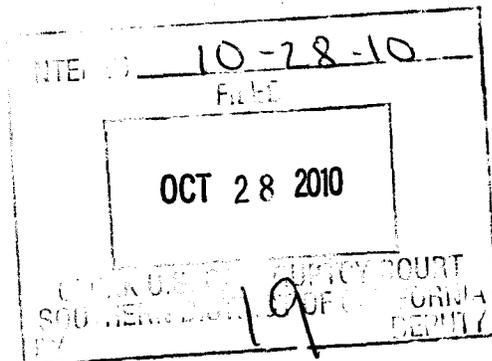


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**NOT FOR PUBLICATION**



**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

**In re** )  
**SOUTH BAY EXPRESSWAY, L.P.** )  
**Debtor.** )  
\_\_\_\_\_)  
**OTAY RIVER CONSTRUCTORS,** )  
**Plaintiff,** )  
**v.** )  
**SOUTH BAY EXPRESSWAY, L.P., et al.,** )  
**Defendants.** )  
\_\_\_\_\_)  
**AND RELATED ADVERSARY**  
**PROCEEDINGS**

**Chapter 11**  
**Case No. 10-04516-A11**  
**(Jointly Administered with Case**  
**No. 10-04518)**  
***Adversary Cases Consolidated for***  
***Discovery and Trial***  
**Lead Case Adv. No. 10-90172-LA**  
**(Consolidated with Adv. No. 10-90180**  
**and Adv. No. 10-90214)**  
**MEMORANDUM DECISION ON**  
**MOTION TO BIFURCATE AND**  
**SUMMARILY ADJUDICATE**  
**WORK-BEFORE-ATTACHMENT**  
**PRIORITY ISSUE**  
**Trial Date: October 25, 2010**

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**1. Introduction and Procedural Background.**

Plaintiff Otay River Constructors (“ORC”) has filed a pre-trial motion seeking an order to bifurcate and summarily adjudicate as a matter of law that ORC’s mechanic’s lien, if valid, has priority over the Senior Lenders’ 2007 Leasehold Deed of Trust. Plaintiff Intrans Group, Inc. (“Intrans”), who is also a mechanic’s lien claimant, has joined the motion. However, prior to the first phase of the consolidated trial, the Court bifurcated Intrans from the first phase for purposes of presentation of evidence on the estoppel and waiver affirmative defenses.<sup>1</sup> Accordingly, the Court’s ruling on this bifurcation motion applies to Intrans to the extent it summarily adjudicates the work-before-attachment priority issue as a matter of law.

**2. Arguments Made in the Bifurcation Motion.**

ORC’s bifurcation motion (and Intrans’ joinder) is based upon two undisputed facts in the Pre-Trial Order: (1) that the Toll Road lease was executed on November 16, 2007 which according to ORC is the earliest date the Debtor could have acquired an interest in the Toll Road lease; and (2) ORC commenced work on the Toll Road before November 16, 2007. Therefore, according to ORC, it follows as a matter of law that the Senior Lenders’ deeds of trust could not *attach* until the Toll Road lease came into existence on November 16, 2007 [Civil Code § 2883(a)]; and as a matter of law, mechanic’s liens are preferred to liens that attach after the work of improvement has commenced [Civil Code § 3134; *In re Sun Lumber Co. v. Bradfield*, 122 Cal. App. 391, 395-96 (1932)].

ORC urged that a ruling on this simple work-before-attachment priority issue would expedite and economize the trial. If the Court ruled, as ORC believes it must, that ORC’s mechanic’s lien has priority over the Senior Lenders’ trust deeds based upon this

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<sup>1</sup> The Court observed, and the parties agreed, the estoppel defense does not apply to Intrans, and the waiver defense is distinct as to Intrans.

1 simple rule, it would obviate the need to try many other lengthy and complex issues,  
2 including the issues of waiver and estoppel, and whether the Senior Lenders' 2003  
3 Construction Deed of Trust ("2003 CTD") could ever have encumbered the Toll Road  
4 lease.

