

## CALIFORNIA COASTAL COMMISSION

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**W13**

Staff: AK-SF  
Staff Report: February 29, 1996  
Hearing Date: March 13, 1996  
CCC Action:

**STAFF REPORT: CEASE AND DESIST ORDER**

CEASE AND DESIST ORDER: CCC-96-CD-01

ALLEGED VIOLATOR: Southern Pacific Transportation Company (SPTCo)  
c/o Paula Amanda, Assistant General Attorney  
1 Market Plaza, 8th Floor  
San Francisco, California 94105

ATTORNEY: Paul Minault, Esq.  
120 Montgomery Street, Suite 2290  
San Francisco, California, 94104

PROPERTY: The gate is located on Vandenberg Air Force Base property located between the Highway 246 road easement and the SPTCo railroad right-of-way, a privately owned enclave within Vandenberg Air Force Base (identified by APN 095-050-02) (Exhibit 1).

DESCRIPTION OF ACTIVITY: The activity that is the subject of this order includes but is not limited to the unpermitted placement, construction and/or erection, on August 7, 1995, of a locked gate that blocks access to the above described parking area and consequently access to the Pacific Ocean.

SUBSTANTIVE FILE DOCUMENTS: Executive Director's Cease and Desist Order No. ED-95-CD-01  
Executive Director's Cease and Desist Order No. ED-95-CD-02  
Consistency Determination No. CD-12-94 (U.S. Air Force)

**SUMMARY OF STAFF RECOMMENDATION**

Staff recommends that the Commission issue a permanent cease and desist order requiring SPTCo to cease and desist from engaging in or maintaining on the property any activity constituting development under the Coastal Act, including activity described above, unless and until: 1) SPTCo obtains a coastal development permit authorizing such activity; and 2) the Commission concurs in SPTCo's consistency certification.

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**Staff Note:** This alleged violation consists of, but is not limited to, the unpermitted placement, construction and/or erection, on August 7, 1995, of a locked gate that blocks access to the above described parking area and consequently the Pacific Ocean, in conflict with Coastal Act section 30600.

SPTCo indicates that it is willing to submit a coastal development permit (CDP) application to seek after-the-fact authorization to erect the gate and then retain it in a closed and locked position. However, because the site of the gate is on federal lands, SPTCo, a private company, must obtain authorization from the U.S. Air Force to erect the gate and retain it in a locked position. Pursuant to Public Resources Code (PRC) § 30601.5 and 14 California Code of Regulations (CCR) § 13057.5(b), this authorization is a CDP application filing requirement. Pursuant to § 307(c)(3)(A) of the federal Coastal Zone Management Act (CZMA) (16 U.S.C. § 1456(c)(3)(A)), the U.S. Air Force cannot issue such authorization unless the Coastal Commission concurs in a consistency certification by SPTCo that the proposed development will not have adverse impacts on coastal resources. The federal Office of Ocean and Coastal Resources Management (OCRM) recently determined that SPTCo must submit a consistency certification to the Coastal Commission for this agency's review. Staff intends to present to the Commission for its concurrent review both the consistency certification and the CDP application.

The Executive Director has issued two temporary cease and desist orders to ensure that the gate remains open, not obstructing access and recreational opportunity previously available, while SPTCo has attempted to file a combined after-the-fact consistency certification and CDP application. The Executive Director now believes a permanent cease and desist order is necessary to ensure the continued availability of public access and recreational opportunities until SPTCo is able to file a combined after-the-fact consistency certification and CDP application and the Coastal Commission is able to render a decision, a process which is expected to take some time considering interagency efforts to negotiate a solution which satisfies the varied interests of public access and public safety.

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## **I. MOTION**

Staff recommends adoption of the following motion:

I move that the Commission issue Cease and Desist Order No. CCC-96-CD-01 as proposed by staff.

Staff recommends a YES vote. An affirmative vote by a majority of the Commissioners present and voting is necessary to pass the motion.

## **II. PROPOSED FINDINGS**

Staff recommends that the Commission adopt the following findings in support of its action:

**A. Background of the Alleged Violation**

1. By letter dated November 7, 1994, E. P. Reilly, Vice President and Chief Engineer, Southern Pacific Lines (SPTCo's parent company), informed Lompoc Mayor Joyce Howerton, regarding access to the beach at Surf, that "Southern Pacific is terminating public access across its property to the beach forthwith by fencing the entrance road into the subject property" (Exhibit 2).
2. On August 7, 1995, Jim Raives of the Coastal Commission's Federal Consistency staff, was contacted by telephone by a confidential informant who stated that SPTCo had constructed the subject gate that day. Later that day, Mr. Raives contacted by telephone Gregg Mohr, County of Santa Barbara Planning and Development Department staff member, who confirmed the statements of the informant.
3. By telephone conversation on August 25, 1995, Nancy Cave, Coastal Commission Statewide Enforcement Program Supervisor, and John Bowers, Coastal Commission Staff Counsel, discussed the gate's construction with Paula Amanda, Counsel with SPTCo. Ms. Cave and Mr. Bowers informed Ms. Amanda that the gate constitutes development under the Coastal Act, is located in the Commission's retained permit jurisdiction and requires Commission permit authorization. They also asked Ms. Amanda to put in writing SPTCo's position with respect to the gate and to confirm in detail SPTCo's legal ownership of the property on which the gate is located.
4. By telephone conversation on August 31, 1995, Paul Minault, an attorney representing SPTCo, stated to Mr. Raives that SPTCo was unwilling to unlock and open the gate unless and until the Commission issued a cease and desist order directing it to do so.
5. On September 1, 1995, Adrienne Klein, Coastal Commission Statewide Enforcement Program staff, delivered to SPTCo, via Mr. Minault, a notice stating that:
  - (1) the subject activity constitutes development which is in violation of the Coastal Act because it is not authorized by a coastal development permit;
  - (2) a coastal development permit application must be submitted to the Coastal Commission by September 15, 1995; and
  - (3) failure to immediately stop the described activity, by agreeing by September 7, 1995, to unlock the gate and retain it in an open position until consideration by the Commission of an after-the-fact coastal development permit application, might result in the issuance of a cease and desist order, the violation of which could result in civil fines (Exhibit 3).
6. By letter dated September 7, 1995, Mr. Minault informed Ms. Klein that SPTCo would make a good faith effort to submit an after-the-fact coastal development permit application by September 15, 1995, but was not willing to unlock the gate and retain it in an open position for the time being (Exhibit 4).

7. On September 7, 1995, Mark Cappelli, Coastal Commission South Central Coast Area staff, conducted a site visit at the subject property during which he personally observed that the subject gate was still locked and in a closed position, precluding public access.

8. On September 7, 1995, Peter Douglas, Executive Director of the Coastal Commission, issued to SPTCo, via Mr. Minault, Cease and Desist Order No. ED-95-CD-01 prohibiting SPTCo from engaging in any development activities, as defined pursuant to PRC § 30106, such as erecting a fence and gate and thereby blocking public access to and from the beach without first obtaining a CDP authorizing such activity (Exhibit 5, without attachments).

9. By letter dated October 10, 1995, Mr. Douglas informed SPTCo and the U.S. Air Force that Commission staff believed that SPTCo's construction of the gate was an activity that "could be reasonably expected to affect the coastal zone (15 C.F.R. § 930.54(c))." That notice was also sent to OCRM (Exhibit 6).

10. In the course of a telephone conversation on December 6, 1995, Mr. Minault responded to an inquiry of Ms. Klein by stating that SPTCo would not maintain the gate in an open and unlocked position after the December 7, 1995, expiration of Order No. ED-95-CD-01 unless the Executive Director were to issue another order.

11. On December 15, 1995, Mr. Douglas issued to SPTCo, via Mr. Minault, Cease and Desist Order No. ED-95-CD-02 prohibiting SPTCo from engaging in any development activities, as defined pursuant to PRC § 30106, such as erecting a fence and gate and thereby blocking public access to and from the beach without first obtaining a CDP authorizing such activity (Exhibit 7, without attachments).

12. By letter dated January 22, 1996, Jeffrey Benoit, Director, Office of Ocean and Coastal Resource Management, informed Mr. Douglas that OCRM had determined that SPTCo's construction of a gate "can reasonably be determined to affect public access." As such, OCRM required SPTCo to prepare a consistency certification pursuant to 15 C.F.R. Part 930, Subpart D, for the Commission's subsequent review (Exhibit 8).

#### **B. Staff Allegations**

The staff alleges the following:

1. On August 7, 1995, SPTCo erected a gate on federal property that blocks access to the above described parking area and consequently the Pacific Ocean, without first informing the Coastal Commission or the U.S. Air Force of its intent to do so.

2. The above described activities constitute development pursuant to Coastal Act section 30106 and have been conducted without benefit of a coastal development permit or Coastal Commission concurrence of a consistency certification; this unpermitted development is in violation of PRC section 30600; and in order to resolve this Coastal Act violation, SPTCo must obtain after-the-fact Commission authorization to retain the unpermitted development in accordance with an approved CDP.

3. SPTCo has neither obtained after-the-fact Commission authorization of the unpermitted development nor removed the unpermitted development, in order to restore the site to its pre-development condition.

**C. Alleged Violator's Defense (Exhibit 9 with attachments) and Staff's Rebuttal to Defense**

**Global Rebuttal.** Under PRC § 30810, the only grounds which must exist for the Commission to have the statutory authority to issue a cease and desist order are that a person has undertaken "any activity that (1) requires a permit from the commission without securing a permit..." In this matter such grounds clearly exist,<sup>1</sup> as evidenced by the fact that SPTCo does not dispute them. Every defense SPTCo has interposed pertains not to the relevant issue of the existence or not of grounds specified by the statute for issuance by the Commission of a cease and desist order, but rather to the issue of whether SPTCo's activities are or are not consistent with the policies of the Coastal Act. The Commission will entertain such issues when SPTCo submits a combined consistency certification and coastal development permit application for its activity. However, in the present context SPTCo's arguments are simply not relevant. Notwithstanding this fact, the staff has prepared the following responses to SPTCo's arguments for the information of the Commission and of the interested public. The issues raised in the following discussion may not include all the issues the Commission will consider when it reviews the subject development's consistency with the Chapter 3 policies of the Coastal Act.

1. **Defense:** SPTCo admits the facts set forth in Findings A, C, D, E, F, H and I of Cease and Desist Order No. ED-95-CD-02 (Exhibit 7). SPTCo has no knowledge of the facts set forth in Findings B and D or the Order because they involve communications between Commission staff.

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<sup>1</sup> In addressing whether an activity requires a permit under the Coastal Act, the Commission staff believes that it is appropriate to rely on the judicial guidance provided in *Southern Pacific Transportation Co. v. Cal. Coastal Comm'n*, 520 F.Supp. 800 (1981), which resolved a previous challenge by SPTCo to the Commission's jurisdiction under the CZMA. The court looked to whether the activity at issue in that case fell within the definition of "development" contained in section 30106 of the CCMP. (*Id.*, at 803-804.) That section defines "development" to include, among other activities, the "construction, demolition, or alteration...of any structure, including any facility of any ... public ... utility." (The CCMP does not define the term "public utility." However, the applicant is a "railroad corporation," a "common carrier," and thus a "public utility" within the meaning of those terms as they are defined, respectively, in sections 230, 211(a), and 216(a) of the CPUC, and thus may reasonably be considered to be a "public utility" for the purposes of section 30106 of the CCMP.) On the basis of a finding that the activity at issue in the case before it constituted "demolition ... of [a] structure ... of [a] public ... utility," and that such activity would affect "several ... land use options" in California's coastal zone, the court held that the activity was subject to the consistency review requirements of the CZMA.

Similarly, the activity that is the subject of the Commission's present decision to conduct an "unlisted activity" review under the CZMA involves the "construction...of [a] structure [a gate] ... of [a] public ... utility" on federal land within the California's coastal zone. The expressly acknowledged purpose of the structure is to preclude the public from crossing the applicant's property to gain access to the coastal zone and engage in the various recreational opportunities that the coastal zone affords. The applicant's activity inhibits, and thus affects, a clearly established use of California's coastal zone.

SPTCo does not deny any of the facts set forth in the findings of Cease and Desist Order No. ED-95-CD-02.

Rebuttal: None.

2. Defense: SPTCo does not believe "a crossing at this location is necessary because adequate access [to the Pacific Ocean] exists nearby." SPTCo acknowledges that access to Ocean Beach County Park is intermittently blocked when the Santa Ynez River floods. Hence, and notwithstanding other arguments to follow that explain SPTCo's position that it should be allowed to block the current accessway, SPTCo believes at a maximum it would only be appropriate for the Commission to require it to provide public access across the tracks at Surf when beach access at Ocean Beach County Park is inaccessible.

Rebuttal: Commission staff is aware that there is another public accessway at Ocean Beach County park, located approximately 3/4 of a mile north of the former railroad station at Surf. That park consists of large parking area, a playground, and an access trail to the beach that crosses under the railroad tracks at the Santa Ynez River railroad bridge. Although this other beach access route allows the public to reach the same shoreline as the "Surf Station" accessway, the Surf accessway is an important accessway for several reasons.

First, this accessway is a very popular route for those people living in the local community. In 1994, when the Air Force proposed a similar closure of this access route through submittal to the Coastal Commission of a consistency determination, to which the Commission objected, the Commission received contact from literally thousands of nearby residents opposed to the closure (Consistency Determination No. CD-12-94, not attached). Specifically, the Commission received petitions containing approximately 2,400 names and approximately 30 letters from concerned citizens opposed to the closure. Additionally, many of these people also telephoned the Commission staff to state their concerns.

Second, the access at Surf provides an alternative means to reach Ocean Beach. A second accessway is necessary because the primary accessway is adjacent to the Santa Ynez River and its access road is subject to flooding. According to the Santa Barbara County Parks Department, that road usually floods at least once a year and stays flooded from anywhere between three weeks and three months (personal communication between James Raives, Federal Consistency staff, Coastal Commission and Jeff Stone, Deputy Director for Santa Barbara County Parks, North County, on October 10, 1995). Also, the accessway provides access to the southern part of Ocean Beach, which the public has used for surf fishing and which might otherwise be inaccessible to fishermen lugging heavy equipment.

Considering this information, the Commission staff believes that the erection of the subject gate clearly affects public access resources of the coastal zone, and that access to the beach at Surf is, at a minimum, necessary on an intermittent basis, if not all year long.

3. Defense: SPTCo states that it is commonly recognized that grade crossings are a public safety concern. In fact, "the Federal Railroad Administration has set a goal of closing 25% of the nation's grade crossings by the turn of the century." SPTCo asserts that the "public use of [its] Surf property to cross the tracks is unsafe, as indicated by two serious accidents at this location."

SPTCo has been sued two times by individuals who were injured and/or killed while crossing the tracks at Surf. In the first instance, even though the courts found that SPTCo was not liable, which judgment was upheld on appeal, it incurred \$100,000 of unreimbursed defense costs. In the second instance, the matter is still in litigation. SPTCo faces allegations, in part, that it failed to comply with:

(a) California Public Utility Code (CPUC) Section 1201 which states that "[n]o public road, highway, or street shall be constructed across the track of any railroad corporation at grade ... without having first secured the permission of the [Public Utilities] commission (PUC);" and

(b) CPUC Section 1202 which grants the PUC "the exclusive power: (a) [t]o determine and prescribe the manner, including the particular point of crossing and the terms of installation, operation, maintenance, use, and protection of each crossing ... of a street by a railroad or visa versa."

Rebuttal: Commission staff recognizes that the reason SPTCo constructed the gate is to protect public safety and lessen its liability risk. Commission staff is sensitive to this issue. In fact, PRC 30210 allows for access limitations in recognition of the need to protect public safety. However, it is through the federal consistency and permit review processes that the Commission can weigh the competing concerns of public access and public safety against the policies of the Coastal Act that mandate the maximization of coastal public access. Through these processes, the Commission will evaluate the legitimacy of the public safety issue and alternative mechanisms that may protect public safety while maintaining public access and recreational resources and determine whether liability risks to SPTCo and the public outweigh the impacts of closing an accessway. Therefore, the resolution of the conflict between public access and public safety will be accomplished through an analysis of the consistency of the subject development with the Coastal Act and California Coastal Management Program (CCMP).

4. Defense: SPTCo asserts that "the mere convenience this access provides is insufficient to outweigh [the stated] safety considerations." In other words, it argues that this accessway is a "shortcut" across SPTCo tracks that is only necessary "during periods when the road to the county park is flooded" and that "there seems to be little reason why these people could not walk in from the legal public access way at the county park and enjoy the beach in the process." SPTCo further asserts that it has been informed by County staff "that this beach sees little use by sunbathers, swimmers and typical beach users because of the harsh environment there, including high winds, strong currents, large waves, and frigid waters" and that "it appeals more to walkers, horse riders, fishermen and other active recreationalists."

Rebuttal: The determination of how popular the beach accessway at Surf may be is subjective. The conflicting concerns of SPTCo and the Commission, minimizing the risk of liability as opposed to preserving maximum public access, necessarily polarize the two entities' interpretation of how much use constitutes a use so popular that to eliminate it would or would not impact the public. As stated earlier, the Coastal Commission's permit and consistency review processes will enable it to fully consider and evaluate these concerns.

5. **Defense:** SPTCo believes that "the proper way to create a crossing at this location is by application to the PUC, not by a Commission cease and desist order." SPTCo supports this assertion by stating that "in California there is only one way that the public may lawfully obtain the right to cross over a railroad track, and that is by following the mandated statutory procedure ... [which] requires the public agency proposing the crossing to submit an application to the PUC, which then determines whether the public convenience and necessity require the proposed crossing to be built, what sort of safety devices are required, whether a grade separation is necessary, and whether the railroad must pay some portion of the construction and maintenance costs of the crossing." SPTCo believes it is not within the jurisdiction of the Coastal Commission to "forc[e] SPTCo to continue to provide public access" in the absence of PUC authorization to do so. SPTCo asserts that the PUC has jurisdiction over pedestrian railroad crossings even though CPUC section 1201 does not specifically reference pedestrian crossings. SPTCo cites the PUC's routine practice of interpreting this section as encompassing pedestrian access. SPTCo has researched case history on this matter and found "no judicial or administrative decision in which any public agency has contested the PUC's decades-long jurisdiction over pedestrian crossings" and "numerous decisions in which the PUC has exercised its authority to grant or abolish pedestrian crossings."

**Rebuttal:** Again, Commission staff of course agrees that the local government and community should seek PUC authorization to construct an above grade crossing at Surf. Such ability is beside the point of the Coastal Commission's duty under the Coastal Act to preserve existing public access pursuant to PRC section 30211.

6. **Defense:** SPTCo states that "neither the County nor any other local agency has made any effort to obtain PUC approval for an authorized pedestrian crossing at this location, even though the County agreed to do so. SPTCo states that in 1972 it conditionally agreed to re-open the access way which it had recently blocked due to mounting public safety concerns, because at that time the County made a commitment to SPTCo that it would undertake to construct an overpass. Currently, neither the County nor the community has applied to the PUC to construct such an overpass, inaction which SPTCo regards as illustrative of the fact that this is in fact not a popular crossing.

**Rebuttal:** The Commission staff does not agree that the County's failure to apply to the PUC to construct an accessway at Surf is relevant to the question of whether preservation of the existing informal accessway is a result that is required or authorized under the regulatory standards of the Coastal Act. There are a multitude of potential reasons why the County has not proceeded to make such an application to the PUC, among them the need to expend a limited sum of public funds to a range of competing public interests. The County's alleged inaction is not necessarily an indication that the accessway is not popular or necessary.

7. **Defense:** SPTCo states that "public agencies have not made a concerted effort to provide public access to Ocean Beach County Park during periods of flooding." Historically, the County has received permission from the Army Corps of Engineers (Corps) to remove the sandbar that causes the Santa Ynez River to flood thereby blocking the Ocean Beach County Park access way. More recently, the County applied to the Corps to raise the level of the road above the flood level. The Corps declined to grant a permit to enable the County to raise the road to a height adequate to enable year round access. Further, the County "obtained the impression that the U.S.



Fish & Wildlife Service and the Ca. Dept. of Fish & Game would oppose permits for future annual removals of the sand bar." Further, the County does not wish to incur the expense of reapplying to the Corps for a sand bar removal permit and "has taken no further action to obtain a permit or otherwise to provide access to Ocean Beach County Park during periods when the access road to the park is flooded." In short, SPTCo does not believe it is appropriate for at grade beach access to be required across its property in the face of local inaction to maintain access at Ocean Beach County Park. Further, SPTCo states that this local inaction reiterates its earlier conclusion that this beach is not as popular as the Coastal Commission has previously asserted.

Rebuttal: The Commission staff does not agree that the Corps' "failure" to authorize the County to construct the road access to Ocean Beach County Park at an elevation high enough to enable year round access to this beach even during periods of flooding is an indication that Ocean Beach access is not in high demand. In fact, the cited problems resulting in temporary blockage of access due to flooding underscores the Commission's concern that alternative access at Surf remain available.

8. Defense: SPTCo asserts that "the public can not acquire rights by prescription or implication to use the property of a public utility which is already dedicated to public use." SPTCo cites Civil Code Section 1007 ("[n]o possession by any person ... of any ... easement ... dedicated to a public use by a public utility ... shall ever ripen into any ... interest ... against the owner") to clarify that "no private party may obtain prescriptive rights to the lands of a regulated public utility such as SPTCo." SPTCo identifies two U.S. and California Supreme Court decisions [*Southern Pacific Co. v. Hyatt*, 132 Cal. 240, 241-242 (1901) and *Breidert v. Southern Pac. Co.*, 272 Cal. App. 2d 398 (1969)], which "have held that 'railroads are esteemed as public highways, constructed for the advantage of the public'" and that "the public can obtain prescriptive rights to a railroad crossing only when a railroad has first taken some affirmative action to create a private crossing, or the PUC to create a public one." SPTCo argues that Commission staff's interpretation that "the public may by prescription or implication independently acquire the right to cross a railroad track, by contrast, would undermine the statutory scheme for PUC review of crossing applications set forth in the CPUC and the State's orderly management of railroads and railroad crossings."

Rebuttal: It is not at all clear that the public crossing of the tracks at this location constitutes "illegal trespass" of the applicant's property. Section 30211 of the Coastal Act obligates the Commission to protect from interference "the public's right of access to the sea" across areas that may be subject to such an implied dedication. It is well settled under California law that such historic use can support a finding that an area has been dedicated by implication to the public for that use. (*Gion v. City of Santa Cruz*, 2 Cal.3d 29 (1970); *County of Los Angeles v. Berk*, 26 Cal.3d 201 (1980).)

SPTCo cites Civil Code § 1007 in support of its position that the public cannot acquire through implied dedication the right to use property owned by a public utility. By its express terms, section 1007 concerns title that one person may acquire in the property of another "by prescription." Under California law there is a clear distinction between rights that are acquired through an implied dedication and those that are acquired "by prescription." (*Gion, supra*, 2 Cal.3d at 39; see generally 4 Witkin, *Summary of California Law*, "Real Property," §§ 130

(implied dedication) and 462 (citing Civil Code § 1007) - 469 (easement by prescription).) Furthermore, by its terms section 1007 applies to "possession [of real property] by any *person, firm, or corporation....*" (Emphasis added.) Notably absent from the language of section 1007 is any reference to the *public*. When the Legislature intends to impose limitations on the ability of the public to acquire through implied dedication rights in real property owned by another, it refers specifically to the *public* as the subject of its concern. (Civil Code §§ 1009(b), (f).) As noted, section 1007 omits any reference to the public. For both of these reasons, Civil Code § 1007 has no applicability to this matter.

SPTCo also argues that its property cannot be the subject of a finding of an implied dedication, citing the case of *Breidert v. Southern Pac. Co.*, 272 Cal.App.2d 398 (1969) as authority for this proposition. SPTCo's reliance on the *Breidert* case is misplaced for two independently sufficient reasons.

First, the holding of *Breidert* SPTCo relies upon is no longer good authority, and has not been for 25 years. In 1971, two years after *Breidert* was decided, the California Legislature added section 1202.3 to the CPUC. In subsection "(b)" of that provision the Legislature expressly acknowledged the possibility that "a road or highway over [a] railroad right-of-way" could be the subject of an "implied dedication ... to public use, based on public use in the manner and for the time required by law ...." Thus, CPUC § 1202.3(b) represents a clear and unambiguous legislative repudiation of the contrary holding of *Breidert* that the applicant relies upon.

