

October 27, 2014

236963

Ms. Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street SW  
Washington, DC 20423

ENTERED  
Office of Proceedings  
November 4, 2014  
Part of  
Public Record

Re: **STB Finance Docket No. 35861, California High-Speed Rail Authority;  
Opposition to Petition for Declaratory Order**

Dear Ms. Brown:

On behalf of the following listed parties, we hereby register our opposition to Petitioner California High-Speed Rail Authority's Petition for Declaratory Order, submitted for filing on October 9, 2014. As stated in the Petition, each of these parties listed below is currently in state court litigation against the California High-Speed Rail Authority ("Authority") based in part upon defective environmental review under California laws for which the Authority seeks preemption under the Interstate Commerce Commission Termination Act ("ICCTA").

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BEFORE THE  
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35861

CALIFORNIA HIGH-SPEED RAIL AUTHORITY

**OPPOSITION TO PETITION FOR DECLARATORY ORDER**

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BEFORE THE  
SURFACE TRANSPORTATION BOARD  
  
FINANCE DOCKET NO. 35861  
  
CALIFORNIA HIGH-SPEED RAIL AUTHORITY  
  
**OPPOSITION TO PETITION FOR DECLARATORY ORDER**

As stated in the Petition, each of the parties listed above is currently in state court litigation against the California High-Speed Rail Authority (“Authority”) based in part upon defective environmental review under California laws for which the Authority seeks preemption under the Interstate Commerce Commission Termination Act (“ICCTA”).

As explained further in the attached briefing submitted to the California Courts of Appeal, in response to the California High-Speed Rail Authority’s similar request for preemption under the ICCTA in the case *Town of Atherton et al. v. California High Speed Rail Authority* (2014) 228 Cal.App.4<sup>th</sup> 314, which briefing is incorporated into this opposition letter by this reference, the ballot measure authorizing the planned high-speed passenger rail system (“Project”) explicitly requires the Authority to comply with the California Environmental Quality Act (“CEQA”). This is a state project that must comply with state law, regardless of the effect of the ICCTA. (See Attachments 1-3.) The Authority has admitted this by preparing no fewer than five environmental impact reports for the project and its segments. The California Court of Appeal has already determined that CEQA review of the Project is not preempted by ICCTA in its published opinion in the *Town of Atherton* case. The *Town of Atherton* case is now a final statement of the law of California since no party has sought Supreme Court review of that decision. The Authority has sought to depublish the *Town of Atherton* decision, but that request

has not been granted as of the date of this letter. Because that case represents the governing California law, and especially because the Petitioner herein fully and unsuccessfully litigated that same claim in the *Town of Atherton* case, we request that the STB reject the petition for preemption entirely as foreclosed both by California law, which federal agencies must apply (*Marrese v. American Academy of Orthopaedic Surgeons* (1985) 470 U.S. 373, 380), and by collateral estoppel (*City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 64).

In addition, as was pointed out in the brief of amicus curiae Preserve Our Heritage in the Town of Atherton case, there is an additional basis for rejecting preemption that the Court of Appeal did not reach. That is that preemption will not interfere with the relationship between a sovereign state and its political subdivisions absent clear statutory indications that such interference is intended by the statute. The ICCTA includes no such indications. For that reason as well, the petition should be rejected.

If the STB does not immediately reject the petition it should withhold a determination on the Authority's Petition until the California Supreme Court can render a final determination on whether the ICCTA preempts CEQA under the circumstances presented here. The California Court of Appeal for the Third Appellate District has already rendered a final decision in *Town of Atherton* that preemption does not apply to review of this Project. However, as noted in the Petition, in *Friends of the Eel River v. North Coast Railroad Authority*, Consolidated Case Nos. A139222 and A139235, the California Court of Appeal, First Appellate District, addressed a somewhat similar preemption issue but in different factual circumstances unrelated to the high speed rail project. The *Friends of the Eel River* decision was issued on September 29, 2014 and remains subject to review by the California Supreme Court. Given the importance of this decision, we expect the California Supreme Court will be petitioned for review of that case, and it is entirely possible, if not likely, that the Supreme Court will accept review to provide a

clarifying decision in that case.