5 **3. Newly Raised Arguments Made in the Supplemental Trial Briefs.**

6  
7 At the Pre-Trial Hearing, ORC persuaded the Court to permit the filing of  
8 Supplemental Trial Briefs on the work-before-attachment priority issue because ORC  
9 represented the issue was not sufficiently briefed.<sup>2</sup> However, ORC's representation was  
10 disingenuous since ORC included the work-before-attachment priority argument (buried  
11 among many others) in its motion for summary adjudication filed last month; it devoted  
12 roughly one-third of its 31-page Trial Brief to the issue; and it briefed the issue again in  
13 this bifurcation motion.

14 ORC's Supplemental Trial Brief did not address the work-before-attachment  
15 priority issue as presented in its bifurcation motion. It *solely* argues that the 2003 CTD  
16 did not ever encumber the Toll Road lease. This is an issue that ORC had represented  
17 would be obviated if the Court granted its motion to summarily adjudicate the  
18 work-before-attachment priority issue. ORC urges the Court to construe the granting  
19 clause in the 2003 CTD to exclude the future Toll Road lease, by selectively quoting the  
20 granting clause, and ignoring the totality of the intended transaction and the entirety of  
21 the granting clause language.

22  
23 For the reasons more fully set forth below, the Court: (1) denies the motion to  
24 summarily adjudicate that ORC's lien has priority over the Senior Lenders' trust deeds  
25 based upon the work-before-attachment priority rule, and instead grants summary  
26 adjudication in favor the Debtor and the Senior Lenders; and (2) grants summary

27 \_\_\_\_\_  
28 <sup>2</sup> All parties, including Intrans, submitted Supplemental Trial Briefs, which the Court directed Intrans to file  
even though it is bifurcated for purposes of evidence.

1 adjudication in favor of the Debtor and the Senior Lenders as to whether the 2003 CTD  
2 encumbered the Toll Road lease.

3 **4. The Work-Before-Attachment Priority Argument Ignores the Law of this**  
4 **Case.**

5 ORC'S work-before-attachment priority argument is flawed because it ignores  
6 the law of this case concerning the bundle of private real property interests that vested  
7 in Debtor upon execution of the Franchise Agreement. *South Bay Expressway* 434 B.R.  
8 at 598-99 and 603-04. In that ruling, the Court examined the legislative background for  
9 creation of the Franchise Agreement, the document itself, and the overall transactions  
10 between the Debtor and the various parties in the consolidated adversary proceedings.

11 It held as follows:

12 This motion turns on the nature of the rights vested in Debtors under the  
13 Franchise Agreement. The Franchise Agreement vested in Debtors a  
14 variety of relatively long-term private possessory interests in real property,  
15 including a leasehold interest to operate the SR 125 Tollway as part of  
16 State Route 125 for the benefit of the citizens of this State. These private  
17 property rights vested upon execution of the Franchise Agreement [1992],  
18 and in California they are treated essentially the same as any other private  
19 estate in real property. As such they can be encumbered and transferred  
20 subject only to the terms of Streets and Highways Code § 143 and the  
21 Franchise Agreement. Nothing in Streets and Highways Code § 143 deems  
22 the transportation demonstration project to be exclusively public  
23 property.

24 *In re South Bay Expressway, L.P.*, 434 B.R. 589, 603-04 (Bankr. S.D. Cal. 2010). ORC  
25 benefitted from that ruling because the Court held that its mechanic's lien could attach  
26 to the Debtor's distinct private property rights. Now, for purposes of examining the  
27 trust deeds, ORC asks the Court to treat the Debtor as though it owned no possessory  
28 property interests for the trust deeds to attach to (aside from a single parcel of fee-titled  
real estate), until the Toll Road lease came into existence in 2007.

ORC's argument improperly disaggregates the Toll Road lease from the bundle of  
vested property interests, and treats the Toll Road lease as though it materialized as an  
isolated transaction on November 16, 2007. ORC's argument starts with the well settled

1 proposition that Civil Code § 3134 prefers mechanic's liens to a trust deed that attaches  
2 after the commencement of the work of improvement. Then, ORC incorrectly asserts  
3 that November 16, 2007 was the earliest date the Debtor could acquire the Toll Road  
4 lease because this is the date the Toll Road lease came into existence. According to  
5 ORC, because the Toll Road lease did not exist until November 16, 2007, no trust deed  
6 could **attach** until that date, necessarily making ORC's mechanic's lien the preferred lien  
7 with first priority.