Second, in its decision the court in *Breidert* placed heavy reliance on the fact the railroad crossing involved in that case was subject to regulation by the PUC pursuant to CPUC §§ 1201 and 1202, which apply to the "construction" of any "public road, highway, or street" across "the track of any railroad corporation ... ." The informal pedestrian use that is involved in the present matter cannot conceivably be characterized as constituting a "public road, highway, or street," nor does such use involve anything that has been "constructed." Because the use involved in this matter is demonstrably *not* included among the activities to which the language of CPUC §§ 1201 and 1202, construed in light of its plain meaning, makes such sections applicable,<sup>2</sup> such use is clearly distinguishable from the facts on the basis of which the court in *Breidert* reached its conclusion.

In conclusion, the staff believes that the public crossing of SPTCo's right-of-way at Surf may under California law have given rise to implied dedication, and thus the public may have a right

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<sup>2</sup> SPTCo concedes this point as evidenced by its reliance on a "General Order" of the PUC which suggests that that Commission has regulatory authority of unspecified origin over the grant of an "easement, license, or permit" for "crossings of railroads ... by ... footpaths ... ." SPTCo suggests that the source of this authority is CPUC § 1201. Even assuming that this ascription by the applicant could be reconciled with the language of section 1201, a dubious proposition at best, the use involved in this matter would still not be subject to regulation by the PUC because, as SPTCo itself readily acknowledges, such use is not and has never been the subject of an "easement, license, or permit" granted by the applicant.

Staff acknowledges the numerous examples cited by SPTCo of administrative proceedings in which the PUC has exercised jurisdiction over pedestrian railroad crossings. However, as noted in the text, each and every such example is distinguishable from the informal public use that is involved at Surf because each such instance involved the "construction" of a formal pedestrian crossing.

to cross the tracks at this location. Therefore, the public crossing of the right-of-way, which provides access to the shoreline, is a resource of the California coastal zone protected by the Coastal Act.

9. Defense: In conclusion, SPTCo argues that the county's failure to apply to the PUC to construct an above grade crossing at Surf "should be subject to agency review and permitting, not SPTCo's control of illegal use of its property."

Rebuttal: The Commission agrees that the crossing is subject to PUC review. However, the Commission has not determined whether the crossing is legal. SPTCo and the Commission have herein presented numerous issues which need to be analyzed in the context of a combined consistency and permit hearing before the Commission. At that time, the Commission will consider the potential impacts on coastal access and recreational opportunities, among others, as defined by the Chapter 3 policies of the Coastal Act and the CCMP, of the gate's construction.

#### **D. Compliance Obligation**

Pursuant to Coastal Act section 30821.6, SPTCo's failure to comply with the terms of this order shall result in the imposition by a court of law of civil fines of up to \$6,000 per day for each day in which the violation persists. The amount of penalty shall be determined reasonably proportionate to the damage suffered as a consequence of the violation, described in brief below.

The Commission finds that the subject gate is adversely affecting, and, so as long as it remains in place, will continue to adversely affect, public access and recreational opportunity within the coastal zone. Since the public comes to Ocean Beach to fish, surf, and swim, the area provides a coastal recreational resource. The gate affects these resources by blocking access to the parking area which is adjacent to the beginning of the informal vertical accessway leading to this shoreline. The result of the gate is to discourage the public from crossing the railroad tracks to reach the beach. People park their cars at this parking area, cross the railroad tracks, and follow an existing, established trail through the dunes down to the beach. Since, other than this parking lot, there are no additional places to park in the immediate vicinity of this access trail, the gate inhibits the use of this public access way. Highway 246, by which cars may reach the subject parking area, has a wide shoulder but it is posted with "No parking" signs. Highway 246 also dead ends at US Air Force property which has a locked gate and is also posted with "No parking" signs (personal communication between Jim Raives and John Gunderson, U.S. Air Force, on February 16, 1996).

In northern Santa Barbara County, access to the shoreline is very limited. The Commission has historically been very concerned about any activity that reduces the amount of public access in this region. This beach is one of only three public beaches along the 64-mile stretch of northern Santa Barbara County. Most of the coast in this area is within three large land holdings, Vandenberg Air Force Base, Bixby Ranch, and Hollister Ranch, each of which restricts the public's ability to access the shoreline.

#### IV. CEASE AND DESIST ORDER

Staff recommends that the Commission issue the following cease and desist order:

##### CEASE AND DESIST ORDER

Pursuant to its authority under California Public Resources Code section 30810, the California Coastal Commission hereby orders SPTCo, all its agents, and any other persons acting in concert with any of the foregoing to cease and desist from: (1) engaging in any further development at the property without first obtaining from the Commission both a concurrence in a consistency certification and a coastal development permit (CDP) which authorizes such activity; and (2) continuing to maintain any development at the property that violates the California Coastal Act. Accordingly, all persons subject to this order shall fully comply with paragraphs A, B, C and D as follows:

A. Refrain from engaging in or maintaining at the property any development activity without first obtaining from the Commission both a concurrence in a consistency certification and a CDP which authorizes such activity. Specifically, until such time as the administrative procedures specified in paragraphs B and C below are completed, SPTCo shall maintain the gate in an unlocked condition.

B. Within 90 days of issuance of this order, i.e. by June 12, 1996, SPTCo shall submit to the Coastal Commission a combined consistency certification and CDP application requesting either: 1) after-the-fact Commission authorization to retain the gate; or 2) Commission authorization to remove the unpermitted development. This deadline may be extended by the Executive Director for good cause. An extension request must be made in writing to the Executive Director and received by Commission staff at least 10 days prior to expiration of the subject deadline.

C. Submit, within 30 days of action by the Commission to deny a request to retain the development, a combined consistency certification and CDP application requesting authorization to remove the unpermitted development.

D. Fully comply with the terms and conditions of any of the above required CDP(s) as approved by the Commission.

#### IDENTIFICATION OF PROPERTY

The gate is located on Vandenberg Air Force Base property located between the Highway 246 road easement and the SPTCo railroad right-of-way (identified by APN 095-050-02) which is a privately owned enclave within Vandenberg Air Force Base.

#### DESCRIPTION OF ACTIVITY

The activity that is the subject of this order includes, but is not limited to, the unpermitted placement, construction and/or erection, on August 7, 1995, of a locked gate that blocks access to the above described parking area and consequently the Pacific Ocean.

TERM

This order shall remain in effect permanently unless and until rescinded by the Commission.

FINDINGS

This order is issued on the basis of the findings adopted by the Commission on March 13, 1996, as set forth in the attached document entitled "Adopted Findings."

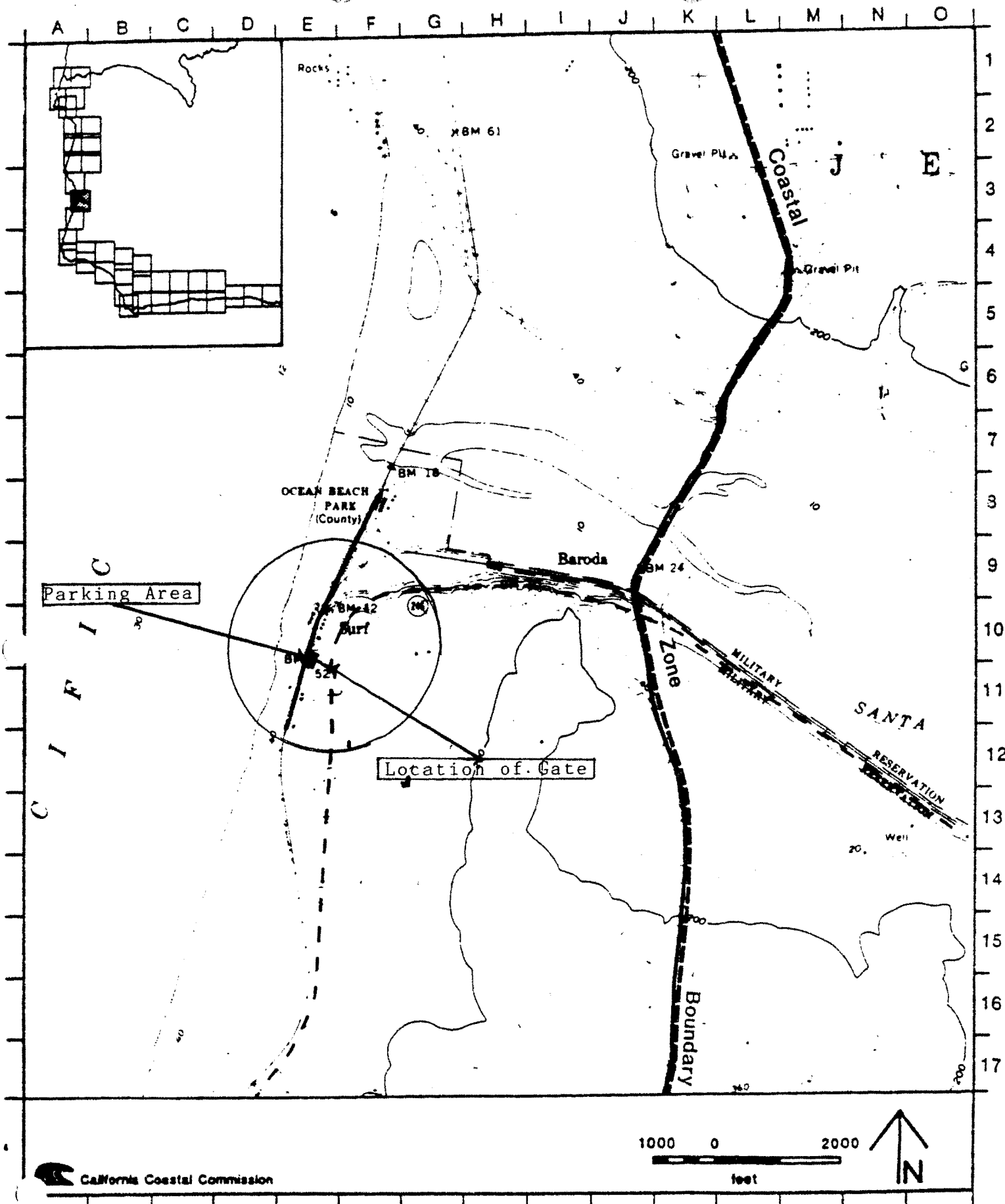
COMPLIANCE OBLIGATION

Strict compliance with this order by all parties subject thereto is required. Failure to comply strictly with any term or condition of this order may result in the imposition of civil penalties of up to SIX THOUSAND DOLLARS (\$6,000) per day for each day in which such compliance failure persists.

APPEAL

Pursuant to PRC § 30803(b), any person or entity against whom this order is issued may file a petition with the Superior Court for a stay of this order.











## Southern Pacific Lines

1800 Lincoln Street • 14th Floor • Denver, Colorado 80295 • Phone (303) 512-5017

E. P. Reilly  
Vice President and  
Chief Engineer

November 7, 1994

Honorable Mayor Joyce Ewardton  
City of Lompoc  
100 Civic Center Plaza  
Lompoc, California 93438-8001

Re: Public Access to Beach at Surf, California

Dear Honorable Mayor Ewardton:

In 1972 at the request of Lompoc City officials and other community leaders, Southern Pacific agreed to permit public access across its property and right of way to the beach at Surf, premised upon the representation of City officials that the City would fund and construct a pedestrian bridge across the railroad tracks. To date the City has failed to comply with its promise. It is for that reason that Southern Pacific is terminating public access across its property to the beach forthwith by fencing the entrance road into the subject property.

Please be advised that we would be agreeable to reestablish a public access if the City would agree to indemnify and insure Southern Pacific against any future loss or damage to those using this access, as well as constructing a public overcross, as was previously promised.

Yours truly,

ORIGINAL SIGNED

E.P.R.

E. P. Reilly

cc: Mr. General Lance W. Lord  
30th Space Commander  
747 Nebraska Avenue, Suite 1  
Vandenberg, USAF 93437-6261



**CALIFORNIA COASTAL COMMISSION**

LEGAL DIVISION  
46 FREMONT STREET, SUITE 2000  
SAN FRANCISCO, CA 94105-2219  
(415) 904-5220

**NOTICE OF VIOLATION OF THE CALIFORNIA COASTAL ACT**

September 1, 1995

CERTIFIED AND  
REGULAR MAIL

Paul Minault  
120 Montgomery Street, Suite 2290  
San Francisco, California 94104

PROPERTY LOCATION: The access road to the former railroad station at Surf, Santa Barbara County. The station is a privately owned enclave within Vandenberg Air Force Base and is located approximately 1/2 mile south of the Santa Ynez River.

VIOLATION FILE NO.: V-4-95-033

Dear Mr. Minault:

We are writing to you in your capacity as counsel for Southern Pacific Transportation Company ("SPTC"). Staff of the California Coastal Commission has received reports and you have admitted that SPTC has undertaken development consisting of construction of a gate at the above described property, which is in the coastal zone, without a necessary coastal development permit in violation of the California Coastal Act (PRC §§30000 et seq.). Pursuant to Coastal Act section 30600, any person wishing to perform or undertake any development in the coastal zone is required to obtain a coastal development permit authorizing such development.

Development is defined under the Coastal Act as:

"Development" means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land, including, but not limited to, subdivision pursuant to the Subdivision Map Act (commencing with Section 66410 of the Government Code), and any other division of land, including lot splits, except where the land division is brought about in

connection with the purchase of such land by a public agency for public recreational use; change in the intensity of use of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility; and the removal or harvesting of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations which are in accordance with a timber harvesting plan submitted pursuant to the provisions of the Z'berg-Nejedly Forest Practice Act of 1973 (commencing with Section 4511).

As used in this section, "structure" includes, but is not limited to, any building, road, pipe, flume, conduit, siphon, aqueduct, telephone line, and electrical power transmission and distribution line. (PRC§ 30106)

In most cases, violations involving unpermitted development may be resolved by completing for filing an application for a coastal development permit for either the removal of the unpermitted development and restoration of any damaged resources or for authorization of the development "after-the-fact." The Coastal Commission's Statewide Enforcement Supervisor, Nancy Cave, and Enforcement Legal Counsel, John Bowers, discussed this alleged violation with Paula Amanda, Counsel with the Southern Pacific Transportation Company, on August 25, 1995. During that phone conversation, Ms. Amanda stated that it is Southern Pacific's assertion that the gate is necessary for public safety and to protect the company from potential liability claims. The Commission staff requested that Ms. Amanda document her company's position concerning the liability issue. Additionally, staff asked Ms. Amanda to document the ownership of the site where the gate was constructed. One of the purposes of this letter is to confirm our request for written information on this alleged violation.

It is the Commission staff's position that the construction of the gate is subject to the permit requirements of PRC § 30600. Therefore, SPTC must immediately stop all unpermitted development activities and submit a completed coastal development permit application by September 15, 1995, to the Commission's South Central Coast Area office for either the removal of the unpermitted development and restoration of any damaged resources or for authorization of the development "after-the-fact." For your convenience, a permit application form is enclosed. Also enclosed is a Waiver of Legal Argument form. Please sign the waiver form and mail it to my attention at 45 Fremont Street, Suite 2000, San Francisco, CA 94105-2219.

Until such time that the Commission grants a permit authorizing the subject development, the gate must remain unlocked and in an opened position to allow the


Paul Minault  
September 1, 1995  
Page 3

public to access the parking area and the beach and to clarify to the public that it may pass through. We must receive your positive reply to this notice by no later than the close of business on September 7, 1995. Your failure to either: (1) agree by September 7, 1995, to immediately open the access way pending Commission consideration of the above described permit application, or (2) submit a completed permit application by September 15, 1995, may result in the issuance of a cease and desist order.

Coastal Act section 30820(a) provides that any person who violates any provision of the Coastal Act may be subject to a penalty not to exceed \$30,000. Section 30820(b) states that a person who intentionally and knowingly undertakes development that is in violation of the Coastal Act may be civilly liable in an amount that shall not be less than \$1,000 and not more than \$15,000 per day for each day in which the violation persists.

Please contact Susan Friend or Jack Ainsworth at our South Central Coast Area office, (805) 641-0142, to discuss your permit application. If you have any questions regarding the foregoing or if you are unable to submit a complete permit application by September 15, 1995, please contact me at (415) 904-5295.

Sincerely,

 FOR:  
ADRIENNE KLEIN  
Coastal Program Analyst II  
Statewide Enforcement

enclosures: Coastal Development Permit Application Form  
Waiver of Legal Argument Form

cc: Timothy Staffel, South Central Coast District Representative, California Coastal  
Commission  
Paula Amanda, Southern Pacific Transportation Company Legal Counsel  
Nancy Cave, Statewide Enforcement Supervisor  
Susan Friend, South Central Coast Area Office



LAW OFFICES OF PAUL M. MINAULT  
120 MONTGOMERY STREET  
SUITE 2290  
SAN FRANCISCO, CALIFORNIA 94104

TELEPHONE (415) 397-6152

FAX (415) 788-5768

September 7, 1995

BY MESSENGER: RETURN RECEIPT REQUESTED

Adrienne Klein  
California Coastal Commission  
45 Fremont, Suite 2000  
San Francisco, CA 94105-2219

Dear Ms. Klein:

SPTCo Surf Site: Santa Barbara County

This responds to your letter of September 1, 1995 notifying Southern Pacific Transportation Company ("SPTCo") that the gate that SPTCo installed to prevent public access to SPTCo's former Surf station property within Vandenberg Air Force Base, in Santa Barbara County, requires a coastal development permit. This letter will also clarify the factual background regarding SPTCo's action and SPTCo's position regarding public use of its property at this location.

SITE HISTORY

The relevant background of this site is contained in documents in SPTCo's files and documents that Jim Raives of the Coastal Commission provided to me. In 1949, SPTCo and Santa Barbara County agreed to the construction of a pedestrian underpass at Ocean Beach County Park, which lies approximately one-quarter mile north of SPTCo's Surf property. This allows pedestrians to cross under SPTCo's tracks on their way to and from the beach. To SPTCo's knowledge, parking at Ocean Beach has always been adequate to meet demand, and there is no real need for the public to access the beach from SPTCo's nearby Surf property. Area residents have apparently been using SPTCo's Surf property for beach access simply because it is slightly more convenient.

In 1972, SPTCo installed a fence and gate blocking access to the parking lot at its Surf property. SPTCo took this action in response to increasing problems with automobiles parked or stalled on the tracks and holding up trains, dune buggy use on the beach, litter on SPTCo's property, people climbing on parked

LAW OFFICES OF PAUL M. MINAULT

Adrienne Klein  
September 7, 1995  
Page 2

trains, and safety concerns regarding the 15-20 high speed passenger trains that passed every day. See Santa Barbara News-Press, July 19, 1972, enclosed as Exhibit A.

Following the installation of this fence, and in response to public concerns, SPTCo officials met with the Mayor of Lompoc, a representative of the County Supervisors and other civic leaders. At that meeting, SPTCo agreed to move the fence to the ocean side of the parking lot, to leave an opening for pedestrians to gain access to the beach, and to create an access ramp to replace an old stairway to the beach. SPTCo did so, however, with the understanding that the community would construct a public overpass. See Exhibit A. SPTCo's representative also stated that "[i]f somebody is hurt on our property, we will be forced to definitely close off the area." See Lompoc Record, July 15, 1972, enclosed as Exhibit B.

In 1977 SPTCo, in cooperation with the Air Force, installed a chain link fence around the perimeter of the parking lot which connected to the fence along either side of the access road. The fence did not prevent public access to the parking lot, but was intended to prevent unauthorized dune buggy access to the beach while still allowing pedestrians access to the beach. See Santa Barbara News-Press, July 2? [illegible], 1977, enclosed as Exhibit C.

In 1982, SPTCo was sued by an individual who had climbed onto a train parked at this location and whose foot was injured when the train began moving. See Complaint, Roum v. Southern Pacific Transportation Co., Super. Ct. for Santa Barbara County (No. 143738) (1982), enclosed as Exhibit D.

In 1994, SPTCo was sued a second time, for the death of a young child killed by a high-speed Amtrak train at this site. See Complaint, Kim v. Southern Pacific Transportation Co., Super. Ct. for Santa Barbara County (No. SM086667) (1994) enclosed as Exhibit E. Among the allegations in this suit was that SPTCo failed to comply with Public Utilities Code § 1201, which states that "[n]o public road, highway, or street shall be constructed across the track of any railroad corporation at grade . . . without having first secured the permission of the [Public Utilities] commission." The suit also alleged that SPTCo failed to comply with Public Utilities Code § 1202, which grants the Public Utilities Commission (the "PUC") "the exclusive power: (a) [t]o determine and prescribe the manner, including the particular point of crossing and the terms of installation, operation, maintenance, use, and protection of each crossing . . . of a street by a railroad or vice versa." See Exhibit E at 15. Also



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included in the allegations was Amtrak's alleged failure to comply with Public Utilities Code § 7604(a), which requires train operators to sound their horn for a distance of "at least 1,320 feet from the place where the railroad crosses any street, road, or highway." See Exhibit E at 6. This matter is still in litigation.

In 1994, the Air Force applied to the Coastal Commission for a permit to restrict public access to the beach at this location. The Coastal Commission staff report recommended against approving this action, stating that "the Air Force has not documented the public safety hazards at this location" and "has not considered alternative measures to protect public safety. For example, the Air Force could post signs warning people of the hazard and/or the Air Force could work with Southern Pacific Railroad to have a warning light installed." See California Coastal Commission, Staff Report and Consistency Determination No. CD-12-94, at 7 (1994), enclosed as Exhibit F. (The Air Force's application did not specifically mention the two lawsuits noted above.) The Air Force withdrew this application at the hearing, apparently anticipating denial of the application by the Commission.

In response to the second lawsuit and the obvious safety concerns that continued public use of this crossing presented, and the fact that no application had ever been made to the PUC by any public entity for an authorized crossing at this site, SPTCo recently installed the gate which blocks vehicular access to its Surf property and which is intended to discourage pedestrians from crossing SPTCo's tracks at this location.

SPTCO'S CURRENT POSITION

SPTCo currently finds itself in an untenable position. On the one hand, SPTCo has been sued twice for injuries at this site and faces the possibility of further personal injury suits if public access across its tracks at this site continues. SPTCo is self-insured and must pay the costs both of its own legal defense and of any monetary award in such suits. These accidents indicate that uncontrolled public use of this site poses a public safety hazard and may cause SPTCo to incur further liability as a consequence. On the other hand, SPTCo wishes to comply with the lawful requirements of public agencies, including the Coastal Commission, the Public Utilities Commission, and the Federal Railroad Administration, which has set a goal of closing 25% of the nation's grade crossings by the turn of the century.

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Adrienne Klein  
September 7, 1995  
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In your letter, you ask SPTCo to submit a permit application for this gate. In response, SPTCo is requesting the issuance of an emergency permit by the Executive Director of the Coastal Commission pursuant to Public Resources Code § 30624 and 14 CCR § 13142.<sup>1</sup> SPTCo believes that the current uncontrolled public access across its right of way at this location constitutes a public safety hazard and justifies emergency corrective measures by SPTCo.

Because this matter has engendered considerable public interest and the attention of the Commission's enforcement staff, SPTCo anticipates that the Commission, if it acted favorably on SPTCo's request for an emergency permit, would likely also request SPTCo to submit a regular permit application in compliance with 14 CCR § 13142.<sup>2</sup> Consequently, SPTCo agrees to make a good faith effort to submit an application form for a Coastal Development Permit by September 15, 1995, as you requested in your letter.<sup>3</sup>

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<sup>1</sup> Public Resources Code § 30624 authorizes the Executive Director of the Coastal Commission to issue a Coastal Development Permit "without compliance with the procedures specified in this chapter in cases of emergency, other than an emergency provided for under Section 30611." Pub. Res. Code § 30624. The Coastal Commission's regulations define an emergency as "a sudden unexpected occurrence demanding immediate action to prevent or mitigate loss or damage to life, health, property or essential public services." 14 CCR § 13009. The Executive Director may issue an emergency permit upon finding that: "(a) [a]n emergency exists and requires action more quickly than permitted by the procedures for administrative permits, or for ordinary permits and the development can and will be completed within 30 days . . . (b) [p]ublic comment on the proposed emergency action has been reviewed if time allows; and (c) [t]he work proposed would be consistent with the requirements of the California Coastal Act of 1976." 14 CCR § 13142.

