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November 3, 2021

The Honorable Carlos Monje
Under Secretary
U.S. Department of Transportation
1200 New Jersey Avenue, SE
Washington, D.C. 20590

Re: Mendocino Railway RRIF Loan Application

Dear Under Secretary Monje,

North Coast Railroad Authority (NCRA) writes to express its concerns with the application by the Mendocino Railway for a Railroad Rehabilitation & Improvement Financing (RRIF) loan. The existence of the loan application is manifest on the Build America Bureau (BAB) website. We have informally sought documentation describing the nature of the loan sought, but have been told to file a FOIA request. We have done so, but have been advised, among other things, of a backlog, so we have no idea if and when we will receive information. We have further been advised that we should supply our comments as soon as possible. In the circumstances, this letter represents our initial comments. We continue to seek all information specified in our FOIA requests. And in light of the circumstances, it is incumbent on us to urge that the Department of Transportation decline to issue any RRIF loan to Mendocino Railway until and unless our concerns are fully addressed, which we do not believe is possible for the reasons set forth below.

NCRA is an agency within the State of California. NCRA currently owns approximately 220 miles of rail line from Eureka to Cloverdale along California's North Coast. The NCRA line from Cloverdale, California up to the Humboldt Bay is inoperable due to slides and tunnel collapse along the Eel River; erosion and corrosion due to rising sea levels, wave action and salt water in the Humboldt Bay area; and further tunnel collapses, landslides and track washouts south of Willits parallel to the Russian River. NCRA's engineers preliminarily estimate that the

rehabilitation cost necessary to restore service exceeds \$2.3 billion, of which \$600 million is for the portion south of Willits (inclusive of the segment from Cloverdale south owned by Sonoma Marin Area Rail Transit (SMART). (See Verified Statement of David Anderson.)

NCRA has been tasked by the legislature of the State of California with railbanking the corridor currently under NCRA's ownership for the purpose of serving the fiscal and environmental interests of the State in ceasing the environmentally damaging and financially disastrous work of maintaining a railroad through the North Coast. The NCRA Board of Directors accepted this mission by the Board's formal adoption of support for the legislative mandate. (See Cal. Gov. Code §§ 93000 et seq.; NCRA Board of Directors Item E.2, June 14, 2021.) Railbanking necessarily entails termination of common carrier obligations. NCRA is actively seeking to railbank the segment from Eureka to Willits in a proceeding before the Surface Transportation Board (STB), docketed as AB 1305X. Mendocino Railway has filed papers with STB suggesting it may attempt to "eminent domain" NCRA's Eureka to Willits line by means of an "offer of financial assistance." Mendocino Railway has thus interfered with and delayed the relief NCRA is seeking in accordance with its legislative mandate.

NCRA has recently become aware that Mendocino Railway has applied for federal financial assistance to repair its inoperable 40-mile rail line, which runs from the coastal town of Fort Bragg east to Willits. Mendocino Railroad has previously operated that line for rail excursion purposes (Skunk Train), but has not been able to interconnect any freight to the interstate rail network because NCRA's line from Eureka through Willits to Cloverdale, and beyond all the way to Windsor in Sonoma County, was embargoed for safety reasons by the Federal Railroad Administration (FRA). FRA imposed the embargo in 1998 (EO 21), long before the current owners of Mendocino Railway acquired it in 2004.

In order for freight interconnection with the national system to become reality, in addition to massive physical rehabilitation work over inhospitable terrain for non-existent customers, NCRA would need to find a bona fide freight operator, as the prior operator recently obtained STB approval to discontinue its lease with NCRA and then consummated that authority by terminating its lease.

Based on a California Supreme Court ruling against NCRA related to the prior operator's ability to resume freight operations over a portion of the embargoed line, NCRA may not engage in or authorize such service without compliance with the California Environmental Quality Act. (See *Friends of the Eel River v. North Coast Railroad Authority*, (2017) 3 Cal. 5th 677.) At the present time, NCRA is forbidden by consent judgment pursuant to the Supreme Court ruling from engaging any freight operator over any portion of the segment needed to connect Mendocino Railway to the national system without such compliance. Conducting the required CEQA analysis is a costly and time-consuming process. It would be frivolous here since demand for rail service falls far short of anything justifying the rehabilitation costs to provide it, much less the extraordinary costs of maintaining this line in the face of the constant slide and

tunnel collapse problems it historically faces. We doubt that Mendocino Railway has pointed any of this out in its application papers.

