



North Coast Railroad Authority
419 Talmage Road, Suite M
Ukiah, Ca 95482

NORTH COAST RAILROAD AUTHORITY (NCRA) BOARD OF DIRECTORS REGULAR BOARD MEETING

Thursday, January 22, 2009~ **10:30**
Ukiah Valley Conference Center
200 South School Street, Ukiah
Mendocino County
Approved Minutes
Approved with Amendments

A. CALL TO ORDER

Chairman Hemphill called the meeting to order at 10:30 a.m.

B. ROLL CALL

Directors Present: Simonson, Colfax, Meyers, MacDonald, Ollivier, Clendenen (leaves at 2:20), Kelley (arrives at 12:00 p.m.), Chairman Hemphill

Directors Absent: Ziedrich

Also Present: Executive Director Mitch Stogner, Legal Counsel Christopher Neary, Project Manager Dave Anderson, Recording Secretary Heather Lindsteadt

C. AGENDA APPROVAL

Chairman Hemphill introduced Humboldt County Supervisor Clif Clendenen as the new NCRA Humboldt County Director.

Chairman Hemphill requested that Closed Session Item J.1 be discussed in Closed Session before Conduct of Business;

Upon Motion by Director MacDonald Agenda Items E. 1 and E. 2 were switched so that Item E.2 could be discussed first, seconded by Director Meyers approved unanimously **AYES: 7, NOES: 0, ABSENT: Kelley, Ziedrich.**

D. PUBLIC COMMENT

No Public Comment

J. CLOSED SESSION

Approved with amendments by NCRA BOD
On February 11, 2009

The Board convened into closed session at 10:37 a.m. to discuss one item of Anticipated Litigation.

- 1. CONFERENCE WITH LEGAL COUNSEL-Anticipated Litigation**
Government Code 54945.9(b); relating to demand served on NCRA on or about January 8, 2009 relating to an approval of a security agreement at the December 2008 meeting.

The Board reconvened into Open Session at 10:54 a.m.

Announcement out of Closed Session

The Board met with Counsel received information and gave direction on one matter of anticipated litigation related to a demand for “Cure and Correct.” No reportable action taken.

E. CONDUCT OF BUSINESS

- 2. Consideration of Demand to Cure and Correct Alleged Violation of the Brown Act Regarding the Security Agreement Approved in December 2008.**

Legal Counsel Neary reported on a “Cure and Correct” notice that was received by NCRA on January 6 from EPIC, Friends of the Eel River, and Baykeeper requesting that NCRA rescind the Board action taken on December 10, 2008 regarding approval of the Security Agreement between NCRA and NWP Co. Legal Counsel Neary said that among the reasons for the request was that the agenda description was too vague and did not allow the public to adequately understand the item that would be discussed. Legal Counsel also stated that NCRA had received a similar letter from the Mendocino Council of Governments (MCOG) on December 15.

Upon Motion by Director Meyers, seconded by Director Colfax, the Board rescinded the Motion made on December 10, 2008 that is recorded as follows:

“Motion by Director Kelley to approve the “Agreement for Financing of Obligations Incurred under Marin Consent Decree, Collateral Security for said Financing, Additional Collateral Security for Financing under the Bridge Financing and Security Agreement, Hereto Entered into and Other Provisions” as per staff recommendation which was seconded by Director Simonson. Motion to amend original Motion made by Director Meyers and accepted by Director Kelley, seconded by Director Simonson as follows: include the word “hereunder” in paragraph 3 and make approval of the Agreement for Financing of Obligations Incurred under Marin Consent Decree, Collateral Security for said Financing, Additional Collateral Security for Financing under the Bridge Financing and Security Agreement, Hereto Entered into and Other Provisions contingent upon Board approval of the Deed of Trust for the Ukiah Depot. Motion carried by the following vote: AYES: 6, NOES: 2, – Meyers, MacDonald ABSTAIN: 0, ABSENT 0.”

Director MacDonald said that he feels that the process did a great disservice to the Board and to the public by not gathering all of the information on the item so that everyone could make an informed decision.

Public Comments on Agenda Item E.2

Nadananda and Andrew Packard expressed appreciation for the Board's decision to rescind the motion and reminded the Board that they work for the Public and should strive to be more transparent in their dealings.

