Case Nos. A139222, A139235 (consolidated for limited purposes)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION 5

FRIENDS OF THE EEL RIVER

Petitioner and Appellant,

v.

NORTH COAST RAILROAD AUTHORITY, ET AL.

Defendants and Respondents.

NORTHWESTERN PACIFIC RAILROAD COMPANY

Real Party in Interest

CALIFORNIANS FOR ALTERNATIVES TO TOXICS

Petitioner and Appellant,

v.

NORTH COAST RAILROAD AUTHORITY, ET AL.

Defendants and Respondents.

NORTHWESTERN PACIFIC RAILROAD COMPANY

Real Party in Interest

Appeal From a Judgment Entered in Favor of Respondents
Marin County Superior Court Case No. CIV 11-03605
Marin County Superior Court Case No. CIV 11-03591
Honorable Faye D'Opal, Judge; Honorable Roy O. Chernus, Judge

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APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF APPELLANTS; PROPOSED BRIEF OF *AMICI CURIAE* NATURAL RESOURCES DEFENSE COUNCIL PLANNING AND CONSERVATION LEAGUE, and SIERRA CLUB

[Caption Continued on Next Page]

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APPLICATION FOR LEAVE TO FILE AMICUS *CURIAE* BRIEF AND STATEMENT OF INTERESTS OF *AMICI* CURIAE

To the honorable justices of the California Court of Appeal, First Appellate District, Division 5:

Amici curiae Natural Resources Defense Council, Planning and Conservation League, and Sierra Club (collectively, "*amici*") make this application to file the accompanying brief pursuant to California Rules of Court, Rule 8.200, subd. (c)(2).[1] *Amici* believe that our brief will assist the Court by further clarifying why the trial court's decision runs counter to established law, and that the Court should reverse the trial court's decision. By applying the doctrine of judicial estoppel to prevent Respondents from evading their promises to comply with CEQA, this Court would uphold the integrity of the judicial process.

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[1] UCLA Law students Donald Ristow and Gregory Bonett contributed significantly to this brief. No party or any counsel for a party in the pending appeal authored the proposed amicus brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief, and no person or entity made a monetary contribution intended to fund the preparation or submission of the brief, other than the amicus curiae, its members, or its counsel in the pending appeal.

Amicus Natural Resources Defense Council ("NRDC") is a not-for-profit organization that is incorporated in New York with offices in California. NRDC has over 330,000 members nationwide with more than 60,000 members in California. NRDC uses law and science to protect the planet and to ensure a safe and healthy environment for all living things. This case is important to NRDC because promoting government transparency and accountability within the California Environmental Quality Act, Public Resources Code § 21000 et seq. ("CEQA") process is critical to guaranteeing that the environmental impacts of projects are disclosed so that all people can influence decisions that affect their environment. NRDC frequently engages in the CEQA process as part of its advocacy efforts including for projects that involve government funding or rail operations.

The Planning and Conservation League (PCL) was formed in 1965 by individuals who were concerned about the uncontrolled development taking place throughout the state and the destruction that accompanied it. PCL was thus created to remedy the state's fast paced development. Today, PCL continues to work on the leading challenges facing our state, such as advocating for land-use planning focused on our urban cores that will transform neighborhoods into thriving, livable and healthy

communities. PCL also partners with hundreds of California organizations, to provide an effective voice in Sacramento for sound planning and responsible environmental policy at the state level. For more than 40 years, PCL has fought to develop a body of environmental laws that is the best in the United States. Its staff works closely with legislators to promote environmental legislation that protects and improves the California environment. PCL was the first organization solely devoted to making California a better place to live through enacting environmental protections. One of its greatest accomplishments was the enactment of CEQA, the most powerful environmental law in the state. PCL helped draft this critically important measure. PCL continues to advocate for the integrity of CEQA to ensure it remains a vibrant tool to empower the public to participate in decisions that impact their communities and environment.

The Sierra Club is a national nonprofit organization of approximately 1.3 million members and supporters dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful

means to carry out these objectives. The Sierra Club has more than 153,000 members in California as part of thirteen different chapters and dozens of local groups. Sierra Club activists frequently participate in proceedings relating to improving environmental quality in California and nationally. The Sierra Club is particularly concerned about upholding the integrity of CEQA by ensuring that government agencies exercise the full extent of their legal authority to ensure protection of the environment and public health. Because this lawsuit concerns an agency's attempt to avoid CEQA compliance, it therefore is of special interest to the Sierra Club and its members.

