

ALJ/MAB/jac

Mailed

MAR 12 1998

Decision 98-03-022 March 12, 1998

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

UNION SAFE DEPOSIT BANK, a California Banking Corporation,

Complainant,

v.

MODESTO AND EMPIRE TRACTION COMPANY, a corporation, formerly known as MODESTO INTERURBAN RAILWAY, a corporation,

Defendant.

**ORIGINAL**

Case 97-02-025  
(Filed February 14, 1997)

**OPINION**

**Summary**

This order approves the settlement agreement between the Union Safe Deposit Bank (Bank) and the Modesto And Empire Traction Company (Railroad). In the settlement agreement Railroad grants Bank an irrevocable license for a railroad crossing to access property Bank owns in Stanislaus County, California.

**Procedural Background**

On February 14, 1997, Bank filed a complaint to establish a private rail crossing in which it alleged that a previously existing crossing over Railroad's right of way was the only means of access to certain property Bank owned along Yosemite Avenue in Stanislaus County. Bank stated that in September 1994 Railroad removed this crossing without approval of Bank or the Commission. Bank sought to have the crossing re-established.

On April 18, 1997, Railroad filed its answer in which it admitted that it removed the crossing without authorization. Railroad also stated that a civil court action was pending on this matter before the Superior Court and that consequently the

Commission should decline to act on this complaint, pending resolution of the civil court matter.

At the request of the parties, Administrative Law Judge Robert (ALJ) Ramsey was assigned to act as a mediator in this proceeding. The parties successfully negotiated an agreement before ALJ Ramsey on June 24, 1997. The parties filed the written and executed settlement agreement in October 1997. Bank also filed a "Motion to Confirm Irrevocable License Agreement" on November 17, 1997. Although this motion is improperly titled, we assume that it is a request to approve the settlement agreement and will treat it as such.

#### **Description of the Settlement Agreement**

The major provisions of the settlement agreement are:

1. Railroad will reinstall the formerly existing crossing from Bank's property to Yosemite Avenue.
2. Protection at the crossing shall be two standard No. 1-C Private Crossing Signs as specified in Commission General Order No. 75-C.
3. Railroad will execute and deliver to Bank an irrevocable license to cross the Railroad's property.
4. Bank shall pay to Railroad \$10,000 for the purpose of reinstalling the private crossing.
5. Upon reinstallation of the crossing, Bank shall request dismissal with prejudice of the pending civil court action.
6. Bank will pay all reasonable costs of maintaining the crossing.

#### **Discussion**

Commission Rule of Practice and Procedure 51(e) requires that settlement agreements be (1) reasonable in light of the whole record, (2) consistent with the law, and (3) in the public interest to be approved by the Commission.

##### **a. Reasonable in Light of the Whole Record**

The record in this case reveals that Bank sought Commission action to obtain a crossing for access to its property. The settlement agreement accomplishes that goal

in an orderly and reliable manner. The costs of taking this matter to hearing before the Commission and litigating it before the Superior Court could substantially exceed the payment Bank made to Railroad. Moreover, the settlement agreement resolves this issue quickly such that the property may be more attractive to potential purchasers. The settlement agreement is, therefore, reasonable in light of the whole record.

**b. Consistent with the Law**

None of the actions required by the settlement agreement are in violation of any statute or Commission rule or regulation.

**c. In the Public Interest**

The Commission is responsible for ensuring that adequate railroad crossings are available to allow, where necessary, private landowners to access their property. This agreement resolves not just a complaint proceeding at the Commission but also a civil case pending in Superior Court.

For these reasons, the Commission finds that the settlement agreement is reasonable in light of the whole record, is consistent with the law, and is in the public interest. The agreement is approved pursuant to Rules 51 through 51.10 of the Commission's Rules of Practice and Procedure. (*See also San Diego Gas & Electric, 46 CPUC2d 538 (1992) (rules for all-party settlements).*)

**Findings of Fact**

1. Bank filed its complaint on February 14, 1997.
2. A settlement conference was held on June 24, 1997.
3. The parties filed the settlement agreement in September 1997 and the motion to accept it in November 1997.
4. The settlement agreement provides for a crossing over Railroad's right of way for access to Bank's property.
5. The settlement agreement resolves all matters relating to this proceeding and the pending Superior Court action.