<sup>2</sup> 14 CCR § 13142 grants the Executive Director of the Coastal Commission discretion to issue an emergency permit and to require the applicant to apply for a regular coastal development permit upon completion of the emergency response action.

<sup>3</sup> SPTCo will make a good faith effort to complete the application, but in the short time available, SPTCo can not be certain that all enclosures that the Commission may deem necessary to complete the application will be available by that time.

LAW OFFICES OF PAUL M. MINAULT

Adrienne Klein  
September 7, 1995  
Page 5

In your letter, you also demand that SPTCo leave the gate unlocked and in an open position to allow the public access to SPTCo's parking area and the beach. You state that SPTCo's failure to do so will result in the Coastal Commission's issuing a cease and desist order and may subject SPTCo to fines and penalties of up to \$15,000 per day. SPTCo would be pleased to leave this gate open, and to provide public access at this site, if a public agency were willing to indemnify SPTCo for any liability associated with such access. SPTCo is currently exploring this possibility with the County and the Coastal Conservancy. In the meantime, however, SPTCo believes that the public safety concerns at this site, and the potential liability that SPTCo may incur in the event of another injury or death, require that this gate remain closed for the time being.

SPTCo believes that the issue of the appropriateness of public beach access at its Surf property is properly within the exclusive jurisdiction of the PUC, pursuant to Public Utilities Code §§ 1201-1202.5. Breidert v. Southern Pacific Co., 272 Cal. App. 2d 398, 406-407 (1969) ("a grade crossing cannot be legally created unless the approval of the Public Utilities Commission has been first secured").<sup>4</sup> SPTCo is very concerned that the Coastal Commission may attempt to create a public crossing at this location by forcing SPTCo to continue to provide public access across its right of way, in the process circumventing the jurisdiction of the PUC and exposing SPTCo to continued liability for failure to comply with the Public Utilities Code.<sup>5</sup> SPTCo believes that if the Coastal Commission and Santa Barbara County

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<sup>4</sup> While Public Utilities Code § 1201 refers only to track crossings by a public "road, highway, or street", the PUC has interpreted this section to include pedestrian crossings as well. Thus, the PUC has, by order, indicated that any crossing of a railroad by a public "footpath" requires prior PUC authorization. PUC, General Order No. 69-C (1985), enclosed as Exhibit G. This policy is also reflected in the routine practice of the PUC in reviewing applications from local agencies for pedestrian crossings of railroad rights of way. Hence, even if SPTCo wished to grant an easement or license for a public crossing at its Surf property without PUC authorization, it would be in violation of this PUC General Order.

<sup>5</sup> The Coastal Act states that "the [Coastal] commission shall not set standards or adopt regulations that duplicate regulatory controls established by any existing state agency pursuant to specific statutory requirements or authorization." Pub. Res. Code § 30401.

LAW OFFICES OF PAUL M. MINAULT

Adrienne Klein  
September 7, 1995  
Page 6

wish to have a public crossing at this location, the County should apply to the PUC for approval of such a crossing and a determination as to the appropriate safety devices to be installed and the proper allocation of costs. In the meantime, however, it is unfair for the Coastal Commission to demand that SPTCo maintain an unauthorized grade crossing over its tracks for the benefit of the public and at its own risk.

In summary, SPTCo believes that the proper course of action at this time is for the Coastal Commission to issue an emergency permit, and if appropriate a coastal development permit to allow SPTCo to maintain a gate or take such other measures as may be necessary to close its Surf property to public access for purposes of public safety, and for Santa Barbara County to apply to the PUC for authorization for a public crossing on or over SPTCo's right of way at this location. SPTCo believes that this course of action is consistent with Public Resources Code § 30212, which exempts coastal development projects from providing public access to the coast where such access is "inconsistent with public safety" and where "adequate access exists nearby". Both of these conditions apply at SPTCo's Surf property.

Please do not hesitate to call me with any questions regarding this information. For your convenience, I have enclosed copies of photos of the site as Exhibit H.

Yours very truly,



Paul M. Minault

Enclosures

cc: Paula Amanda, Esq. (w/encl)

**CALIFORNIA COASTAL COMMISSION**

45 FREMONT, SUITE 2000  
SAN FRANCISCO, CA 94105-2219  
VOICE AND TDD (415) 904-5200

September 8, 1995



Hand Delivered to:

Sent by Certified Mail Receipt  
No. Z 778 711 936 to:

**Paul Minault, Esq.**  
120 Montgomery Street, Suite 2290  
San Francisco, California 94104

**Paula Amanda, Asst. Gen. Atty**  
Southern Pacific Transportation Co.  
1 Market Plaza, 8th Floor  
San Francisco, California 94105

**SUBJECT: Executive Director's Cease and Desist Order No. ED-95-CD-01****DATE ISSUED: September 8, 1995****EXPIRES: December 7, 1995****I. ORDER**

Pursuant to my authority under California Public Resources Code section 30809, I hereby order Southern Pacific Transportation Company ("SPTCo") and all its divisions, officers, employees, contractors, and agents and any persons acting in concert with any of the foregoing to cease and desist from engaging in any development activities, as defined pursuant to California Public Resources Code section 30106, such as erecting a fence and gate and thereby blocking public access to and from the beach, at the property described below without first obtaining a coastal development permit authorizing such activity and SPTCo must open the gate that has been erected in violation of the Coastal Act so as not to impede public access to the beach unless and until a coastal development permit has been reviewed and approved by the Coastal Commission.

**II. IDENTIFICATION OF PROPERTY**

The property which is the subject of this cease and desist order includes a parking area commonly used by the public to cross to and from the beach. The parking area is at the end of an access road to the former railroad station, located off of Highway 246, approximately 1/2 mile south of the Santa Ynez River at Surf, Santa Barbara County. The railroad right of way is located in a privately owned enclave within Vandenberg Air Force Base identified by APN 095-050-02. This property is located in the Commission's retained permit jurisdiction (Exhibit 1).

**III. DESCRIPTION OF ACTIVITY**

The activity that is the subject of this order includes but is not limited to the unpermitted placement, construction and/or erection, on August 7, 1995, of a fence and locked gate that

blocks access to the above described parking area. This unpermitted activity constitutes development and adversely affects coastal resources by blocking coastal access.

As you are aware, in 1994 Commission staff informed the U.S. Air Force through a staff report that its proposed elimination of the subject access way would be inconsistent with the Coastal Act [Consistency Determination No. CD-12-94 as modified (not attached hereto)].

#### IV. FINDINGS

- A. By letter dated November 7, 1994, E. P. Reilly, Vice President and Chief Engineer, Southern Pacific Lines (SPTCo's parent company), informed Lompoc Mayor Joyce Howardton regarding access to the beach at Surf, that "Southern Pacific is terminating public access across its property to the beach forthwith by fencing the entrance road into the subject property" (Exhibit 2).
- B. On August 7, 1995, Jim Raives of the Coastal Commission's Federal Consistency staff, was contacted by telephone by a confidential informant who stated that SPTCo had constructed the subject gate and fence that day. Later that day, Mr. Raives contacted by telephone Gregg Mohr, County of Santa Barbara Planning and Development Department staff member, who confirmed the statements of the informant.
- C. By telephone conversation on August 25, 1995, Nancy Cave, Coastal Commission Statewide Enforcement Program Supervisor, and John Bowers, Coastal Commission Staff Counsel, discussed the gate's construction with Paula Amanda, Counsel with SPTCo. Ms. Cave and Mr. Bowers informed Ms. Amanda that the gate constitutes development under the Coastal Act, is located in the Commission's retained permit jurisdiction and requires Commission permit authorization. They also asked Ms. Amanda to put in writing SPTCo's position with respect to the gate and to confirm in detail SPTCo's legal ownership of the property on which the gate is located.
- D. By telephone call on August 31, 1995, Mr. Raives spoke by telephone with Paul Minault, an attorney representing SPTCo, who stated that SPTCo was unwilling to unlock and open the gate unless and until the Commission issued a cease and desist order requesting it to.
- E. On September 1, 1995, Adrienne Klein, Coastal Commission Statewide Enforcement Program staff, served Mr. Minault, on behalf of SPTCo, with a notice stating that:
  - (1) the subject activity constitutes development which is in violation of the Coastal Act because it is not authorized by a coastal development permit;
  - (2) a coastal development permit application must be submitted to the Coastal Commission by September 15, 1995; and

- (3) failure to immediately stop the described activity, by agreeing by September 7, 1995, to unlock the gate and retain it in an open position until consideration by the Commission of an after-the-fact coastal development permit application, might result in the issuance of a cease and desist order, the violation of which could result in civil fines (Exhibit 3).

The notice instructed SPTCo to contact identified Coastal Commission staff members for further discussions and information.

- F. On September 7, 1995, Ms. Klein telephoned Mr. Minault to determine SPTCo's response to her September 1, 1995 letter. Mr. Minault stated that SPTCo will make a good faith effort to submit an after-the-fact coastal development permit application by September 15, 1995, but is not willing to unlock the gate and retain it in an open position for the time being. Later that day, Ms. Klein received a letter from Mr. Minault confirming and elaborating on his earlier oral statements and also requesting that the Coastal Commission consider issuing an emergency permit for the gate (Exhibit 4).
- G. On September 7, 1995, Mark Cappelli, of the Coastal Commission's South Central Coast Area staff, conducted a site visit at the subject property during which he personally observed that the subject gate is still locked and in a closed position, precluding public access.

#### V. COMPLIANCE OBLIGATION

Strict compliance with this order by all parties subject thereto is required. Failure to comply strictly with any term or condition of this order may result in the imposition of civil penalties of up to SIX THOUSAND DOLLARS (\$6,000) per day for each day in which such compliance failure persists.

#### VI. APPEAL

Pursuant to PRC section 30803(b), any person or entity against whom this order is issued may file a petition with the Superior Court for a stay of this order.

Executed at San Francisco, California on September 8, 1995

  
PETER DOUGLAS  
EXECUTIVE DIRECTOR

cc: Timothy Staffel, California Coastal Commissioner, South Central Coast District  
Nancy Cave, Statewide Enforcement Program Supervisor  
Susan Friend, South Central Coast Area Enforcement Officer





**CALIFORNIA COASTAL COMMISSION**

45 FREMONT STREET, SUITE 2000  
SAN FRANCISCO, CA 94105-2219  
VOICE AND TDD (415) 904-5200



October 10, 1995

Paul Minault, Esq.  
120 Montgomery Street, Suite 2290  
San Francisco, CA 94104

Paula Amanda, Asst. Gen. Atty.  
Southern Pacific Transportation Co.  
1 Market Plaza, 8th Floor  
San Francisco, CA 94105

John Gunderson  
Chief, Environmental Law  
U.S. Air Force, 30 SW/ET  
806 13th Street, Suite 116  
Vandenberg AFB, CA 93437-5242

RE: After-the-fact federal permission for construction of a gate blocking public use of the shoreline access trail at the former Surf, CA, railroad station, Vandenberg Air Force Base, Santa Barbara County, California.

Dear Mr. Minault, Ms. Amanda, and Mr. Gunderson:

The purpose of this letter is to inform the Air Force and the Southern Pacific Transportation Company that this gate, if approved by the Air Force, will affect the resources of the California coastal zone, and thus, is subject to the federal consistency requirements of Section 307(c)(3) of the federal Coastal Zone Management Act (CZMA) (16 U.S.C. §1456(c)(3)(A)).

**BACKGROUND**

On August 7, 1995, a concerned citizen notified the Commission staff that the Southern Pacific Transportation Company constructed a gate blocking vehicular access to a parking area that supports public access to the beach. The parking area is located at the end of an

access road to the former Surf, CA, railroad station located off Highway 246, approximately 1/2 mile south of the Santa Ynez River, Santa Barbara County. Southern Pacific and the Air Force initially informed the Commission staff that the gate is located on property owned by Southern Pacific. Based on that information and other investigations, the staff concluded that Southern Pacific constructed the gate without a coastal development permit. Through its enforcement procedures, the Commission staff issued a notice, dated September 1, 1995, requiring the submittal of a permit application to the Commission. On September 15, 1995, the Commission staff received a letter from Mr. Paul Minault, the attorney representing Southern Pacific, stating that his client now believes that the subject gate is located on land owned by the U.S. Air Force (Vandenberg Air Force Base) and that Southern Pacific has initiated discussions with the Air Force seeking its authorization for the gate to remain at its current location. The Air Force subsequently confirmed that the gate is on federal land and that the gate requires Air Force permission to remain.

### **FEDERAL CONSISTENCY**

The CZMA and its implementing regulations (15 C.F.R. Part 930, subpart D) require the applicant for a federal permit or license, which is defined as "any authorization, certification, approval, or other form of permissions which any Federal agency is empowered to issue to an applicant" (15 C.F.R. § 930.51(a)), to prepare a "consistency certification" for an activity that affects the coastal zone (15 C.F.R. § 930.57(a)).

A consistency certification is a statement that the activity is consistent with the state's coastal management program (15 C.F.R. § 930.57(b)) and information supporting that conclusion (15 C.F.R. § 930.58). The applicant for the federal permit must submit the consistency certification and the supporting information to the Coastal Commission for its review. The Commission has six months from the date the Commission received the original notice of the permit application or three months from the Commission's receipt of a consistency certification and the supporting information, whichever period terminates last, to concur with or object to the consistency certification. If the Commission does not act within this time period, the Commission's concurrence of the consistency certification is conclusively presumed (15 C.F.R. § 930.54(e)). If the Commission objects to the consistency certification, the federal agency cannot issue the permit or license unless the applicant appeals the objection to the Secretary of Commerce and the Secretary overrides the objection under the provisions of 15 C.F.R. Part 930 subpart H (15 C.F.R. § 930.65).

### **UNLISTED PERMIT**

Since the federal permit or license involved in this matter is not "listed" in the California Coastal Management Program (CCMP), the federal Office of Ocean and Coastal

Resources Management (OCRM) must approve the Commission's intent to review this activity (15 C.F.R. §§ 930.53 and 930.54). The sole basis for granting (or withholding) such approval is whether the proposed activity can reasonably be expected to affect the coastal zone (15 C.F.R. § 930.54(c)). The Commission staff believes that the proposed activity clearly meets this standard.

By copy of this letter, the Commission staff is notifying the Assistant Administrator, National Ocean Services, National Oceanic and Atmospheric Administration, and the director of the OCRM of the Commission's intent to review this project. The Assistant Administrator has 30 days from receipt of this notice to approve or disapprove it (15 C.F.R. § 930.54(c)). In making its decision, the Assistant Administrator will consider comments from the federal "permitting" agency (the U.S. Air Force) and the applicant (Southern Pacific Transportation Company), who have 15 days from receipt of this letter to submit to the Assistant Administrator any such comments (15 C.F.R. § 930.54(c)). If the Assistant Administrator approves the Commission's request for review, the Air Force cannot issue its "permit or license" until the Commission reviews and concurs with a consistency certification (15 C.F.R. § 930.54 (b)).

### **EFFECTS ON PUBLIC ACCESS**

The Commission staff believes that the subject gate will adversely affect public access and recreational resources of the coastal zone. The Commission staff recognizes that the federal government owns this beach, Ocean Beach, and, thus, the area above the mean high tide is not within the coastal zone. However, federal ownership ends at the mean high tide line and the area below that line is within the coastal zone. Since the public comes to Ocean Beach to fish, surf, and swim, the area provides a coastal recreational resource. The gate affects these resources by closing one of the vertical accessways leading to this beach. The purpose of the gate is to prevent the public from crossing the railroad tracks to reach the beach. People park their cars at this parking area, cross the railroad tracks, and follow the trail through the dunes down to the beach. Since, other than this parking lot, there are no other places to park in the immediate vicinity of this parking area, the gate prevents the use of this public access way.

In northern Santa Barbara County, access to the shoreline is very limited. The Commission has historically been very concerned about any activity that reduces the amount of public access in this region. This beach is one of only three public beaches along the 64-mile stretch of northern Santa Barbara County. Most of the coast in this area is within three large landholdings, Vandenberg Air Force Base, Bixby Ranch, and Hollister Ranch, each of which restricts the public's ability to access the shoreline.

The Commission staff recognizes that there is another public accessway at Ocean Beach County park, which approximately 3/4 of a mile north of the former railroad station at Surf, CA. That park consists of large parking area, a play ground, and an access trail to the beach crosses under the railroad tracks at the Santa Ynez River railroad bridge. Although this other access route to this beach allows the public to reach the shoreline at the same beach as the "Surf Station" accessway, the Surf access way is necessary for several reasons. First, this accessway is a very popular route for those people living in the local community. In 1994, when the Air Force proposed a similar closure of this access route (see CD-12-94), the Commission received contact from literally thousands of nearby residents opposed to the closure. Specifically, the Commission received petitions containing approximately 2,400 names and approximately 30 letters from concerned citizens opposed to the closure. Additionally, many of these people also called the Commission staff to state their concerns. Second, the accessway provides access to the southern part of the beach, which would otherwise be inaccessible to fishermen lugging heavy equipment. Finally, the access at Surf provides a necessary alternative means to reach the beach. A second access way is necessary because the primary accessway is adjacent to the Santa Ynez River and its access road is subject to flooding. According to the Santa Barbara County Parks, that road usually floods at least once a year and stays flooded from anywhere between three weeks and three months (pers. com., 10/10/95, Jeff Stone, Deputy Director for Santa Barbara County Parks, North County). Considering this information, the Commission staff believes that the subject gate clearly affects public access resources of the coastal zone.

The Commission staff recognizes that the reason Southern Pacific constructed the gate is to protect public safety and lessen its liability risk. The Commission staff is sensitive to this issue and the Coastal Act allows for access limitations necessary to protect public safety (Public Resource Code 30210). However, it is through the federal consistency processes that the Commission can weigh the competing concerns of public access and public safety against the enforceable policies of the CCMP. Through the process, the Commission will evaluate the legitimacy of the public safety issue and alternative mechanisms that may protect public safety while maintaining public access and recreational resources. Therefore, the resolution of the conflict between public access and safety is accomplished through an analysis of consistency with the CCMP and does not change the determination that the construction of this gate affects public access and recreational resources of the coastal zone.

## **CONCLUSION**

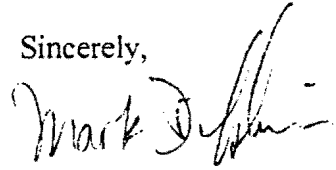
In conclusion, the Commission staff believes that the proposed activity can reasonably be expected to affect the coastal zone, and, therefore, it is subject to the federal consistency provisions of the CZMA. Pursuant to the requirements of the CZMA, the Commission

OCTOBER 6, 1995  
PAGE 5

will request the concurrence of the federal Office of Ocean and Coastal Resource Management in this determination.

Thank you for your cooperation in this matter. If you need any further assistance, please contact James Raives of the Commission staff at (415) 904-5292.

Sincerely,

A handwritten signature in dark ink, appearing to read "Mark Douglas", is written over the typed name.

(fol-)  
PETER M. DOUGLAS  
Executive Director

cc: South Central Coast Area Office  
NOAA Assistant Administrator  
Assistant General Counsel for Ocean Services  
OCRM  
Department of Water Resources  
Governor's Washington D.C. Office  
Santa Barbara County

PMD/JRR



**CALIFORNIA COASTAL COMMISSION**

45 FREMONT, SUITE 2000  
SAN FRANCISCO, CA 94105-2219  
VOICE AND TDD (415) 904-5200



December 15, 1995

Hand Delivered to:

Sent by Certified Mail Receipt

No. Z 778 711 895 to:

**Paul Minault, Esq.**  
120 Montgomery Street, Suite 2290  
San Francisco, California 94104

**Paula Amanda, Asst. Gen. Atty.**  
Southern Pacific Transportation Co.  
1 Market Plaza, 8th Floor  
San Francisco, California 94105

**SUBJECT: Executive Director's Cease and Desist Order No. ED-95-CD-02**

**DATE ISSUED: December 15, 1995**

**EXPIRES: March 14, 1995**

**I. ORDER**

Pursuant to my authority under California Public Resources Code section 30809, I hereby order Southern Pacific Transportation Company ("SPTCo") and all its divisions, officers, employees, contractors, and agents and any persons acting in concert with any of the foregoing to: 1) cease and desist from engaging in any development activities, as defined pursuant to California Public Resources Code section 30106, such as erecting a fence and gate and thereby blocking public access to and from the Pacific Ocean, at the property described below without first obtaining a coastal development permit authorizing such activity; and 2) open the gate that has been erected in violation of the Coastal Act so as not to impede public access to the beach and ocean unless and until a coastal development permit has there for been reviewed and approved by the Coastal Commission.

**II. IDENTIFICATION OF PROPERTY**

The property which is the subject of this cease and desist order consists of a parking area commonly used by the public to travel by foot to and from a beach area of the adjacent Pacific Ocean. The parking area is at the end of an access road to a former SPTCo railroad station, located off of Highway 246, approximately 1/2 mile south of the Santa Ynez River at Surf, Santa Barbara County. The gate is located on Vandenberg Air Force Base property located between the Highway 246 road easement and the SPTCo railroad right of way (identified by APN 095-050-02) which is a privately owned enclave within Vandenberg Air Force Base. This property is located in the Commission's permit jurisdiction that is retained notwithstanding its certification of the Santa Barbara County Local Coastal Program (Exhibit 1).

### III. DESCRIPTION OF ACTIVITY

The activity that is the subject of this order includes but is not limited to the unpermitted placement, construction and/or erection, on August 7, 1995, of a fence and locked gate that blocks access to the above described parking area and consequently the Pacific Ocean.

### IV. FINDINGS

A. By letter dated November 7, 1994, E. P. Reilly, Vice President and Chief Engineer, Southern Pacific Lines (SPTCo's parent company), informed Lompoc Mayor Joyce Howerton, regarding access to the beach at Surf, that "Southern Pacific is terminating public access across its property to the beach forthwith by fencing the entrance road into the subject property" (Exhibit 2).

B. On August 7, 1995, Jim Raives of the Coastal Commission's Federal Consistency staff, was contacted by telephone by a confidential informant who stated that SPTCo had constructed the subject gate and fence that day. Later that day, Mr. Raives contacted by telephone Gregg Mohr, County of Santa Barbara Planning and Development Department staff member, who confirmed the statements of the informant.

C. By telephone conversation on August 25, 1995, Nancy Cave, Coastal Commission Statewide Enforcement Program Supervisor, and John Bowers, Coastal Commission Staff Counsel, discussed the gate's construction with Paula Amanda, Counsel with SPTCo. Ms. Cave and Mr. Bowers informed Ms. Amanda that the gate constitutes development under the Coastal Act, is located in the Commission's retained permit jurisdiction and requires Commission permit authorization. They also asked Ms. Amanda to put in writing SPTCo's position with respect to the gate and to confirm in detail SPTCo's legal ownership of the property on which the gate is located.

D. By telephone conversation on August 31, 1995, Paul Minault, an attorney representing SPTCo, stated to Mr. Raives that SPTCo was unwilling to unlock and open the gate unless and until the Commission issued a cease and desist order directing it to do so.

E. On September 1, 1995, Adrienne Klein, Coastal Commission Statewide Enforcement Program staff, delivered to SPTCo, via Mr. Minault, a notice stating that:

(1) the subject activity constitutes development which is in violation of the Coastal Act because it is not authorized by a coastal development permit;



(2) a coastal development permit application must be submitted to the Coastal Commission by September 15, 1995; and

(3) failure to immediately stop the described activity, by agreeing by September 7, 1995, to unlock the gate and retain it in an open position until consideration by the Commission of an after-the-fact coastal development permit application, might result in the issuance of a cease and desist order, the violation of which could result in civil fines (Exhibit 3).

F. By letter dated September 7, 1995, Mr. Minault informed Ms. Klein that SPTCo will make a good faith effort to submit an after-the-fact coastal development permit application by September 15, 1995, but is not willing to unlock the gate and retain it in an open position for the time being (Exhibit 4).

G. On September 7, 1995, Mark Cappelli, of the Coastal Commission's South Central Coast Area staff, conducted a site visit at the subject property during which he personally observed that the subject gate was still locked and in a closed position, precluding public access.