The Authority's Petition raises concerns about the availability of injunctive relief to Petitioners prior to the first case management conference in trial court proceedings, which is scheduled for November 21, 2014. The Petition seeks to prevent imminent injunctive relief that might delay construction of the Project. However, Petitioners have not filed any motions seeking injunctive relief in the trial court proceedings related to the Fresno-Bakersfield segment. Presently, Petitioners and the Authority are still conferring with regard to the contents and cost of the administrative record for the trial court proceedings. Briefing has not begun, and a hearing on the merits is not expected until at least July 2015. Thus, the Authority's request for expedited consideration is unnecessary and premature. Declaratory relief is only available to address an actual controversy. In the absence of a party's actually requesting that relief, it is only speculation on Petitioner's part that such relief will be sought. Declaratory relief must be based on a present controversy, and mere speculation about a potential future controversy is an insufficient basis.

Since the Surface Transportation Board is being asked to step into a judicial role to determine whether the ICCTA preempts all or a portion of the California Environmental Quality Act, we hereby supply briefing on the relevant issues submitted to the California Courts of Appeal in *Town of Atherton v. California High-Speed Rail Authority* and *Friends of the Eel River*, and the final decision of the California Court of Appeal in *Town of Atherton*. In the event the Surface Transportation Board does not summarily reject the petition or defer its consideration pending a determination by the California Supreme Court, we ask that the Surface Transportation Board call for full briefing of the issues raised by the Petition, so that the Surface Transportation Board can make its decision based on a full understanding of the law presented, which raises issues not addressed by previous cases before the STB.

Attachments:

1. Appellants' Joint Supplemental Brief on Federal Preemption, submitted by Petitioner Town of Atherton et al., California Court of Appeal, Third Appellate District, Civ. No. C070877.
2. Application and Supplemental Brief of Amicus Curiae Preserve Our Heritage, California Court of Appeal, Third Appellate District, Civ. No. C070877.
3. Appellants' Supplemental Letter Brief, submitted by Friends of the Eel River and Californians for Alternatives to Toxics, California Court of Appeal, First Appellate District, Consolidated Case Nos. A139222 and A139235.

**VERIFICATION**

I declare under penalty of perjury that the factual statements made in the foregoing Opposition to Petition for Declaratory Order are true and correct.

Further, I certify that I am qualified and authorized to file this pleading.

Sincerely,

Executed on Nov. 3, 2014

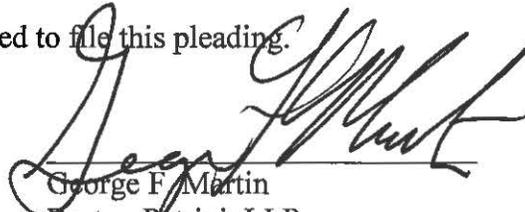
  
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Michelle Black  
*Attorneys for County of Kings, Citizens for  
High Speed Rail Accountability, and Kings  
County Farm Bureau*

VERIFICATION

I declare under penalty of perjury that the factual statements made in the foregoing Opposition to Petition for Declaratory Order are true and correct.

Further, I certify that I am qualified and authorized to file this pleading.

Executed on 10-28-14



George F. Martin  
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*Attorneys for Petitioner,  
Dignity Health*

**VERIFICATION**

I declare under penalty of perjury that the factual statements made in the foregoing Opposition to Petition for Declaratory Order are true and correct.

Further, I certify that I am qualified and authorized to file this pleading.

Executed on October 31, 2014

THERESA A. GOLDNER, COUNTY  
COUNSEL



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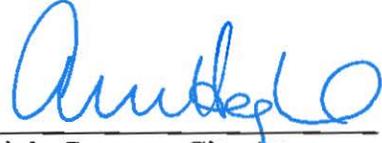
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VERIFICATION

I declare under penalty of perjury that the factual statements made in the foregoing Opposition to Petition for Declaratory Order are true and correct.

Further, I certify that I am qualified and authorized to file this pleading.

Executed on 10/27/14



Virginia Gennaro, City Attorney  
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**VERIFICATION**

I declare under penalty of perjury that the factual statements made in the foregoing Opposition to Petition for Declaratory Order are true and correct.