**Conclusions of Law**

1. The settlement agreement is reasonable in light of the whole record, is consistent with the law, and is in the public interest.
2. The settlement agreement should be approved.

**O R D E R**

**IT IS ORDERED that:**

1. The settlement agreement affixed hereto as Attachment A and made a part hereof is approved, and the parties are directed to comply with the terms set forth in the settlement agreement.

2. This proceeding is closed.

This order is effective today.

Dated March 12, 1998, at San Francisco, California.

RICHARD A. BILAS  
President  
P. GREGORY CONLON  
JESSIE J. KNIGHT, JR.  
HENRY M. DUQUE  
JOSIAH L. NEPPER  
Commissioners

C.97-02-025 /ALJ/MAB/jac

ATTACHMENT A

1 LEE P. BARDELLINI, ESQ. (S.B. # 53108)  
2 JAMES T. STRAW, ESQ. (S.B. # 78339)  
3 DEBORAH L. PHILLIPS, ESQ. (S.B. # 164689)  
4 BARDELLINI, STRAW & CAVIN  
5 3160 Crow Canyon Road, Suite 295  
6 San Ramon, CA 94583-1331  
7 Telephone: (510) 277-3580  
8 Facsimile: (510) 277-3591

9 Attorneys for Complainant  
10 UNION SAFE DEPOSIT BANK, a  
11 California Banking corporation

12 BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

13 ---o0o---

14 UNION SAFE DEPOSIT BANK,  
15 a California Banking corporation,  
16 Complainant,

17 v.

18 MODESTO AND EMPIRE TRACTION  
19 COMPANY, a corporation, formerly known  
20 as MODESTO INTERURBAN RAILWAY,  
21 a corporation,  
22 Defendant.

Case No. 97 02 025

SETTLEMENT AGREEMENT

23 This Settlement Agreement (hereinafter "this Agreement") is entered into  
24 between UNION SAFE DEPOSIT BANK, a California banking corporation (hereinafter the  
25 "Bank") and MODESTO AND EMPIRE TRACTION COMPANY, a corporation, successor by  
26 merger to MODESTO INTERURBAN RAILWAY, a corporation (hereinafter referred to as the  
27 "Railroad") who are parties to the above proceeding (hereinafter "the Case").

28 Subject only to the conditions as set forth below in this Agreement, the Bank and  
the Railroad have agreed to resolve their differences in accord with the terms and requirements of

1 this Agreement, which is to be construed as a full and final compromise and settlement of all past  
2 and present claims, controversies, disputes, liabilities, loss or damage relating to the actions  
3 alleged in the pleadings filed in the Case or in the action pending in the Superior Court of the  
4 County of Stanislaus, State of California, entitled *Union Safe Deposit Bank v. Modesto and*  
5 *Empire Traction Company*, No. 114772 (the "Action").

6 NOW THEREFORE, in consideration of the following terms, covenants and  
7 conditions the undersigned parties agree as follows:

8 1. Non-Admission:

9 This Agreement shall not be treated or acknowledged by any party  
10 as a concession or admission as to fault, liability, culpability or  
11 responsibility whatsoever.

12 2. Commission Approval:

13 It is understood by the parties that the Bank may request approval  
14 of the Public Utilities Commission of this Agreement; however,  
15 the settlement conditions listed below and this Agreement do not  
16 require the advance approval of the Public Utilities Commission.  
17 The parties contemplate that this Agreement will be substantially  
18 performed, including re-installation of the crossing described  
19 below, before the Motion to approve this Agreement is heard by  
20 the Public Utilities Commission. Approval by the Commission is  
21 not a condition of this Agreement.