8  
9 ORC cites to Civil Code § 2883(a) to support its position. Civil Code § 2883(a)  
10 permits an agreement to create a lien on property not yet in existence, and provides  
11 that the lien **attaches** from the time when the party agreeing to grant the lien acquires  
12 an **interest** in the thing, to the extent of such **interest**. Without explaining, ORC assumes  
13 the word "interest" means fee title or a leasehold estate in the property. However, it  
14 does not follow that the Debtor had no protectable **interest** in the Toll Road lease prior  
15 to executing this lease. As already pointed out, the law of the case is that the Debtor  
16 held vested "private possessory interests in real property," including this future Toll  
17 Road lease, upon execution of the Franchise Agreement. While the Debtor's **interest**  
18 had not yet ripened into a "leasehold estate" when the 2003 CTD was executed and  
19 recorded, it nevertheless represented a protectable **interest**. At that point in time,  
20 Caltrans could no longer retain the future leasehold estate for itself and could no longer  
21 freely convey this interest even though it had not yet ripened into a leasehold estate.<sup>3</sup>

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22 <sup>3</sup> The Court's prior ruling cited to several California decisions that examined and described the  
23 nature of property interests granted by a governmental franchise, including *Santa Barbara County*  
24 *Taxpayers Assn. v. Board of Supervisors*, 209 Cal. App. 3d 940, 949 (1989). See *South Bay Expressway*, 434  
25 at 598-99. In *Santa Barbara County Taxpayers*, the court provided: "A franchise agreement is a grant of  
26 a possessory interest in public real property, similar to an easement [citations omitted] .... A franchise is a  
27 negotiated contract between a private enterprise and a governmental entity for the long-term possession  
28 of land [citations omitted] .... In sum, franchise fees are paid for the governmental grant of a relatively long  
possessory right to use land, similar to an easement or a leasehold, to provide essential services to the  
general public [citations omitted]." ORC's Supplemental Trial Brief takes issue with the Court's  
characterization of the Franchise Agreement as granting "possessory" real property rights, citing to  
*Redemeyer v. Cunningham*, 61 Cal. App. 423, 433-34 (1923). [See ORC's Supplemental Trial Brief at 3-4]  
Aside from the procedural impropriety, the precise nature of the Debtor's private property interests is

1 Pursuant to Civil Code § 2883(a) the Senior Lenders' lien granted on Debtor's  
2 protectable property *interest* in the Toll Road lease *attached* to the extent of such  
3 *interest*.

4           ORC's citation to *Sun Lumber Co.*, 122 Cal. App. at 395-96 (1932) does not assist  
5 it. In *Sun Lumber Co.*, the court focused on the trustor's lack of fee title in the land, and  
6 did not consider whether the trustor had an existing lesser *interest* in the work of  
7 improvement or the land before it acquired the fee title since that issue was not  
8 presented.

9  
10           Further, if ORC is correct that the law always requires ownership of at least a  
11 leasehold estate for a lien to *attach*, then it follows that ORC's mechanic's lien could not  
12 have attached to the Toll Road lease until it came into existence. Like Civil Code  
13 § 2883(a) which governs the creation of liens, Civil Code § 3128 in the mechanic's lien  
14 law provides in pertinent part:

15           The liens provided for in this chapter [mechanic's liens] shall *attach* to the  
16 work of improvement and the land on which it is situated ... *if at the*  
17 *commencement of the work* ... the land belonged to the person who  
18 caused such work of improvement to be constructed, but if such person  
owned less than a fee simple estate in such land [i.e., a leasehold estate]  
then only his interest is subject to such lien .... (Emphasis added.)

19 Under ORC's argument, at the commencement of the work, the land belonged  
20 exclusively to Caltrans. Debtor – who had requested the work – did not own any estate

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22 \_\_\_\_\_  
23 immaterial because it is apparent from the entire transaction that, by entering into the Franchise  
24 Agreement, Caltrans – the fee owner – had divested itself of many valuable property rights incidental to  
25 its ownership of the land, including the right to retain the leasehold estate for itself or to convey it to  
26 someone else. The technical terms of these many property interests (i.e., an estate, appurtenance,  
27 incorporeal or corporeal hereditament, or something else), is immaterial because, upon execution of the  
28 Franchise Agreement, the Debtor possessed a bundle of protectable real property *interests* in the Caltrans  
land, which subject to satisfaction of the conditions in the Franchise Agreement, Debtor had the right to  
compel. See *Chapman v. Great Western Gypsum Co.*, 216 Cal. 420, 428-32 (1932) (explaining why the  
precise “interest in the land” bestowed by an agreement that granted an option to purchase land was  
“immaterial” because it was apparent from the “total rights” included therein that the optionee had  
acquired a protectable property interest).