Further, I certify that I am qualified and authorized to file this pleading.

Executed on October 30, 2014



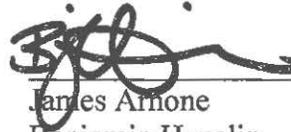
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VERIFICATION

I declare under penalty of perjury that the factual statements made in the foregoing Opposition to Petition for Declaratory Order are true and correct.

Further, I certify that I am qualified and authorized to file this pleading.

Executed on 10-30-14



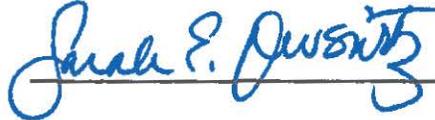
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**VERIFICATION**

I declare under penalty of perjury that the factual statements made in the foregoing Opposition to Petition for Declaratory Order are true and correct.

Further, I certify that I am qualified and authorized to file this pleading.

Executed on October 30, 2014



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I hereby certify that I have served all parties of record in this proceeding with this document by United States mail to the addresses as follows:

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Executed on November 4, 2014

  
\_\_\_\_\_  
Cynthia Kellman  
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# ATTACHMENT 1

**Civ. No. C070877**

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**CALIFORNIA COURT OF APPEAL  
THIRD APPELLATE DISTRICT**

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TOWN OF ATHERTON *et al.*,  
Plaintiffs/Appellants

v.

CALIFORNIA HIGH SPEED RAIL  
AUTHORITY, a public entity,  
Defendant/Respondent

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On Appeal from the Judgment and Post-Judgment Order of the Sacramento  
County Superior Court  
Honorable Michael P. Kenny, Judge  
Cases No. 34-2008-80000022CUWMGDS  
and 34-2010-80000679CUWMGDS

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**APPELLANTS' JOINT SUPPLEMENTAL BRIEF ON FEDERAL  
PREEMPTION**

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## I. INTRODUCTION

Respondent and Defendant California High-Speed Rail Authority (“Respondent”), represented by the California Attorney General, has made the surprising last-minute assertion that the proceedings under the California Environmental Quality Act<sup>1</sup> (“CEQA”) at issue in this case are preempted by the federal Surface Transportation Board’s (“STB”) assertion of jurisdiction over the state’s high-speed rail project. The California Attorney General, the state’s primary legal counsel, is generally the defender of California’s laws against challenge.<sup>2</sup> Surrendering to federal authority in an attempt to override California’s most important environmental law runs counter to that long and consistent record.

It should be noted that both Respondent and the Attorney General are components of the executive branch of California government. CEQA, by contrast, was written and passed by the legislative branch of state government. The executive branch is generally expected to faithfully execute and enforce the laws enacted by the legislative branch. (*See, .e.g., Lockyer v. City & County of San Francisco* (2004) 33 Cal.4th 1055.) Here, it appears that the executive branch’s enthusiasm for implementing its vision of a high-speed train system has led it to seek to exempt that project from CEQA<sup>3</sup>. While the Office of the Attorney General often offers its interpretation of California laws, it does not have the prerogative to unilaterally alter or refuse to enforce California laws. (*Lockyer, supra.*)

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<sup>1</sup> Public Resources Code §21000 *et seq.*

<sup>2</sup> *See, e.g., Jevne v. Superior Court* (2005) 35 Cal.4th 935, 950 [attorney general, as amicus curiae, defends California arbitrator ethics standards against claim of federal preemption]; *Physicians Committee for Responsible Medicine v. McDonald's Corp.* (2010) 187 Cal.App.4th 554, 573 [attorney general, as amicus curiae, defends California Proposition 65 initiative against claim of federal preemption]; *Gibson v. World Savings & Loan Assn.* (2002) 103 Cal.App.4th 1291, 1295 [attorney general, as amicus curiae, defends assertion of unfair business practices under California law as not preempted by federal law].

<sup>3</sup> In the past, both the Governor and the Chair of Respondent’s Board of Directors have toyed with the idea of exempting the project from CEQA. However, those forays have been rebuffed by the legislative leadership.

Under the separation of powers doctrine, only the judicial branch has that ability.