22 3. Authority:

23 The undersigned parties warrant and represent that they have had  
24 the opportunity to review this Agreement with their attorneys and  
25 with the appropriate corporate management officers or directors.  
26 By executing this Agreement the persons signing below represent  
27 and warrant that they are authorized to execute this Agreement on  
28 behalf of the corporation for which they are acting.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

4. **Settlement Terms:**

- (a) Railroad shall execute and deliver to Bank a license in the form attached as Attachment 1.
- (b) The Railroad shall reinstall the formerly existing crossing over the Railroad's property in the location shown on Exhibit A to Attachment 1. The crossing shall be 32 feet in width with a 36 foot flare at the junction of the public highway known as Yosemite Boulevard, together with Public Utilities Commission standard 1C Stop signs and railroad crossing signs. This reinstallation will occur within thirty (30) days of the date of the execution of this Agreement by Railroad.
- (c) Upon signing this Agreement and as a condition of delivering it to Bank, \$10,000.00 shall be paid through the Bank to the Railroad to carry out the re-installation of the formerly existing crossing as required by the terms of this Agreement, including the installation of stop signs and paving.
- (d) If the Public Utilities Commission, or any other governmental agency having jurisdiction, requires the installation of improvements greater than those set forth in subparagraph (b), Railroad shall perform the work and Bank shall reimburse it for the reasonable and necessary costs thereof in accordance with the procedure for reimbursement set out in paragraph C of Attachment 1.
- (e) If within a 180 day period of the execution of this Agreement by Bank, Railroad is able to obtain an alternate access easement that Bank reasonably determines meets the minimum governmental standards required for access to the Bank's property from another public street in a commercially reasonable fashion and consistent with the zoning of Bank's property, Bank shall relinquish the irrevocable license.

///



1 (f) Upon execution of this Agreement, Bank will cause to be delivered to  
2 Railroad's attorneys its request for dismissal with prejudice of all causes  
3 of action of the Action. Railroad's attorneys may file said dismissal with  
4 prejudice when Railroad has advised its attorneys that it has completed the  
5 re-installation of the crossing as contemplated by this Agreement.

6 (g) In accord with this Agreement, the parties agree that the railroad crossing  
7 may be re-installed prior to any approval of this Agreement by the Public  
8 Utilities Commission.

9 5. General Release:

10 Subject only to the occurrence of the conditions set forth in  
11 paragraphs 4(a)-(g), Bank and Railroad hereby waive, discharge  
12 and release each other and their directors, officers, employees,  
13 agents and attorneys and other representatives from any and all  
14 claims, controversies, disputes, liabilities, loss, damage, rights,  
15 demands and causes of action whatsoever, whether known or  
16 unknown and whether suspected or unsuspected that they may  
17 have or acquire as a result of, or that are based, in whole or in part,  
18 on any loss, damages, injuries, facts, acts, circumstances, events or  
19 occurrences, communications or transactions or dealings of any  
20 kind that have been sustained, existed or taken place or occurred  
21 prior to the date this Agreement is executed and that relate to, or  
22 arise from the allegations in the pleadings filed in the Case or in  
23 the Action Bank and Railroad do hereby waive any and all rights  
24 under California Civil Code § 1542 which states as follows:

25 "A general release does not extend to claims which the  
26 creditor does not know or suspect to exist in his favor at the  
27 time of executing the release, which if known by him must  
28 have materially effected his settlement with the debtor."

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

6. Miscellaneous:

- (a) Each party and counsel for each party have reviewed this Agreement and accordingly the normal rule of construction that any ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of this Agreement.
- (b) In the event one or more provisions or portions of this Agreement is determined to be illegal or unenforceable, the remainder of this Agreement shall not be affected thereby and each remaining provision or portion thereof shall continue to be valid and effective and shall be enforceable to the fullest extent permitted by law, unless the provision found to be invalid or unenforceable renders this Agreement inoperative or void.
- (c) This Agreement is entered into in the State of California and shall be construed and interpreted in accordance with its law.
- (d) This Agreement shall be binding on and inure to the benefit of successors and assigns of the parties hereto.
- (e) This Agreement may not be amended or modified except by an agreement in writing signed by the party against whom the enforcement of any modification or amendment is sought.
- (f) Each party agrees to execute, acknowledge and deliver or cause to be executed, acknowledged and delivered such further instruments and documents as may be necessary in order to consummate this Agreement, including an Irrevocable License in the form of Attachment I. In addition the Bank directs its attorneys to prepare a request for dismissal with prejudice of the Action and to deliver it to Railroad's attorneys, in accordance with Section 4(f) above; and, the Bank shall dismiss the Case as soon as the Commission has finally ruled on the Motion of the Bank to approve this Agreement.