H. On September 7, 1995, Peter Douglas, Executive Director of the Coastal Commission, issued to SPTCo, via Mr. Minault, Cease and Desist Order No. ED-95-CD-01 prohibiting SPTCo from engaging in any development activities, as defined pursuant to California Public Resources Code section 30106, such as erecting a fence and gate and thereby blocking public access to and from the beach without first obtaining a coastal development permit authorizing such activity (Exhibit 5, without exhibits).

I. In the course of a telephone conversation on December 6, 1995, Mr. Minault responded to an inquiry of Ms. Klein by stating that SPTCo would not maintain the gate in an open and unlocked position after the December 7, 1995, expiration of Order No. ED-95-CD-01 unless the Executive Director were to issue another order.

#### V. COMPLIANCE OBLIGATION

Strict compliance with this order by all parties subject thereto is required. Failure to comply strictly with any term or condition of this order may result in the imposition of civil penalties of up to SIX THOUSAND DOLLARS (\$6,000) per day for each day in which such compliance failure persists.

## VI. APPEAL

Pursuant to PRC section 30803(b), any person or entity against whom this order is issued may file a petition with the Superior Court for a stay of this order.

## VII. NOTICE OF INTENT TO COMMENCE CEASE AND DESIST ORDER PROCEEDING BEFORE THE COASTAL COMMISSION

SPTCo is hereby notified of my decision to commence a proceeding pursuant to which the Commission may issue a Cease and Desist Order (PRC section 30810) prohibiting SPTCo from engaging in any development activity or otherwise inhibiting public access to the Pacific Ocean at Surf unless and until the Commission grants a CDP authorizing such activity.

In accordance with section 13181 of the Commission's regulations (Title 14, Division 5.5, CCR), you have the opportunity to respond to the staff's violation allegations as set forth in this notice by completing the enclosed Statement of Defense Form. The completed Statement of Defense Form must be received by this office no later than January 5, 1995. Should you have any questions regarding this matter, please contact Adrienne Klein at (415) 904-5295.

Executed at San Francisco, California on December 15, 1995.



PETER DOUGLAS  
EXECUTIVE DIRECTOR  
CALIFORNIA COASTAL COMMISSION

*Review/C. Use*



UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration  
NATIONAL OCEAN SERVICE  
OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT  
Silver Spring, Maryland 20910

JAN 22 1996

Mr. Peter M. Douglas  
Executive Director  
California Coastal Commission  
45 Fremont St., Suite 2000  
San Francisco, CA 94105-2219

JAN 20 1996  
CALIFORNIA  
COASTAL COMMISSION

Dear Mr. Douglas:

This letter responds to the California Coastal Commission's ("Commission") request, dated October 10, 1995, to review as an unlisted activity, the Southern Pacific Transportation Company's ("SPTCo") request for approval from Vandenberg Air Force Base ("Vandenberg AFB") to retain a gate placed by SPTCo on Vandenberg AFB property. The Office of Ocean and Coastal Resource Management ("OCRM") finds that the activity can be reasonably expected to affect public access in California's coastal zone and approves your request. This finding does not address whether the activity is consistent with the California coastal management program; it merely authorizes the Commission's review.

SPTCo must provide the Commission with a consistency certification pursuant to 15 C.F.R. Part 930, Subpart D. The Commission must complete its review within six months from the original notice of the activity or within three months from receipt of SPTCo's consistency certification and accompanying information, whichever period terminates last. See 15 C.F.R. § 930.54(e). Vandenberg AFB may not approve SPTCo's request until the requirements of 15 C.F.R. Part 930, Subpart D have been met.


The materials placed in the record by both parties raise an issue of state law regarding the legality of the coastal use (public access) at issue. SPTCo argued that access across its tracks would be trespassing and would not merit protection under federal consistency review. The Commission takes issue with the illegality of the use, as alleged by SPTCo. Where there is an issue of whether a coastal use is permissible under state law, OCRM is not the body to interpret state law. Thus, OCRM bases its decision only on whether the activity can be reasonably expected to affect any land or water use or natural resource of the coastal zone. See 15 C.F.R. § 930.54(e).



The record shows that public access along California's coast has been a longstanding concern to the state. Ocean Beach is one of only three public beaches along the 64-mile stretch of northern Santa Barbara County. Despite the existence of another access point less than a mile away, it is reasonably expected that the gate will block access to the beach. The record shows that closing the Surf access way is reasonably likely to have an effect on the community's usage of the beach, and that, combined with the shortage of access points in northern Santa Barbara County and the flooding of the Santa Ynez River, effects on the coastal zone can be reasonably expected.<sup>1</sup>

Please call David Kaiser, Federal Consistency Coordinator, OCRM, at (301) 713-3098, x 144 if you have any questions.

Sincerely,



Jeffrey R. Benoit  
Director

---

<sup>1</sup> Failure by the County or the State to use the California Public Utilities Commission's procedures to formalize the Surf access way or take steps to control the flooding is not relevant to whether the gate can be reasonably expected to affect public access.

cc: Margo Jackson  
Mary O'Brien  
John King

Mr. Paul Minault, Esq.  
120 Montgomery St., Suite 2290  
San Francisco, CA 94104

Ms. Paula Amanda  
Assistant General Attorney  
1 Market Plaza, 8th Floor  
San Francisco, CA 94105

Mr. John Gunderson  
Chief, Environmental Law  
U.S. Air Force, 30 SW/ET  
806 13th St., Suite 116  
Vandenberg AFB, CA 93437-5242

dk\fc\ca\surf.2



LAW OFFICES OF PAUL M. MINAULT  
120 MONTGOMERY STREET  
SUITE 2290  
SAN FRANCISCO, CALIFORNIA 94104

TELEPHONE (415) 397-6152

FAX (415) 788-5768

January 4, 1996

BY MESSENGER:  
RETURN RECEIPT REQUESTED

Peter Douglas  
Executive Director  
California Coastal Commission  
45 Fremont, Suite 2000  
San Francisco, CA 94105-2219

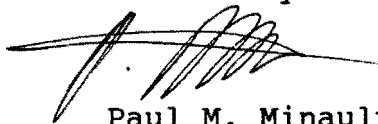
Attention: Adrienne Klein

Dear Mr. Douglas:

SPTCo Surf Site: Santa Barbara County

Enclosed is the Statement of Defense of Southern Pacific Transportation Company ("SPTCo") in regard to the Commission's Cease and Desist Order No. ED-95-CD-02 dated December 15, 1995.

Yours very truly,



Paul M. Minault

Enclosure

cc: Paula Amanda, Esq. (w/encl)

EXHIBIT NO. 9

of CCC-96-CD-01

with exhibits

California Coastal Commission





1 Paul M. Minault, Esq.  
2 Law Offices of Paul M. Minault  
3 120 Montgomery Street, Suite 2290  
4 San Francisco, CA 94104  
5 (415) 397-6152  
6 (415) 788-5768 (fax)  
7 Attorney for Southern Pacific  
8 Transportation Company

9 CALIFORNIA COASTAL COMMISSION

10 California Coastal Commission	)	Order No. ED-95-CD-02
11 Cease and Desist Order Issued to	)	
12 Southern Pacific Transportation	)	STATEMENT OF DEFENSE
13 Company	)	OF SOUTHERN PACIFIC
	)	TRANSPORTATION COMPANY

14 Southern Pacific Transportation Company ("SPTCo")  
15 submits the following Statement of Defense in regard to the  
16 Coastal Commission's ("the Commission's") Cease and Desist  
17 Order No. Ed-95-CD-02 ("the Order"). The numbered items below  
18 restate and respond to the questions in the Commission's  
19 Statement of Defense Form.

20 1. Facts or allegations contained in the cease and  
21 desist order or the notice of intent that you admit (with  
22 specific reference to the paragraph number in such document).

23 SPTCo admits the facts set forth in Findings A, C, D,  
24 E, F, H, and I of the Order.

25 2. Facts or allegations contained in the cease and  
26 desist order or notice of intent that you deny (with specific  
27 reference to paragraph number in such document).

28 SPTCo denies none of the facts set forth in the  
Findings of the Order.

3. Facts or allegations contained in the cease and  
desist order or notice of intent of which you have no personal  
knowledge (with specific reference to paragraph number in such  
document).

SPTCo has no knowledge of the facts set forth in  
Findings B and G of the Order regarding communications between  
Commission staff.

1           4. Other facts which may exonerate or mitigate your  
2 possible responsibility or otherwise explain your relationship  
3 to the possible violation (be as specific as you can; if you  
4 have or know of any document(s), photograph(s), map(s),  
5 letter(s), or other evidence that you believe is/are relevant,  
6 please identify it/them by name, date, type, and any other  
7 identifying information and provide the original(s) or (a)  
8 cop(y/ies) if you can):

9           In response to the Commission's Order, SPTCo presents  
10 the following statements of facts and legal arguments.

11           A Crossing at This Location is Not Necessary Because Adequate  
12 Access Exists Nearby.

13           In 1949, SPTCo and Santa Barbara County, with the  
14 approval of the Public Utilities Commission ("the PUC"), agreed  
15 to construct a pedestrian underpass at Ocean Beach County Park,  
16 less than a mile up the coast from SPTCo's Surf property. This  
17 park has ample parking as well as a pedestrian under-crossing,  
18 which allows people to access the beach safely without crossing  
19 over SPTCo's tracks.

20           SPTCo acknowledges that access to the county park is  
21 blocked during periods when the Santa Ynez River is flooded, as  
22 discussed in more detail below. Nevertheless, the Order  
23 applies at all times, not only during flooding. Consequently,  
24 SPTCo asks the Commission, as an initial matter, to limit its  
25 Order to apply only during periods when access to Ocean Beach  
26 County Park is closed by flooding.

27           Public Use of SPTCo's Surf Property to Cross the Tracks is  
28 Unsafe, as Indicated by Two Serious Accidents at this Location.

          Grade crossings are a well-recognized safety concern  
within the transportation industry, and the Federal Railroad  
Administration has set a goal of closing 25% of the nation's  
grade crossings by the turn of the century. These safety  
concerns are also reflected by two incidents at SPTCo's Surf  
property.

          In 1982, SPTCo was sued by an individual who had  
climbed onto a train parked at this location and whose foot was  
injured when the train began moving. See Complaint, Roum v.  
Southern Pacific Transportation Co., Super. Ct. for Santa  
Barbara County (No. 143738) (1982), enclosed as Exhibit A. The  
court eventually found SPTCo not liable, and the judgement was  
upheld on appeal. See Exhibit B. SPTCo nevertheless incurred  
approximately \$100,000 of unreimbursed defense costs in this

1 suit.

2 In 1994, SPTCo was sued a second time, for the death  
3 of a young child killed by a high-speed Amtrak train at this  
4 site. See Complaint, Kim v. Southern Pacific Transportation  
5 Co., Super. Ct. for Santa Barbara County (No. SM086667) (1994)  
6 enclosed as Exhibit C. Among the allegations in this suit was  
7 that SPTCo failed to comply with Public Utilities Code § 1201,  
8 which states that "[n]o public road, highway, or street shall  
9 be constructed across the track of any railroad corporation at  
10 grade . . . without having first secured the permission of the  
11 [Public Utilities] commission." The suit also alleged that  
12 SPTCo failed to comply with Public Utilities Code § 1202, which  
13 grants the PUC "the exclusive power: (a) [t]o determine and  
14 prescribe the manner, including the particular point of  
15 crossing and the terms of installation, operation, maintenance,  
16 use, and protection of each crossing . . . of a street by a  
17 railroad or vice versa." See Exhibit C at 15. Also included  
18 in the allegations was Amtrak's alleged failure to comply with  
19 Public Utilities Code § 7604(a), which requires train operators  
20 to sound their horn for a distance of "at least 1,320 feet from  
21 the place where the railroad crosses any street, road, or  
22 highway." Id. at 6. This matter is still in litigation.

13 The Mere Convenience this Access Provides is Insufficient to  
14 Outweigh these Safety Considerations.

15 The Surf "shortcut" across the SPTCo tracks has  
16 become popular with local residents because it provides a  
17 shorter and more level access to the beach than the access at  
18 Ocean Beach Park. Nevertheless, except during periods when the  
19 road to the county park is flooded, there is no real need for  
20 the public to access the beach from SPTCo's Surf property.  
21 County staff have informed SPTCo that this beach sees little  
22 use by sunbathers, swimmers and typical beach users because of  
23 the harsh environment there, including high winds, strong  
24 currents, large waves, and frigid waters. Rather, it appeals  
25 more to walkers, horse riders, fishermen and other active  
26 recreationalists. (Personal communication with Jeff Stone,  
27 Deputy Director for Santa Barbara County Parks, North County.)

22 There seems to be little reason why these people  
23 could not walk in from the legal public access way at the  
24 county park and enjoy the beach in the process. SPTCo does not  
25 believe that requiring people to walk along a public beach,  
26 which most people would consider a rare pleasure, is an undue  
27 burden.

1 The Proper Way to Create a Crossing at This Location is by  
2 Application to the PUC, Not by a Commission Cease and Desist  
3 Order.

4 In California there is only one way that the public  
5 may lawfully obtain the right to cross over a railroad track,  
6 and that is by following the mandated statutory procedure for  
7 doing so. This procedure is set forth in the Public Utilities  
8 Code and requires the public agency proposing the crossing to  
9 submit an application to the PUC, which then determines whether  
10 the public convenience and necessity require the proposed  
11 crossing to be built, what sort of safety devices are required,  
12 whether a grade separation is necessary, and whether the  
13 railroad must pay some portion of the construction and  
14 maintenance costs of the crossing. Pub. Util. Code § 1201 et  
15 seq.<sup>1</sup> Breidert v. Southern Pacific Co., 272 Cal. App. 2d 398,  
16 406-407 (1969) ("a grade crossing cannot be legally created  
17 unless the approval of the Public Utilities Commission has been  
18 first secured").

19 SPTCo does not believe that the Coastal Commission  
20 should attempt to create a public crossing at this location by  
21 forcing SPTCo to continue to provide public access across its  
22 right of way, in the process circumventing the jurisdiction of  
23 the PUC and exposing SPTCo to continued liability for failure  
24 to comply with the Public Utilities Code.<sup>2</sup>

25 The Commission staff have indicated that they do not  
26 believe that the PUC has jurisdiction over pedestrian, as  
27 opposed to vehicular, railroad crossings under the Public  
28 Utilities Code. While Public Utilities Code § 1201 refers only  
to track crossings by a public "road, highway, or street", the

1 Chapter 6 of Division One, Part 1 of the Public  
2 Utilities Code is entitled Rail Crossings and encompasses  
3 sections 1201-1220 of the Public Utilities Code. Section  
4 1201 grants the PUC authority to approve the construction  
5 of public railroad grade crossings. Section 1202 grants  
6 the PUC the exclusive authority to prescribe the manner,  
7 location, and types of protective devices to be used at  
8 all such crossings; to alter, relocate or abolish such  
9 crossings; to require grade separations; and to allocate  
10 the costs of construction and engineering between  
11 railroads and local governments.

12 The Coastal Act states that "the [Coastal]  
13 commission shall not set standards or adopt regulations  
14 that duplicate regulatory controls established by any  
15 existing state agency pursuant to specific statutory  
16 requirements or authorization." Pub. Res. Code § 30401.

1 PUC has interpreted this section to include pedestrian  
2 crossings as well. Thus, the PUC has, by order, indicated that  
3 any crossing of a railroad by a public "footpath" requires  
4 prior PUC authorization. PUC, General Order No. 69-C (1985),  
5 enclosed as Exhibit D. This policy is also reflected in the  
6 routine practice of the PUC in reviewing applications from  
7 local agencies for pedestrian crossings of railroad rights of  
8 way. Hence, even if SPTCo wished to grant an easement or  
9 license for a public crossing at its Surf property without PUC  
10 authorization, it would be in violation of this PUC General  
11 Order.

12 Our research to date has found no judicial or  
13 administrative decision in which any public agency has  
14 contested the PUC's decades-long jurisdiction over pedestrian  
15 crossings. We have, however, found numerous decisions in which  
16 the PUC has exercised its authority to grant or abolish  
17 pedestrian crossings, and a summary of a number of these  
18 decisions is enclosed as Exhibit E, with two of these printed  
19 in full for reference.<sup>3</sup>

20 Neither the County Nor Any Other Local Agency Has Made Any  
21 Effort to Obtain PUC Approval for an Authorized Pedestrian  
22 Crossing at this Location, Even Though the County Agreed to Do  
23 So.

24 In 1972, SPTCo installed a fence and gate blocking  
25 access to the parking lot at its Surf property. SPTCo took  
26 this action in response to increasing problems with automobiles  
27 parked or stalled on the tracks and holding up trains, dune  
28 buggy use on the beach, litter, people climbing on parked  
trains, and safety concerns regarding the 15-20 trains,  
including high speed passenger trains, that passed every day.  
See Santa Barbara News-Press, July 19, 1972, enclosed as  
Exhibit F.

Following the installation of this fence, and in  
response to public concerns, SPTCo officials met with the Mayor  
of Lompoc, a representative of the County Supervisors and other  
civic leaders. At that meeting, SPTCo agreed to move the fence  
to the ocean side of the parking lot, to leave an opening for

3  
Please note that in the Forest Service decision, the  
PUC states that "[S]ection 1201 of [the Public Utilities  
Code] requires prior [Public Utilities] Commission  
authorization before construction of any at-grade  
crossing" (emphasis added). In re United States Dept. of  
Agric., PUC Decision 90-07-043 at 8 [page 4 of the  
printout] (1990).

1 pedestrians to gain access to the beach, and to create an  
2 access ramp to replace an old stairway to the beach. SPTCo did  
3 so, however, with the understanding that the community would  
4 construct a public overpass. See Lompoc Record, July 15, 1972,  
5 enclosed as Exhibit G. SPTCo's representative also stated that  
6 "[i]f somebody is hurt on our property, we will be forced to  
7 definitely close off the area." Id. In the ensuing years, no  
8 public agency has applied to the PUC for an approved grade  
9 crossing at this location. Following SPTCo's installation of a  
10 fence in 1995, County residents did, however, complain to the  
11 Commission.

12 SPTCo believes that if the Surf crossing is so  
13 popular with County residents, then surely they can prevail  
14 upon the County to initiate the statutory process to create a  
15 safe and legal crossing at this location, rather than simply  
16 insisting on continuing to use SPTCo's property for their own  
17 convenience, without such authorization, while exposing SPTCo  
18 to continued legal liability for failing to have a statutory  
19 crossing with mandated safety devices.

20 To SPTCo's knowledge, no citizen has asked the County  
21 to initiate this process, and the County has made no effort to  
22 do so on its own initiative, even after promising to do so over  
23 20 years ago. SPTCo submits that the lack of any interest by  
24 the County or its citizens in expending public funds and  
25 devoting staff time to create a safe and legal crossing at this  
26 location belies the Commission's assertions regarding the  
27 popularity of this crossing.

28 Public Agencies Have Not Made a Concerted Effort to Provide  
Public Access to Ocean Beach County Park During Periods of  
Flooding.

Flooding of the Santa Ynez river occurs when seasonal  
stream flows drop sufficiently for a sandbar to develop at the  
river's mouth. This sandbar causes the river to back up and  
flood the area inland from the beach and dunes. When stream  
flows increase, the sandbar is washed away again. This  
flooding may last up to several months and cover the access  
road to the Ocean Beach County Park parking lot, though not the  
parking lot itself.<sup>4</sup>

In the past, the County had obtained a permit from  
the U.S. Army Corps of Engineers to remove the sand bar,

The information in this and subsequent paragraphs is  
from a personal communication with Jeff Stone, Deputy  
Director for Santa Barbara County Parks, North County.

1 subject to the County's obtaining an annual permit from the  
2 California Department of Fish & Game. Over the years, the  
3 Department of Fish & Game continually delayed issuing the  
4 permit until the flooding was ended, or very nearly so, making  
5 its permit largely superfluous.

6 Several years ago, the County applied to the Corps of  
7 Engineers for a permit to raise the road above flood levels.  
8 The Corps granted a permit to raise the road a few inches, but  
9 not the two feet or so necessary to clear flood waters. In the  
10 course of the environmental review for this project, the County  
11 also obtained the impression that the U.S. Fish & Wildlife  
12 Service and the California Department of Fish & Game would  
13 oppose permits for future annual removals of the sand bar. The  
14 County's Corps of Engineers permit for the sandbar removal has  
15 now expired, and the County does not wish to incur the expense  
16 of reapplying for a new sandbar removal permit, or a permit for  
17 some alternative form of access, conducting environmental  
18 reviews, and implementing the likely mitigation measures.  
19 Consequently, the County has taken no further action to obtain  
20 a permit or otherwise to provide public access to Ocean Beach  
21 County Park during periods when the access road to the park is  
22 flooded.

23 The County has also not approached SPTCo to discuss  
24 how SPTCo's Surf property could be used on a temporary basis  
25 when the park access road is flooded. SPTCo would be willing  
26 to consider some sort of temporary arrangement for public  
27 parking on its property to facilitate beach access, provided  
28 that statutory requirements for creation of a permanent public  
crossing were not violated and the County bore the cost of  
appropriate safety measures. SPTCo believes that it is the  
role of the County, not SPTCo, to initiate such solutions,  
however.

SPTCo believes that if the County and its citizens  
feel that access to Ocean Beach during flooding is really  
necessary, as the Commission maintains, then the County would  
have taken appropriate action to ensure that such access  
continued. The fact that the County has taken no such action  
belies the Commission's assertion that public access to Ocean  
Beach during flooding is truly necessary.

The Public Can Not Acquire Rights by Prescription or  
Implication to Use the Property of a Public Utility Which is  
Already Dedicated to Public Use.

The Commission has maintained that the public has  
acquired the right, by prescription or implied dedication, to  
continue to use SPTCo's Surf property to cross to the beach by  
virtue of the public's use of this crossing for many years.

1 California has, by statute, however, made it clear that no  
2 person may acquire rights by prescription or implication to a  
3 railroad right of way. In this regard, Civil Code § 1007  
4 states:

5 [N]o possession by any person, firm or corporation no  
6 matter how long continued of any land, water, water right,  
7 easement, or other property whatsoever dedicated to a  
8 public use by a public utility, or dedicated to or owned  
9 by the state or any public entity, shall ever ripen into  
10 any title, interest or right against the owner thereof.

11 This statute clarifies that no private party may  
12 obtain prescriptive rights to the lands of a regulated public  
13 utility such as SPTCo. The obvious purpose of the statute is  
14 to recognize the paramount interest of the public in the  
15 ownership and control of lands imbued with a public purpose.  
16 The statute also acknowledges that the lands of public  
17 utilities are "dedicated to a public use" in a manner little  
18 different from the lands owned by public entities.

19 The Legislature apparently did not feel the need to  
20 state the obvious corollary of Civil Code § 1007, namely that  
21 the public cannot, through extended use, obtain any interest or  
22 right in the use of the lands of a public utility. As Civil  
23 Code § 1007 notes, the lands of a public utility are already  
24 dedicated to public use. Hence, Civil Code § 1007 indicates  
25 that the public cannot acquire any rights by implication or  
26 prescription over SPTCo's right of way at Surf.

27 This conclusion is consistent with the holdings of  
28 both the United States Supreme Court and the California Supreme  
Court, which have held that "railroads are esteemed as public  
highways, constructed for the advantage of the public."  
Southern Pacific Co. v. Hyatt, 132 Cal. 240, 241-242 (1901).  
As a consequence, neither individuals nor the public may  
acquire rights to railroad lands by prescription. Id. at 244.  
See also, Breidert v. Southern Pac. Co., 272 Cal. App. 2d 398  
(1969) (the public can obtain prescriptive rights to a railroad  
crossing only when a railroad has first taken some affirmative  
action to create a private crossing, or the PUC to create a  
public one). Of course neither of these conditions apply at  
SPTCo's Surf property.

29 The fact that the Legislature has established a  
30 statutory scheme for the creation of public railroad crossings  
31 under the Public Utilities Code also supports the conclusion  
32 that the public may not acquire rights to a crossing by  
33 prescription or implication. The Commission's argument that  
34 the public may by prescription or implication independently  
35 acquire the right to cross a railroad track, by contrast, would  
36 undermine the statutory scheme for PUC review of crossing



1 applications set forth in the Public Utilities Code and the  
2 State's orderly management of railroads and railroad crossings.