As will be shown, the Attorney General's attempt here to have the Court exempt the high-speed rail project from CEQA review through a claim of federal preemption is both ill-informed and ill-advised. The Interstate Commerce Commission Termination Act of 1995 ("ICCTA")<sup>4</sup> was intended to protect private railroads from burdensome state or federal economic regulation.<sup>5</sup> Its preemption provisions have no application to a state law intended solely to assure that California public agencies act with full knowledge and understanding of a project's environmental consequences. Indeed, CEQA and the National Environmental Policy Act<sup>6</sup> ("NEPA") (which the ICCTA does not preempt<sup>7</sup>) are similar and fully compatible statutes and CEQA includes specific provisions (Public Resources Code §21083.5 et seq.) detailing a joint process for environmental review of projects to which both CEQA and NEPA apply.

Further, even if the ICCTA was intended to generally protect railroad operations from any state regulation, in this case the rail operation involved is a state-run proprietary enterprise and the CEQA review involved here is a type of internal project review undertaken by the very agency proposing the project. As such, Respondent's approval of its own project, including the CEQA review of that project, and state court actions

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<sup>4</sup> Public Law 104-88, 49 U.S.C. §10101 *et seq.*

<sup>5</sup> Appellants accompanying Motion for Judicial Notice highlights this emphasis by asking the Court to take judicial notice of the testimony of the chair of the STB before Congress in 1998 as it sought reauthorization. That testimony highlights the STB's role in financial regulation of railroads through rate proceedings [testimony at p.7], mergers [testimony at p.11], rail operations [testimony at p.13], and labor matter [testimony at p.15]. Nowhere is environmental regulation even mentioned.

<sup>6</sup> 42 U.S.C. §4321 *et seq.*

<sup>7</sup> See, e.g., *Mid States Coal. for Progress v. Surface Transp. Bd.* (8th Cir. 2003) 345 F.3d 520, 533 [STB approval process can include preparation of Environmental Impact Statement under NEPA].

intended to assure that the CEQA review is done properly, are, under the market participant exception, not subject to federal preemption.<sup>8</sup>

Finally, in 2008 California's voters passed Proposition 1A, a ballot measure that authorized the issuance of \$9 billion in state general obligation bonds to help "jump start" the high-speed rail project. One of the provisions of that measure (Streets & Highways Code §2704.08(c)(2)(K)) requires, as a prerequisite for obtaining an appropriation of bond funds for use in the project, that Respondent certify that it has completed "all necessary project level environmental clearances necessary to proceed to construction." Other provisions of the bond act made clear to the voters that such environmental clearances specifically included CEQA review.<sup>9</sup> Thus California's voters have affirmatively chosen to apply CEQA to the project and specifically conditioned receipt of \$9 billion in state bond funds upon CEQA compliance. This mandate, specific to Respondent and dictated by the California electorate, its ultimate legislative body, is independent of any other general requirement for CEQA compliance. While the STB may have preemptive authority over railroad operations, it has no authority over the ability of California's voters to condition the use of bond funds on specific performance requirements.

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<sup>8</sup> The Attorney General is presumably very aware of the market participant exception, having argued its broad application before the U.S. Supreme Court. (*Chamber of Commerce of U.S. v. Brown* (2008) 544 U.S. 60.)

<sup>9</sup> See, e.g., Streets & Highways Code §2704.04(a) [bonds intended to construct high-speed rail system consistent with Respondent's certified EIRs of 2005 and 2008], 2704.04(b)(4) [bond measure provisions not intended to prejudice Respondents determination of alignment for Central Valley to San Francisco Bay segment and certification of EIR for that segment].

## ARGUMENT

### I. WHILE THE ICCTA MAY PREEMPT STATE ENVIRONMENTAL PERMIT REQUIREMENTS, CEQA IS AN INFORMATIONAL RATHER THAN A REGULATORY STATUTE.