Given the fact that Mendocino Railway lacks a connection to the interstate rail network (both because of tunnel collapse and slides, and because of the FRA embargo), it would appear that the only real justification for federal financial assistance for the line is to restore it sufficiently to restart Skunk Train tourist excursion operations between Fort Bragg and Willits, and Mendocino Railway's ancillary rail bike operations. There are at least two problems with this proposed use of funds. First, the funding looks like it is to repair the same kind of damage (e.g., tunnel collapse etc.) to the Mendocino line that NCRA incurs on its own line and which USDOT has previously advised NCRA is just an operating expense, ineligible for RRIF assistance. (See 45 U.S.C. 822(b)(2).) Second, NCRA's understanding is that usage of federal funds for a tourist excursion or rail bike operation would not meet the RRIF program-specific requirements in that such use of funds would not service demand for rail services or intermodal facilities as meant by the RRIF program. (See 45 U.S.C. § 822(c), (f).)¹ The Mendocino line literally cannot provide meaningful freight rail service or passenger transit because it is not connected to the national rail system; it simply fails to meet funding criteria by its failure to connect. See *id.*

NCRA is also very concerned about Mendocino's intent with any federal financial assistance which it receives from US DOT. As noted, NCRA is seeking to abandon and railbank its rail line from Willits north to Eureka, including all branch lines in the Eureka area. NCRA has actually filed a two-year out of service "notice of exemption" (NOE) abandonment proceeding at the Surface Transportation Board (STB), docketed as AB 1305X. Mendocino Railway has recently indicated that it is considering filing an "offer of financial assistance" ("OFA") to acquire some or all of the line proposed for abandonment. Mendocino Railway should explain how it will administer federal loan assistance on Fort Bragg to Willits while at the same time pursuing an OFA against NCRA's property north of Willits. None of that property will supply Mendocino Railway with its missing interconnection with the national freight rail network. Moreover, Mendocino Railway's proposed OFA action is contrary to the policies adopted by the California legislature which instead support protection of the Eel River from further rail use. The terrain along the Eel River is not suitable for rail use, and historically is believed to be the most expensive line in the country to operate. It was closed on its first day and its last by slides, and many rail cars are still trapped along the trackway and in the Eel River itself. In any event,

¹ Moreover, as it relates to tourist operations, Mendocino Railway's intended construction projects would be subject to California law. NCRA notes that on the basis of the lack of freight activities, inter alia, the City of Fort Bragg has filed a lawsuit against Mendocino Railway seeking a declaration that Mendocino Railway is not a common carrier, and thus is not exempt from local land use controls. (See Complaint, *City of Fort Bragg v. Mendocino Railway, et al.*, *Mendocino County* Sup. Court Case No. 21CV00850.) It is not appropriate for Mendocino Railway to claim federal preemption of state law for purely tourist rail purposes. Those are outside ICC Termination Act regulation.

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we are troubled by any federal financial assistance to Mendocino Railway which facilitates in any way an OFA against NCRA for any property north of Willits. It would appear at this time that any loan to Mendocino Railway might so facilitate that entity in making an OFA, and NCRA therefore opposes any such loan unless and until Mendocino Railway agrees it will not pursue an OFA north of Willits.

Even then, US DOT should know that the long term policy of the State is to favor abandonment and railbanking of the NCRA line from Eureka south to at- least Cloverdale, which is about 57 miles south of Willits. (See Cal. Gov. Code §§ 93000 et seq.) This was made clear through the enactment of legislation in 2019 (SB1029) and 2021 (SB69), which directs NCRA to railbank the inoperable segment through which Mendocino would need to pass to connect to the national rail system. NCRA's Board of Directors has formally supported these legislative enactments. The Mendocino Railway line has not been used for freight rail service for over 20 years and cannot be connected to the interstate rail network at any reasonable cost. It is currently susceptible to a successful adverse abandonment application. Because granting any federal assistance to Mendocino Railway ostensibly for resurrection of freight service would interfere with the State of California's future plans for railbanking the Willits to Cloverdale segment, NCRA opposes any federal financial assistance to Mendocino Railway at this time.

The entire route of the former Northwestern Pacific Railroad, which at one point was essentially all part of NCRA, has had a checkered history, with slides, tunnel collapses, trains washed into the environmentally sensitive Eel River, bankruptcies, and service disruption. We question whether the United States Department of Transportation wishes to promote continuation of that cycle, or whether it is better to find wiser and more environmentally propitious uses for federal rail financial assistance.

NCRA reserves the right to comment further should additional information, including information requested from USDOT, become available. In the meantime, it is not possible to imagine how Mendocino Railway can justify a RRIF loan for the line between Fort Bragg and Willits. The RRIF loan may not lawfully be granted.

Sincerely,



Elizabeth Coleman
General Counsel, North Coast Railroad Authority

Cc:

Amit Bose, Federal Railroad Administration, Administrator

Morteza Farajian, Build America Bureau, Executive Director

Roger Bohnert, Build America Bureau, Director of Outreach and Project Development