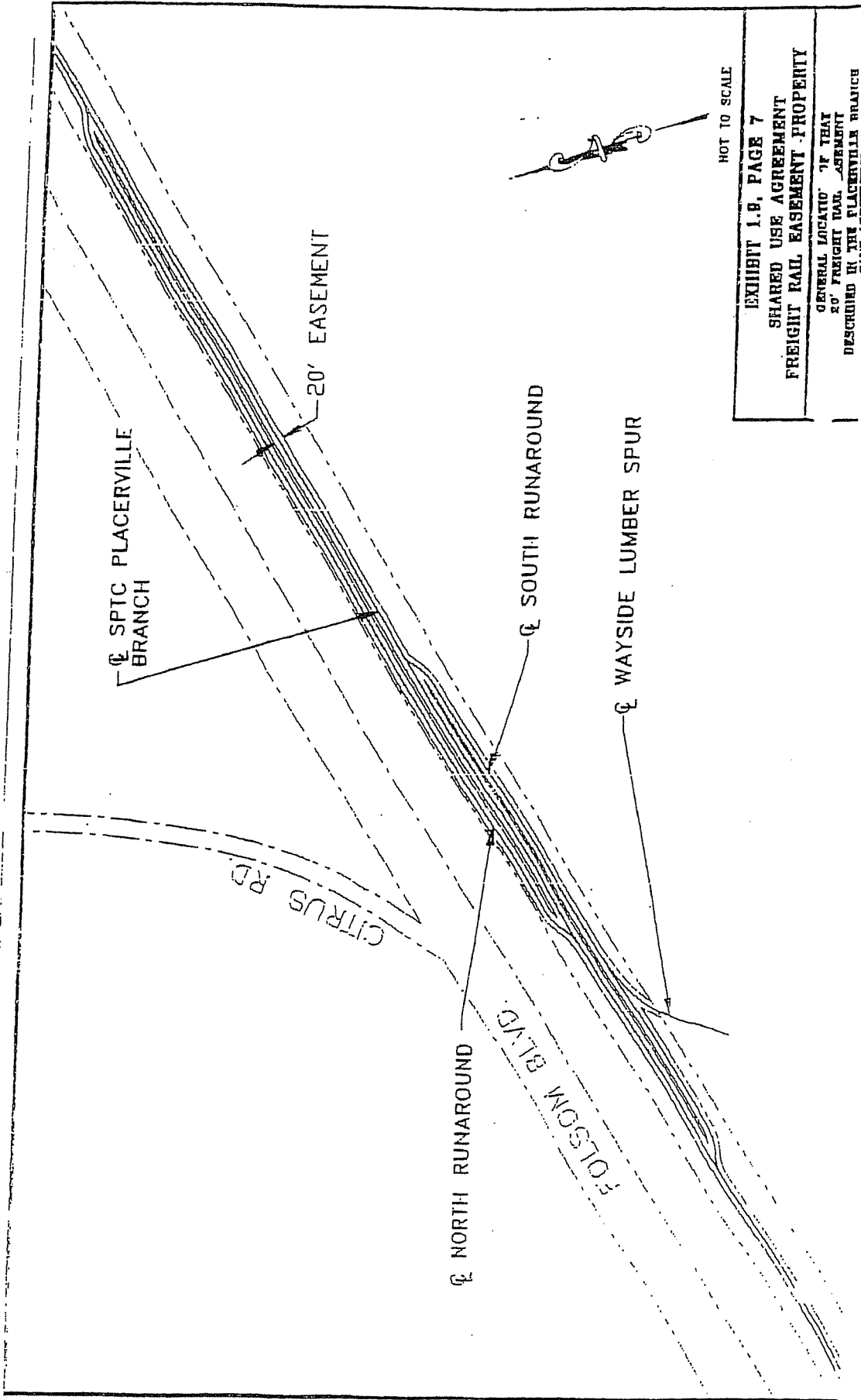


NOT TO SCALE

EXHIBIT 1.9, PAGE 6  
 SHARED USE AGREEMENT  
 FREIGHT RAIL EASEMENT PROPERTY  
 GENERAL LOCATION OF THAT  
 20' FREIGHT RAIL ALIGNMENT  
 DISCUSSED IN THE PLACERVILLE BRANCH  
 2015 AGREEMENT







