



Contra
Costa
County

To: Board of Supervisors
From: Monica Nino, County Administrator
Date: August 10, 2021

Subject: Tolling agreement in BNSF Railway Company v. Alameda County, et al.

RECOMMENDATION(S):

APPROVE AND AUTHORIZE County Counsel, or her designee, to enter into a tolling agreement in BNSF Railway Company v. Alameda County, et al., U.S. Dist. Ct, N.D. Cal., Case No. 19-cv-07230.

FISCAL IMPACT:

No negative fiscal impact

BACKGROUND:

On or about November 20, 2020, BNSF submitted to a claim for refund of property taxes pursuant to Revenue and Taxation Code section 5097 ("Claim for Refund"). In that claim, BNSF requested that the Board of Supervisors direct the Auditor-Controller to refund to BNSF the sum of \$288,448.14, plus appropriate interest, in taxes levied for the fiscal year 2016-17. On March 2, 2021, the Board of Supervisors denied BNSF's Claim for Refund.

The Claim for Refund relates to a lawsuit that BNSF brought in federal court, BNSF Railway Company v. Alameda County, et al., U.S. Dist., N.D. Cal., Case No. 19-cv-07230,

☒ APPROVE

☐ OTHER

☒ RECOMMENDATION OF CNTY
ADMINISTRATOR

☐ RECOMMENDATION OF BOARD
COMMITTEE

Action of Board On: **08/10/2021** ☒ APPROVED AS RECOMMENDED ☐ OTHER

Clerks Notes:

VOTE OF SUPERVISORS

AYE: John Gioia, District I Supervisor
Candace Andersen, District II Supervisor
Diane Burgis, District III Supervisor
Karen Mitchoff, District IV Supervisor
Federal D. Glover, District V Supervisor

I hereby certify that this is a true and correct copy of an action taken and entered on the minutes of the Board of Supervisors on the date shown.

ATTESTED: August 10, 2021

Monica Nino, County Administrator and Clerk of the Board of Supervisors

By: Stacey M. Boyd, Deputy

Contact: Rebecca Hooley (925)
655-2254

cc:

against the County and fourteen other counties (the “Litigation”). In that lawsuit, BNSF contests the

BACKGROUND: (CONT'D)

statutory tax rate applied to its railway property for each tax year since 2014/2015. BNSF seeks injunctive and other equitable relief to prohibit the counties from levying and collecting taxes on its railway property at a rate that is higher than the average countywide tax rate on the ground that this practice violates federal law.

Following a hearing on BNSF's motion for a preliminary injunction, the court issued an order on April 8, 2020, enjoining defendant counties from collecting taxes on BNSF's unitary property based on a tax rate that is greater than the average countywide tax rate for 2019/2020 and each subsequent year for the pendency of the litigation. The defendant counties are currently appealing that decision before the Ninth Circuit Court of Appeals. The Court of Appeals held oral argument in June 2021, and the parties are awaiting its decision.

Although BNSF has already brought suit against the County in federal court, it contends that it may have to also bring a cause of action in state court to receive retrospective relief in the form of a refund for the years at issue. For this reason, BNSF has asked the County to enter into an agreement to stop the statute of limitations from running on its time to file a state lawsuit relating to its Claim for Refund while its federal case is litigated. California law permits a rate payer to challenge the denial of a Claim for Refund through a judicial action within six months of the denial of the Claim for Refund. (Rev. & Tax. Code, § 5141.)

Under the terms of the proposed tolling agreement, any legal action related to the Claim of Refund would be tolled from August 10, 2021, until a final judgment is reached in the Litigation, or until cancelled by one of the Parties upon thirty (30) days' written notice. As such, BSNF would not be able to file a lawsuit related to the Claim for Refund and the County would not be able to assert defenses related to the Claim for Refund during the tolling period. The terms of the tolling agreement require that both parties also waive any claim for the recovery of prejudgment interest that might accrue during the tolling period with respect to any claims or causes of action that might be asserted relating to the Claim for Refund.

CONSEQUENCE OF NEGATIVE ACTION:

Failure to take this action may result in BNSF bringing a lawsuit against the County in state court related to the Claim for Refund.