Phil Dow – Executive Director Mendocino Council of Governments (MCOG) said that he appreciated the Board action and said that he agreed with Director MacDonald that one of the main issues is that NCRA the process did a great disservice to its Board for not fully explaining the issues surrounding the Security Agreement.

Director Meyers thanked Phil Dow and Loretta Ellard for their continued support.

Motion to rescind the December 10, 2008 action as stated above, conditional upon NWP Co. support which was granted, publicly by Mr. Williams, carried unanimously by the following vote: **AYES:** 6, **NOES:** 0, **ABSTAIN:** Clendenen **ABSENT:** Kelley, Ziedrich.

1. Consideration of Resolution No 2009-01 Setting Public Hearing to Declare Portions of the Ukiah Depot Property Surplus to the Reasonable Needs of the Railroad.

Legal Counsel Neary updated the Board on the history surrounding the Ukiah Depot property in Ukiah. He said that half of the property is owned by NCRA in fee, and the other half is owned by Union Pacific (UP) and NCRA has a surface easement. He said that NCRA has began discussions with Union Pacific about the clean-up of the half owned by UP that is contaminated.

He said that each time NCRA attempts to use the property as collateral, or begin discussion about possible sale of the property, CalTrans raises objections because Caltrans believes the funds that purchased the property were state funds and therefore subject to a January 1996 Funds Transfer Agreement that restricts sale or use of the property as collateral without CTC approval. Legal Counsel Neary said that in February 1996 NCRA presented a plan to the CTC that stipulated that \$5.9 mil of the federal Q-Fund Loan be used to purchase the Ukiah Depot property.

Legal Counsel Neary said that he is in discussions with CalTrans and said that Resolution 2009-01 will allow NCRA to formally seek clarification on the CalTrans. He said once CalTrans issues a legal opinion on the matter the NCRA can revisit the issue in April or May.

Legal Counsel Neary said that Resolution 2009-01 attempts to set a hearing date on the issue so that all parties involved will have ample opportunity to review the associated documents. He said it also makes a preliminary determination that the Ukiah Depot can be declared surplus by the Board, and authorizes staff to research the issues surrounding the Ukiah Depot in preparation for another NCRA Board meeting to decide the issue.

Upon motion by Director MacDonald, seconded by Director Simonson the Board adopted Resolution 2009-01 Setting Public Hearing to Declare Portions of the Ukiah Depot Property Surplus to the Reasonable Needs of the Railroad subject to the changes made by Director MacDonald for discussion.

Director Meyers asked why NCRA would consider selling the property. He said that NCRA is faced with many issues that require funding such as compliance with two Consent Decrees, numerous lawsuits, the high-risk designee status that inhibits the ability to access TCRP funding,

and an FRA order that shut the rail line down along with numerous other issues. He said that the initial staff proposal to sell the Ukiah Depot property was inadequate and the issue will take months to finalize.

Director Meyers said that staff needs to present clear unbiased evidence on why NCRA can sell the Ukiah Depot. He said that the first paragraph of the Resolution mentions Del Norte County and asked that it be removed because the rail line does not travel through Del Norte County. He also said that “*other state and or federal agencies as may be appropriate*” and “*Attorney Generals Office*” be added to paragraph 3. He also asked a variety of questions related to liens and rental income on the Ukiah Depot Property which Executive Director Stogner addressed.

Public Comment on Item E.1

Phil Dow – Mendocino Council of Governments (MCOG) – Mr. Dow said that MCOG is concerned about grant funds that will be used to renovate the Depot Building and said that any sale or transfer of the Depot Property could affect availability of those grant funds. He said that it is important that NCRA Counsel thoroughly research the funding used to purchase the property.

Director Colfax asked Phil Dow if he would be able to help NCRA with research relative to the issues surrounding the Ukiah Depot prior to the public hearing.

Mr. Dow said that MCOG is the grant administering agency and said that NCRA agreed to and approved use of the grant funds for the renovation of the Depot Property. He said that it might appear that collateralization of the Depot Property is a gift of public funds and wanted to be sure that NCRA was made aware of MCOG’s issues early in the process.

Leishara Ward – Caltrans District 01 read into the record comments on behalf of Caltrans staff. She said that CTC, CalTrans staff, and CalTrans Legal all recommend that the Board not take action to declare the Ukiah Depot property until Caltrans has an opportunity to research whether sale of the property is legally permissible.