1 in the land so ORC's mechanic's lien could not attach even though work had  
2 commenced.

3           The present case is more analogous to *Sontag v. Abbott*, 140 Colo. 351, 356-58  
4 (1959). *Sontag* involved a priority dispute between a trust deed and a mechanic's lien  
5 claimant for materials delivered to land at the request of a person having only an option  
6 to purchase the land. The mechanic delivered the materials prior to execution of the  
7 trust deed and before the optionee had exercised the purchase option and acquired the  
8 fee title. *Id.* at 352-53. Subsequently, the trust deed lender made the loan to the  
9 optionee to enable the optionee to purchase the land and pay for construction of the  
10 improvements, which the lender secured with a first trust deed upon the land "together  
11 with improvements now thereon and improvements hereafter constructed thereon." *Id.*  
12 at 353.

13  
14           Thereafter, the mechanic sued to foreclose its mechanic's lien, alleging that its  
15 lien was superior in right to the intervening trust deed. *Id.* at 354. The court held that  
16 the mechanic's lien was superior to the trust deed because the materials were delivered  
17 at a time when the optionee was an "owner" within the scope of the mechanic's lien  
18 laws empowered to impress such a lien upon the land where the option thereafter  
19 "ripened into" fee ownership. *Id.* at 355-57. Further, since the mechanic supplied the  
20 materials to the land at the request of the optionee-owner before the execution and  
21 recording of the trust deed, it held the mechanic's lien related back to the date of  
22 delivery so it had priority over the later loan and first trust deed. *Id.* at 359.

23           Likewise, in this case, Debtor owned the right to use and possess the Toll Road  
24 property for the purposes set forth in the Franchise Agreement, and it held what  
25 amounted to an option to lease the Toll Road at the time the work on the Toll Road  
26 commenced. Since the Debtor's interest subsequently ripened into the Toll Road lease,  
27 Debtor held a sufficient *interest* in the Toll Road property for both the mechanic's lien  
28

1 and the Senior Lenders' trust deeds to **attach**. See Miller & Starr, 4 California Real  
2 Estate 3d, Sec. 10:16 (3d ed.)("Any interest in real property that is transferable may  
3 serve as the security for a deed of trust .... A deed of trust may be secured by a lien on a  
4 lessee's option to purchase; on exercise of the option, the lien attaches to the fee title  
5 acquired by the lessee.").

6 Further, *Sontag's* holding is consistent with California's after-acquired property  
7 doctrine codified in Civil Code § 2930. This Section states:

8  
9 Title acquired by the mortgagor subsequent to the execution  
10 of the mortgage, ***inures to the mortgagee as security for the  
debt in like manner as if acquired before the execution.***  
(Emphasis added.)

11 The statutory language instructs that where a trust deed grants a lien on the trustor's  
12 interest in property to be acquired in the future, the after-acquired interest inures to  
13 the benefit of the beneficiary as security as if acquired before the execution of the trust  
14 deed. Any other interpretation would make the after-acquired title doctrine ineffective  
15 and meaningless. The case of *Perego v. Seltzer*, 260 Cal. App. 2d 825, 828-29 (1968)  
16 makes the same observation:

17  
18 "Title acquired by the mortgagor subsequent to the execution of the  
19 mortgage, inures to the mortgagee as security for the debt in like manner  
20 as if acquired before the execution." (Civ. Code § 2930.) This code section  
21 is fully applicable to trust deeds ... and it is well settled that a trust deed  
22 creates a valid lien on real property to secure a debt for which it is  
23 executed, even though the trustor has no title to the property at that the  
time of the execution of the instrument, provided he subsequently  
acquires title thereto during the life of the deed of trust. ***Title to the real  
property acquired after it is mortgaged is deemed to be covered by the  
lien*** on the theory that the mortgagor is estopped from denying title under  
such circumstances. (Citations omitted and emphasis added.)