The decision of this Court will directly affect *amici*, and *amici* may assist the Court's decision through their unique perspectives. Accordingly, *amici* respectfully request the permission of the Justices to file this *amici curiae* brief.

Dated: March 13, 2014

By: _____

Sean B. Hecht
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AMICI CURIAE BRIEF

I. Introduction

The North Coast Railroad Authority has promised repeatedly, in both administrative and judicial proceedings, that it will comply with the California Environmental Quality Act ("CEQA") before taking action to re-open a controversial rail line between Marin County and Humboldt Bay. These promises, formally adopted by the operator and beneficiary of the line, the Northwestern Pacific Railroad Company, enabled the NCRA to acquire $31 million in public funding. Now, the NCRA claims that that the legal adequacy of its compliance with CEQA is unreviewable because of the preemptive effect of federal laws. Judicial estoppel exists precisely to prevent these changes in position. This Court should use it to reject the NCRA's attempt to escape its long-affirmed commitments.

II. Respondents' Actions Fit Squarely Within the Judicial Estoppel Doctrine

The NCRA and NWP Co. ("Respondents") engaged in exactly the type of conduct that judicial estoppel was designed to prevent. The NCRA promised the California Transportation Commission ("CTC") that it would comply with CEQA as an explicit condition that allowed it to receive millions in state taxpayer transportation funding to renovate and

reopen its rail line.[2] Since the CTC and other state agencies are prohibited from funding projects that do not comply with CEQA (Pub. Res. Code § 21102), this promise was crucial to the CTC's decision to provide funding. The lessee operator of the line, NWP Co., similarly bound itself to CEQA compliance when it signed its lease with the NCRA. (AR: 13:6731.) They reaffirmed this commitment in another court proceeding. But both entities now argue in court that the NCRA need not comply with CEQA. NCRA's and NWP Co.'s changes in position satisfy each element necessary to establish judicial estoppel. Further, applying judicial estoppel to prevent Respondents from asserting preemption before this Court fits squarely within the background policies underlying the doctrine: protecting the integrity of the judicial process and ensuring fairness to those affected by the change in position. Allowing the Respondents to make the preemption argument would not only create confusion among the courts about when judicial estoppel should be applied, but would set precedent for others to obtain agency funding based on false promises at the expense of the state taxpayers.

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[2] Including $2.4 million dollars in furtherance of satisfying the CEQA compliance condition. (AR:13:6795-96.)

III. **Respondents' Actions Meet the Elements of Judicial Estoppel**

At its heart, judicial estoppel is a simple doctrine: a party cannot take one position to its advantage, and then assert the opposite position to gain a second advantage. (*People ex rel. Sneddon v. Torch Energy Services, Inc.*, 102 Cal. App. 4th 181, 189 (2002) ("*Torch*".) State and federal courts adopted and applied the doctrine across the country in the last century because they didn't like being manipulated: allowing a party to argue the validity of a condition to one governmental body, but then attack it before the court, perverted the integrity of the judicial process, and was substantively unfair for those relying on the initial positions. (*People v. Castillo*, 49 Cal. 4th 145, 155 (2010).) In order to bring clarity to the application of the doctrine, in 1997, the Second Appellate District applied a five-element test to determine whether judicial estoppel was appropriate. (*Jackson v. County of Los Angeles*, 60 Cal. App. 4th 171, 183 (1997).) The California Supreme Court adopted this test. (*Aguilar v. Lerner*, 32 Cal. 4th 974 (2004).)

In *Jackson v. County of Los Angeles*, the court adopted and applied the following test, which, when satisfied, judicially estops the party changing positions:

- "The same party has taken two positions;

- The positions were taken in judicial or quasi-judicial administrative proceedings;
- The party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true);
- The two positions are totally inconsistent; and
- The first position was not taken as a result of ignorance, fraud, or mistake."

(*Jackson*, 60 Cal. App. 4th at 183.) [3]

Federal courts apply the same elements identified in *Jackson* in judicial estoppel cases. For example, the Ninth Circuit has applied a similar test to find claims or defenses barred by judicial estoppel in appropriate circumstances. (See, e.g., *Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC.*, 692 F.3d 983, 1000 (9th Cir. 2012).)