Chairman Hemphill asked if the word “preliminary” added throughout the document would satisfy CalTrans. He said that NCRA needs to begin discussions about possible sale of the Depot property but that the Board is not taking action to declare the property surplus at this meeting.

Tim Erickson – City of Ukiah Engineer and Director of Public Works – He said that the City of Ukiah has spent \$60,000 out of its General Fund toward the renovation of the Depot building and said that if Caltrans refuses to reimburse those funds or makes the city repay the \$15,000 that it has already been reimbursed it would create a serious situation. He said that the City of Ukiah is improving the facility on NCRA’s behalf and would like to be kept informed of any issues related to the property.

David Rapport – City of Ukiah Attorney – he said that NCRA and the City of Ukiah have an agreement dated June 25, 2002 which states that the city agrees to act as the fiscal agent and will not be responsible for any financial liability. He said that if the City loses the grant funding, the City would look to NCRA to repay the \$60,000. He said that the agreement also states that NCRA will retain ownership of the Depot and would assume the repairs once they are completed. He asked if NCRA’s statutory authority allows NCRA to incur private debt or sell property.

Chairman Hemphill adjourned the meeting to a 10 minute break at 12:30 p.m.

Chairman Hemphill reconvened the meeting at 12:40 p.m.

Mari Rodin – Ukiah Councilmember – Ms. Rodin said that she is pleased that NCRA is publicly discussing the Ukiah Depot property. She said that the property lies at the gateway to Ukiah and is an extremely important aspect of the future transit needs of Ukiah. She requested that the City of Ukiah be kept informed of any developments regarding the property.

David Keller – Mr. Keller said that there is no reason for the adoption of a resolution and the declaration of surplus could be made at a future hearing on the issue.

Legal Counsel read into the record the amendments made to Resolution 2009-01 by the Board. He also said that the hearing could be held in April or May depending on which would be held in Ukiah. He also said that he would change the title to reflect the amendments.

Upon motion by Director MacDonald, seconded by Director Simonson the Board adopted Resolution 2009-01: A Resolution Setting a Public Hearing For April 8, 2009 as to the Possible Disposition of the Ukiah Depot Property or Other Appropriate Action subject to amendments approved by the Board. Motion passed by the following vote: **AYES: 6, NOES: Meyers , ABSTAIN: Clendenen , ABSENT: Ziedrich**

3. Consideration of Security Agreement with Northwestern Pacific Railroad Company Securing Obligations related to the Marin Consent Decree.

Legal Counsel Neary said that the Security Agreement under consideration has some changes that arose from the December 10, 2008 Board meeting. He listed the changes as:

1. The title has been changed to “Marin Consent Decree Security Agreement”
2. Paragraph 4 recognizes that it is NCRA’s intention that the security will list the railcars as additional security and that the Depot Property will be used as additional security if the issues surrounding the property are resolved with CalTrans and CTC.
3. Paragraph 9 was added to outline key dates and events so there is no ambiguity to the three agreements between NCRA and NWP Co.

Upon Motion by Director Ollivier, seconded by Director Kelley, the Marin Consent Decree Security Agreement was approved for discussion.

Director MacDonald said he does not think NCRA has the authority to receive loans from a private entity. He said that Government Code §93000 only list two ways that NCRA can receive funding and neither of them are loans from private entities. He does not think NCRA can enter into the Security Agreement.

Legal Counsel Neary said that he distributed an Opinion to the Board on the NCRA’s ability to receive loans from outside organization because of implied powers outside of the express terms of NCRA’s enabling act.

Director MacDonald said that the Board should seek an outside legal opinion perhaps from the Attorney General’s Office. Director MacDonald said that if NCRA can get past the issue of whether or not it can even enter into the agreement, there is the issue of

collateral and whether collateral is necessary. He said the Operator should accept the risk of NCRA default because NWP Co. is jointly and severally responsible for costs associated with the settlement agreement. Director MacDonald suggested eliminating the Ukiah Depot from the agreement and just using the railcars as collateral with the understanding that NWP Co. will be undercollateralized until the issue surrounding the Ukiah Depot can be resolved.