3 Conclusion.

4 In conclusion, SPTCo currently finds itself in an  
5 untenable position. SPTCo has been sued twice for injuries at  
6 this site and faces the possibility of further personal injury  
7 actions if public access across its tracks at this site  
8 continues. SPTCo is self-insured and must pay the costs both  
9 of its own legal defense and of any monetary award in such  
10 suits. Yet the Commission would require SPTCo to maintain this  
11 property open to the public and to continue to face this  
12 liability.

13 SPTCo believes that if the public interest requires a  
14 public crossing at this location, the County should apply to  
15 the PUC for approval of such a crossing and a determination as  
16 to the appropriate safety devices to be installed and the  
17 proper allocation of costs. In the meantime, however, it is  
18 unfair for the Coastal Commission to demand that SPTCo maintain  
19 an unauthorized grade crossing over its tracks for the benefit  
20 of the public and at its own risk.

21 SPTCo's action to protect its property from  
22 trespassing does not affect lawful public access to this  
23 section of the California coast. The Commission's assertions  
24 as to the necessity of access to Ocean Beach, particularly  
25 during flooding, are belied by the complete failure of Santa  
26 Barbara County or its citizens to take any action to create a  
27 safe and lawful accessway across SPTCo's property at Surf or to  
28 pursue solutions for public access during periods of flooding  
at Ocean Beach County Park. SPTCo has seen no evidence that a  
single person would need to be barred from reasonable access to  
Ocean Beach as a result of SPTCo's controlling trespassing on  
its property. Santa Barbara County has the ability to work  
together with other public agencies to address the access needs  
of its citizens, and SPTCo is willing to take part in that  
process. Until public agencies initiate such efforts, however,  
SPTCo does not see how its efforts to control unauthorized  
public use of its own property can reasonably be considered as  
affecting legitimate access to the coast.

23 SPTCo finds it outrageous that the continued illegal  
24 use of SPTCo's property by local residents is accepted as a  
25 given by the Commission, while SPTCo's lawful efforts to  
26 control this use are regarded as an "activity" or "project"  
27 requiring a permit and consistency review. SPTCo believes that  
28 precisely the reverse analysis should apply; if the public  
needs access across SPTCo's tracks, the County should follow  
statutory procedures to obtain it, and that process is the one

1 that should be subject to agency review and permitting, not  
2 SPTCo's control of illegal use of its property.

3 5. Any other information, statement, etc. that you  
4 want to offer or make.

5 SPTCo has no further information or statement to  
6 offer or make.

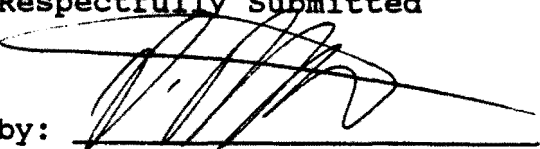
7 6. Documents, exhibits, declarations under penalty  
8 of perjury or other materials that you have attached to this  
9 form to support your answers or that you want to be made part  
10 of the administrative record for this enforcement proceeding  
11 (Please list in chronological order by date, author, and title  
12 and enclose a copy with this completed form).

13 The following exhibits are attached to this Statement  
14 of Defense:

- 15 • Exhibit A Complaint in Roum v. Southern Pac.  
16 Transp. Co.
- 17 • Exhibit B Decision of the Court in Roum v.  
18 Southern Pac. Transp. Co.
- 19 • Exhibit C Complaint in Kim v. Southern Pac.  
20 Transp. Co.
- 21 • Exhibit D PUC General Order No. 69-C.
- 22 • Exhibit E PUC Decisions Regarding Pedestrian  
23 Crossings.
- 24 • Exhibit F Santa Barbara News-Press, July 19,  
25 1972.
- 26 • Exhibit G Lompoc Record, July 15, 1972.
- 27 • Exhibit H Photographs of the site.

28 Date: January 4, 1996

Respectfully Submitted

by:   
Paul M. Minault  
Attorney for Southern Pacific

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**FILED**

**SUPERIOR COURT**

**DEC 10 1982**

**HOWARD G. MENZEL, County Clerk**

**M. M. KUNTZELMAN**

**Deputy Clerk**

Attorney for Plaintiff

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**FOR THE COUNTY OF SANTA BARBARA**

LEE BRADLEY ROUM,

Plaintiff,

vs.

SOUTHERN PACIFIC TRANSPORTATION  
COMPANY, DOES 1 through 20,  
inclusive,

Defendants.

No.

**143738**

**COMPLAINT FOR PERSONAL INJURIES**

Plaintiff alleges:

1. Defendant, Southern Pacific Transportation Company is, and at all times herein mentioned was, a Delaware corporation duly qualified to do business and doing business in the State of California.

2. Plaintiff is ignorant of the true names and capacities of the defendants sued herein as DOES 1 through 20, inclusive, and each of them, and therefore sues said defendants by such fictitious names. Plaintiff will ask leave of this court to amend this complaint to set forth their true names and capacities when the same are ascertained. Plaintiff is informed and believes

**EXHIBIT A**

1 and thereupon alleges that each of the fictitiously named  
2 defendants is negligently responsible in some manner for the acts,  
3 omissions, and occurrences herein alleged, and that plaintiff's  
4 injuries as herein alleged were proximately caused by the  
5 negligence of said defendants.

6 3. Plaintiff is informed and believes and thereupon  
7 alleges that each of the defendants was the agent and employee  
8 of each of the other defendants, and of each other, and that, and  
9 in doing the things hereinafter alleged, was acting within the  
10 course and scope of such agency and/or employment.

11 4. That at all times herein mentioned, Southern Pacific  
12 Transportation Company and DOES 1 through 20, inclusive, and each  
13 of them, did own, operate, maintain, and control, a public  
14 railroad station, and train depot, in the County of Santa  
15 Barbara, State of California. Plaintiff is further informed and  
16 believes and thereupon alleges that said railroad station is  
17 adjacent to, and provides access to a public beach.

18 5. That on or about the 3rd day of June, 1982, plaintiff  
19 parked and left his motor vehicle in defendant's public parking  
20 lot, and crossed, as a pedestrian, defendant's vacant train tracks,  
21 which train tracks were the public access way to the public beach.  
22 Plaintiff further alleges that upon plaintiff's return to the  
23 parking lot the train tracks and public access way, were blocked  
24 by a motionless train, forcing plaintiff to climb over the train  
25 to return to the parking lot.

26 6. That at said time and place defendants, and each of  
27 them, owned, maintained, controlled, managed, operated said  
28 train upon said tracks.

1           7.     At said time and place, defendants, and each of them,  
2 so negligently, carelessly, and recklessly, owned, managed,  
3 controlled, maintained, and operated said train as to cause said  
4 train to be set in motion without giving any type of warning  
5 signal prior thereto, so as to cause plaintiff's foot and leg to  
6 be caught between specific cars of the train, and so as to  
7 proximately cause the hereinafter described injuries and damages  
8 to plaintiff.

9           8.     That as a direct and proximate result of the negligence  
10 of the defendants, and each of them, plaintiff was hurt and  
11 injured in his health, strength and activity, sustaining injury  
12 to his nervous system and person, all of which injuries have  
13 caused and continue to cause plaintiff great mental, physical,  
14 and nervous pain and suffering. Plaintiff is informed and believes  
15 and thereupon alleges that such injuries will result in some  
16 permanent disability to him, all to his general damage in an  
17 amount in excess of the jurisdictional minimum of this court.

18           9.     That as a further, direct and proximate result of  
19 the said negligence of the defendants, and each of them, plaintiff  
20 was required to and did employ physicians and surgeons to examine,  
21 treat, and care for him, and did incur medical, hospital, and  
22 incidental expenses, the exact amount of which is unknown to  
23 plaintiff at this time, and plaintiff will ask leave of this court  
24 to amend his complaint to set forth the exact amount when the  
25 same is ascertained.

26           10..   As a further, direct and proximate result of the  
27 aforesaid negligence of the defendants, and each of them,  
28 plaintiff was prevented from attending to his usual occupation

1 thereby sustaining a loss of earnings, the exact amount of which  
2 is unknown to plaintiff at this time and plaintiff will ask leave  
3 of this court to set forth said amount when ascertained.

4 Plaintiff is further informed and believes and thereupon alleges  
5 that he will be prevented from attending to his usual occupation  
6 for a period in the future and that plaintiff's future earning  
7 capacity has been greatly impaired as a result thereof, in a sum  
8 which has not yet been ascertained. Plaintiff will ask leave of  
9 this court to set forth said amount when ascertained.

10 WHEREFORE, plaintiff prays judgment against defendants, and  
11 each of them, as follows:

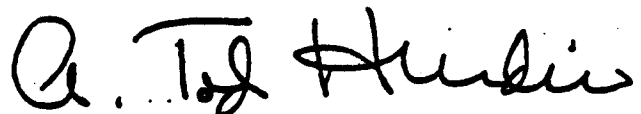
12 1. For medical, hospital and incidental expenses,  
13 according to proof;

14 2. For general damages in an amount in excess of the  
15 jurisdictional minimum of this court to-wit: in excess of  
16 \$15,000.00;

17 3. For costs of suit incurred herein; and

18 4. For such other and further relief as to this court  
19 may seem proper.

20 A. TOD HINDIN  
21 A Professional Corporation

22 

23 A. TOD HINDIN, A Professional  
24 Attorneys for Plaintiff

NOT TO BE PUBLISHED  
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION SIX

LEE BRADLEY ROUM,	)	2d Civil No. B031761
	)	(Super. Ct. No. 143738)
Plaintiff and Appellant,	)	(Santa Barbara County)
	)	
y.	)	COURT OF APPEAL - SECOND DIST.
	)	<b>F I L E D</b>
SOUTHERN PACIFIC TRANSPORTATION	)	
COMPANY, etc., et al.,	)	JUL 11 1989
	)	
Defendants and Respondents.	)	ROBERT S. [unclear] Clerk

Deputy Clerk

Lee Bradley Roun appeals from a judgment in favor of the Southern Pacific Transportation Company (hereinafter (S.P. or railroad) rendered pursuant to a jury verdict in his suit for injuries received while he was assisting another person climb over and cross between two cars of a stopped freight train. We affirm.

We decide that Public Utilities Commission (PUC) General Order 135 did not require the railroad to separate the train at a crossing that was not approved by the PUC; that where the parties agree to make a pretrial exchange of information about expert witnesses the trial court may exclude the testimony of undisclosed experts

2.

even though no demand for the information had been made pursuant to Code of Civil Procedure section 2034; that the court did not err in excluding testimony about the rules and practices of S.P. from the same witnesses who had been excluded as experts; and that any error in refusing to instruct the jury concerning willful and malicious acts was rendered harmless by a determination that S.P. was not negligent.

The following facts were stipulated to by the parties:

The railroad maintained a depot near Surf Beach in Santa Barbara County. Between the years 1900 and 1972 the public was allowed to park vehicles on S.P.'s property adjacent to the depot and to walk across the tracks to gain access to the beach.

In 1972 S.P. built a fence which prevented the public from parking on its property and gaining access to the beach over its tracks. A public outcry resulted. S.P. agreed to move the fence so as to allow the public to park on its property, and to put a gate in the fence that would allow the public to cross the tracks.

The agreement was carried out, and S.P. acknowledged that the public would be welcome to use the crossing.



3.

On the evening of June 3, 1982, approximately 200 people gathered at Surf Beach to celebrate a high school class graduation. They parked in the lot next to the depot and crossed the tracks to go to the beach. Some used the depot bathroom with the permission of the depot manager.

Roum arrived at approximately 8:00 p.m. accompanied by others, including Melinda Love. They parked their car in the parking lot and proceeded through the pedestrian gate and across the tracks to the beach.

At approximately 11:15 p.m. Roum returned from the beach to the parking lot area across the tracks. Love remained on the beach.

At 11:20 p.m. a freight train approximately 4600 feet long was approaching the depot. The depot manager warned the engineer by radio that there were a number of people partying on the beach, and the engineer saw fires on the beach and cars parked in the lot. The train stopped at the depot and remained there until 12:45 a.m., a period of one hour and twenty-five minutes.

After the train stopped, Love appeared on the beach side of the train and asked Roum to help her to get to the parking lot side. To assist Love, Roum climbed onto a flat car and then onto the coupling area between

4.

the flat car and a box car. While Roun was standing in the coupling area the train moved. Roun's foot got caught and was crushed in the train mechanism.

After Roun's foot was extricated he was taken to a local hospital for surgery. Despite treatment, gangrene set in. Since the accident, Roun has had multiple surgeries at UCLA hospital, and as a proximate result of the accident Roun incurred \$56,505.18 in reasonable and necessary medical expenses.

The stipulated facts were read to the jury, and the jury was instructed that the stipulated facts were conclusively proved.

In addition to the stipulated facts, the jury heard evidence that the train's engineer, head brakeman and conductor had actual knowledge of a large number of people on the beach that evening.

The brakeman testified that he was aware of a high probability of injury to somebody crossing a train.

The engineer testified that he knew the train would block the way for people going from the beach to their cars; that people crossed trains when they were stopped; that there was no way for people to get from the beach to their cars without crossing the train; and that there was a high probability of injury to people crossing trains.

5.

The conductor testified that there was no reason why the train could not have been split on the night of the accident, and a portion of his deposition was read in which he testified that it would not have taken more than three minutes to split the train.

I.

Negligence Per Se Instruction.

The trial court refused to instruct the jury that S.P. was negligent per se for failure to follow PUC General Order 135. General Order 135 provides in part that ". . . a public grade crossing which is blocked by a stopped train, other than by a passenger train, must be opened within 10 minutes, unless no vehicle or pedestrian is waiting at the crossing."

The trial court's refusal to give the instruction was based on its finding that the crossing at Surf Beach was not a "public grade crossing" within the meaning of the order.

In support of its position S.P. cites Breidert v. Southern Pacific Co. (1969) 272 Cal.App.2d 398. In that case Breidert brought an action against S. P. in inverse condemnation when the railroad barricaded a grade crossing used by Breidert to gain access to his land. The crossing was also used by the public.

6.

In rejecting Breidert's contention that the crossing was a public crossing the court stated: "Since the year 1911, the Public Utilities Commission has had exclusive jurisdiction to establish or abolish public grade crossings. Such powers were conferred upon the commission in sections 1201<sup>1</sup> and 1202<sup>2</sup> of the Public Utilities Code of the State of California. [¶] The only reasonable conclusion must be that a grade crossing cannot be legally created unless the approval of the Public Utilities Commission has been first secured. [Citation.]" (*Id.*, at p. 406.)

In the instant case Roum concedes that the Surf Beach crossing was not approved by the PUC, but he

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"1    '§ 1201.

"'No public road, highway or street shall be constructed across the track of any railroad corporation at grade, nor shall the track of any railroad corporation be constructed across a public road, highway, or street at grade . . . without having first secured the permission of the commission.'"

"2    '§ 1202.

"'The commission has the exclusive power:

"'(a) To determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use, and protection of each crossing of a . . . public or publicly used road or highway by a railroad . . .

"'(b) To alter, relocate, or abolish by physical closing any such crossing heretofore or hereafter established.'"

7.

contends that the crossing was a "de facto" public crossing and subject to General Order 135.

In support of his argument Roum relies on In re Investigation of Richmond Avenue Crossing (1962) 60 PUC 227. In that case the question was whether the PUC had the authority to determine safety requirements for a particular crossing. The crossing in question involved a public street, but it had not been approved by the PUC.

The PUC found the crossing was a public crossing, and stated, "[t]he failure of the involved public body or bodies to obtain Commission authorization to construct the crossing does not convert it into a private crossing." (Id., at p. 277.)

However, in a subsequent case with similar facts, In re Investigation of Southern Pacific Crossings in Red Bluff (1963) 61 PUC 265, although the original opinion referred to the crossing as a ". . . public crossing . . . ," quoting the Richmond Avenue Crossing case (Id., at p. 277), in an amendment to the opinion that language was deleted, and the crossing was referred to as a ". . . publicly used crossing. . . ."

Thus the Red Bluff case recognized that, despite the language of the Richmond Avenue case, an unapproved crossing cannot be properly designated as a "public

8.

crossing," but that an unapproved crossing regularly used by the public is properly designated as a "publicly used crossing."

Because General Order 135 refers only to a "public crossing," we conclude that it applies only to such crossings as have been approved by the PUC. Moreover, it is unreasonable to construe that order as requiring S. P. to open every "de facto public crossing" within ten minutes. Such crossings may be numerous and not well defined in areas where the public customarily crosses the tracks.

We are not persuaded by the testimony of Roum's expert, Robert Stich, an employee of the PUC testifying as a privately paid consultant. He testified that all PUC regulations relevant to public crossings are also relevant to de facto public crossings.

First, an expert may not properly testify on questions of law. (Communications Satellite Corp. v. Franchise Tax Bd. (1984) 156 Cal.App.3d 726, 747.)

Second, Stich cited as authority for his position Public Utilities Code section 1202, subdivision (a). However, that section gives the PUC jurisdiction to regulate railroad crossings of a ". . . public or

9.

publicly used road or highway. . . .<sup>3/</sup> General Order 135 speaks only of a ". . . public grade crossing. . . ." If the PUC had intended the order to apply to de facto public crossings, we presume it would have expressly included the term "publicly used grade crossing" in the order.

## II.

Exclusion of Roun's Expert Witnesses.

At a trial setting conference Roun's counsel signed a status report whereby the parties agreed to designate expert witnesses by October 10, 1987. The court made this date the basis of a trial setting conference order requiring the parties to designate witnesses by that date stating, "[i]f I leave this to [Code of Civil Procedure section] 2034, you're not going to have time. The trial date will be here."

Neither party designated any expert witnesses.

Nevertheless, at trial Roun offered the testimony of two experts concerning the operation of trains. The trial court precluded the testimony for failure to comply with the trial setting conference

---

<sup>3/</sup> See footnote "2," *supra*.

10.

order requiring the designation of experts by October 10.

Roum contends he was not required to designate experts because no demand had been made upon him pursuant to Code of Civil Procedure section 2034. Subdivision (b) of that section provides: "Any party may make a demand for an exchange of information concerning expert trial witnesses without leave of court. A party shall make this demand no later than the 10th day after the initial trial date has been set, or 70 days before that trial date, whichever is closer to the trial date."

However, there is nothing in section 2034 which prevents the parties from reaching an agreement as to the time and manner for exchanging information concerning expert trial witnesses. Where, as here, the parties made such an agreement, we cannot say the trial court erred in excluding witnesses that were not designated. The trial court has the power to exclude such witnesses as part of its basic power to insure that all parties receive a fair trial. (See Castaline v. City of Los Angeles (1975) 47 Cal.App.3d 580, 592.)

Roum's reliance on St. Vincent Medical Center v. Superior Court (1984) 160 Cal.App.3d 1030, is



11.

misplaced. In that case the trial court issued a form trial setting conference order providing that any demand for an exchange of expert witnesses must be made in less than the minimum time period provided by statute [former Code Civ. Proc., § 2037]. The Court of Appeal found the trial court's order was unenforceable because the statute allowed no deviation from the time limit provided therein.

In St. Vincent, unlike the instant case, there was no agreement between the parties. The trial court attempted to set its own time limits without the support of either statute or agreement. Here the trial court's order reflected the parties' agreement, and under the circumstances, we can find no error in the exclusion of Roum's expert witnesses.

### III.

#### Exclusion of Testimony Regarding the Rules and Practices of the Railroad.

After the trial court excluded the testimony of Roum's expert witnesses, Roum offered the same witnesses for the purpose of testifying as to the rules and practices of the railroad. One of the witnesses was a former employee of the railroad. Roum's counsel stated that he would not pose any hypothetical questions, and he would not ask for opinion testimony.

12.

The trial court excluded the testimony on the ground that it was a attempt to get around the exclusion of expert testimony.

An expert witness is a person who is qualified to testify based on special knowledge, skill, experience, training or education on the subject matter to which the testimony relates. (See Evid. Code, § 720, subd. (a).) Ordinarily, testimony concerning the recognized and accepted operating standards and practices in a profession, trade or business is a matter for expert witnesses. (See Rosenberg v. Goldstein (1966) 247 Cal.App.2d 25, 29.)

In the instant case it appeared from Roum's offer of proof that neither of the witnesses whose testimony was excluded by the court were witnesses to the events surrounding the particular accident in question. Rather their testimony would be based on the special knowledge, experience and training they received from working on the railroad. This is in the nature of expert testimony, and in light of the trial court's exclusion of expert testimony, we can find no error.

The fact that one of the witnesses had been an employee of the defendant railroad is not relevant. His testimony would be based on knowledge, experience and

13.

training gained while working for the railroad rather than what he saw of the events surrounding the accident in question.

Contrary to Roum's contention, Chatman v. Alameda County Flood Control Etc. Dist. (1986) 183 Cal.App.3d 424, does not stand for the proposition that the procedures and practices of a witness' employer are not matter for expert testimony. There the question was whether the flood control district had ownership and control over a culvert for the purpose of tort liability. Conclusions concerning ownership and responsibility for the culvert stated in a district employee's affidavit in support of a motion for summary judgment were found to be admissible even though made by a nonexpert. The court cited the rule that where the facts are too complex or too subtle for concrete description, the witness may state his or her general impression. (Id., at p. 429, citing Angelus Chevrolet v. State of California (1981) 115 Cal.App.3d 995, 1001.) Unlike questions concerning custom and practices of an industry, questions such as ownership of property have been deemed matters upon which a nonexpert can... (p. 435.)

14.

## IV.

Instructions Concerning Willful and Malicious Acts.

Finally, Roum contends that it was error for the court to refuse to instruct the jury on his theory that the railroad acted willfully and maliciously.

However, willful and malicious acts require a higher degree of culpability than negligent acts. (See 6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 761, p. 100.) Because the jury found that the railroad was not negligent, any error there may have been in failing to instruct the jury as to willfulness or malice must be harmless. (See People v. Watson (1956) 46 Cal.2d 818, 836.)

The judgment is affirmed. Respondent is awarded costs on appeal.

NOT TO BE PUBLISHED.

ABBE, J.

We concur:

STONE, P. J.

GILBERT, J.

15.

Bruce Wm. Dodds, Judge  
Superior Court County of Santa Barbara

---

A. Tod Hindin, a Professional Corporation, and  
A. Tod Hindin, for Plaintiff and Appellant.

F. Brian Rapp; Griffith & Thornburgh, for  
Defendant and Respondent Southern Pacific Transportation  
Company.



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Attorneys for Plaintiffs

FILED  
SUPERIOR COURT  
SANTA BARBARA

MAY 25 1994

KENNETH A. PETTIT, County Clerk-Recorder

By: *[Signature]*

T. MENDEZ, Deputy Clerk Recorder

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF SANTA BARBARA

YUN SIK KIM and YUN KEUM KIM, )  
Plaintiffs, )  
-vs- )  
SOUTHERN PACIFIC )  
TRANSPORTATION COMPANY, a )  
Delaware corporation, NATIONAL )  
RAILROAD PASSENGER )  
CORPORATION, aka AMTRAK, )  
COUNTY OF SANTA BARBARA, STATE )  
OF CALIFORNIA, ROBERT E. )  
WHITTLE, ALMA E. STATTI, KENT )  
E. ANDERSON, RICHARD EDSON, )  
PETER HILDAGO, JR., and DOES 1 )  
through 300, inclusive, )  
Defendants. )

CASE NUMBER:

COMPLAINT FOR:

S#086667

1. WRONGFUL DEATH BASED UPON  
SERIOUS AND WILFUL MISCONDUCT
2. WRONGFUL DEATH BASED UPON  
NEGLIGENCE
3. INTENTIONAL INFLICTION OF  
EMOTIONAL DISTRESS
4. NEGLIGENT INFLICTION OF  
EMOTIONAL DISTRESS

RECEIVED

AUG 15 1994

AMTRAK CLAIMS  
WESTERN REGION - L.A.