HOT TO SCALE

EXHIBIT 1.8, PAGE 7  
 SHARED USE AGREEMENT  
 FREIGHT RAIL EASEMENT PROPERTY

GENERAL LOCATION OF THAT  
 20' FREIGHT RAIL EASEMENT  
 DESCRIBED IN THE PLACERVILLE BRANCH

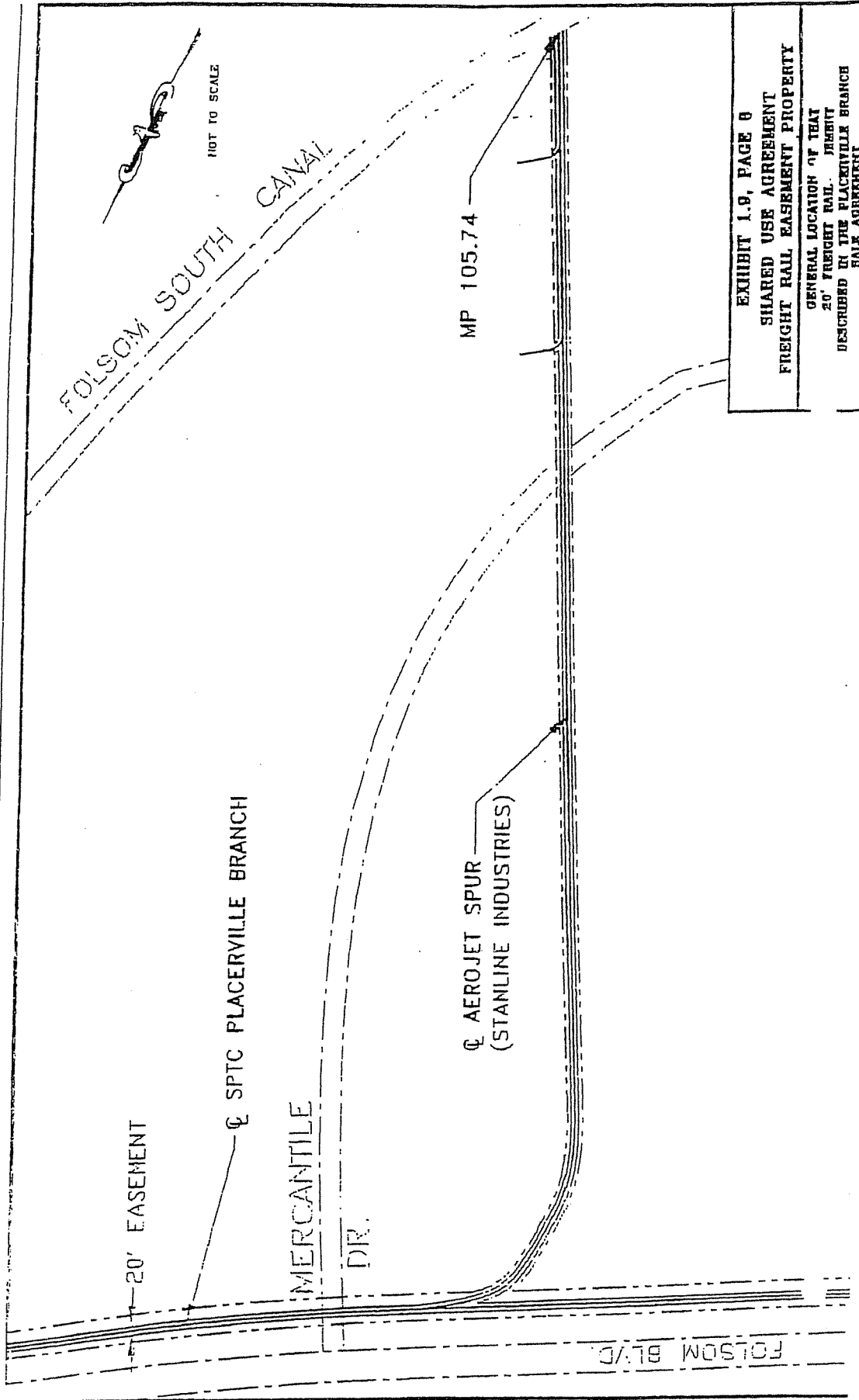