The facts of *Jackson*, the landmark judicial estoppel case in this state, are similar to those at issue here. In *Jackson*, the plaintiff brought an Americans with Disabilities Act ("ADA") claim against his employer for terminating his employment, arguing that he could perform his job as a safety officer. (*Id*. at 177.) Previously, however, the plaintiff had been injured on the job, and filed a workers' compensation claim. (*Id.* at 175-76.) The plaintiff and his employer entered into an agreement concerning

[3] Formatting altered for clarity, but the content remains identical.

the claim. (*Id.* at 176-77.) The agreement stipulated that the plaintiff had sustained a "permanent" injury that required a stress-free environment. (*Ibid.*) The agreement was then submitted to an administrative worker's compensation judge, who approved the award and stipulations. (*Id.* at 177.)

The court reasoned that because the plaintiff had agreed that he needed a stress-free working environment in an agreement approved by an administrative judge, he was prevented from arguing in his ADA claim that he could perform the stress-laden safety officer job. (*Id.* at 190.) Of particular relevance for this Court is what specifically satisfied the second and third elements in *Jackson*: The nature of the forum for the first position, and what constitutes success. The court reasoned that a stipulation in an administrative agreement satisfied the second element. (*Ibid.*) The court further reasoned that because the agreement was adopted by the administrative law judge (i.e. went into effect), the plaintiff was successful in asserting it for the purposes of the third element. (*Ibid.*)

Courts have applied this doctrine to prevent parties from making claims very similar to those the Respondents make here. In *People ex rel. Sneddon v. Torch Energy Services, Inc.*, 102 Cal. App. 4th 181 (2002)

("*Torch*"), the Second Appellate District confronted a change in a party's position directly analogous to Respondents' change in position here, and affirmed the trial court's application of judicial estoppel to render a federal preemption defense invalid. (*Torch*, 102 Cal. App. 4th at 190.) The case arose out of the well-known 1997 Santa Barbara oil spill. In the wake of the disaster, the County of Santa Barbara filed an action seeking an injunction against the responsible energy company to require the company to comply with permit conditions relating to safety. (*Id.* at 186.) These permit conditions were part of an administrative agreement with the County, which the energy company agreed to in order to begin drilling off the coast. (*Id.* at 184.) When the County filed the action, the energy company responded by raising the defense of federal preemption. (*Id.* at 185.) The oil company argued that federal oil pipeline laws rendered the permit conditions invalid. The *Torch* court agreed that the federal Pipeline Safety Act expressly preempts the field of pipeline safety regulation. (*Id.* at 188.) However, the court held that judicial estoppel prevented the company from asserting that defense. (*Id.* at 190.)

The court explained that the doctrine applies to statements in administrative proceedings and agreements with administrative agencies, (*Id.* at 188), just as it did in *Jackson*. Federal courts also apply judicial

estoppel when the prior statement was made before an administrative agency. *See American Mfrs. Mut. Ins. Co. v. Payton Lane Nursing Home, Inc.*, 704 F. Supp. 2d 177, 193 (E.D.N.Y. 2010) ("It is well established that the doctrine of judicial estoppel applies equally where the prior statements were made to administrative agencies, *i.e.*, in administrative or quasi-judicial proceedings.").) In *Torch*, because the company had agreed to comply with safety guidelines in its permit to conduct oil operations, the court reasoned that it was then precluded from arguing before the court that those permit conditions did not apply. (*Id.* at 190.) The court noted that "[t]he doctrine may be used to estop a party from asserting federal preemption," (*Id.* at 189), and concluded that any other holding would be rewarding the company for "cynical gamesmanship," and would allow the company to escape long-established commitments. (*Ibid.*)

The conduct of the NCRA, as well as real party in interest NWP Co., parallels the conduct in *Torch*, and likewise meets each judicial estoppel element. First, it is unassailable that the Respondents have taken two different, inconsistent positions. The NRCA took the first position in an administrative agreement with the California Transportation Commission to comply with CEQA ("Master Agreement"). Specifically,

the Master Agreement provided that, as a "special requirement" to obtain funding, the NCRA would complete CEQA review before expending funds for any project that might significantly affect the environment. (AR:16:8563.) NCRA reiterated this commitment in several follow-up agreements with the Commission. (*See, e.g.*, AR:13:6801.) As an explicit condition to lease the line, NWP Co. consented to the funding condition requiring CEQA compliance. (AR:13:6731.) As the NCRA explained later in court, the lease agreement "…has a condition precedent that NCRA comply with CEQA prior to NWPCo. taking possession of the property…" (App:5:48a:1414.)[4]

