

## **Cooperative Agreement between the Tuolumne County Transportation Council and Sierra Northern Railway**

This Cooperative Agreement is dated November 2, 2017 and is between the Tuolumne County Transportation Council (“TCTC”) and Sierra Northern Railway (“SNR”).

The TCTC is the regional transportation planning agency for Tuolumne County.

Sierra Northern Railway is a California corporation, a common carrier railroad, and operator of the Sonora Branch railroad line that serves the people and businesses of Tuolumne County.

The U.S. Department of Transportation (“USDOT”) has released a Notice of Funding Opportunity for the Department of Transportation’s National Significant Freight and Highway Projects (under the USDOT’s Infrastructure for Rebuilding America (“INFRA”) grant program) for Fiscal Years 2017 and 2018, (DOT-OST-2017-0090).

The TCTC believes the preservation and improvement of the local railroad infrastructure to be consistent with Tuolumne County’s Regional Transportation Plan and beneficial to the people and businesses of Tuolumne County. The TCTC, as an eligible applicant for INFRA grants, is accordingly submitting an application under the INFRA grant program above to fund a rail improvement project known as “Sierra Northern Railway’s Rail Improvement Project for Increased Efficiency, Safety, and Cost-Effectiveness of Nationally and Regionally Significant Freight Transport in California’s Central Valley and Sierras” (the “**Project**”). A copy of the TCTC’s final application (the “**Application**”) is attached as Exhibit A hereto and incorporated by reference herein.

The TCTC is the lead agency on the Application and will administer any resulting funding (the “**Grant Funding**”). SNR will conduct all rail improvement work conducted as part of the Project, being fully qualified to conduct such work.

The parties therefore agree as follows:

1. **Agreement Documents.** The agreement (the “**Agreement**”) between the parties consists of this agreement and the Application.
2. **Representations.**
  - 2.1 SNR represents the following:
    - 2.1.1 SNR understands that Grant Funding may be used for up to 60% of Project costs. SNR further understands that while other federal assistance may satisfy the non-federal share requirement for any Grant Funding, total federal assistance for the Project may not exceed 80% of eligible Project costs.
    - 2.1.2 SNR understands that non-federal sources include state funds originating from programs funded by state revenue, local funds originating from state

or local revenue-funded programs, private funds, or other funding sources of non-federal origins.

- 2.1.3 SNR will timely acquire or provide all match funding required pursuant to any Grant Funding.
- 2.1.4 SNR will only use Grant Funding for: (i) eligible construction, reconstruction, rehabilitation, acquisition of property (including land related to the project and improvements to the land), environmental mitigation, construction contingencies, equipment acquisition; and operational improvements directly related to railroad system performance, (ii) statutorily eligible development phase activities including planning, feasibility analysis, revenue forecasting, environmental review, preliminary engineering, design, and other preconstruction activities; (iii) public-private partnership assessments for projects in the development phase; and (iv) subsidy and administrative costs necessary to receive Transportation Infrastructure Finance and Innovation Act (“TIFIA”) funding.
- 2.1.5 To the extent Grant Funding or other identified funding sources does not cover TCTC’s costs in administering the Grant Funding, SNR shall reimburse the TCTC. In the event such reimbursement is anticipated to be necessary, the parties shall meet and confer in good faith to develop a mutually agreeable financing plan to ensure timely and cost effective completion of the Project.
- 2.1.6 To the extent authorized by the Grant Funding, SNR, at its option, may provide administrative services for the Grant Funding.

2.2 The TCTC represents the following:

- 2.2.1 The TCTC is an eligible INFRA grant applicant.
- 2.2.2 The TCTC will assist SNR in seeking additional funding sources to facilitate the timely and cost effective completion of the Project.
- 2.2.3 It is anticipated that the TCTC will seek to retain a consultant to assist the TCTC in ensuring that all work on the Project complies with Grant Funding requirements. The consultant’s fees would be considered the TCTC’s costs for purposes of Section 2.1.5. To the extent allowed by law, the TCTC will consult with SNR in the selection of the consultant. Unless otherwise agreed to by SNR, the TCTC will seek a “not to exceed” agreement with the selected consultant.
- 2.2.4 SNR will submit to the TCTC monthly written invoices identifying the work conducted and the proportion of the Project encompassed thereby. The TCTC will verify work performed and accept or reject the invoice within ten (10) working days. Accepted invoices will be submitted for

federal reimbursement within ten (10) working days of acceptance. The TCTC will pay approved invoices to SNR within ten (10) working days of receiving federal reimbursement payment.