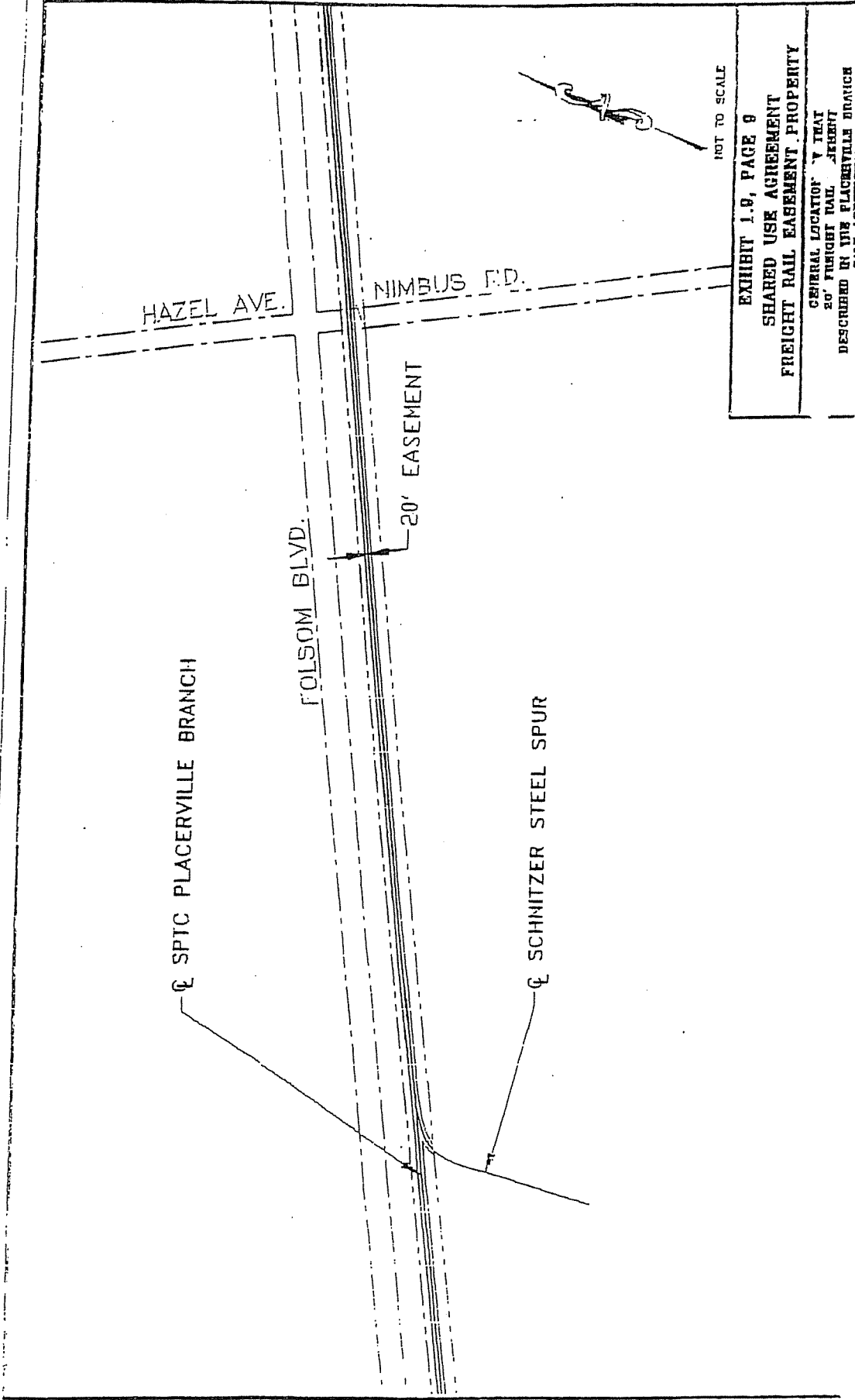
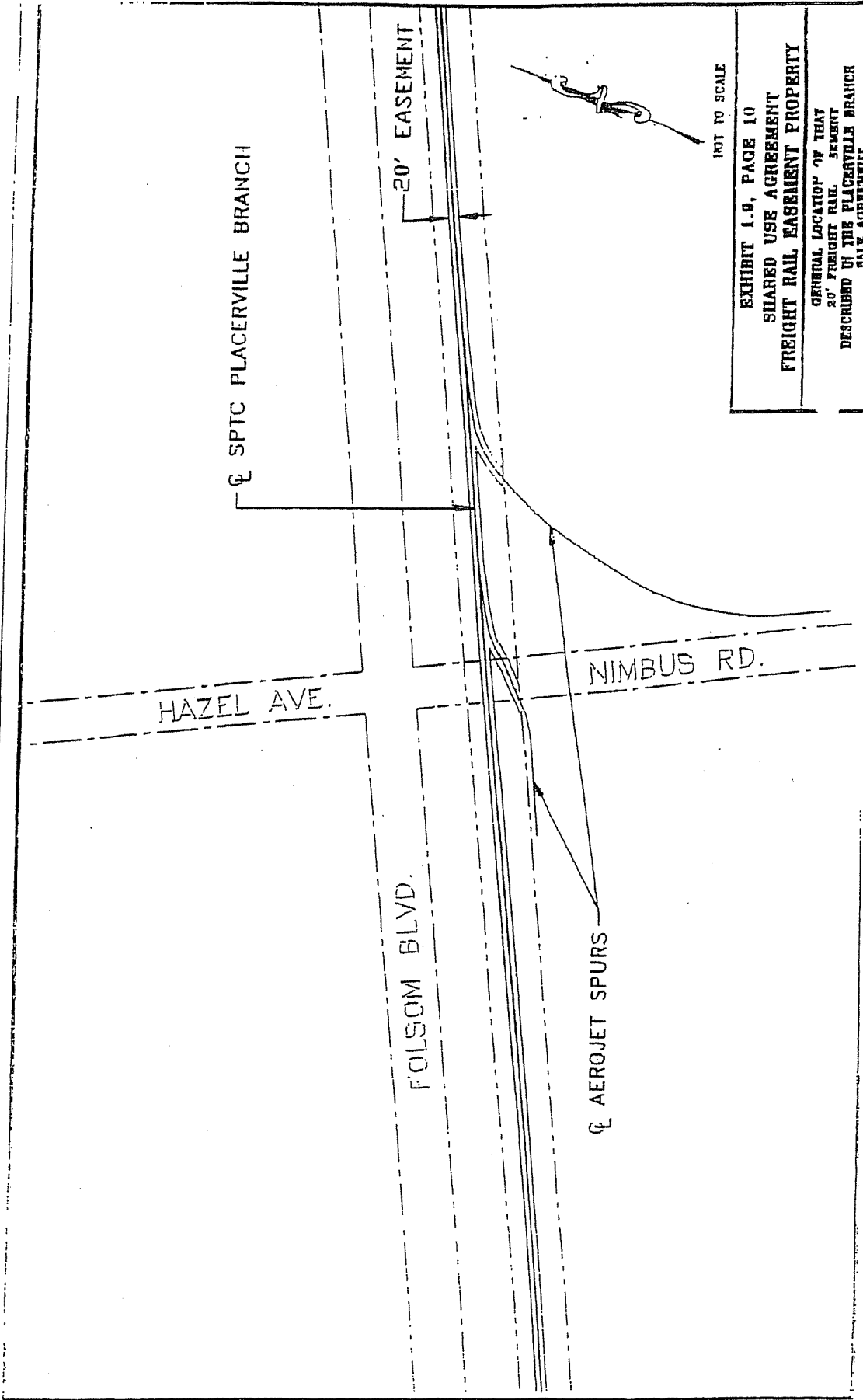