The NCRA again took the position that CEQA applied in a proceeding before the Marin County Superior Court in *City of Novato v. NCRA*, Marin County Superior Court Case No. CV 074645 ("*Novato*"). (App:13:100:3644, Paras. 44-46.) In *Novato*, the Executive Director of the NCRA stated explicitly before the court that the project had:

"…potentially significant environmental consequences for resumption of operations on the Northwestern Pacific Line. This determination *required* the preparation of an Environmental Impact

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[4] Citations to Appellants' Consolidated Appendix In Lieu of Clerk's Transcripts appear as "App:[volume]:[tab]:[page]."

Report, which is currently underway." (*Ibid.* (emphasis added).) Moreover, in a consent decree between the *Novato* parties—including both the NCRA and NWP Co.—the Respondents agreed that "in deciding whether to approve and undertake the performance of any and all components of the work, NCRA shall comply with CEQA…" (AR:17:8911.)

Finally, perhaps the most straightforward example of the NCRA's position that CEQA applies is its very attempt to comply with CEQA: the NCRA issued a draft and final Environmental Impact Report in furtherance of its long-established duty to comply with CEQA, and the NCRA Board of Directors certified that EIR at a public meeting on the matter. (AR:1:18-23.) Essentially, for more than a decade, the Respondents made clear to anyone that would listen that they were complying with CEQA. In fact, to this day the NCRA is still publicly advertising its CEQA compliance in bold, red print at the front header of its website.[5] Before this court, however, the Respondents have taken the position that they need not comply with CEQA due to federal

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[5]*See* North Coast Rail Authority, http://www.northcoastrailroad.com/ (last visited March 12, 2014). *See also* Appendix, *infra*, for a recent screen capture of the website.

preemption. Thus, it is unassailable that the Respondents have taken two positions on the application of CEQA here.

Second, these positions were taken in judicial or quasi-judicial administrative proceedings. As established above, the Respondents asserted that they were bound to comply with CEQA in (1) an administrative agreement between the NCRA and the CTC in furtherance of the CTC's formal decision to provide funding for NCRA's project, (2) the lease agreement between the NCRA and the NWP Co., which formally incorporated the underlying CEQA condition, (3) statements by the NCRA before the *Novato* court, and (4) commitments by both the NCRA and NWP Co. in the consent decree approved by the *Novato* court.

The agreement to comply with CEQA in the administrative agreement with the CTC alone is sufficient to satisfy this element. Just as a stipulated agreement approved by an administrative judge in *Jackson* was sufficient (*Jackson*, 60 Cal. App. 4th at 190), so too is the funding agreement between the NCRA and the CTC, formally approved by the CTC. Similarly, just as the permit condition was sufficient in *Torch* (*Torch*, 102 Cal. App. 4th at 190), so too is the special condition in the agreement between the NCRA and the CTC. The statements before the

court in *Novato* and in the *Novato* court-approved consent decree similarly would be sufficient to satisfy this element of judicial estoppel.

This case also meets the third element of judicial estoppel: the Respondents were successful in asserting the first positions. In *Torch*, the court relied on the fact that the County of Santa Barbara approved the permit that included the relevant condition. (*Torch*, 102 Cal. App. 4th at 190.) The special condition in the agreement here is exactly analogous to the permit condition in *Torch*. The CTC not only approved the Master Agreement, but over the past decade allocated $31 million to the NCRA pursuant to it. (AR:16:8579.) But for agreeing to comply with CEQA, the NCRA would not have received that funding. Similarly, the NCRA's and NWP Co.'s promises in the *Novato* case meet the third factor, because they were "adopted" by the court when it approved the consent decree—which included binding commitments to comply with CEQA going forward. (AR:17:8911.)