///

- 1 (g) Each party agrees that time is of the essence and each party agrees to use  
2 its best efforts to promptly perform all obligations hereunder.
- 3 (h) Each party shall bear their own costs and attorneys' fees through the date  
4 of this Agreement.
- 5 (i) If any party to this Agreement is required to take any legal action for  
6 enforcement of any provision contained in this Agreement, the prevailing  
7 party shall, in addition to any other costs, be entitled to reasonable  
8 attorneys' fees.
- 9 (j) This Agreement may be executed in counterpart originals, each of which  
10 will constitute an original as executed and all such counterparts shall  
11 constitute but one and the same instrument.

12 IN WITNESS WHEREOF the parties have executed this Agreement on the dates  
13 set forth.

14 UNION SAFE DEPOSIT BANK,  
15 a California banking corporation

16 By: [Signature]  
17 Name: KEVIN COLKAS  
18 Title: V.P.  
19 Date: 10/16/97

20 The above Agreement is read and approved by its attorneys.

21 BARDELLINI, STRAW & CAVIN

22 [Signature]  
23 JAMES T. STRAW  
24 Date: 10/22/97

25 (Signatures continued on next page)

26 / / /  
27 / / /  
28 / / /

1 (Signatures continued from previous page)

2 **MODESTO AND EMPIRE TRACTION CO.,**  
3 **a corporation, (successor by merger to MODESTO**  
4 **INTERURBAN RAILWAY, a corporation)**

4 By: *William R. Beard*

5 Name: WILLIAM R BEARD

6 Title: VP, SEC'Y & TREAS

7 Date: 15 SEPT 97

8 The above Agreement is read and approved by its attorneys.

9 **McCUTCHEEN, DOYLE, BROWN & ENERSEN**

10  
11 *Sanford M. Skaggs*

12 SANFORD M. SKAGGS

13 Date: September 12, 1997

14 CA972410 007

15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**Attachment 1**  
**To The**  
**Settlement Agreement**

EXHIBIT A

RECORDING REQUESTED BY AND  
WHEN RECORDED MAIL TO:

UNION SAFE DEPOSIT BANK  
317 E. MAIN STREET  
P.O. BOX 1200  
STOCKTON, CA 95201

ATTN: KENT GIKAS

Stanislaus Co Recorder's Office  
Karen Mathews, County Recorder

DOC - 97-0089253-00

Check Number 6437

Tuesday, OCT 28, 1997 15:30:37

REC \$8.00|MOD \$8.00|MIC \$1.00

STF \$5.00|

Ttl Pd \$12.00

Nbr-0000123457

RCT/R2/1-6

### IRREVOCABLE LICENSE

Modesto and Empire Traction Company, a corporation ("Licensor") hereby grants to Union Safe Deposit Bank, a California banking corporation ("Licensee") an Irrevocable License for a railroad track crossing, subject to the terms and conditions below including paragraph D., over the real property of Licensor located in the County of Stanislaus, State of California, and more particularly described as

A strip of land 40 feet in width along the north line of the northeast quarter of Section 35, Township 3 South, Range 9 East, Mt. Diablo Basin Meridian

(hereafter "Railroad's Right-of-Way"). The location of the crossing is more particularly described in Exhibit A attached hereto and shown on the Plat attached hereto as Exhibit B.

The purpose of the crossing is to provide access from State Highway 132, commonly known as "Yosemite Boulevard" to the real property of Bank located in the County of Stanislaus, State of California, and more particularly described as:

The east half of the west half of the northwest quarter of the northeast quarter of Section 35, Township 3 South, Range 9 East, Mt. Diablo Basin Meridian lying north of the north line of Lateral No. 1 of the Modesto Irrigation District, excepting therefrom the north 33 feet

(hereafter the "Licensed Real Property").