**2.3** Each of the parties represents the following:

**2.3.1** The parties anticipate the Project will take approximately five years to complete.

**2.3.2** The parties understand that the TCTC is not obligated to provide funding for the Project beyond any awarded Grant Funding.

**2.3.3** The parties understand that, in the event a party receives any Grant Funding later determined by USDOT or similar audit to be validly disallowed under United States Office of Management and Budget Circular A-87 and the terms of the Agreement, such party shall repay such disallowed Grant Funding to the USDOT. However, nothing herein shall prohibit a party from challenging or otherwise disputing any such audit or disallowance prior to any repayment of Grant Funding.

**2.3.4** The parties understand that all federal funding obligations are subject to budget action by the federal government.

**2.3.5** The parties understand that the execution of this agreement and the final award of any Grant Funding does not obligate either party to participate in any future agreements or funding applications.

**3. The Parties' Rights and Obligations.**

**3.1** SNR's Rights and Obligations:

**3.1.1** SNR agrees to furnish all labor, materials, tools, equipment, supervision, and other incidentals required to perform and complete any portions of the Project funded through Grant Funding and any applicable matching funds. Unless otherwise specified, all materials incorporated in the Project shall be of good quality.

**3.1.2** SNR shall perform all work on the Project in compliance with applicable rules and regulations and Grant Funding requirements.

**3.1.3** SNR shall obtain all applicable environmental and construction clearances, permits, licenses, certificates or entitlements required for completion of the Project. In the event INFRA grant funds are awarded, the TCTC retains full discretion to consider any applicable California Environmental Quality Act (CEQA) and the National Environmental Protection Act (NEPA) review and then to accept the grant funds, reject the grant funds, or require additional mitigation measures or alternatives to the Project.

**3.2 The TCTC's Rights and Obligations:**

**3.2.1** The TCTC has the right to inspect and evaluate the work performed or being performed by SNR, and the premises where such work is being performed, at all reasonable times and in any manner that will not unduly delay the work.

**3.2.2** The TCTC may withhold reimbursement for any work that does not comply with the requirements of section 3.1 above; provided that any reimbursement shall not be unreasonably delayed or withheld.

**3.3 Rights and Obligations of Both Parties:** The parties agree to account for all Project costs, including administrative costs, according to generally acceptable accounting principles.

**4. Term and Termination.**

**4.1** The Agreement shall commence upon the full execution of this agreement by all parties and shall continue until:

**4.1.1** Completion of such portions of the Project funded through Grant Funding and any applicable matching funds;

**4.1.2** The parties' mutual written agreement to terminate the Agreement; or

**4.1.3** Any default or breach of the Agreement by either party which has not been cured within 30 days following written notice of such default by the other party, or such later time as is reasonably necessary if the default cannot be reasonably cured within such 30-day period.

**4.2** Upon termination of The Agreement, all affairs undertaken or conducted pursuant to the Agreement shall be wound up and debts paid.

**4.3** In the event the awarded Grant Funding, when combined with any required match funding, is insufficient to complete the Project as originally envisioned, the parties will engage in good faith negotiations to revise the Project scope to maximize the awarded funding. If such negotiations are unsuccessful, either party may terminate this Agreement prior to beginning any work on the Project.

**5. Indemnity.**

**5.1** SNR shall indemnify, defend and hold harmless the TCTC from any and all demands, losses, claims, costs, suits, liabilities and expenses for any damage, injury or death (collectively, "**Liability**") arising directly or indirectly from or connected with the services provided under the Agreement which is caused, or claimed or alleged to be caused, in whole or in part: (i) the negligence or willful misconduct of SNR its officers, agents, employees, and contractors; (ii) SNR's actions related to the Agreement; or (iii) SNR's failure to comply with or perform

any of the terms and conditions set forth in the Agreement; except to the extent that the Loss is caused by the sole negligence or willful misconduct of the TCTC, its officers, agents, or employees, or a breach of an express material representation or warranty of the TCTC. The provisions of this section shall survive the termination or expiration of the term of the Agreement.