Fourth, the two positions are totally inconsistent for the purposes of the applicable test. In *Torch*, the court found that agreeing to comply with a safety condition in an oil-drilling permit and then arguing that it was federally preempted from complying were sufficiently inconsistent to grant judicial estoppel. (*Torch*, 102 Cal. App. 4th at 190.) NCRA's

conduct is exactly parallel. It first agreed to comply with CEQA as a condition in an agreement, and is now arguing that it is federally preempted from doing so. Additionally, the commitments by the Respondents in the *Novato* consent decree and before the court are totally inconsistent. Taking the position that CEQA is "required" (App:13:100:3644, Para. 46), and the project "shall be subject to CEQA," (AR:17:8911), and then asserting that CEQA compliance is prohibited, are mutually exclusive positions that cannot be reconciled.

Lastly, the Respondents' positions were not taken under any circumstances that could excuse the first position. In *Jackson* and *Torch*, by simply knowingly entering into the first agreement, the parties effectively estopped themselves from reversing course before a court on what was said in those agreements. (*Jackson,* 60 Cal. App. 4th at 190; *Torch*, 102 Cal. App. 4th at 190.) Similarly, the NCRA and NWP Co. had knowledge of their legal responsibilities and commitments, and repeatedly asserted that they would comply with CEQA in order to obtain the millions of dollars from state taxpayers they acquired.

Therefore, the Respondents' actions fit squarely within the judicial estoppel doctrine applied in California and federal courts. All elements are satisfied on their face. Further, the court in *Torch* found judicial

estoppel on parallel facts—a special condition in an administrative agreement, followed by an argument that compliance with the special condition was impossible due to preemption. To hold that judicial estoppel does not apply would be an express contravention of the outcome in *Torch*, creating confusion as to when the application of the doctrine is appropriate.

IV. Applying Judicial Estoppel to the Respondents' Conduct Would Serve the Policy Goals Underlying Judicial Estoppel

Two distinct policy goals underlie judicial estoppel in California and in federal courts. In simple terms, the first goal is to protect the court from manipulation, and the second is to protect those adversely affected by it. The same general language frames each decision, guiding courts in their application of the doctrine: "to maintain the integrity of the judicial process and to protect the parties from opponents' unfair strategies." (*See, e.g.*, *People v. Castillo*, 49 Cal. 4th 145, 155 (2010). In the federal context, *see Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC.*, 692 F.3d 983, 993 (9th Cir. 2012). The Respondents' conduct frustrates these goals to such an extent that judicial estoppel is especially warranted here.

A. The Respondents' Conduct Infringes on the Integrity of Judicial and Administrative Process

Allowing the Respondents to argue for federal preemption of CEQA would undermine the integrity of judicial and administrative process. To hold otherwise would be to permit the NCRA to make a binding commitment for substantial gain—$31 million dollars worth, to be precise—yet then argue that federal law precludes that commitment when facing a claim that it has failed to perform. Allowing parties to tell two stories to two different government bodies to obtain two separate gains would denigrate the integrity of the legal apparatus of this state. The doctrine of judicial estoppel exists as a check against this gamesmanship, and would bolster the integrity of this court if applied here.

B. The Respondents' Change in Position is Unfair to Other Parties and to the Public

Judicial estoppel is also applied to protect the parties, the public, and the court from the use of the court as a forum for unfair strategies. One recent case applying judicial estoppel described the principle more broadly: "This doctrine rests on the principle that litigation is not a war game unmoored from conceptions of ethics, truth, and justice." (*Ferraro v. Camarlinghi*, 161 Cal. App. 4th 509, 558 (2008).) Although fairness is

a core goal of the doctrine, application does not require a specific showing of detrimental reliance by the opposing parties in the litigation. Instead, courts look to unfairness in a more general sense. This is a major distinguishing feature of judicial estoppel and equitable estoppel—the latter an entirely separate doctrine that focuses on the relationship between the parties, requiring privity between the parties, a showing of reasonable reliance on the opponent's conduct, and actual detriment. (*Jackson*, 60 Cal. App. 4th at 183.) Instead, judicial estoppel concerns itself more broadly with unfairness and maintaining judicial integrity.

The NCRA's argument that preemption prevents it from performing legally adequate CEQA review is not only unfair to the parties in this case, but to the people of this state who exchanged $31 million of their tax dollars for a rail line between Marin County and Humboldt Bay that adequately mitigates environmental impacts along the line, including impacts to the biologically-sensitive Russian and Eel Rivers. The California Transportation Commission granted this funding on the condition that the NCRA study what method of reopening the line would be the most environmentally protective, and how to mitigate both construction-related and long term impacts on sensitive, slide-prone river banks and other resources.