24 Thus, it is clear the Debtor could grant a lien on its vested **interest** in the right to enter  
25 into the Toll Road lease, and upon its ripening into the Toll Road lease it was deemed to  
26 be covered by the lien as if the Debtor had owned this ripened interest before execution  
27 of the 2003 CTD. This relation back result is particularly appropriate in this case in view  
28

1 of the entirety of the facts of this case.<sup>4</sup> The Franchise Agreement granted the Debtor  
2 right to enter into the Toll Road lease in exchange for Debtor privately financing and  
3 constructing the Toll Road improvements. Debtor's right to the Toll Road lease to  
4 operate the Toll Road to recoup its private investment and repay the Senior Lenders is  
5 expressly required by Streets and Highways Code § 143, which authorized and enabled  
6 Caltrans to grant to Debtor the Franchise Agreement and the Toll Road lease to help  
7 solve the State's urgent transportation needs.

8  
9 **5. The 2003 CTD Contained Sufficient Language to Grant a Lien on the  
Future Acquired Toll Road Lease.**

10 Finally, although it is newly raised, the Court will briefly address ORC's argument  
11 that the 2003 CTD could not ever have granted a lien on the Toll Road lease. It is illogical  
12 and beyond dispute that the Debtor would not have incurred hundreds of millions of  
13 dollars in indebtedness constructing the Toll Road if it did not believe the Franchise  
14 Agreement had vested it with valuable property rights, including the right to the Toll  
15 Road lease. Likewise, it is illogical and beyond dispute that the Senior Lenders would not  
16 have loaned hundreds of millions of dollars if they believed their only *attachable*  
17 security was the Debtor's single parcel of unimproved land it owned in fee. It is also  
18 illogical that both the Debtor and the Senior Lenders who were comprised of  
19 sophisticated business persons and represented by capable counsel, committed such  
20 gross oversight concerning their respective rights.

21 Keeping the above in mind, and reviewing the title of the 2003 CTD and the plain  
22 language of its granting clause, the Court concludes no such oversight occurred. As the  
23 title of the 2003 CTD reflects, this was a "construction loan" and assignment of future  
24 leases and revenues which would convert to a "term loan" upon completion<sup>5</sup> of the  
25 construction of the Toll Road. The granting clause demonstrates that, in exchange for  
26

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27 <sup>4</sup> See *South Bay Expressway*, 434 B.R. at 593-98; see also Pre-Trial Order Undisputed Facts.

28 <sup>5</sup> The Court recognizes there is a dispute concerning the actual "completion" date of the Toll Road project for purposes of commencing the period to record mechanic's liens.

1 their massive financial commitment to finance the Toll Road construction, the Senior  
2 Lenders took a lien on all of the Debtor's property interests described in the subsequent  
3 paragraphs (a) through (g), whether now owned or hereafter acquired (collectively  
4 defined as "Property"). The Senior Lenders took care to identify in lengthy detail the  
5 spectrum of Debtor's Property rights and interests in paragraphs (a) through (g),  
6 whether now owned or hereafter acquired. These Property rights and interests included  
7 paragraph (g) titled "Franchise Agreement" which included all of Debtor's right, title and  
8 interests in and to the Franchise Agreement, and all proceeds and products thereof.  
9 Further, paragraph (a) described the "Real Estate." It provided that in addition to the  
10 land described in Exhibit A-1 (the Debtor's fee parcel), the Real Estate included "the land  
11 described in Exhibit A-2 (Caltrans Land) to which the Debtor has been granted the right  
12 to possession and use pursuant to the Franchise Agreement, and the other rights now or  
13 hereinafter appurtenant thereto. Thus, the plain language of the granting clause  
14 demonstrates the attempt to encumber virtually all of Debtor's then existing or  
15 hereinafter acquired tangible and intangible real property interests. To the extent these  
16 rights did not constitute a real property interest, concurrent with execution of the 2003  
17 CTD, the Debtor also executed a personal property security agreement and a UCC-1  
18 financing statement to supplement the terms of the 2003 CTD.