A. This Irrevocable License is for a private crossing of Railroad's Right-of-Way consisting of pavement of a minimum width of 32 feet in width across the railroad tracks as depicted on the attached Exhibit A drawing, with a minimum 36 foot flare at the junction of the public highway known as Yosemite Boulevard, together with Public Utilities Commission standard 1C stop signs and railroad crossing signs.

B. This Irrevocable License may be assigned by Bank to any successors in interest of the Licensed Real Property, provided that each such assignee assumes the obligations

of Licensee contained herein. Upon delivery to Licensor of an assignment and assumption, in recordable form, the assignor will be relieved of its obligations under this License.

C. Any work done on the crossing at the request of the Licensee, or required by the Public Utilities Commission or any other government agency, including normal maintenance of the crossing, as well as improvements of the crossing or the crossing protection required by governmental agencies and improvements necessary or desirable for the development of Licensed Real Property, shall be done by the Licensor in a commercially reasonable fashion at the sole expense of the Licensee. Maintenance shall include but not be limited to maintenance related to the crossing paving, asphalt, striping, crossing signs, stop signs and the crossing. If the work is estimated to cost more than \$2500, Licensor may provide a written estimate of the work to Licensee. Within 45 days of receipt of Licensor's estimate for such work, Licensee shall advance to Licensor the estimated amount. At the completion of work Licensor shall provide an accounting of the cost of the work together with check for the unused portion of the advance, if any, or an invoice for the balance due. Within 45 days of receipt of Licensor's invoice for such work, Licensee shall reimburse Licensor for the reasonable and necessary costs of such maintenance and improvements. If maintenance work is done by the Licensor on its own tracks or ties lying beneath the crossing such work or repair shall be paid for by the Licensor. Any dispute regarding Licensor's entitlement to reimbursement shall be resolved by binding arbitration pursuant to Title 9 of Part 3 of the Code of Civil Procedure of this State, sections 1250 et seq. Initially the costs of the proceeding shall be divided equally between the parties. The arbitrator in any such proceeding shall award attorneys' fees and costs of arbitration to the prevailing party.

D. This irrevocable license may be modified or revoked only (1) upon an order of the Public Utilities Commission of the State of California, or (2) upon obtaining, at no cost to Licensee, an alternate unimproved access easement that Licensee reasonably determines meets the minimum governmental standards required for access to the Licensed Real Property from another public street in a commercially reasonable fashion and consistent with the zoning of the Licensed Real Property. Licensor shall have no obligation to improve the easement. If such alternate access is obtained, Licensor shall refund to Licensee an amount equal to the total of the depreciated values of each improvement in excess of \$2500 made at the expense of Licensee. The Licensee and Licensor agree to act in good faith in making any request for a revocation or modification of the crossing and with respect to any determination regarding alternative access. Any disputes regarding Licensee's entitlement to refund or the amount of the refund shall be resolved by arbitration as provided in section C. above.



E. This Irrevocable License shall be binding on and inure to the benefit of the parties' successors and assigns.

**MODESTO AND EMPIRE TRACTION CO.,**  
a corporation

By: William R Beard

Name: WILLIAM R BEARD

Title: VP, SEC'Y & TREAS

Date: 15 SEPT 97

STATE OF CALIFORNIA

COUNTY OF \_\_\_\_\_

On SEPT. 15, 1997 before me, ELVIA L. VICTORINE, Notary Public,

personally appeared WILLIAM R. BEARD  
NAME(S) OF SIGNER(S)

personally known to me ~~OR~~ ~~proved to me on the basis of satisfactory evidence~~ to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/hen/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.



Witness my hand and official seal.

Elvia L. Victorine  
SIGNATURE OF NOTARY

OPTIONAL SECTION  
CAPACITY CLAIMED BY SIGNER  
Though statute does not require the Notary to fill in the data below, doing so may prove invaluable to persons relying on the document.