5.2 The TCTC shall indemnify, defend and hold harmless SNR from any Liability which is due to or arises from: (i) the negligence or willful misconduct of the TCTC its officers, agents, employees, and contractors; (ii) the TCTC's actions related to the Agreement; or (iii) the TCTC's failure to comply with or perform any of the terms and conditions set forth in the Agreement; except to the extent that the Loss is caused by the sole negligence or willful misconduct of SNR, its officers, agents, or employees, or a breach of an express material representation or warranty of SNR.

5.3 If such indemnification becomes necessary, the indemnified party shall have the absolute right and discretion to approve or disapprove of any and all counsel employed to defend it.

5.4 Should it become necessary for a party to this agreement to enforce any of the provisions hereof, the prevailing party in any claim or action shall be entitled to reimbursement for all expenses so incurred, including reasonable attorney's fees and costs.

5.5 The provisions of this section 5 shall survive the termination or expiration of the term of the Agreement.

6. **Insurance.** SNR shall, at its own cost and expense, provide and procure Commercial General Liability ("CGL") and, as applicable, Workman's Compensation or Federal Employer's Liability Act ("FELA"), insurance. The insurance shall be kept in force during the life of the Agreement and shall be written by a reputable insurance company reasonably acceptable to the TCTC, or with a current Best's Insurance Guide Rating of A- and Class VII or better, and authorized to do business in California.

6.1 The CGL insurance policy providing bodily injury, including death, personal injury and property damage coverage shall have a limit of not less than \$25 million each occurrence and an aggregate limit of not less than \$50 million. The self-insured retention may not exceed \$100,000 (as that value is periodically adjusted by the Consumer Price Index from and after the effective date of this agreement.) The CGL insurance policy must be written on ISO occurrence form CG 00 01 12 04 or a substitute form providing reasonably equivalent coverage. This insurance shall contain broad form contractual liability covering the indemnity provisions contained in this agreement, coverage for railroad operations, and coverage for construction or demolition work on or near railroad tracks. Prior to the execution of this agreement, SNR shall provide the TCTC with a certificate of insurance on a standard ACORD form, or other form reasonably acceptable to the TCTC, substantiating the required coverages and limits set forth

herein. Upon request by the TCTC, SNR shall immediately furnish a complete copy of any policy required hereunder, including all endorsements, with said copy certified by the insurance company to be a true and correct copy of the original policy.

- 6.2 Workers' Compensation or FELA insurance shall cover any statutory liability as determined to be applicable by the compensation laws of the State of California or FELA, as applicable, with a limit of at least \$1 million.

**7. Dispute Resolution; Venue.**

7.1 Any claim or dispute arising out of or related to the Agreement shall be subject to mediation as a condition precedent to the institution of legal or equitable proceedings by either party. If the parties cannot otherwise agree, mediation shall be conducted in accordance with the Construction Industry Mediation Procedures of the American Arbitration Association in effect as of the date of this agreement. Request for mediation shall be filed in writing with the other party and, if necessary, with the American Arbitration Association. The parties shall share the mediator's fee and filing fees equally. The mediation shall be held in Stanislaus County, California unless another location is mutually agreed upon.

7.2 Subject to section 7.1 above, any and all disputes, controversies, or claims arising out of, relating to, or in connection with the Agreement shall be instituted and maintained in a competent court in Stanislaus County, California and the parties hereby consent to the jurisdiction of any such court and to service of process by any means authorized under California law.

7.3 In the event of a judicial proceeding or action by one party against the other with respect to the interpretation or enforcement of the Agreement, the prevailing party shall, in addition to damages, be entitled to recover reasonable costs and expenses, including reasonable attorneys' fees and other expenses whether at the investigative, pretrial, trial, or appellate level. Any award of damages shall include an award of prejudgment interest from the date of breach at the legal rate in the State of California.

7.4 TCTC hereby waives the application of any statute, law, rule, or regulation that provides for sovereign immunity or that otherwise prohibits or limits the collection of damages, attorneys' fees and costs, or interest from such entity in accordance with the Agreement. This limited waiver is granted solely for the purpose of SNR enforcing the terms of the Agreement and shall be regarded as a limited waiver of sovereign immunity in any proceeding commenced by SNR for such purpose.

