

Case No. S222472

OCT 13 2015

In the Supreme Court of the State of California

Frank A. McGuire Clerk

FRIENDS OF EEL RIVER AND CALIFORNIANS FOR ALTERNATIVES TO TOXICS, ^{Deputy}
Plaintiffs and Appellants,

vs.

NORTH COAST RAILROAD AUTHORITY AND BOARD OF DIRECTORS OF
NORTH COAST RAILROAD AUTHORITY,
Defendants and Respondents,

NORTHWESTERN PACIFIC RAILROAD COMPANY,
Real Party in Interest and Respondent.

After a Decision by the Court of Appeal
First Appellant District, Division One, Case Nos. A139222, A139235

Appeal from Superior Court of the State of California for the
County of Marin, Case Nos. CIV11-3605, CIV11-03591
The Honorable Roy Chernus, Presiding

**RESPONDENTS' AND REAL PARTY'S OBJECTION TO
PETITIONER'S THIRD REQUEST FOR JUDICIAL NOTICE**

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I.

**OBJECTION TO PETITIONER'S
REQUEST FOR JUDICIAL NOTICE**

The North Coast Railroad Authority (“NCRA”) and Northwestern Pacific Railroad Company (“NWPCo”) (together, “Respondents”) jointly submit this objection to Petitioner Californians for Alternatives to Toxics’ (“Petitioner”) third request for judicial notice.

Petitioner requests that the Court take judicial notice of the contents of a trial court brief filed by the California Attorney General (the “Trial Court Brief”) in *Fast Lane Transportation, Inc. v. City of Los Angeles* (“*Fast Lane*”), which is not properly subject to judicial notice. (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 113 [“Although the *existence* of a document may be judicially noticeable, the truth of the statements contained in the document and its proper interpretation are not subject to judicial notice if those matters are reasonably disputable.”].)

Even if judicial notice of the contents of a document was proper, the *Fast Lane* case is unrelated, factually distinguishable, and thus irrelevant. Because the Trial Court Brief concerns a case that is irrelevant to the one presented here, it too is irrelevant.

The Trial Court Brief does not address the conduct challenged by Petitioner here and is outside the administrative record. (See, e.g., *Coastside Fishing Club v. Cal. Fish & Game Comm'n* (2013) 215 Cal.App.4th 397, 429 [denying judicial notice of materials on the basis that they are “irrelevant or unnecessary” to the court’s resolution of the issues]; *Ballona Wetlands Trust v. City of L.A.* (2011) 201 Cal.App.4th 455, 475 fn. 10 [denying a request for judicial notice because there was “no extraordinary circumstances to justify the consideration of such extra-record evidence”].)

Specifically, the Trial Court Brief concerns the proposed lease of land from the Port of Los Angeles by BNSF Railway Company for the construction of the Southern California International Gateway Project (SCIG), an intermodal facility. Containers would be offloaded from ships at the Port and driven by truck to SCIG, where they could be transferred to rail for distribution.

That *Fast Lane* involves a rail carrier, BNSF, does not make it analogous to the facts of the case here. *Fast Lane* is more similar to *Florida East Coast Ry. Co. v. City of West Palm Beach* (11th Cir. 2001) 266 F.3d 1324. In *Florida East Coast Railway*, the court determined that zoning regulations preventing a private aggregate mining company from operating a mine on land leased from a rail carrier were not preempted by ICCTA because the state regulations were not being applied to a rail carrier or rail

transportation. (*Id.* at pp. 1331–32 & fn. 5; see *Native Village of Eklutna v. Alaska R.R. Corp.* (Alaska 2004) 87 P.3d 41, 57 [application of zoning ordinance to a quarry to be operated by rail carrier not preempted because the zoning ordinance would not interfere with rail transportation].)

Similarly, *Fast Lane* appears to concern the Port’s decision to enter into a lease for a building and possible regulation of that building rather than regulation of an operating rail carrier on an existing rail line.

Unlike *Fast Lane*, Petitioner here challenges NCRA’s and NWPCo’s operation of the existing Russian River Division of the Northwestern Pacific Railroad Line, an action at the core of the Surface Transportation Board’s jurisdiction. (49 U.S.C. § 10501.) To the extent Petitioner argues that both cases involve a lease, NCRA entered into a lease with NWPCo in 2006 and, thus, that decision is well beyond the challenge before this Court, which concerns an EIR certified in 2011.

The position taken by the Attorney General in a dissimilar and unrelated trial court proceeding is irrelevant to the Court’s consideration of this case and, therefore, the Trial Court Brief is inadmissible. (Evid. Code § 350 [“No evidence is admissible except relevant evidence.”].) Respondents object to Petitioner’s request for judicial notice and ask the Court deny Petitioner’s request.

Dated: October 13, 2015

COX, CASTLE & NICHOLSON LLP

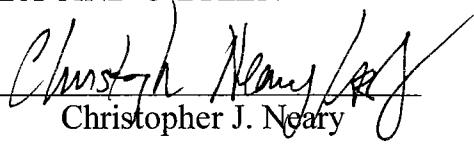
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**CERTIFICATE OF SERVICE
DECLARATION OF SERVICE BY MAIL**

CASE NAME: *Friends of the Eel River, Californians for Alternatives to Toxics
v. North Coast Railroad Authority, et al.*

CASE NUMBER: Supreme Court of California Case No. S222472

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is 50 California Street, Suite 3200, San Francisco, California 94111.

On **October 13, 2015**, I served the foregoing documents described as:

- 1) **RESPONDENTS' AND REAL PARTY'S OBJECTION TO PETITIONER'S THIRD REQUEST FOR JUDICIAL NOTICE**

in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

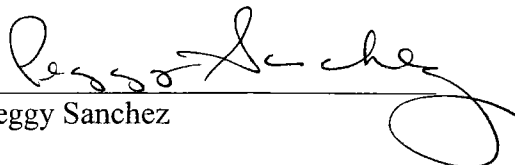
On the above date:

- BY U.S. MAIL:** The sealed envelope with postage thereon fully prepaid was placed for collection and mailing following ordinary business practices. I am aware that on motion of the party served, service is presumed invalid if the postage cancellation date or postage meter date on the envelope is more than one day after the date of deposit for mailing set forth in this declaration. I am readily familiar with Cox, Castle & Nicholson LLP's practice for collection and processing of documents for mailing with the United States Postal Service and that the documents are deposited with the United States Postal Service the same day as the day of collection in the ordinary course of business.
- BY ELECTRONIC MAIL DELIVERY:** By causing a true copy of the within documents to be mailed electronically to the offices of the addressees set forth below, on the date set forth above.

I hereby certify that the above document was printed on recycled paper.

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

Executed on **October 13, 2015**, at San Francisco, California.


Peggy Sanchez

SERVICE LIST

**CASE NAME: *Friends of the Eel River, Californians for Alternatives to Toxics
v. North Coast Railroad Authority, et al.***

<p><u>Court of Appeal First Appellate District, Division Five</u> Clerk of the Court 350 McAllister Street San Francisco, California 94102 <i>(Case Nos. A139222, A139235)</i> <i>(via mail only)</i></p>	<p><u>Superior Court – Marin County</u> Clerk of the Court P.O. Box 4988 San Rafael, California 94913 <i>(Case Nos. CIV11-3605, CIV11-03591)</i> <i>(via mail only)</i></p>
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