Judicial estoppel's function is to prevent such an unfair outcome, where the elements of the doctrine have been met. (*Jackson*, 60 Cal. App. 4th at 183.) And here, Respondents' conduct falls squarely within the doctrine, similar to the situation in *Torch*. While the Respondents argue that judicial estoppel should not apply here because of an alleged "rule" that "when a public agency prepares an EIR that it later determines is unnecessary, it is not estopped from arguing the EIR is not required" (Respondents' Brief at 67-68), or should not apply because judicial estoppel should apply only in extraordinary circumstances or where a party has made a specific factual misrepresentation, Respondents rely on inapposite cases, including *Del Cerro Mobile Estates v. City of Placentia*, 197 Cal.App.4th 173 (2011), where equitable estoppel, rather than judicial estoppel, was at issue. (*Id.* at 179-180.)

Allowing the NCRA to argue before this court that it is preempted from complying with CEQA would allow it to repudiate its deal with the state, and with no consequence. It would allow the NCRA to retain all the benefits of promised CEQA compliance—millions in state funding, the public perception of environmental stewardship and attendant reduction in public environmental resistance, but none of the burdens associated with thorough, legally adequate CEQA review. Judicial

estoppel exists to prevent this. In the past it has prevented plaintiffs like those in *Jackson* from realizing the gains of a workers' compensation disability claim, and then demanding employment by claiming they aren't disabled. It has prevented companies like those in *Torch* from agreeing to permit conditions to gain permission to drill for oil, and then later refusing to comply with those conditions due to federal preemption. Here, it should prevent NCRA from escaping its well-funded commitments because it prefers not to confront the mitigation requirements that may loom on the horizon.

C. A Failure to Judicially Estop the NCRA from Changing its Position Creates Other Broad, Negative Policy Implications

A holding that the Respondents are not judicially estopped from asserting federal preemption would not only fall outside the conventional judicial estoppel doctrine, but would create a problematic loophole for those contracting with state agencies. If the NCRA is successful in avoiding judicial estoppel and establishing federal preemption, then its path creates a clear blueprint for future fraud upon the taxpayers of the state. Just as the NCRA entered into an agreement for transportation funding with the California Transportation Commission, similarly-situated parties in the future can secure taxpayer funds on the condition of compliance with state statutes and conditions, knowing that those

conditions can be avoided through preemption at a later date. The party can then perform little or no compliance with those conditions, just as the NCRA did when it issued a legally inadequate Environmental Impact Report in feigned compliance with the condition. Then, as soon as that compliance becomes inconvenient, the party can escape the duty, just as the NCRA seeks to do before this court. Setting up such an open-ended escape clause to agreements with public agencies cannot be the right outcome in this case.

By contrast, invoking judicial estoppel in this case will allow parties to contract to comply with CEQA in a meaningful way. Allowing CEQA challenges to go forward on the merits in a case such as this one will promote mutually beneficial agreements to further cooperation between agencies. Since the CTC and other state agencies generally may not fund projects that do not comply with CEQA (Pub. Res. Code § 21102 (prohibiting state agencies from "authorizing funds for expenditure for any project … which may have a significant effect on the environment unless such authorization is accompanied by an environmental impact report"), rendering such agreements unenforceable may interfere with potentially beneficial projects. And it is particularly important to allow citizen challenges to allege noncompliance, in order to

ensure that these contracts are meaningful. Public agencies will frequently lack the resources and expertise necessary to ensure adequate compliance. Significantly, a funding agency may have little incentive to delay a project it funded by challenging the adequacy of the project's EIR. *See Serv. Employees Inter. Union, Local 99 v. Options--A Child Care & Human Servs. Agency*, 200 Cal. App. 4th 869, 880 (2011) (finding that members of the public had standing to enforce a contract provision requiring compliance with the Brown Act, in part because "the enforcement of such a provision in a government contract should not depend on action by the public agency, which may have little incentive to enforce the provision.") *Amici* are aware of no other case in which the CTC or another state funding agency has attempted to enforce judicially the requirement of CEQA compliance. Thus, in cases where such enforcement is necessary, it falls to nonprofit organizations such as *amici* and Appellants here.