Director Meyers said that the Opinion that Legal Counsel prepared contained no evidence that NCRA can offer real property to a private entity for collateral and suggested asking for an outside opinion before the matter is considered by the Board. He said the NWP Co. is responsible because the settlement agreement is guaranteed by NWP Co. as well as NCRA.

Director Kelley said that he recognizes that there are disagreements on whether or not NCRA can enter into loan agreements with private entities. He said that public agencies couple with private agencies quite often and said that he thinks that NCRA can enter into a loan agreement with NWP Co. He said that settlement of the Novato lawsuit was an important step for resumption of rail service, which is NCRA's ultimate responsibility.

Chairman Hemphill reminded the Board of the process for selection of the Operator. He said a major component of that selection was the Operators ability to provide advance funding for the repair projects and administrative costs associated with the repairs. He said that the NCRA was sued and that added an additional financial strain on the agency.

Legal Counsel Neary said that NCRA enabling legislation is very succinct. He said that he disagrees with Director Meyers and Director MacDonald assessment of NCRA's enabling legislation.

Public Comment in Item E.3

Phil Dow – Mendocino Council of Governments (MCOG). Mr. Sow said that the City of Ukiah received a federal grant for \$300,000 to renovate the Ukiah Depot property. He said that in order for those funds to continue to be utilized, the Depot Building needs to be preserved and retained in NCRA ownership. He said that collateralization of the property may encumber the federal grant if NCRA defaults. He requested that the Depot building along with parking and access to the Depot Building be removed as consideration as use as collateral or sale by NCRA for any purpose. He added that Mr. Stogner sent a letter in 2004 stating NCRA's support for the rehabilitation of the Depot building and that that position should not change.

Chairman Hemphill asked if the Security Agreement could be amended by removing any reference to the Ukiah Depot building.

Legal Counsel Neary said that NCRA can do a lot-line adjustment removing the Building from any possible sale or collateralization.

Phil Dow, Tom Erickson, and Leishara Ward said that they support removal of the Ukiah Depot building, parking, and access from the Security Agreement.

David Keller – Friends of the Eel River – Mr. Keller said that it would be premature to pledge the property as collateral because the property is in public ownership and is a real

estate transaction that requires more than a 4 page document. He said there is no official appraisal and there is no process for pay off or amortization of the loan, it does not describe the property or what the cost of the clean-up will be and that NCRA has prepared a 4 page security document and he feels it is defective.

David Colfax requested striking section 4-b. and 5 from the agreement.

John Williams thanked the Board for considering the Security Agreement. He said he is seriously undercollateralized and he asked for additional security. He thanked the Board for exploring the Ukiah Depot for possible use as collateral. He said he agrees to the removal of Item 4-b. and 5 from the Security Agreement. He added that he thinks that the goal of two Directors is to cut off the funding to NCRA.

Upon motion by Director Colfax, seconded by Director Simonson the original motion was amended to include removal of section 4-b. and 5 from the Security Agreement.

Upon Motion by Director Ollivier, seconded by Director Kelley, as amended by Director Colfax the Marin Consent Decree Security Agreement was approved with Section 4-b. and Section 5 removed and if it is appropriate add a signature line for Douglas Bosco, NWP CO. General Counsel. Motion carried by the following vote: **AYES:** Kelley, Ollivier, Simonson, Colfax, Hemphill **NOES:** MacDonald, Meyers, **ABSTAIN:** Clendenen, **ABSENT:** Ziedrich

Director Clendenen leaves at 2:20 p.m.

4. Approval of Promissory Note to Northwestern Pacific Railroad Company Relating to the Marin Consent Decree

Upon Motion by Director Kelley, seconded by Director Meyers, Promissory Note was approved for discussion.

Director Meyers asked that the incorrect dates be changed from January 21, 2009 and January 21, 2014 to January 22, 2009 and January 22, 2014 and also the last paragraph should read“*Marin Consent Decree Security Agreement* provisions.” A date and signature line for Legal Counsel should be added.

Upon Motion by Director Kelley, seconded by Director Meyers, the Promissory Note with amendments carried by the following vote: **AYES:** Kelley, Simonson, Ollivier, Colfax, Hemphill **NOES:** MacDonald, Meyers, **ABSTAIN:** 0, **ABSENT:** Ziedrich, Clendenen.