FIRST CAUSE OF ACTION FOR WRONGFUL DEATH

BASED ON SERIOUS AND WILFUL MISCONDUCT

ARISING OUT OF THE OPERATION OF A RAILROAD TRAIN

COME NOW the plaintiffs who for a first cause of action  
against defendants SOUTHERN PACIFIC TRANSPORTATION COMPANY,  
NATIONAL RAILROAD PASSENGER CORPORATION aka AMTRAK, ROBERT E.  
WHITTLE, ALMA E. STATTI, KENT E. ANDERSON, RICHARD EDSON, PETER

NOTICE: Santa Barbara County Civil Cases are on "Fast Track"  
Summons and Proof of Service on all defendants must be filed with the court  
within 60 days of filing the complaint. A Joint Issue Management Conference will be held  
within 210 days of filing the complaint. Failure to comply with Fast Track procedures may  
result in sanctions or in the striking of the pleadings.  
See Santa Barbara County Local Rule 1.14

1 HILDAGO, JR., and DOES 1 through 100, inclusive, and each of  
2 them, complain and allege as follows:

3 1. At the time of the filing of this complaint, the  
4 plaintiffs are unaware of the true names and capacities of the  
5 defendants named herein as DOES and, therefore, sue said  
6 defendants by such fictitious names. The plaintiffs will amend  
7 the complaint to show said defendants' true names and capacities  
8 when the same shall have been ascertained.

9 2. The plaintiffs are informed and believe and thereon  
10 allege that the defendants named herein as DOES were responsible  
11 in some actionable manner for the events and happenings  
12 hereinafter alleged.

13 3. The plaintiffs are informed and believe and thereon  
14 allege that, at all times herein mentioned, the defendants and  
15 each of them were the agents, employees and/or representatives of  
16 each of their co-defendants.

17 4. The plaintiffs are informed and believe and thereon  
18 allege that, at all times herein mentioned, the defendants and  
19 each of them were acting within the course and scope of said  
20 agency, employment and representation.

21 5. The plaintiffs are informed and believe and thereon  
22 allege that all actions taken by the defendants were subsequently  
23 ratified by each of their co-defendants.

24 6. The plaintiffs are informed and believe that, at all  
25 times herein mentioned, defendant SOUTHERN PACIFIC TRANSPORTATION  
26 COMPANY (hereinafter SOUTHERN PACIFIC) was a corporation duly  
27 organized and established by virtue of and pursuant to the laws  
28 of the State of Delaware, was authorized to transact business in



1 California, was transacting business in California and was acting  
2 as a public and common carrier in California engaging in the  
3 business of the maintenance, operation and ownership of railroad  
4 trains, railroad rights of way, railroad rolling stock, railroad  
5 depots, railroad crossings and related facilities.

6 7. The plaintiffs are informed and believe that, at all  
7 times herein mentioned, defendant NATIONAL RAILROAD PASSENGER  
8 CORPORATION aka AMTRAK (hereinafter AMTRAK) was a corporation  
9 duly organized and established by virtue of and pursuant to the  
10 laws of the United States of America, was authorized to transact  
11 business in California, was transacting business in California  
12 and was acting as a public and common carrier in California  
13 engaging in the business of the maintenance, operation and  
14 ownership of railroad trains, railroad rolling stock and related  
15 facilities.

16 8. The plaintiffs are informed and believe that, at all  
17 times herein mentioned, defendant COUNTY OF SANTA BARBARA was a  
18 political subdivision of the STATE OF CALIFORNIA.

19 9. The plaintiffs have timely complied with all applicable  
20 claims statutes.

21 10. The plaintiffs are informed and believes that, at all  
22 times herein mentioned, the provisions of Title 49 of the Code of  
23 Federal Regulations, and California Public Utilities Code §§1021,  
24 7604 and 7678 were in full force and effect.

25 11. The plaintiffs are the parents and sole heirs of  
26 JOHN (DAE KELIN) KIM (hereinafter JOHN KIM), a minor child.

27 12. JOHN KIM was the loving, and affectionate and attentive  
28 son and the pride and joy of the plaintiffs.

1        13. The plaintiffs enjoyed the affection, love, society,  
2        comfort, services and attention of JOHN KIM.

3        14. The plaintiffs anticipated and expected to receive the  
4        love, affection, society, comfort, services and economic support  
5        from JOHN KIM in their latter years.

6        15. At all times herein mentioned, the railroad tracks,  
7        adjoining land and beach where JOHN KIM suffered a wrongful death  
8        as hereinafter set forth, were located on or near the Southern  
9        Pacific Railroad right of way, at or near the Surf Depot and at  
10       or near Ocean Beach County Park, in the County of Santa Barbara,  
11       State of California.

12       16. At said location, said railroad tracks extended in a  
13       general north-south direction along the California coast.

14       17. At or near said location, there is an open public beach  
15       on the ocean side of said railroad tracks and a parking lot with  
16       a chain link fence running parallel to the railroad tracks on the  
17       inland side of the railroad tracks.

18       18. Said chain link fence contained a locked gate and a  
19       pedestrian opening.

20       19. Said opening was commonly used by pedestrians for the  
21       purpose of crossing the railroad tracks in traversing between the  
22       parking lot and the beach.

23       20. The plaintiffs are informed and believe and thereon  
24       allege that the defendants and each of them knew or should have  
25       known that said opening was commonly used by pedestrians for the  
26       purpose of crossing the railroad tracks in traversing between the  
27       parking lot and the beach.

28       21. On or about 6:15 p.m., May 29, 1993, a railroad train

1 proceeded in a southerly direction along said railroad tracks at  
2 said location.

3 22. At or about said time and at or near said location, JOHN  
4 KIM was crossing said railroad tracks.

5 23. The plaintiffs are informed and believe and thereon  
6 allege that, at or about said time, defendants SOUTHERN PACIFIC,  
7 AMTRAK, ROBERT E. WHITTLE, ALMA E. STATTI, KENT E. ANDERSON,  
8 RICHARD EDSON, PETER HILDAGO, JR., and DOES 1 through 100,  
9 inclusive, and each of them, controlled, maintained, owned,  
10 operated and/or repaired said railroad train.

11 24. The plaintiffs are informed and believe and thereon  
12 allege that defendants SOUTHERN PACIFIC, AMTRAK, ROBERT E.  
13 WHITTLE, ALMA E. STATTI, KENT E. ANDERSON, RICHARD EDSON, PETER  
14 HILDAGO, JR., and DOES 1 through 100, inclusive, and each of  
15 them, had a duty to control, maintain, own, operate and/or repair  
16 said railroad train in a safe and lawful manner, including but  
17 not limited to operating said train at a safe speed, providing an  
18 adequate lookout and giving an adequate warning (including  
19 warning of said train's approach), and complying with the  
20 provisions of Title 49 of the Code of Federal Regulations,  
21 California Public Utilities Code §§7604 and 7678, and other  
22 statutes, rules and provisions of law including common law.

23 25. The plaintiffs are informed and believe and thereon  
24 allege that defendants SOUTHERN PACIFIC, AMTRAK, ROBERT E.  
25 WHITTLE, ALMA E. STATTI, KENT E. ANDERSON, RICHARD EDSON, PETER  
26 HILDAGO, JR., and DOES 1 through 100, inclusive, and each of  
27 them, controlled, maintained, owned, operated and/or repaired a  
28 railroad train in a careless, unreasonable, unsafe and unlawful

manner, including but not limited to travelling at an unsafe speed, failing to provide an adequate lookout and without giving an adequate warning (including warning of said train's approach) and doing other acts or omissions in violation of the provisions of Title 49 of the Code of Federal Regulations, California Public Utilities Code §§7604 and 7678, and other statutes, rules and provisions of law including common law, so as to create and exacerbate an unreasonable risk of harm to persons in the vicinity including but not limited to JOHN KIM and the plaintiffs.

26. The plaintiffs are informed and believe and thereon allege that defendants SOUTHERN PACIFIC, AMTRAK, ROBERT E. WHITTLE, ALMA E. STATTI, KENT E. ANDERSON, RICHARD EDSON, PETER HILDAGO, JR., and DOES 1 through 100, inclusive, and each of them, knew or should have known that said careless, unreasonable, unsafe and unlawful control, maintenance, ownership, operation and/or repair of said train would create and exacerbate an unreasonable risk of harm to persons in the vicinity including but not limited to JOHN KIM and the plaintiffs and would probably result in a person being struck and either injured or killed by said train at said location.

27. The plaintiffs are informed and believe and thereon allege that, despite the knowledge that said careless, unreasonable, unsafe and unlawful control, maintenance, ownership, operation and/or repair of said train would create and exacerbate an unreasonable risk of harm to persons in the vicinity including but not limited to JOHN KIM and the plaintiffs and would probably result in a person being struck and either

1 injured or killed by said train at said location, defendants  
2 SOUTHERN PACIFIC, AMTRAK, ROBERT E. WHITTLE, ALMA E. STATTI, KENT  
3 E. ANDERSON, RICHARD EDSON, PETER HILDAGO, JR., and DOES 1  
4 through 100, inclusive, and each of them, controlled, maintained,  
5 owned, operated and/or repaired said railroad train in said  
6 careless, unreasonable, unsafe and unlawful manner.

7 28. On or about said time, at or near said location and as  
8 at the proximate result thereof, JOHN KIM was struck and killed  
9 by said train while crossing said railroad tracks at or about  
10 said time and at or near said location.

11 29. As a proximate result of the death of JOHN KIM, the  
12 plaintiffs lost his love, affection, comfort and society, and  
13 have been damaged in an amount which should be awarded according  
14 to proof.

15 30. As a proximate result of the death of JOHN KIM, the  
16 plaintiffs have sustained economic losses for the loss of the  
17 services and support the plaintiffs would receive in their old  
18 age in an amount which has not been determined at the time of the  
19 filing of the complaint but which should be awarded according to  
20 proof and on which the plaintiffs are entitled to recover  
21 interest from the time of the death of JOHN KIM.

22 31. As a proximate result of the death of JOHN KIM, the  
23 plaintiffs have incurred hospital and medical expenses in an  
24 amount which should be awarded according to proof, and on which  
25 the plaintiffs are entitled to recover interest thereon from the  
26 date they were incurred.

27 32. As a proximate result of the death of JOHN KIM the  
28 plaintiffs have incurred funeral and burial expenses in an amount

1 which should be awarded according to proof, and on which the  
2 plaintiffs are entitled to recover interest thereon from the date  
3 they were incurred.

4 33. As a proximate result of the death of JOHN KIM, the  
5 plaintiffs have lost earnings and earning capacity in an amount  
6 which should be awarded according to proof, and on which the  
7 plaintiffs are entitled to recover interest from the time of  
8 death of JOHN KIM.

9 34. The plaintiffs are informed and believe and thereon  
10 allege that since defendants SOUTHERN PACIFIC, AMTRAK, ROBERT E.  
11 WHITTLE, ALMA E. STATTI, KENT E. ANDERSON, RICHARD EDSON, PETER  
12 HILDAGO, JR., and DOES 1 through 100, inclusive, and each of  
13 them, controlled, maintained, owned, operated and/or repaired a  
14 railroad train in said careless, unreasonable, unsafe and  
15 unlawful manner despite their knowledge that said control,  
16 maintenance, ownership, operation and/or repair of said train  
17 would create and exacerbate an unreasonable risk of harm to  
18 persons in the vicinity including but not limited to JOHN KIM and  
19 the plaintiffs and would probably result in a person being struck  
20 and either injured or killed by said train at said location, said  
21 control, maintenance, ownership, operation and/or repair was  
22 malicious, reckless, wanton and wilful.

23 35. As a result thereof, the plaintiffs are entitled to  
24 recover punitive and exemplary damages in an amount which should  
25 be awarded according to proof.

26  
27 SECOND CAUSE OF ACTION FOR WRONGFUL DEATH BASED ON NEGLIGENCE  
28 ARISING OUT OF THE OPERATION OF A RAILROAD TRAIN

1 COME NOW the plaintiffs who for a second cause of action  
2 against defendants SOUTHERN PACIFIC TRANSPORTATION COMPANY,  
3 NATIONAL RAILROAD PASSENGER CORPORATION aka AMTRAK, ROBERT E.  
4 WHITTLE, ALMA E. STATTI, KENT E. ANDERSON, RICHARD EDSON, PETER  
5 HILDAGO, JR., and DOES 1 through 100, inclusive, and each of  
6 them, complain and allege as follows:

7 36. The plaintiffs hereby incorporate by reference each and  
8 every allegation contained in paragraphs 1 through 25, inclusive  
9 and paragraphs 28 through 33, inclusive, of this complaint.

10 37. The plaintiffs are informed and believe and thereon  
11 allege that defendants SOUTHERN PACIFIC, AMTRAK, ROBERT E.  
12 WHITTLE, ALMA E. STATTI, KENT E. ANDERSON, RICHARD EDSON, PETER  
13 HILDAGO, JR., and DOES 1 through 100, inclusive, and each of  
14 them, breached said duty.

15  
16 THIRD CAUSE OF ACTION FOR WRONGFUL DEATH  
17 BASED ON SERIOUS AND WILFUL MISCONDUCT  
18 ARISING OUT OF PREMISES LIABILITY

19 COME NOW the plaintiffs who for a third cause of action  
20 against defendants SOUTHERN PACIFIC TRANSPORTATION COMPANY,  
21 COUNTY OF SANTA BARBARA, STATE OF CALIFORNIA, and DOES 1 through  
22 300, inclusive, and each of them, complain and allege as follows:

23 38. The plaintiffs hereby incorporate by reference each and  
24 every allegation contained in paragraphs 1 through 23, inclusive,  
25 paragraphs 28 through 33, inclusive, and paragraph 35 of this  
26 complaint.

27 39. The plaintiffs are informed and believe and thereon  
28 allege that defendants SOUTHERN PACIFIC, COUNTY OF SANTA BARBARA,

1 STATE OF CALIFORNIA, and DOES 1 through 300, inclusive, and each  
2 of them, were in custody, possession and control of said parking  
3 lot, railroad tracks and beach at said location.

4 40. The plaintiffs are informed and believe and thereon  
5 allege that defendants SOUTHERN PACIFIC, COUNTY OF SANTA BARBARA,  
6 STATE OF CALIFORNIA, and DOES 1 through 300, inclusive, and each  
7 of them, had an duty to:

8 a. construct and maintain a railroad crossing,

9 b. properly design and construct the site by placement  
10 of a railroad right of way that would not pose a hazard to  
11 persons in the vicinity.

12 c. construct and maintain a safe railroad crossing  
13 which would provide adequate warning that a train was  
14 approaching,

15 d. properly design and construct (and adequately  
16 maintain) said location, factors of which include but are  
17 not limited to:

18 (1) properly placing signs so as to provide  
19 adequate warning,

20 (2) not allowing signs that are present to  
21 deteriorate so as not to provide adequate warning,

22 (3) not allowing signs that are present to be  
23 obscured,

24 (4) not placing a facility where a train track  
25 separates the parking lot from the beach,

26 (5) properly designing and constructing a facility  
27 where people do not have to cross a train track  
28 which separates the parking lot from the beach to



1 get to the beach,  
2 (6) providing adequate warning,  
3 (7) not designing a facility so as to funnel  
4 people to cross railroad tracks at an unsafe location;  
5 (8) not placing an opening in fence for beach  
6 access which funnels people across railroad track at an  
7 unsafe location,  
8 (9) not placing an opening in a fence for beach  
9 access which gives a false impression that it is safe  
10 to cross railroad tracks,  
11 (10) not designing and constructing the facility  
12 so as to conceal the approach of the train,  
13 (11) not allowing the placement of a dumpster to  
14 obscure warning,  
15 (12) not allowing the placement of a dumpster to  
16 obscure approaching trains,  
17 (13) not designing and constructing a facility  
18 where there was a preexisting or subsequently  
19 constructed artificial dangerous condition, and  
20 (14) properly designing and constructing the  
21 premises and giving adequate warning.

22 41. The plaintiffs are informed and believe and thereon  
23 allege that defendants SOUTHERN PACIFIC, COUNTY OF SANTA BARBARA,  
24 STATE OF CALIFORNIA, and DOES 1 through 300, inclusive, and each  
25 of them, engaged in the following acts and omissions:

26 a. Failing to construct and maintain a railroad  
27 crossing,

28 b. Defectively designing and constructing the site by

1 placement of a railroad right of way at a place so as to  
2 cross proximately close to the beach where it would pose a  
3 hazard to persons in the vicinity,

4 c. Failing to construct and maintain a safe railroad  
5 crossing which would provide adequate warning that a train  
6 was approaching,

7 d. Defectively designing and constructing (and  
8 inadequately maintaining) said location, factors of which  
9 include but are not limited to:

10 (1) failing to properly place signs so as to  
11 provide adequate warning,

12 (2) allowing signs that are present to deteriorate  
13 so as not to provide adequate warning,

14 (3) allowing signs that are present to be obscured  
15 which signs were in fact obscured,

16 (4) placing a facility where a train track  
17 separates the parking lot from the beach,

18 (5) designing and constructing of a facility where  
19 people have to cross a train track which separates the  
20 parking lot from the beach to get to the beach,

21 (6) failing to provide warning or providing  
22 inadequate warning,

23 (7) designing a facility so as to funnel people to  
24 cross railroad tracks at an unsafe location,

25 (8) placing an opening in fence for beach access  
26 which funnels people across railroad track at an unsafe  
27 location,

28 (9) placing of opening in fence for beach access

1           which gives a false impression that it is safe to cross  
2           railroad tracks,

3                 (10) designing and constructing the facility so as  
4           to conceal the approach of the train,

5                 (11) allowing the placement of a dumpster to  
6           obscure warning,

7                 (12) allowing the placement of a dumpster to  
8           obscure approaching trains,

9                 (13) designing and constructing a facility where  
10          there was a preexisting or subsequently constructed  
11          artificial dangerous condition, and

12                (14) defectively designing and constructing the  
13          premises and giving no adequate warning.

14           42. The plaintiffs are informed and believe and thereon  
15          alleges that defendants SOUTHERN PACIFIC, COUNTY OF SANTA  
16          BARBARA, STATE OF CALIFORNIA, and DOES 1 through 300, inclusive,  
17          and each of them, knew that said acts and omissions would create  
18          and exacerbate an unreasonable risk of harm to persons in the  
19          vicinity including but not limited to JOHN KIM and the plaintiffs  
20          and would probably result in a person being struck and either  
21          injured or killed by said train at said location.

22           43. The plaintiffs are informed and believe and thereon  
23          allege that, despite the knowledge that said acts and omissions  
24          would create and exacerbate an unreasonable risk of harm to  
25          persons in the vicinity including but not limited to JOHN KIM and  
26          the plaintiffs and would probably result in a person being struck  
27          and either injured or killed by said train at said location,  
28          defendants SOUTHERN PACIFIC, COUNTY OF SANTA BARBARA, STATE OF

CALIFORNIA, and DOES 1 through 300, inclusive, and each of them, engaged in said acts and omissions.

44. The plaintiffs are informed and believe and thereon allege that since defendants SOUTHERN PACIFIC, COUNTY OF SANTA BARBARA, STATE OF CALIFORNIA, and DOES 1 through 300, inclusive, and each of them, engaged in said acts and omissions despite their knowledge that said acts and omissions would create and exacerbate an unreasonable risk of harm to persons in the vicinity including but not limited to JOHN KIM and the plaintiffs and would probably result in a person being struck and killed by said train at said location, said acts and omissions were malicious, reckless, wanton and wilful and a proximate cause of the death of JOHN KIM.

FOURTH CAUSE OF ACTION FOR WRONGFUL DEATH BASED ON NEGLIGENCE  
ARISING OUT OF PREMISES LIABILITY

COME NOW the plaintiffs who for a fourth cause of action against defendants SOUTHERN PACIFIC TRANSPORTATION COMPANY, COUNTY OF SANTA BARBARA, STATE OF CALIFORNIA, and DOES 1 through 300, inclusive, and each of them, complain and allege as follows:

45. The plaintiffs hereby incorporate by reference, each and every allegation contained in paragraphs 1 through 23, inclusive, paragraphs 28 through 33, inclusive, and paragraphs 39 through 41, inclusive, of this complaint.

46. The plaintiffs are informed and believe and thereon allege that defendants SOUTHERN PACIFIC, COUNTY OF SANTA BARBARA, STATE OF California, and DOES 1 through 300, inclusive, and of each of them, breached said duty.

FIFTH CAUSE OF ACTION FOR WRONGFUL DEATH

BASED ON SERIOUS AND WILFUL MISCONDUCT

ARISING OUT OF THE FAILURE OF AN OPERATING

RAILROAD TO CONSTRUCT AND MAINTAIN A RAILROAD CROSSING

COME NOW the plaintiffs who for a fifth cause of action against defendants SOUTHERN PACIFIC TRANSPORTATION COMPANY, NATIONAL RAILROAD PASSENGER CORPORATION aka AMTRAK and DOES 1 through 100, inclusive, and each of them, complain and allege as follows:

47. The plaintiffs hereby incorporate by reference each and every allegation contained in paragraphs 1 through 23, inclusive, paragraphs 28 through 33, inclusive, and paragraph 35 of this complaint.

48. At said location, there was a crossway traversing said railroad tracks.

49. The plaintiffs are informed and believe and thereon allege that said crossway was either a dedicated or a prescriptive crossing of said railroad tracks.

50. The plaintiffs are informed and believe that defendants SOUTHERN PACIFIC, AMTRAK and DOES 1 through 100, inclusive, and each of them, had a duty to construct, erect and maintain signs and equipment providing proper and adequate warning of approaching trains at said crossway, including but not limited to compliance with the provisions of California Public Utilities Code §§1201, et seq.

51. Defendants SOUTHERN PACIFIC, AMTRAK and DOES 1 through 100, inclusive, and each of them, failed to construct, erect and maintain signs and equipment providing proper and adequate

1 warning of approaching trains at said crossway as required by the  
2 provisions of California Public Utilities Code §§1201, et seq.,  
3 and other statutes, rules and provisions of law.

4 52. Defendants SOUTHERN PACIFIC, AMTRAK and DOES 1 through  
5 100, inclusive, and each of them, knew or should have known that  
6 the failure to construct, erect and maintain proper and adequate  
7 signs and equipment providing proper warning of approaching  
8 trains at said crossway would create and exacerbate an  
9 unreasonable risk of harm to persons in the vicinity including  
10 but not limited to JOHN KIM and the plaintiffs and would probably  
11 result in a person or persons crossing the track at said crossway  
12 being struck and either injured or killed by an oncoming train at  
13 said crossway.

14 53. Despite the knowledge that the failure to construct,  
15 erect and maintain proper and adequate signs and equipment  
16 providing proper warning of approaching trains at said crossway  
17 would create and exacerbate an unreasonable risk of harm to  
18 persons in the vicinity including but not limited to JOHN KIM and  
19 the plaintiffs and would probably result in a person or persons  
20 crossing the track at said crossway being struck and either  
21 injured or killed by an oncoming train at said crossway,  
22 defendants SOUTHERN PACIFIC, AMTRAK and DOES 1 through 100,  
23 inclusive, and each of them, failed to do so.

24 54. Since defendants SOUTHERN PACIFIC, AMTRAK and DOES 1  
25 through 100, inclusive, and each of them, knew or should have  
26 known that the failure to construct, erect and maintain proper  
27 and adequate signs and equipment providing proper warning of  
28 approaching trains at said crossway would create and exacerbate

1 an unreasonable risk of harm to persons in the vicinity including  
2 but not limited to JOHN KIM and the plaintiffs and would probably  
3 result in a person or persons crossing the track at said crossway  
4 being struck and killed by an oncoming train at said location and  
5 they failed to do so, said failure was malicious, oppressive,  
6 wanton and wilful and a proximate cause of the death of JOHN KIM.

7  
8 SIXTH CAUSE OF ACTION FOR WRONGFUL DEATH BASED ON NEGLIGENCE  
9 ARISING OUT OF THE FAILURE OF AN OPERATING  
10 RAILROAD TO CONSTRUCT AND MAINTAIN A RAILROAD CROSSING

11 COME NOW the plaintiffs who for a sixth cause of action  
12 against defendants SOUTHERN PACIFIC TRANSPORTATION COMPANY,  
13 NATIONAL RAILROAD PASSENGER CORPORATION aka AMTRAK and DOES 1  
14 through 100, inclusive, and each of them, complain and allege as  
15 follows:

16 55. The plaintiffs hereby incorporate by reference each and  
17 every allegation contained in paragraphs 1 through 23, inclusive,  
18 paragraphs 28 through 33, inclusive, and paragraphs 48 through  
19 51, inclusive, of this complaint.