8. **Notice.** Any and all notices or communications required or permitted by the Agreement or by law to be delivered to, served on, or given to either party to the Agreement by the other party to the Agreement shall be in writing and shall be deemed properly delivered,

served, or given to the party directed, to or in lieu of each such personal service, when deposited in the United States mail, first-class, postage prepaid and addressed to:

**SNR:**

Kennan H. Beard III, President  
Sierra Northern Railway  
341 Industrial Way  
Woodland, CA 95776  
Fax: (530) 666-9646

**The TCTC:**

Darin Grossi, Executive Director  
Tuolumne County Transportation Council  
2 South Green Street  
Sonora, CA 95370  
Fax: (209) 533-5698

**9. Miscellaneous**

- 9.1 Consent.** Unless expressly provided to the contrary elsewhere in the Agreement, whenever the consent, approval, judgment, or determination (collectively, “**consent**”) of a party is required or permitted under the Agreement, the consenting party shall exercise good faith and reasonable judgment in granting or withholding such consent. No party may unreasonably withhold or delay its consent; consent shall be deemed to have been withheld if a party fails to consent to the other party within 30 days of having been given written notice of the other party’s intention to take any action as to which consent is required or permitted.
- 9.2 Successors and Assigns.** The Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, executors, administrators, successors, and assigns.
- 9.3 Entire Agreement.** The Agreement constitutes the entire agreement and understanding between the parties and supersedes any and all prior agreements and understandings, oral or written, relating to the subject matter hereof. Each of the parties acknowledges that no other party, nor any agent or attorney of any other party, has made any promise, representation, or warranty, and acknowledges that the party has not executed or authorized the execution of the Agreement in reliance upon any such promise, representation, or warranty, except as expressly contained herein.
- 9.4 Modifications.** All modifications of, waivers of, and amendments to the Agreement or any part hereof must be in writing signed on behalf of each of the parties. No failure or delay by either party in exercising any right, power, or privilege under the Agreement shall operate as a waiver thereof nor shall any single or partial exercise thereof preclude any other or further exercise of any right, power, or privilege hereunder.
- 9.5 Severability.** If any portion of the Agreement is held by a court or other tribunal of competent jurisdiction to be invalid or unenforceable, that portion shall be enforced to the maximum extent possible so as to effect the intent of the parties and shall be amended or reformed to the extent necessary to make such portion



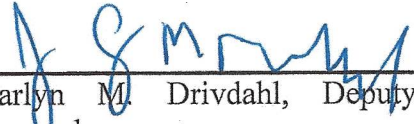
valid and enforceable; the remaining portions of the Agreement shall remain in full force and effect.

- 9.6 Headings; Ambiguities.** Headings used in the Agreement are used only for reference and are not intended to define, limit, expand, or describe the scope of the Agreement. Any rule of construction to the effect that ambiguities are to be resolved against the drafting party will not be applied in the construction or interpretation of the Agreement; the Agreement is to be construed as if the parties had drafted it jointly.
- 9.7 Force Majeure.** Neither party shall be deemed to be in default of the Agreement if any failure to meet any condition or to perform any obligation or provision hereof is caused by, a result of, or due to strikes, insurrections, acts of God, inclement weather, governmental restrictions or failure to act, failure or inability to secure materials or labor by reason of priority or similar regulations or order of any governmental or regulatory body, enemy action, civil disturbance, fire, unavoidable casualties, or any other cause beyond the reasonable control of either party hereto provided that the party claiming force majeure promptly provides written notice to the other of said claim.
- 9.8 Signatures.** Each party acknowledges that the officer executing this agreement has the authority to enter into the Agreement on behalf of the party and in so doing is authorized to bind the party on whose behalf he or she is signing, to the terms and conditions of the Agreement. Each party agrees that this agreement may be executed by electronic or facsimile signature, which shall be as effective as an original signature and which may be used in lieu of the original for any purpose, and in one or more counterparts, all of which together shall constitute one agreement binding on all the parties.

*[signatures follow on next page]*



The parties hereto have executed this agreement as of the day and year first above written.

<b>Tuolumne County Transportation Council:</b>  Darin Grossi, Executive Director	<b>Sierra Northern Railway:</b>  Kennan H. Beard III, President
<b>APPROVED AS TO LEGAL FORM:</b>  Carlyn M. Drivdahl, Deputy County Counsel	

**Exhibit A**  
**Final Application**