Finally, failing to judicially estop the NCRA in this case effectively allows it to pick and choose which elements of state law it wants to follow, and which it wants to ignore through preemption. By arguing that the Interstate Commerce Commission Termination Act ("ICCTA") preempts its obligation to comply with CEQA, and at the

same time accepting the benefit of state funding and other state-law-derived benefits, the NCRA seeks to ignore the portions of state law that inconvenience it, while following any portions of state law that benefit it. The U.S. Supreme Court recently rejected an entity's attempt to pick and choose which state laws it wanted to follow through tactical assertions of federal preemption. (*Dan's City Used Cars, Inc. v. Pelkey*, 133 S.Ct. 1769, 1781 (2013) ("In sum, Dan's City cannot have it both ways. It cannot rely on New Hampshire's regulatory framework as authorization for the sale of Pelkey's car, yet argue that Pelkey's claims, invoking the same state-law regime, are preempted.").) Judicial estoppel is an effective remedy to prevent parties like the NCRA from improperly manipulating our federalist system. To refuse to apply it would be unfair to the taxpayers, unfair to the litigants, and demeaning to the integrity of the judicial process.

V. **Conclusion**

For the foregoing reasons, the Court should reverse the trial court's decision. By applying the doctrine of judicial estoppel to prevent Respondents from evading their promises to comply with CEQA, this Court would uphold the integrity of the judicial process.

Dated: March 13, 2014

By: _____

Sean B. Hecht
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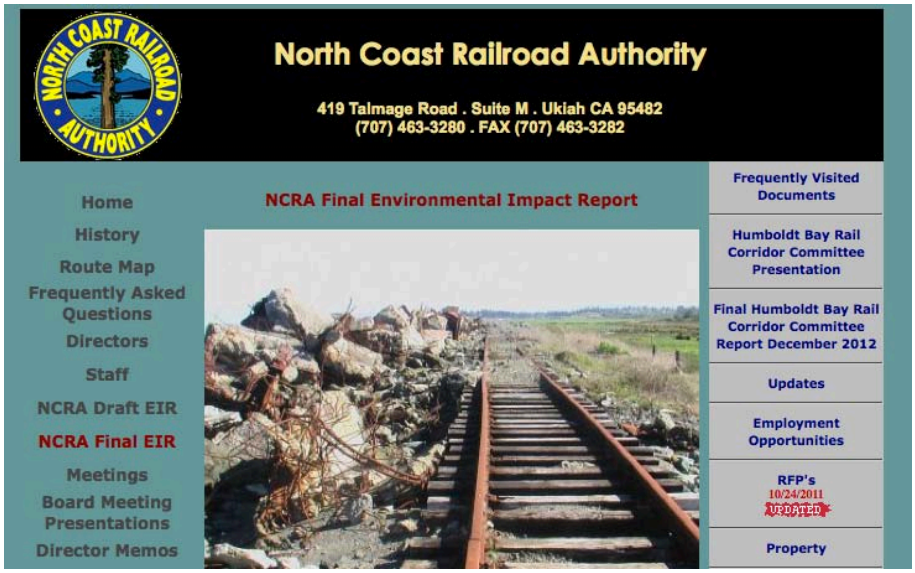
Appendix



North Coast Rail Authority, http://www.northcoastrailroad.com/ (last visited March 12, 2014)

CERTIFICATION OF WORD COUNT

I certify that the total word count of this brief, including footnotes, is 4,904 words, as determined by the word count of the Microsoft Word program on which this brief was prepared.

Dated: March 13, 2014 By: _____

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DECLARATION OF SERVICE BY U.S. MAIL

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen and am not a party to the within action; my business address is 405 Hilgard Avenue, Los Angeles, California 90095.

On March 13, 2014, I served the foregoing document described as:

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF APPELLANTS; PROPOSED BRIEF OF *AMICI CURIAE* NATURAL RESOURCES DEFENSE COUNCIL PLANNING AND CONSERVATION LEAGUE, and SIERRA CLUB

on the interested parties listed on the attached service list, by U.S. Mail. I am readily familiar with the UCLA Environmental Law Clinic's practice of collection and processing correspondence for U.S. Mail. It is deposited with the U.S. Mail on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

Executed on March 13, 2014, at Los Angeles, California.

_____

Jeanne Fontenot

SERVICE LIST

Friends of the Eel River v. North Coast Railroad Authority, et al.

Consolidated for Limited Purposes with

Californians For Alternatives To Toxics v.
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Case Nos. A139222, A139235
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