EXHIBIT 1.9, PAGE 8  
 SHARED USE AGREEMENT  
 FREIGHT RAIL EASEMENT PROPERTY  
 GENERAL LOCATION OF TEAT  
 20' FREIGHT RAIL EASEMENT  
 DESCRIBED IN THE PLACERVILLE BRANCH  
 SALE AGREEMENT





NOT TO SCALE

EXHIBIT 1.9, PAGE 10  
SHARED USE AGREEMENT  
FREIGHT RAIL EASEMENT PROPERTY  
GENERAL LOCATION OF THIS  
20' FREIGHT RAIL EASEMENT  
DESCRIBED IN THE PLACERVILLE BRANCH  
SALE AGREEMENT

**EXHIBIT 7.1**

**PLACERVILLE BRANCH  
TURNOUTS, TEAM TRACKS, RUNAROUND TRACKS AND SPURS**

**EAST OF SP JUNCTION AT BRIGHTON**

<u>SPINS<sup>1</sup></u>	<u>MILEPOST</u>	<u>LOCATION</u>	<u>USER</u>	<u>TURNOUTS</u>
0665	95.294	Power Inn Rd	Weyerhaeuser New document in process Formerly American Steel Document No. T-024579	1
0670	95.910	Jackson Hwy	Nevada Cement runaround	2
0671	95.915	Jackson Hwy	Nevada Cement Provides access to tracks 0671 and 0672 Document Nos. T-22842, T-28138	1
0689	96.417	Florin Perkins Rd	team track	1
1720	101.589	Mather Field Road	Mather Field Spur United States of America Document No. 109390 (Provides access to tracks 1721, 1722, 1724 and Mather Field)	1
1721	101.77	Mather Field Road	Pacific Supply Document No. T-707708	1
1722	101.94	Mather Field Road	Vacant	1

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<sup>1</sup>SPINS refers to "Southern Pacific Industrial Numbering System. Track numbers commonly found on switch targets.

<u>SPINS</u>	<u>MILEPOST</u>	<u>LOCATION</u>	<u>USER</u>	<u>TURNOUTS</u>
1724	102.06	Mather Field Road	Vacant	1
1738	104.271	Citrus	South runaround (Provides access to track 1739)	2
1739	104.330	Citrus	Wayside Lumber Document No. T-33389	1
1741	104.400	Citrus	North runaround (To be replaced in accordance with Section 7.1(d).)	2
1750	105.05	Mercantile Drive	Aerojet spur (Provides access to track 1749) Document No. T-20301	1
1749	105.30	Mercantile Drive	Stanline Industries Document Nos. T-33833, T-467 (2 turnouts, but not a runaround) (Also referred to as Rugby Building Products.)	2
1762	106.839	Nimbus	Schnitzer Steel Document No. T-30488	1
1770	107.489	Nimbus	Aerojet Document Nos. T-13638, T-13732, T-19200	1
1772	107.583	Nimbus	Aerojet Document Nos. T-18558, T-22448, T-20432, T-18810, T-18596	1

WEST OF SP JUNCTION AT BRIGHTON

<u>SPINS</u>	<u>MILEPOST</u>	<u>LOCATION</u>	<u>USER</u>	<u>TURNOUTS</u>
0624	94.7	Brighton	Tail Track from SP main	none



**FIRST SUPPLEMENT TO  
SHARED USE AGREEMENT -- PLACERVILLE BRANCH**

This First Supplement to the Shared Use Agreement -- Placerville Branch ("First Supp") is made by and among the Sacramento-Placerville Transportation Corridor Joint Powers Authority ("Owner"), Sacramento Regional Transit District ("RT"), the City of Folsom, California ("Folsom"), the County of El Dorado, California ("El Dorado") and Southern Pacific Transportation Company ("User"). Collectively, RT, Folsom, and El Dorado are hereinafter referred to as the "Member Entities."

**RECITALS**

A. On September 6, 1996 Owner and User entered in the Shared Use Agreement -- Placerville Branch ("SUA").

B. The Member Entities desire to have the right to make claims directly against User pursuant to the SUA and under certain conditions be deemed to be an Owner under the SUA.

C. Owner, the Member Entities and User now desire to supplement the SUA, subject to the terms and conditions set forth below.

**AGREEMENT**

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. Owner and RT represent and warrant to User that RT has been designated as an Operator, as that term is defined in the SUA.

2. Folsom and El Dorado may in the future become Operators, as that term is defined in the SUA. The commencement of operations on the Nimbus Corridor (as that term is defined in the SUA) by Folsom and/or El Dorado as an Operator in accordance with the SUA shall be a condition precedent to Folsom's and/or El Dorado's respective rights under this First Supp.

3. Subject to Section 4 hereof, any Member Entity shall have the right to make any claim or demand under Section 6 of the SUA directly against User for liabilities (as that

term is defined in Section 6 of the SUA) incurred by such Member Entity.

4. On and after the date any Member Entity makes any claim or demand of any kind permitted by Section 3 hereof against User, such Member Entity shall be considered an Owner for all purposes of the SUA (including, without limitation, the right to make claims or demands against User in accordance with the SUA) and shall be jointly and severally liable with Owner (and all other Member Entities then deemed to be Owners) for all purposes of the SUA.