INDIVIDUAL  
 CORPORATE OFFICER(S)  
VP, SEC'Y & TREAS

TITLE(S)

PARTNER(S)  LIMITED  
 GENERAL

ATTORNEY-IN-FACT

TRUSTEE(S)

GUARDIAN/CONSERVATOR

OTHER: \_\_\_\_\_

SIGNER IS REPRESENTING:  
Name of Person(s) or Entity(es)

MODESTO and EMPIRE

TRACTION COMPANY

OPTIONAL SECTION

THIS CERTIFICATE MUST BE ATTACHED TO THE DOCUMENT DESCRIBED AT RIGHT:

Though the data requested here is not required by law, it could prevent fraudulent reattachment of this form.

Title or Type of Document IRREVOCABLE LICENSE

Number of Pages 3 W/ATTACH Date of Document 15 SEPT 97

Signer(s) Other Than Named Above NONE

©1993 National Notary Association, Canoga Park, CA



Land Planning • Engineering • Surveying

A Professional Corporation

900 "H" Street, Suite G • Modesto, CA 95354 • (209) 526-4214 • FAX (209) 526-0803

July 10, 1997  
Job No. 70-455Z

LICENSE FOR  
ACCESS

ALL that certain real property being a portion of the Northeast Quarter of Section 35, Township 3 South, Range 9 East, Mount Diablo Base and Meridian, City of Modesto, County of Stanislaus, State of California, being more particularly described as follows:

COMMENCING at the Northeast Corner of property deed to Ira T. Denlinger as shown on Record of Survey, Volume 14 of Surveys at Page 64, Stanislaus County Records; thence North 89°54'18" West, along the northerly line of said property, a distance of 36.90 feet, to the TRUE POINT OF BEGINNING; thence North 89°54'18" West along said northerly line of said Denlinger property a distance of 32.00 feet; thence North 00°05'42" East, at right angles to last said line, a distance of 35.00 feet; thence North 21°42'23" West, a distance of 5.39 feet, to the southerly right-of-way line of Yosemite Boulevard; thence South 89°54'18" East along said southerly right-of-way, a distance of 36.00 feet; thence South 21°53'47" West, a distance of 5.39 feet; thence South 00°05'42" West, a distance of 35.00 feet, to the POINT OF BEGINNING.

Containing 1,290 square feet, more or less.

SUBJECT TO all easements and/or rights-of-way of record.