F. CONSENT CALENDAR

1. Approval of Minutes - Regular Board Meeting – December 10, 2008
2. Acceptance of Financial Statements – December 2008
3. Approval of Warrants Issued - Agency 787010 – December 2008
4. Approval of Warrants Issued - TCRP 787101 – December 2008
5. Approval of CalCard Statements – December 2008

Upon Motion by Director Meyers, seconded by Director Ollivier the Consent Calendar was approved with Director Meyers suggested changes to Item F. 1 which are hereby made part of

these minutes by reference. Motion approved unanimously **AYES: 7, NOES: 0, ABSTAIN:0, ABSENT:** Kelley, Clendenen.

G. STAFF REPORTS

1. Executive Director – Mitch Stogner

A. Draft EIR Schedule

Executive Director Stogner said that the Draft RRD EIR is undergoing the last review. He said the Marin Consent Decree changed some of the information included in the document which has delayed issuance of the document. He said he would keep the Board updated.

Director Meyers said that the Draft EIR is needed so that operations can resume.

B. Draft Trail Guidelines

Executive Director Stogner said that trail guidelines will be amended and presented to the Board in March or April.

Mike Kirn – Public Works Director City of Healdsburg said that the trail guidelines are critical to the City of Healdsburg. He said that the City of Healdsburg has a Beautification Agreement that was amended to include the trail along Foss Creek. He said that a developer has submitted an application for housing in Healdsburg and NCRA denied the application because the trail was included in the plan. He stressed that if NCRA does not comply with the existing lease agreement for the trail, the City of Healdsburg will take appropriate actions to make the Foss Creek Trail a reality.

John Williams said that the Beautification Agreement that Mr. Kirn is referencing did not contemplate the SMART train. He said the restriction along the right of way becomes very prohibitive and added that the trail will not be safe when SMART trains begin to run along with freight service.

C. SMART/NCRA Operating Agreement Meeting

Executive Director Stogner said that NCRA will meet with SMART on February 18 in Petaluma to begin discussing the operating agreement.

D. Economic Stimulus Funding

Executive Director Stogner said that he has been in contact with Congressman Thompson's office, Senator Feinstein's office and Senator Boxer's office. He said that NCRA could be eligible for freight rail infrastructure funds to repair the line from Windsor to Willits.

2. Project Manager – Dave Anderson

Mr. Anderson said that all of the contracts associated with the rehabilitation of the railroad from Windsor to Lombard have been awarded and all of the contractors have

received Notice to Proceed. He said that the Brazos Bridge and Haystack Landing Bridge repair work is underway by Summit Signal. He said that the frequent vandalism has impacted the scope of work for the project and will require change orders because those repairs directly effect the scope of work. He said that the vandalism needs to be addressed or it will cause unacceptable delays.

Mr. Anderson said that all projects are on schedule. He said that FRA has been contacted and he will be briefing FRA as the projects unfold.

Director Ollivier Leaves at 2:50 p.m.

3. Legal Counsel - Chris Neary

No Report

H. OPERATOR REPORT

1. NWP Co. – John Williams

No Report

I. MATTERS FROM THE BOARD

No matters

The Board convened into Closed Session at 2:50

Director Kelley Leaves at 2:55 p.m.

J. CLOSED SESSION

2. CONFERENCE WITH LEGAL COUNSEL - Existing Litigation

Government Code 54956.9 (a)(two cases)

a. NWPY v. NCRA – Arbitration Pending Before Resolution Remedies

b. Humboldt Baykeeper v. Union Pacific, CUE VI, NCRA; US District Court
Case # 06-02560 JSW

3. CONFERENCE WITH LEGAL COUNSEL - Deciding Whether or Not to Initiate Litigation

Government Code 54956.9(c)

K. ANNOUNCEMENT OUT OF CLOSED SESSION

The Board reconvened into Open Session at 3:10 p.m.

Legal Counsel reported that the Board met with Counsel received information and gave direction on 2 cases of existing litigation. No reportable action taken.

L. ANNOUNCEMENT OF NEXT MEETING

February 11, 2009, 10:30 a.m.

Approved with amendments by NCRA BOD
On February 11, 2009

Sonoma County
Healdsburg City Council Chambers

M. ADJOURNMENT

Chairman Hemphill adjourned the meeting at 3:12 p.m.