5. This First Supp is only intended to govern rights and obligations between User and Owner, and between User and the Member Entities. This First Supp does not give, reserve or grant to any Member Entity the right to conduct operations in the Nimbus Corridor; such right may be granted only by Owner. This First Supp also does not affect any rights or obligations among Owner and each of the Member Entities, which rights and obligations are set forth in separate agreements among Owner and the Member Entities. In the event of any conflict between the provisions of this Section 5 and Section 4 hereof, the provisions of this Section 5 shall control.

6. By executing this First Supp, the parties hereto do not waive any rights which they may have at law or in equity.

7. This First Supp may be executed in any number of counterparts, and by different parties in separate counterparts, each of which, when executed and delivered, shall be deemed to be an original and all of which counterparts taken together shall constitute but one and the same instrument.

8. Except to the extent supplemented hereby, the SUA shall remain in full force and effect according to its terms.

Executed this 6<sup>th</sup> day of SEPTEMBER, 1996.

SOUTHERN PACIFIC  
TRANSPORTATION COMPANY

By: Michael D. Ongerth  
Name: MICHAEL D. ONGERTH  
Title: VICE PRESIDENT

SACRAMENTO-PLACERVILLE  
TRANSPORTATION CORRIDOR JOINT  
POWERS AUTHORITY

By: Robert Holderness  
Robert Holderness, Chair

By: John Segerdell  
John Segerdell, CEO

APPROVED AS TO LEGAL FORM:

By: Kirk E. Trost  
Kirk E. Trost,  
Authority's Legal Counsel

SACRAMENTO REGIONAL  
TRANSIT DISTRICT,  
a public corporation

By: \_\_\_\_\_  
Pilka Robinson, General Manager

By: \_\_\_\_\_  
Mark Gilbert, Chief Legal Counsel

CITY OF FOLSOM,  
a municipal corporation

*Glenn Fair*  
Mayor / City of Folsom Glenn Fair  
California

APPROVED AS TO CONTENT:

*Jay Walker* 8/29/96  
Director of Public Works

APPROVED AS TO FORM:

*St. Lawrence, Anniston*  
City Attorney

ATTEST:

*Alvina Belder*  
City Clerk

COUNTY OF EL DORADO, a political  
subdivision of the State of California

By: \_\_\_\_\_  
Chairman, Board of Supervisors

ATTEST:

DIXIE L. FOOTE  
Clerk of the Board of Supervisors

By: \_\_\_\_\_  
Deputy Clerk

SACRAMENTO-PLACERVILLE  
TRANSPORTATION CORRIDOR JOINT  
POWERS AUTHORITY

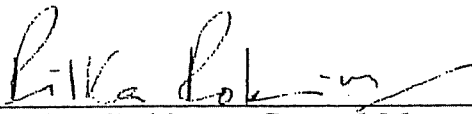
By: \_\_\_\_\_  
Robert Holderness, Chair

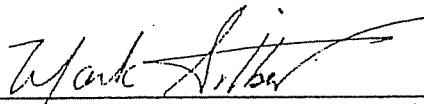
By: \_\_\_\_\_  
John Segerdell, CEO

APPROVED AS TO LEGAL FORM:

By: \_\_\_\_\_  
Kirk E. Trost,  
Authority's Legal Counsel

SACRAMENTO REGIONAL  
TRANSIT DISTRICT,  
a public corporation

By:   
\_\_\_\_\_  
Pilka Robinson, General Manager

By:   
\_\_\_\_\_  
Mark Gilbert, Chief Legal Counsel

CITY OF FOLSOM,  
a municipal corporation

\_\_\_\_\_  
Mayor

APPROVED AS TO CONTENT:

\_\_\_\_\_  
Director of Public Works

APPROVED AS TO FORM:

\_\_\_\_\_  
City Attorney

ATTEST:

\_\_\_\_\_  
City Clerk

COUNTY OF EL DORADO, a political  
subdivision of the State of California

By: *Raymond J. Nutting*  
Chairman, Board of Supervisors

**RAYMOND J. NUTTING**

8/20/96  
Bd dte

ATTEST:

DIXIE L. FOOTE  
Clerk of the Board of Supervisors

By: *Margaret E. Moody*  
Deputy Clerk  
8/20/96  
Bd dte