20 56. Defendants SOUTHERN PACIFIC, AMTRAK and DOES 1 through  
21 100, inclusive, and each of them, breached said duty.

22  
23 SEVENTH CAUSE OF ACTION FOR WRONGFUL DEATH  
24 BASED ON SERIOUS AND WILFUL MISCONDUCT  
25 ARISING OUT OF THE PLACEMENT OF A DUMPSTER

26 COME NOW the plaintiffs who for a seventh cause of action  
27 against defendants SOUTHERN PACIFIC TRANSPORTATION COMPANY,  
28 NATIONAL RAILROAD PASSENGER CORPORATION aka AMTRAK, COUNTY OF

SANTA BARBARA, STATE OF CALIFORNIA, and DOES 1 through 300, inclusive, and each of them complain and allege as follows:

57. The plaintiffs hereby incorporate by reference each and every allegation contained in paragraphs 1 through 23, inclusive, paragraphs 28 through 33, inclusive, and paragraph 35 of this complaint.

58. The plaintiffs are informed and believe and thereon allege that defendants SOUTHERN PACIFIC, AMTRAK, COUNTY OF SANTA BARBARA, STATE OF CALIFORNIA, and DOES 1 through 300, inclusive, and each of them, caused or permitted a dumpster to be placed along said fence at said location, knew or should have known of the presence of said dumpster sufficiently in advance of said time and date to have taken remedial measures prior to said time and date, failed to cause said dumpster to be removed or relocated, and failed to guard and warn in a manner appropriate to the exacerbated unreasonable risk of harm.

59. Said dumpster was placed in a position that obscured what signs there were advising of trains, as well as the warning of an approaching train and the actual approach of a train, and interfered with the visibility from where the plaintiffs were watching JOHN KIM.

60. Defendants SOUTHERN PACIFIC, AMTRAK, COUNTY OF SANTA BARBARA, STATE OF CALIFORNIA, and DOES 1 through 300, inclusive, and each of them, knew or should have known that said placement of said dumpster would create and exacerbate an unreasonable risk of harm to persons in the vicinity including but not limited to JOHN KIM and the plaintiffs, would interfere with parents observing their children at said location, would obscure what



1 signs existed advising of trains, as well as the warning of an  
2 approaching train and the actual approach of the train, and  
3 further exacerbated an already present unreasonable risk of harm.

4 61. Since defendants SOUTHERN PACIFIC, AMTRAK, COUNTY OF  
5 SANTA BARBARA, STATE OF CALIFORNIA, and DOES 1 through 300,  
6 inclusive, and each of them, knew or should have known the facts  
7 alleged in paragraph 60 of this complaint, they had a duty not to  
8 place said dumpster at said location and to take remedial actions  
9 to remove and relocate said dumpster.

10 62. Despite the fact that defendants SOUTHERN PACIFIC,  
11 AMTRAK, COUNTY OF SANTA BARBARA, STATE OF CALIFORNIA, and DOES 1  
12 through 300, inclusive, and each of them, knew or should have  
13 known the facts alleged in paragraph 60 of this complaint  
14 sufficiently in advance to have taken remedial measures prior to  
15 said time and date, they placed said dumpster at said location,  
16 and unreasonably failed to remove or cause the removal of said  
17 dumpster or to guard or otherwise provide appropriate warning in  
18 a manner appropriate to the risk of harm.

19 63. Because defendants SOUTHERN PACIFIC, AMTRAK, COUNTY OF  
20 SANTA BARBARA, STATE OF CALIFORNIA, and DOES 1 through 300,  
21 inclusive, and each of them, placed said dumpster at said  
22 location, knew or should have known of the presence of said  
23 dumpster sufficiently in advance of said time and date to have  
24 taken remedial measures prior to said time and date, and  
25 unreasonably failed to remove or cause the removal of said  
26 dumpster or to guard or otherwise provide appropriate warning in  
27 a manner appropriate to the risk of harm, even though they knew  
28 or should have known that said placement of and failure to remove

1 and relocate said dumpster would create and exacerbate an  
2 unreasonable risk of harm to persons in the vicinity including  
3 but not limited to JOHN KIM and the plaintiffs, would interfere  
4 with parents observing their children at said location, would  
5 obscure said signs there was advising of trains, as well as the  
6 warning of an approaching train and the actual approach of the  
7 train itself, said placement of and failure to remove and  
8 relocate said dumpster was malicious, oppressive, wanton and  
9 wilful and a proximate cause of the death of JOHN KIM.

10  
11 EIGHTH CAUSE OF ACTION FOR WRONGFUL DEATH BASED ON NEGLIGENCE  
12 ARISING OUT OF THE PLACEMENT OF A DUMPSTER

13 COME NOW the plaintiffs who for a eighth cause of action  
14 against defendants SOUTHERN PACIFIC TRANSPORTATION COMPANY,  
15 NATIONAL RAILROAD PASSENGER CORPORATION aka AMTRAK, COUNTY OF  
16 SANTA BARBARA, STATE OF CALIFORNIA, and DOES 1 through 300,  
17 inclusive, and each of them, complain and allege as follows:

18 64. The plaintiffs hereby incorporate by reference each and  
19 every allegation contained in paragraphs 1 through 23, inclusive,  
20 paragraphs 28 through 33, inclusive, and paragraphs 58 through  
21 62, inclusive, of this complaint.

22 65. Defendants SOUTHERN PACIFIC, AMTRAK, COUNTY OF SANTA  
23 BARBARA, STATE OF CALIFORNIA, and DOES 1 through 300, inclusive,  
24 and each of them, breached said duty.

25  
26 NINTH CAUSE OF ACTION FOR  
27 INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

28 COME NOW the plaintiffs who for a ninth cause of action

1 against the defendants and each of them complain and allege as  
2 follows:

3 66. The plaintiffs hereby incorporate by reference, each and  
4 every allegation contained in paragraphs 1 through 35, inclusive,  
5 paragraph 37, paragraphs 39 through 44, inclusive, paragraph 46,  
6 paragraphs 48 through 54, paragraph 56, inclusive, paragraphs 58  
7 through 63, inclusive, and paragraph 65 of this complaint.

8 67. The plaintiffs were present at said location at the time  
9 said train struck JOHN KIM.

10 68. The plaintiffs were present at the scene and were aware  
11 of and believed that said train struck JOHN KIM at the time said  
12 train struck him and that said train caused him fatal injuries.

13 69. The defendants and each of them knew, were actually  
14 aware or should have been aware that said control, maintenance,  
15 operation and ownership of said train, said acts and omissions  
16 with respect to said location, said failure to construct, erect  
17 and maintain said signs and equipment, and said placement of and  
18 failure to remove and relocate said dumpster, could and would  
19 create and exacerbate an unreasonable risk of harm to persons in  
20 the vicinity and probably result in a person such as JOHN KIM  
21 being struck by a railroad train, and that said striking would  
22 cause persons such as the plaintiffs to suffer severe emotional  
23 distress.

24 70. The defendants and each of them engaged in said control,  
25 maintenance, operation, ownership, acts, omissions and failures  
26 with reckless and wanton disregard of the probability that such  
27 conduct would create and exacerbate an unreasonable risk of harm  
28 to persons in the vicinity including but not limited to JOHN KIM

1 and the plaintiffs and would cause emotional distress to persons  
2 such as the plaintiffs.

3 71. The defendants knew that people such as the plaintiffs  
4 would be present at said location during said time.

5 72. Said control, maintenance, operation, ownership, acts,  
6 omissions and failures so as to create and exacerbate an  
7 unreasonable risk of harm to persons in the vicinity including  
8 but not limited to JOHN KIM and the plaintiffs, and which would  
9 probably result in a person such as JOHN KIM being struck by a  
10 railroad train, and would constitute emotional distress to  
11 persons such as the plaintiffs, constituted extreme and  
12 outrageous conduct.

13 73. Because defendants and each of them conducted themselves  
14 as described herein when they were actually aware or should have  
15 been aware that said control, maintenance, operation, ownership  
16 acts, omissions and failures could and would probably result in a  
17 person such as JOHN KIM being struck by a railroad train, said  
18 conduct was malicious, oppressive, wanton and wilful.

19 74. As a proximate result thereof, the plaintiff suffered  
20 serious and severe emotional and emotional distress including  
21 psychological stress.

22  
23 TENTH CAUSE OF ACTION FOR

24 NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

25 COME NOW the plaintiffs who for a tenth cause of action  
26 against the defendants and each of them complain and allege as  
27 follows:

28 75. The plaintiffs hereby incorporate by reference each and

1 every allegation contained in paragraphs 1 through 25, inclusive,  
2 paragraphs 28 through 33, inclusive, paragraph 37, paragraphs 39  
3 through 41, inclusive, paragraph 46, paragraphs 48 through 51,  
4 inclusive, paragraph 56, paragraphs 58 through 61, inclusive,  
5 paragraph 65, paragraphs 68 through 69, inclusive, paragraphs 70  
6 through 72, inclusive, and paragraph 74 of this complaint.

7  
8 PRAYER

9 WHEREFORE, the plaintiffs pray for relief against the  
10 defendants and each of them as follows:

11 1. On the first cause of action against defendants SOUTHERN  
12 PACIFIC TRANSPORTATION COMPANY, NATIONAL RAILROAD PASSENGER  
13 CORPORATION aka AMTRAK, ROBERT E. WHITTLE, ALMA E. STATTI, KENT  
14 E. ANDERSON, RICHARD EDSON, PETER HILDAGO, JR., and DOES 1  
15 through 100, inclusive, and each of them, for:

16 a. For general damages, damages for loss of love,  
17 affection, comfort and society and pecuniary damages in an  
18 amount which should be awarded according to proof,

19 b. For economic damages for the loss of the services  
20 and support the plaintiffs would receive in their old age  
21 according to proof, together with interest thereon from the  
22 time of the death of JOHN KIM,

23 c. For hospital and medical expenses in an amount which  
24 should be awarded according to proof, together with interest  
25 thereon from the date they were incurred,

26 d. For funeral and burial expenses in an amount which  
27 should be awarded according to proof, together with interest  
28 thereon from the date they were incurred,

1 e. For economic damages for lost earnings and earning  
2 capacity of plaintiffs in an amount which should be awarded  
3 according to proof, together with interest thereon according  
4 to proof, and

5 f. For punitive and exemplary damages in an amount  
6 which should be awarded according to proof.

7 2. On the a second cause of action against defendants  
8 SOUTHERN PACIFIC TRANSPORTATION COMPANY, NATIONAL RAILROAD  
9 PASSENGER CORPORATION aka AMTRAK, ROBERT E. WHITTLE, ALMA E.  
10 STATTI, KENT E. ANDERSON, RICHARD EDSON, PETER HILDAGO, JR., and  
11 DOES 1 through 100, inclusive, and each of them, for:

12 a. For general damages, damages for loss of love,  
13 affection, comfort and society and pecuniary damages in an  
14 amount which should be awarded according to proof,

15 b. For economic damages for the loss of the services  
16 and support the plaintiffs would receive in their old age  
17 according to proof, together with interest thereon from the  
18 time of the death of JOHN KIM,

19 c. For hospital and medical expenses in an amount which  
20 should be awarded according to proof, together with interest  
21 thereon from the date they were incurred,

22 d. For funeral and burial expenses in an amount which  
23 should be awarded according to proof, together with interest  
24 thereon from the date they were incurred, and

25 e. For economic damages for lost earnings and earning  
26 capacity of plaintiffs in an amount which should be awarded  
27 according to proof, together with interest thereon according  
28 to proof.

1           3. On the third cause of action against defendants SOUTHERN  
2 PACIFIC TRANSPORTATION COMPANY, COUNTY OF SANTA BARBARA, STATE OF  
3 CALIFORNIA, and DOES 1 through 300, inclusive, and each of them,  
4 for:

5           a. For general damages, damages for loss of love,  
6 affection, comfort and society and pecuniary damages in an  
7 amount which should be awarded according to proof,

8           b. For economic damages for the loss of the services  
9 and support the plaintiffs would receive in their old age  
10 according to proof, together with interest thereon from the  
11 time of the death of JOHN KIM,

12           c. For hospital and medical expenses in an amount which  
13 should be awarded according to proof, together with interest  
14 thereon from the date they were incurred,

15           d. For funeral and burial expenses in an amount which  
16 should be awarded according to proof, together with interest  
17 thereon from the date they were incurred,

18           e. For economic damages for lost earnings and earning  
19 capacity of plaintiffs in an amount which should be awarded  
20 according to proof, together with interest thereon according  
21 to proof, and

22           f. For punitive and exemplary damages in an amount  
23 which should be awarded according to proof.

24           4. On the fourth cause of action against defendants SOUTHERN  
25 PACIFIC TRANSPORTATION COMPANY, COUNTY OF SANTA BARBARA, STATE OF  
26 CALIFORNIA, and DOES 1 through 300, inclusive, and each of them,  
27 for:

28           a. For general damages, damages for loss of love,

1 affection, comfort and society and pecuniary damages in an  
2 amount which should be awarded according to proof,

3 b. For economic damages for the loss of the services  
4 and support the plaintiffs would receive in their old age  
5 according to proof, together with interest thereon from the  
6 time of the death of JOHN KIM,

7 c. For hospital and medical expenses in an amount which  
8 should be awarded according to proof, together with interest  
9 thereon from the date they were incurred,

10 d. For funeral and burial expenses in an amount which  
11 should be awarded according to proof, together with interest  
12 thereon from the date they were incurred, and

13 e. For economic damages for lost earnings and earning  
14 capacity of plaintiffs in an amount which should be awarded  
15 according to proof, together with interest thereon according  
16 to proof.

17 5. On the fifth cause of action against defendants SOUTHERN  
18 PACIFIC TRANSPORTATION COMPANY, NATIONAL RAILROAD PASSENGER  
19 CORPORATION aka AMTRAK, and DOES 1 through 100, inclusive, and  
20 each of them, for:

21 a. For general damages, damages for loss of love,  
22 affection, comfort and society and pecuniary damages in an  
23 amount which should be awarded according to proof,

24 b. For economic damages for the loss of the services  
25 and support the plaintiffs would receive in their old age  
26 according to proof, together with interest thereon from the  
27 time of the death of JOHN KIM,

28 c. For hospital and medical expenses in an amount which



should be awarded according to proof, together with interest thereon from the date they were incurred,

d. For funeral and burial expenses in an amount which should be awarded according to proof, together with interest thereon from the date they were incurred,

e. For economic damages for lost earnings and earning capacity of plaintiffs in an amount which should be awarded according to proof, together with interest thereon according to proof, and

f. For punitive and exemplary damages in an amount which should be awarded according to proof.

6. On the sixth cause of action against defendants SOUTHERN PACIFIC TRANSPORTATION COMPANY, NATIONAL RAILROAD PASSENGER CORPORATION aka AMTRAK, and DOES 1 through 100, inclusive, and each of them, for:

a. For general damages, damages for loss of love, affection, comfort and society and pecuniary damages in an amount which should be awarded according to proof,

b. For economic damages for the loss of the services and support the plaintiffs would receive in their old age according to proof, together with interest thereon from the time of the death of JOHN KIM,

c. For hospital and medical expenses in an amount which should be awarded according to proof, together with interest thereon from the date they were incurred,

d. For funeral and burial expenses in an amount which should be awarded according to proof, together with interest thereon from the date they were incurred, and

1 e. For economic damages for lost earnings and earning-  
2 capacity of plaintiffs in an amount which should be awarded  
3 according to proof, together with interest thereon according  
4 to proof.

5 7. On the seventh cause of action against defendants  
6 SOUTHERN PACIFIC TRANSPORTATION COMPANY, NATIONAL RAILROAD  
7 PASSENGER CORPORATION aka AMTRAK, COUNTY OF SANTA BARBARA, STATE  
8 OF CALIFORNIA, and DOES 1 through 300, inclusive, and each of  
9 them, for:

10 a. For general damages, damages for loss of love,  
11 affection, comfort and society and pecuniary damages in an  
12 amount which should be awarded according to proof,

13 b. For economic damages for the loss of the services  
14 and support the plaintiffs would receive in their old age  
15 according to proof, together with interest thereon from the  
16 time of the death of JOHN KIM,

17 c. For hospital and medical expenses in an amount which  
18 should be awarded according to proof, together with interest  
19 thereon from the date they were incurred,

20 d. For funeral and burial expenses in an amount which  
21 should be awarded according to proof, together with interest  
22 thereon from the date they were incurred,

23 e. For economic damages for lost earnings and earning  
24 capacity of plaintiffs in an amount which should be awarded  
25 according to proof, together with interest thereon according  
26 to proof, and

27 f. For punitive and exemplary damages in an amount  
28 which should be awarded according to proof.

1 8. On the eighth cause of action against defendants SOUTHERN  
2 PACIFIC TRANSPORTATION COMPANY, NATIONAL RAILROAD PASSENGER  
3 CORPORATION aka AMTRAK, COUNTY OF SANTA BARBARA, STATE OF  
4 CALIFORNIA and DOES 1 through 300, inclusive, and each of them,  
5 for:

6 a. For general damages, damages for loss of love,  
7 affection, comfort and society and pecuniary damages in an  
8 amount which should be awarded according to proof,

9 b. For economic damages for the loss of the services  
10 and support the plaintiffs would receive in their old age  
11 according to proof, together with interest thereon from the  
12 time of the death of JOHN KIM,

13 c. For hospital and medical expenses in an amount which  
14 should be awarded according to proof, together with interest  
15 thereon from the date they were incurred,

16 d. For funeral and burial expenses in an amount which  
17 should be awarded according to proof, together with interest  
18 thereon from the date they were incurred, and

19 e. For economic damages for lost earnings and earning  
20 capacity of plaintiffs in an amount which should be awarded  
21 according to proof, together with interest thereon according  
22 to proof.

23 9. On the ninth cause of action against the defendants and  
24 each of them for:

25 a. For general damages in an amount which should be  
26 awarded according to proof,

27 b. For hospital and medical expenses in an amount which  
28 should be awarded according to proof,

1 c. For loss of income in an amount which should be  
2 awarded according to proof,

3 d. For punitive and exemplary damages in an amount  
4 which should be awarded according to proof, and

5 e. For interest according to proof.

6 10. On the tenth cause of action against the defendants and  
7 each of them for:

8 a. For general damages in an amount which should be  
9 awarded according to proof,

10 b. For hospital and medical expenses in an amount which  
11 should be awarded according to proof,

12 c. For loss of income in an amount which should be  
13 awarded according to proof, and

14 d. For interest according to proof.

15 11. On all causes of action against the defendants  
16 respectively named therein:

17 a. for costs of suit, and

18 b. for such further relief as the court deems proper.

19 LAW OFFICES OF RICHARD M. RUGER

20  
21 Dated: July 24, 1994

By: [Signature]

Richard M. Ruger, Attorneys  
for plaintiffs

RESOLUTION NO. L-230

APPENDIX A

PROPOSED GENERAL ORDER NO. 69-C  
(supersedes General Order No. 69-B)

PUBLIC UTILITIES COMMISSION OF THE  
STATE OF CALIFORNIA

EASEMENTS ON PROPERTY OF  
PUBLIC UTILITIES RESOLUTION NO. L-230

Adopted July 10, 1985, Effective July 10, 1985.

IT IS HEREBY ORDERED, that all public utilities covered by the provisions of Section 851 of the Public Utilities Code of this State be, and they are hereby authorized to grant easements, licenses or permits for use or occupancy on, over or under any portion of the operative property of said utilities for rights of way, private roads, agricultural purposes, or other limited uses of their several properties without further special authorization by this Commission whenever it shall appear that the exercise of such easement, license or permit will not interfere with the operations, practices and service of such public utilities to and for their several patrons or consumers;

PROVIDED, HOWEVER, that each such grant, other than a grant by a public utility to the State of California or a political subdivision thereof for a governmental use superior to the use by the public utility under the provisions of Section 1240.610 ~~1240~~ of the Code of Civil Procedure, ~~shall be or a grant to the United States Government or any agency thereof for a governmental use,~~ shall be made conditional upon the right of the grantor, either upon order of this Commission or upon its own motion to commence or resume the use of the property in question whenever, in the interest of its service to its patrons or consumers, it shall appear necessary or desirable to do so;

AND PROVIDED, FURTHER, that nothing herein applies, or shall be deemed to apply to crossings of railroads or street railroads by private or public roads, passengerways or footpaths, at grade or otherwise;

AND PROVIDED, FURTHER, that the term "political subdivision" as used in this General Order is defined as set forth in Section 1402 of the Public Utilities Code.

The effective date of this order shall be \_\_\_\_\_.

Approved and dated at San Francisco, California on  
\_\_\_\_\_

PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA

By: JOSEPH E. BODOVITZ  
*Executive Director*

(Overstriking indicated language to be deleted; underlining indicates language to be added.)