*Roy A. Galli* <sup>7-10-97</sup>  
\_\_\_\_\_  
Roy A. Galli, R.C.E. 16024

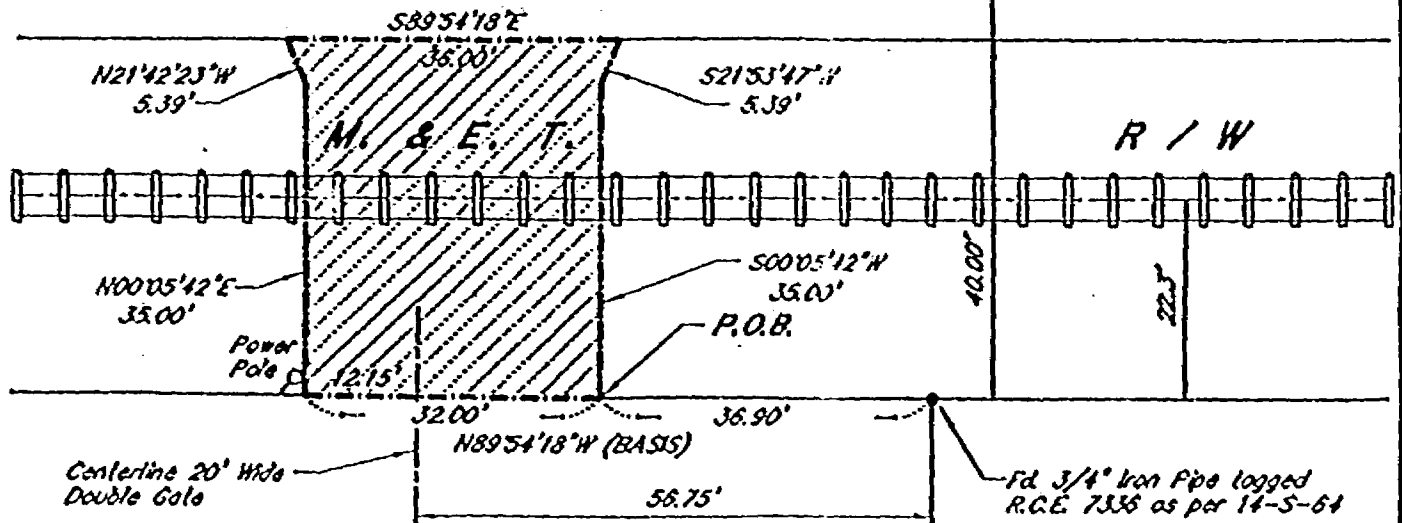


**YOSEMITE BOULEVARD**  
**STATE HIGHWAY NO. 132**

North line Sec. 35/35/9E

SCALE 1"=20'

Power Pole



IRA T. DENLINGER

14 - 5 - 64

EXHIBIT B

Drawn	E.T.
Date	7/10/97
Scale	1" = 20'
Job No.	70-455Z
Dwg.	RRXING

**PLAT TO ACCOMPANY  
 LEGAL DESCRIPTION**

Being a portion of the Northeast  
 quarter of Sec. 35-T35-R9E, MDM  
 City of Modesto, California



P.O. BOX 818, MOCESTO, CALIFORNIA 95353  
 (209) 526-4214

FAX (209)  
 526-6603

SHEET

1.  
 OF 1.

1 LEE P. BARDELLINI, ESQ. (S.B. # 53108)  
2 JAMES T. STRAW, ESQ. (S.B. # 78339)  
3 DEBORAH L. PHILLIPS, ESQ. (S.B. # 164689)  
4 BARDELLINI, STRAW & CAVIN  
5 3160 Crow Canyon Road, Suite 295  
6 San Ramon, CA 94583-1331  
7 Telephone: (510) 277-3580  
8 Facsimile: (510) 277-3591

9 Attorneys for Complainant  
10 UNION SAFE DEPOSIT BANK, a  
11 California Banking corporation

12 BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

13 ---o0o---

14 UNION SAFE DEPOSIT BANK,  
15 a California Banking corporation,  
16 Complainant,

Case No. 97 02 025

PROOF OF SERVICE

17 v.

18 MODESTO AND EMPIRE  
19 TRACTION COMPANY, a  
20 corporation, formerly known as  
21 MODESTO INTERURBAN  
22 RAILWAY, a corporation,  
23 Defendant.

1 PROOF OF SERVICE

2 I declare that:

3 I am employed in San Ramon, California. I am over the age of 18 years and not a  
4 party to this action. My business address is 3160 Crow Canyon Road, Suite 295, San Ramon,  
5 Ca 94583.

6 On this date, with this Proof of Service, I caused to be served the attached document(s)  
7 entitled: **MOTION TO CONFIRM IRREVOCABLE LICENSE AGREEMENT**  
8 on the following parties, as listed below:

9 Stanford M. Skaggs, Esq.  
10 McCutchen, Doyle, Brown & Enersen  
11 1331 No. California Blvd.  
12 P.O. Box V  
13 Walnut Creek, CA 94596-1270

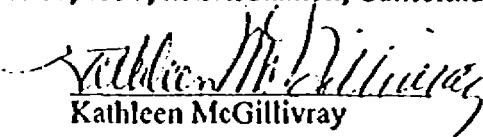
14 The following is the procedure in which service of this document(s) was effected:  
15 XXX U.S. Postal Service (placing sealed envelope in with postage thereon fully prepaid  
16 in the designated area for out-going mail in accordance with this office's practice,  
17 whereby mail is deposited in a U.S. mailbox in Contra Costa County at the close  
18 of the business day).

19  Sent via facsimile machine before sealing envelope.

20  Federal Express or Express Mail.

21  Personal Service (I caused such envelope to be delivered by hand to the office(s) of the  
22 addressee(s).

23 I hereby declare under penalty of perjury under the laws of the State of California that  
24 the foregoing is true and correct. Executed on November 17, 1997, in San Ramon, California.

25   
26 Kathleen McGillivray  
27  
28