19           The 2003 CTD also provides that upon completion of the Toll Road and execution  
20 of the Toll Road lease, at the request of the Senior Lenders, the construction loan would  
21 be converted to a term loan and the Property granted in the 2003 CTD would be  
22 reconveyed, provided that substantially concurrent with such reconveyance, the Debtor  
23 would enter into the Leasehold Deed of Trust. As such, the 2003 CTD provides for  
24 replacement of the 2003 CTD with the Leasehold Deed of Trust once the Debtor's  
25 franchise property rights ripened into the Toll Road lease.  
26

27           ORC complains that the "Toll Road lease" is not expressly mentioned in the  
28 granting clause of the 2003 CTD. It was unnecessary to mention the "Toll Road lease" by

1 name because it is a right expressly granted in the Franchise Agreement (and also as  
2 indicated above, by the enabling legislation). Any broad grant of a lien on the Debtor's  
3 property interests in the Franchise Agreement, whether now owned or hereinafter  
4 acquired, would necessarily include the Debtor's protectable interest in this future  
5 lease.

6 Further, ORC argues that the definition of "Property" in the 2003 CTD excludes  
7 the Caltrans Land. The Court construes this exclusion to recognize the Debtor could not  
8 encumber the fee title to the Caltrans Land which is public land. ORC also claims the  
9 Real Property legal descriptions in the 2003 CTD were inadequate to encumber the Toll  
10 Road lease. The Court's recollection is that the 2003 CTD included legal descriptions of  
11 the Debtor's Land and the Caltrans Land (to which the Debtor had been granted the  
12 right to possession and use); the Franchise Agreement identified the Toll Road and  
13 attached a map of the Toll Road segment and the various other segments that could be  
14 added to the Project by future amendments; and the anticipated form of Toll Road  
15 lease, which was also attached to the Franchise Agreement, included a legal description  
16 of the real property that would be the subject of the Toll Road lease. Given the timing of  
17 this argument, the Court has not had the opportunity to parse through the attachments  
18 to the various documents. However, at this point, the Court is puzzled why this  
19 intangible real property interest would require a further legal description beyond that  
20 contained in the 2003 CTD.

## 21 22 23 **6. Conclusion.**

24 For the foregoing reasons, the Court: (1) denies the motion to summarily  
25 adjudicate that the mechanic's liens have priority over the Senior Lenders' trust deed  
26 based upon the work-before-attachment priority rule, and instead grants summary  
27  
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1 adjudication in favor of the Debtor and the Senior Lenders;<sup>6</sup> and (2) grants summary  
2 adjudication in favor of the Debtor and the Senior Lenders as to whether the 2003 CTD  
3 encumbered the Toll Road lease. The Court will enter a separate order in accordance  
4 with this Memorandum Decision.

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8 Dated: 28 Oct 10

  
LOUISE DE CARL ADLER, Judge

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27 <sup>6</sup> *Portsmouth Square, Inc. v Shareholders Protective Committee*, 770 F.2d 886, 869 (9<sup>th</sup> Cir. 1985)  
28 (*sua sponte* judgment appropriate where one party moves for summary judgment, and it appears from all the evidence presented that there is no genuine issue of material fact and the non-moving party is entitled to judgment as a matter of law).

1 CAD 168  
2 [Revised July 1985]

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4 **UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

5 Case No. 10-04516-A11  
6 (Jointly Administered with Case No. 04518)  
7 Lead Adv. No. 10-90172-LA  
8 Consolidated with Adv. No. 10-90180  
9 And Adv. No. 10-90214)  
10 Case Name: In Re: SOUTH BAY EXPRESSWAY, L.P.

11  
12 **CERTIFICATE OF SERVICE**

13 The undersigned, a regularly appointed and qualified clerk in the Office of  
14 the United States Bankruptcy Court for the Southern District of California, at San  
15 Diego, hereby certifies that a true copy of the attached document, to-wit:

16 **MEMORANDUM DECISION ON MOTION TO  
17 BIFURCATE AND SUMMARILY ADJUDICATE  
18 WORK-BEFORE-ATTACHMENT PRIORITY ISSUE**

19 was filed electronically by using the CM/ECF system, which will automatically send  
20 an e-mail notification of such filing to the interested parties in this action as listed on  
21 the attached service list.

22 I declare under penalty of perjury under the laws of the United States that the  
23 above is true and correct

24 Executed on October 28, 2010 at San Diego, California.

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Roma London, Deputy Clerk  
Roma London

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**SERVICE LIST**

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