## PUC DECISIONS REGARDING PEDESTRIAN CROSSINGS

1. Application of CITIES of NORWALK and SANTA FE SPRINGS for authority to construct a pedestrian overpass at railroad milepost 156.21 and to alter the Imperial Highway Underpass, Crossing No. 2-156.1-B, of the AT&SF Railroad Company's San Bernardino subdivision main line, as part of their regional multimodal Transportation Center Project; and for a determination as provided for in GO-26-D, Section 3.16, that handicapped passenger facilities at the center be located to meet the requirements for tangent track; in the Cities of Norwalk and Santa Fe Springs, County of Los Angeles, Decision No. 95-02-012, Application No. 94-07-003 (Filed July 5, 1994), 1995 Cal. PUC LEXIS 66, February 8, 1995
2. Application of the City of Santa Clara to construct one (Pedestrian/Bicycle) grade crossing of the Southern Pacific Transportation Company "L" Line, in the vicinity of Tasman Drive in said City of Santa Clara, State of California, Decision No. 94-04-032, Application No. 94-01-013 (Filed January 10, 1994), 1994 Cal. PUC LEXIS 294, April 6, 1994
3. Application of the East Bay Regional Park District for an Order Authorizing conversion of an existing railroad flood control trestle to a pedestrian/bicycle underpass crossing between Marsh Creek Recreational Trail and the track of the Southern Pacific Transportation Company, sometimes referred to as the "Marsh Creek Trail Pedestrian Underpass" [PUC No. B-60.75BD], Decision No. 94-03-064, Application No. 93-07-012 (Filed July 6, 1993), 1994 Cal. PUC LEXIS 224, March 16, 1994
4. Application of the East Bay Regional Park District for an Order Authorizing construction of a crossing at separated grades between Wildcat Creek Recreational Trail and the tracks of The Atchison, Topeka, & Santa Fe Railway and the Southern Pacific Transportation Company, sometimes referred to as the "Wildcat Creek Trail Pedestrian Overhead" (PUC No. 2-1187.4AD and A-16.74AD), Decision No. 94-03-063, Application No. 91-06-052 (Filed June 24, 1991), 1994 Cal. PUC LEXIS 229, March 16, 1994
5. In the Matter of the Application of LOS ANGELES COUNTY TRANSPORTATION COMMISSION for an order authorizing the construction of two rail transit tracks at separated grade at 89 highway and street crossings, at 5 pedestrian crossings and at 5 railroad crossings within the median of the I-105 Freeway between La Cienega Boulevard in the City of Los Angeles and Hoxie Avenue in the City of Norwalk, Los Angeles County, California, Decision No. 93-09-052, Application No. 93-04-056 (Filed April 30, 1993), 1993 Cal. PUC LEXIS 650, September 1, 1993
6. Application of the City of Santa Clara to construct one (Pedestrian/Bicycle) grade crossing of the Southern Pacific Transportation Company "L" Line, in the vicinity of Tasman Drive in said City of Santa Clara, State of California, Decision No. 93-08-020, Application No. 93-05-046 (Filed May 10, 1993), 1993 Cal. PUC LEXIS 535, August 4, 1993

7. In the Matter of the Application of LOS ANGELES COUNTY TRANSPORTATION COMMISSION For an order authorizing the construction of a pedestrian grade crossing across the Atchison Topeka and Santa Fe Railway Harbor Branch track and right-of-way at its MP 15.0 in El Segundo, County of Los Angeles, Decision No. 93-02-052, Application No. 92-08-004 (Filed August 4, 1992), 1993 Cal. PUC LEXIS 112, February 17, 1993
8. In the Matter of the Application of the UNITED STATES OF AMERICA, acting by and through the United States Department of Agriculture, Forest Service, to construct a pedestrian and equestrian crossing at grade, across the railroad tracks of the Southern Pacific Transportation Company in Soledad Canyon, County of Los Angeles, Decision No. 90-07-043, Application No. 85-12-028 (Filed December 13, 1985; amended April 23, 1990), 1990 Cal. PUC LEXIS 778; 37 CPUC2d 32, July 18, 1990
9. Application of the City of Port Hueneme to remove a Pedestrian Bridge over the Ventura County Railway in the City of Port Hueneme, County of Ventura, Decision No. 89-07-001, Application No. 88-10-002 (Filed October 3, 1988), 1989 Cal. PUC LEXIS 751; 32 CPUC2d 231, July 6, 1989
10. In the Matter of the Application of LOS ANGELES COUNTY TRANSPORTATION COMMISSION for an order authorizing the construction of two light rail transit tracks at grade across southbound vehicle lanes of Long Beach Boulevard at 27th Street and the construction of a pedestrian crossing in the City of Long Beach California, Decision No. 89-07-008, Application No. 88-07-053 (Filed July 29, 1988), 1989 Cal. PUC LEXIS 758, July 6, 1989
11. In the Matter of the Application of the CITY OF NOVATO for authority to construct a bicycle, pedestrian and equestrian path at grade over and across the Northwestern Pacific Railroad Company track in the City of Novato, County of Marin, State of California, Decision No. 86-07-017, Application No. 85-10-045 (Filed October 23, 1985), 1986 Cal. PUC LEXIS 470; 21 CPUC2d 403, July 2, 1986
12. APPLICATION OF THE SAN DIEGO METROPOLITAN TRANSIT DEVELOPMENT BOARD FOR AN ORDER AUTHORIZING THE CLOSING OF AN EXISTING PEDESTRIAN CROSSING AT GRADE AT K STREET ACROSS THE TRACKS OF THE SAN DIEGO IMPERIAL VALLEY RAILROAD AND FUTURE SAN DIEGO TROLLEY AND CONSTRUCTING A NEW PEDESTRIAN UNDERPASS ONE BLOCK EAST AT 33rd STREET, Decision No. 85-12-073, Application No. 85-10-003 (Filed October 2, 1985), 1985 Cal. PUC LEXIS 1071; 19 CPUC2d 434, December 18, 1985
13. In the Matter of the Application of the County of Orange to construct a pedestrian bridge over the railroad tracks of the Atchison, Topeka and Santa Fe Railway Company in the community of Capistrano Beach, County of Orange, Decision No. 85-08-095, Application No. 85-05-067 (Filed May 14, 1985), 1985 Cal. PUC LEXIS 774; 18 CPUC2d 669, August 21, 1985
14. Application of the County of Santa Cruz, a political subdivision of the State of California, for permission to construct a pedestrian bridge attached to the existing Rio Del Mar Boulevard Highway Bridge over The Southern Pacific Transportation Company tracks, Decision No. 85-08-034, Application No. 85-04-085 (Filed April 19, 1985), 1985 Cal. PUC LEXIS 675; 18 CPUC2d 526, August 7, 1985



15. Application of the City of Pinole, a municipal corporation, Pinole, California, for an order authorizing a pedestrian at-grade crossing of Southern Pacific Railroad at the Foot of Tennent Avenue, Pinole, California, Decision No. 8305024, Case No. 82-10-48 (Filed October 20, 1982;; 1983 Cal. PUC LEXIS 718; 11 CPUC2d 446, 05/04/83

16. Affirms the allocation of grade crossing protection funds to City of Oxnard (Gary Drive Pedestrian Crossing) granted in Resolution No. CP-2239. (Concurrence per Commissioner Batinovich)., Decision No. 85950, Case No. CP-2239; 5495, 1976 Cal. PUC LEXIS 251; 80 CPUC 103, 06/15/76

17. City of Sacramento authorized to construct pedestrian grade crossings with special protective devices at I, J, K, and L Streets over tracks of Southern Pacific Transportation Co., Decision No. 83645, Case No. 53619, 1974 Cal. PUC LEXIS 140; 77 CPUC 446, 10/29/74

1993 Cal. PUC LEXIS 535 printed in FULL format.

Application of the City of Santa Clara to construct one (Pedestrian/Bicycle) grade crossing of the Southern Pacific Transportation Company "L" Line, in the vicinity of Tasman Drive in said City of Santa Clara, State of California

Decision No. 93-08-020, Application No. 93-05-046 (Filed May 10, 1993)

California Public Utilities Commission

1993 Cal. PUC LEXIS 535

August 4, 1993

PANEL:  
[\*1]

Daniel Wm. Fessler, President, Patricia M. Eckert, Norman D. Shumway, P. Gregory Conlon, Commissioners

OPINION

As part of the project to construct the Amtrak Great American Railroad Station, the City of Santa Clara (City) requests authority to construct a pedestrian/bicycle crossing at grade near Tasman Drive across the tracks of Southern Pacific Transportation Company's (SPT) Vasona Branch Line in Santa Clara, Santa Clara County.

This project is located in the northern portion of Santa Clara, just west of Lafayette Street and north of Tasman Drive. A temporary station platform is now in place. The pedestrian/bicycle crossing will provide safer access between the Amtrak Great American Railroad Station platform and the Santa Clara Transportation Agency's Lick Mill Light Rail Station on Tasman Street.

City is the lead agency for this project under the California Environmental Quality Act of 1970 (CEQA), as amended, Public Resources Code Sections 21000, et seq. City has determined that the project is an improvement to an existing mass transit project and is, as such, exempt from CEQA under Section 15275 of the CEQA Guidelines (14 Cal. Admin. Code - Div. 6).

The Commission [\*2] is a responsible agency for this project under CEQA and has reviewed and considered the lead agency's exemption determination.

The site of the proposed project has been inspected by the Commission's Safety Division Traffic Engineering staff. The staff examined the need for and safety of the proposed construction, and recommends issuance of an ex parte order authorizing construction of the pedestrian/bicycle grade crossing.

City has met the filing requirements of the Commission's Rules of Practice and Procedure, including Rule 38, which relates to the construction of a public

highway across a railroad. A sketch of the crossing area is included as Appendix A.

#### Findings of Fact

1. Notice of the application was published in the Commission's Daily Calendar on June 8, 1993. No protests have been filed. A public hearing is not necessary.

2. City requests authority under Public Utilities (PU) Code Sections 1201-1205 to construct a pedestrian/bicycle crossing at grade near Tasman Drive across the tracks of SPT's Vasona Branch Line in Santa Clara, Santa Clara County.

3. The proposed crossing is required to provide safer access for pedestrians between the Great American Railroad [\*3] Station and the Lick Mill Light Rail Station.

4. Public convenience and necessity require construction of the proposed pedestrian/bicycle crossing.

5. Public safety requires that protection at the crossing be two Standard No. 10 flashing light-type signals, modified to provide two flashing light assemblies similar to those used for Standard No. 8 flashing light signals (General Order (GO) 75-C).

6. City is the lead agency for this project under CEQA, as amended.

7. The Commission is a responsible agency for this project and has reviewed and considered the lead agency's exemption determination.

#### Conclusions of Law

1. The application should be granted as set forth in the following order.

2. The activity is not covered by the requirements set forth in CEQA and, therefore, the Guidelines (14 Cal. Admin. Code - Div. 6) concerning the evaluation of projects and the preparation and review of environmental documents do not apply.

#### ORDER

#### IT IS ORDERED that:

1. The City of Santa Clara (City) is authorized to construct a pedestrian/bicycle crossing at grade near Tasman Drive across the tracks of Southern Pacific Transportation Company's (SPT) Vasona Branch Line in Santa [\*4] Clara, Santa Clara County, at the location and substantially as shown by plans attached to the application, to be identified as Crossing L-40.6-D.

2. Clearances shall be in accordance with GO 26-D. Walkways shall conform to GO 118.

3. Protection at the crossing shall be two Standard No. 10 automatic flashing light signals, modified to provide two flashing light assemblies similar to those used on Standard No. 8 flashing light signals (GO 75-C).

4. Construction expense of the crossing and installation cost of the automatic protection shall be borne by City.

5. Maintenance of the crossing shall conform to GO 72-B. Maintenance cost of the automatic protection shall be borne by City under PU Code Section 1202.2.

6. Construction plans of the crossing, approved by SPT, together with a copy of the agreement entered into between the parties, shall be filed with the Commission's Safety Division prior to commencing construction.

7. Within 30 days after completion of the work under this order, City shall advise the Commission's Safety Division in writing that the authorized work has been completed.

8. This authorization shall expire if not exercised within two years unless time [\*5] is extended or if the above conditions are not complied with. Authorization may be revoked or modified if public convenience, necessity, or safety so require.

9. The application is granted as set forth above.

This order becomes effective 30 days from today.

Dated August 4, 1993, at San Francisco, California.

APPENDIX A

[SEE ILLUSTRATION IN ORIGINAL]

1990 Cal. PUC LEXIS 778 printed in FULL format.

In the Matter of the Application of the UNITED STATES OF AMERICA, acting by and through the United States Department of Agriculture, Forest Service, to construct a pedestrian and equestrian crossing at grade, across the railroad tracks of the Southern Pacific Transportation Company in Soledad Canyon, County of Los Angeles

Decision No. 90-07-043, Application No. 85-12-028 (Filed December 13, 1985; amended April 23, 1990)

California Public Utilities Commission

1990 Cal. PUC LEXIS 778; 37 CPUC2d 32

July 18, 1990

PANEL:  
[\*1]

G. Mitchell Wilk, President; Frederick R. Duda; Stanley W. Hulett; John B. Ohanian; Patricia M. Eckert, Commissioners

#### OPINION

#### Statement of Facts

The Congress of the United States, in order to provide for ever increasing outdoor recreation needs of the expanding population and to promote public access to, travel within, and enjoyment of the open air, outdoor areas of the nation, on October 2, 1968, with the passage of Public Law 90-543, directed that trails should be established near urban areas and within established scenic areas more remotely located.

The Pacific Crest Trail was designated as one of the initial components of that trail system. The trail extends 2,400 miles, Mexico to Canada through California, Oregon, and Washington, and is administered by the Secretary of Agriculture, Forest Service, in cooperation with the Secretary of Interior. Its purpose is to provide a continuous, high quality public trail for hikers and equestrians. Use of motorized vehicles is prohibited.

The trail has been substantially completed. But southwest of Acton, California, it was proposed to cross the Southern Pacific Transportation Company's (S.P.) El Paso mainline tracks in [\*2] Soledad Canyon in the rugged mountains of Angeles National Forest on the northern rim of the Los Angeles Basin. In 1981 the Forest Service selected for the crossing site a large existing concrete drainage structure at approximately Milepost 431.6 on the railroad's mainline in the canyon. This would have resulted in a grade separated crossing in the canyon, and was acceptable to S.P., provided the Forest Service would agree to hold the railroad harmless. The Forest Service

was not adverse but also advised it was looking at possible alternative routes before final decision would be made.

In 1985, the Forest Service changed its mind and determined upon an at-grade crossing at Milepost 431.8. Assertedly, the trail was to be located so as to provide the shortest route, affect the least amount of private landowners, and minimize the impacts on private land and future development. Rights of way to the north and south of the new site were acquired. The nearest other public crossings along the S.P. tracks are approximately 2-3/4 miles to the east and 3-1/2 miles to the west. At the point chosen the topography and the low volume of pedestrian and equestrian use (approximately 250-300 [\*3] crossings per year) and train traffic (approximately four trains daily) assertedly preclude the construction and high cost of a grade separation.

When the Forest Service contacted S.P. with its standard easement deed for signature, S.P. refused to sign and suggested Forest Service file an application before the Commission. Accordingly, the Forest Service in 1985 filed the present application, seeking permission pursuant to §§ 1201-1205 of the Public Utilities (PU) Code to construct an at-grade crossing 20 feet wide, including a longitudinal trail extending 424 feet roughly parallel to the S.P. tracks before passing over the tracks northward. This longitudinal trail would utilize S.P.'s service road within the railroad's right-of-way.

S.P. protested the application, asserting both that the proposed crossing was not properly designed and would be incompatible with rail operations, and that the Public Utilities Commission lacked power to order such use of its longitudinal road and right-of-way.

The United Transportation Union (Union) also protested, asserting that an easterly bound freight train on that grade would be unable to stop within the 700-foot visibility distance to the [\*4] west; that pack mules tied together might be unable to clear the tracks in time, and raising questions about safety warnings and policing the area for four-wheel drive vehicles and/or motorcycles.

The Department of Public Works of Los Angeles County had no objections since the proposed crossing was near no county roads.

The application was set for hearing September 10, 1986 before Administrative Law Judge (ALJ) William S. Pilling. In view of ongoing discussions it was reset at the request of the Forest Service. During this time attorneys for the Forest Service and S.P. were exploring compromises. The Forest Service took the position that unless S.P. and the Union would stipulate before the Commission that its congressionally enacted power removed from the Commission the consideration of a split-grade crossing, the Secretary of Agriculture was prepared, first, to "dismiss, without prejudice" this application, then execute a "Declaration of Taking" for an at-grade crossing at the point under consideration which would be filed in a condemnation proceeding in U.S. District Court in Los Angeles. Once the Order of Possession was received, the Forest Service would have title and would [\*5] refile with the Commission, leaving the sole issue before the Commission that of defining the safety facilities for an at-grade crossing.

S.P. declined to stipulate, suggesting that if the California Public Utilities Commission could exercise only such safety jurisdiction as the Secretary of Agriculture in his sole discretion wishes to permit, the statutory language "in his judgment" found in the National Trails System Act (16 USC 1241, et seq., 16 USC 1246(g)) would be so broad and convey such arbitrary power as to raise serious questions of due process.

The Union also declined to stipulate.

At the written request of the Department of Agriculture, the hearing set for June 25, 1987 was canceled, and the matter was removed from the Commission calendar; the Department advising the ALJ that it would initiate condemnation proceedings.

With the retirement of ALJ Pilling, the matter was reassigned to ALJ William Turkish, and thence on January 27, 1989 to ALJ John B. Weiss. The latter contacted the Department of Agriculture attorney to suggest that further efforts be undertaken to resolve the open matter. The federal attorney followed up with S.P., the Union, and Commission staff, [\*6] leading to a November 14, 1989 meeting attended by representatives of the Forest Service, S.P., and Commission staff. Certain conditions were agreed upon, and on April 23, 1990 the United States of America, acting by and through the U.S. Department of Agriculture, Forest Service, filed the present amendment to Application 85-12-028, superseding the originally submitted application.

By the amended application, permission is sought pursuant to §§ 1201-1205, inclusive, of the PU Code, to construct an at-grade pedestrian and equestrian crossing for the Pacific Crest National Scenic Trail, across the tracks of S.P. in Soledad Canyon at the same point as planned in the original application, but providing for installation of 300 feet of 5-foot, 4-inch welded wire fencing south of and parallel to the S.P. track to channel trail users to the trail crossing while still permitting them to use the S.P. parallel road. The fence will be gated and locked to permit access for S.P.'s track maintenance. The trail width at the crossing will be 9 feet wide to permit use of standard crossing materials. S.P. will construct the crossing. The approach footing ties have been redesigned to meet S.P.'s [\*7] requirements, and the approaches will be posted with railroad crossing signs as set forth in Exhibits A and B to the amended application. These amendments were made to reflect the conditions agreed upon in the November 14, 1989 meeting.

Although all parties, including S.P., the Union, and the staff's Traffic Engineering Section were served copies of the amendment, only the Union responded. The Union on May 24, 1990 wrote ALJ Weiss stating its continued serious concerns as to the safety of such pedestrian crossings. The Union's State Legislative Director, James Jones, forthrightly stated his awareness of other pedestrian at-grade crossing authorizations having been granted under like circumstances by the Commission and expressed belief that there would be no productive purpose to the Union burdening the Commission by insisting on a public hearing.

In view of the apparent fact that no further evidence would be presented or developed by going to hearing, the ALJ determined to proceed ex parte and

submitted the matter for decision.

## Discussion

Chapter 6 (Railroad Crossings) of the PU Code is concerned with requirements associated with crossings over, under, and at grade of the [\*8] track of any railroad corporation. Section 1201 of that chapter requires prior Commission authorization before construction of any at-grade crossing. Other sections of the chapter provide for other aspects related to crossings and are not at issue here.

The choice of crossing point was determined after consideration of alternative routes, and these considerations were discussed at length in the Environmental Assessment Report prepared in 1981 pursuant to provisions of the National Environmental Policy Act of 1969. A Negative Declaration and Notice of Determination were filed on November 1, 1983.

The proposed at-grade pedestrian and equestrian crossing with a 9-foot tread width using standard crossing materials, as well as access way, together with appropriate warning signs described in Exhibits A and B to the application, is necessary to provide reasonably safe hiker and equestrian access across the S.P. tracks. n1

n1 The legal description of the proposed crossing is:

"A strip of land 20 feet wide by 521 feet long, paralleling then perpendicular to the Southern Pacific Company railroad tracks near structure number 431.9 and located in the W1/2 of the SW1/4 of Section 8, T 4N., R. 13W., S.B.M., or particularly described as:

"Beginning at a point on the west line of Section 8, Township 4 North, Range 13 West, San Bernardino Meridian, said point lying north 813 feet of the corner common to Sections 7, 8, 18 and 17 of said township and range, thence easterly, utilizing the dirt service road along a line with a bearing of North 85 degrees 52' 45" East for a distance of 424 feet, thence north for a distance of 46 feet to the centerline of the Southern Pacific Transportation company tracks, thence northeasterly for a distance of 51 feet ending at a point on the northline of the south half of the southwest quarter of said Section 8, said point lying 509.16 feet west of the southwest 1/16th corner of said Section 8." [\*9]

Separation of the grades is infeasible in that the topography of the area and the low volume of pedestrian and equestrian use (approximately 250-300 crossings per year) and train traffic (approximately four trains daily) preclude the construction and high cost of a grade separation. The Forest Service will install and maintain all signs within the right-of-way, as well as a fence along the track side of the right-of-way, gated to permit S.P. access for track maintenance. The maintenance cost of the crossing will be borne by the Forest Service.

We are appreciative of the Union's concerns, as expressed by its Legislative Director, that only separations can adequately provide fully for pedestrian and equestrian safety at such crossings. But where separations are not reasonably



practical and the exposure is thus limited, the cost involved to provide such separations can better be applied elsewhere. Local authorities, represented here by the County, accept the alternative. Accordingly, we will grant the application as amended.

#### Findings of Fact

1. The Congress has mandated certain trails for the use of the general public, one of which is the Pacific Crest Trail extending from [\*10] Mexico to Canada.

2. The trail, largely completed, extends through the rugged mountains of Angeles National Forest where a segment to be completed must cross the Soledad Canyon.

3. A mainline track of the S.P. traverses the Soledad Canyon, necessitating a crossing at approximately Milepost 431.8 in the canyon.

4. The United States Government, acting by and through the federal Department of Agriculture, Forest Service, and S.P. have, together with the Commission's Traffic Engineering Section, agreed after negotiations and conference, upon the detailed construction particulars for such a crossing, memorializing these in the present amended application.

5. Natural terrain conditions, difficulty of access, high cost, and very limited projected usage of the crossing preclude the construction of a separated crossing.

6. An at-grade pedestrian and equestrian crossing under all attendant conditions appears a reasonably safe alternative for this location.

7. The amended application under consideration was protested by the Union, which advises that while it maintains its protest, it believes a public hearing would serve no productive purpose. Accordingly, there is no need for a [\*11] public hearing, and the matter may be resolved ex parte.

#### Conclusions of Law

1. No hearing is necessary.
2. The amended application should be granted.

#### ORDER

IT IS ORDERED that:

1. The United States of America, acting by and through the United States Department of Agriculture, Forest Service, is authorized to construct a pedestrian and equestrian crossing at grade, across the railroad tracks of the Southern Pacific Transportation Company (S.P.) near Structure No. 431.9 in Soledad Canyon, County of Los Angeles, subject to an appropriate agreement

between the parties on a price for S.P. to construct the crossing portion two feet on either side of the track.

2. The at-grade crossing will conform to the provisions of the application and its exhibits.

3. This authorization shall expire within 1 year after today if not exercised within that time, unless time be extended. Authorization may be revoked or modified if public convenience, necessity, or safety so requires.

This order becomes effective 30 days from today.

Dated July 18, 1990, at San Francisco, California.

## OVERHEAD WALKWAY PROPOSED

# Rail officials agree to reopen Surf access

LOMPOC — Southern Pacific Co. officials after conferring with city and county representatives have announced that they are reopening access to the Surf Beach.

The Surf access has been closed to the public since June 8 when the railroad without warning erected a fence across the area leading into the Surf depot parking lot.

Railroad officials at the time said the move was necessary because the public had been "abusing" the privilege of access by driving cars onto the tracks, littering the area and presenting a hazard by climbing on railroad cars.

ACCESS to the popular Surf beach through the depot area had been a cherished activity by Lompoc area residents since the turn of the century.

Fishermen and those wishing to visit the beach objected

strongly to the cutting off of the access. Railroad officials had been in touch with local citizens in an attempt to resolve the matter and yesterday's meeting resulted in the present breakthrough.

Jay Long, assistant to the vice president of operations for SP, said that the railroad has agreed to move the existing barrier back from the entrance to the parking lot to the railway right-of-way which runs roughly parallel to the station house.

THIS WILL permit citizens to again approach Surf Beach through the depot property "at their own risk," said Long.

The railroad executive pointed out that the company's agreement to allow access and move the barrier back is based on the premise that the community will

gather together to finance an overhead pedestrian bridge to eliminate the hazard from passing trains.

Some 15-20 highspeed trains per day zip through the Surf area, it was pointed out. Long reported that before the barrier was erected, one citizen had actually driven his car onto the main line track where it became stranded resulting in the holding up of train traffic.

THE PROPOSED overhead bridge would be for pedestrians only.

SP officials who visited here said they would not wish to estimate the cost of the proposed pedestrian overpass without further engineering study. Speculation however is that the bridge will cost more than \$20,000.

The SP will not participate in the cost of the bridge, but

will grant an easement for the structure. The one requirement is that it be at least 23 feet above the rails. Length of the bridge will have to be about 150 feet.

GEORGE HUTSON, administrative assistant to County Supervisor Francis H. Beattie of Lompoc, said his office was checking into the availability of county funds. "It appears, however, that most of the money would have to come from gas tax funds newly allotted," he pointed out.

Long said the existing barrier would probably be moved back late next week.

Also present at the meeting were Mayor George Cotsonmoyer, Frank Lathrop, public projects engineer for the SP of Los Angeles, and George Townsend, trainmaster for the SP's Coast District.



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Lompoc RECORD  
July 15, 1972

SURF  
PR

## S.P. to grant Surf access

Officials of Southern Pacific Railroad Company yesterday afternoon agreed to an arrangement to allow access to Surf beach.

In a meeting with several civic officials, the railroad executives agreed to allow the use of the depot

parking lot by moving the presently installed fence to the rear of the remodeled depot and not enforcing the no trespassing edict.

S.P. Area Manager Jay Long stated that crews would be in next week to move the fencing.

In addition, Long stated that immediate plans will be made to bulldoze a slanting ramp to the beach rather than replace the steps which were removed several weeks ago.

Meeting with Long were Mayor George Cotsenmoyer; Supervisor Francis Beattie's administrative aide, George Hutson; Chamber of Commerce Executive Manager Earle Sweetland and Lompoc Record Editor Harry J. Crompe.

S.P. Division Superintendent Bob Thurston stated that the situation at the Surf station had become dangerous to life but regretted that the company had made the move without prior notice.

Long said that he hoped that the community would get behind some effort to construct a pedestrian overpass over the tracks in the near future.

He said the danger situation will exist until this is accomplished but that by moving the fence to the rear of the remodeled station, no autos will have access to the track area.

"If somebody is hurt on our property, we will be forced to definitely close off the area," Long warned.

Several parking areas will be reserved by sign for SP personnel in the new arrangement and users of the beach area are requested not to park in the stalls.

Long and city officials both pleaded for cooperation from the users of the beach area to "clean up" after their use.

NOTE: The meeting with Lompoc city officials was the result of the earlier public stir about blocking beach access, as indicated on the previous Lompoc RECORD stories below.

J. G. SHEA

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