Respondent's brief cites the preemption provision of the ICCTA, 49 U.S.C. §10501(b), which preempts other federal and state remedies with respect to the regulation of rail transportation. (Respondent's Supplemental Brief on Preemption ["RSB"] at p. 8.) Respondent then points to case law that holds that the ICCTA preempts state and local permitting laws for establishing rail service, and specifically to *City of Auburn v. United States government* (9<sup>th</sup> Cir. 1998) 154 F.3d 1025. (RSB at pp. 10-11.) However, *City of Auburn* and the other cases cited by Respondent make clear that what the ICCTA preempts are state or local statutes or regulations that attempt to regulate rail transportation. In particular, *City of Auburn* states that even an environmental statute *may* trespass on the exclusive jurisdiction of the FRA:

For if local authorities have the ability to impose "environmental" permitting regulations on the railroad, such power will in fact amount to "economic regulation" if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line. (Id. at 1031.)

In *City of Auburn*, local authorities had attempted to impose permit requirements on the Burlington Northern Railway's proposed reopening of Stampede Pass. (Id. at 1027-1028.) While these permits were apparently primarily environmental in nature, they nevertheless would have been requirements for the project to proceed, and their denial would have defeated the project. The court therefore properly found that they were preempted by the ICCTA. Similarly, in *Green Mountain Railroad Corp. v. State of Vermont* ("*Green Mountain*") (2d Cir. 2005) 404 F.3d 638 Vermont's Act 250, a state environmental land use statute, required the railroad to obtain preconstruction permits for land development. (Id. at 639.) The court ruled that such permit requirements were likewise preempted by the ICCTA.

In *Assn. of Am. Railroads v. South Coast Air Quality Mgmt. Dist* (9<sup>th</sup> Cir. 2010) 622 F.3d 1094, regulations approved by the South Coast Regional Air Quality District similarly were preempted under the ICCTA because they attempted to regulate air quality in connection with railroad yard operations<sup>10</sup> and, in doing so, attempted to manage or govern rail transportation.

CEQA, by contrast, is essentially an informational statute. It serves as an “environmental alarm bell” to alert governmental officials, and the public, to a project’s potential environmental impacts and to inform public officials and the public of ways in which significant impacts might be mitigated or avoided. (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1229.)

If CEQA is scrupulously followed, the public will know the basis on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it disagrees. (*Id.*)

CEQA does not, in itself, either approve or reject a project. Rather, analysis of a project under CEQA provides the public agency’s decision makers with information that informs their decisions on the merits.<sup>11</sup>

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<sup>10</sup> Subsequently, the Air District submitted the same rules to the California Air Resources Board for approval by U.S. E.P.A. and incorporation in the California’s State Implementation Plan under the Clean Air Act. The District Court concluded that this action was not preempted. (Case 2:06-cv-01416-JFW-PLA, Document 269, filed 2/24/2012.)

<sup>11</sup> Respondent, at p.13 of its brief, cites to the STB’s order in *DesertXpress Enterprises, LLC* – Petition for Declaratory Order, No. FD34914, 2007 WL 1833521 (STB June 25, 2007) as indicating that CEQA compliance is generally preempted for rail project. However, that ruling is distinguishable in that DesertXpress was a private rail carrier seeking regulatory approval for its application. CEQA compliance would have been an adjunct to that regulatory approval, and therefore would arguably be subsumed within a more general preemption of such a state regulatory approval. Similarly, in *North San Diego County Transit Development Board* – Petition for Declaratory Order, No. FD 34111, 2002 WL 1924265 (STB August 19, 2002), CEQA compliance would have been in the context of applying for a state Coastal Act permit. Since the permit requirement was preempted under the ICCTA, so was CEQA compliance. Here, Respondent would not be acting as a regulator, but as the rail line’s proprietor. (See below.)

The purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind. CEQA does not, indeed cannot, guarantee that these decisions will always be those which favor environmental considerations. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 393 [quoting from *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283].)

CEQA allows an agency to approve a project in spite of its having significant and unavoidable environmental impacts. The only requirement on granting such an approval is that the agency, in approving the project, adopt a statement of overriding considerations (“SOC”) which explains to the public the agency’s rationale for approving the project in spite of its impacts. (Public Resources Code §21081(b).) Indeed, Respondent herein adopted such a SOC in approving the project at issue herein. (1 SAR 110 *et seq.*)

Respondent may argue that CEQA contains “action-forcing” provisions that prohibit an agency from approving a project with significant environmental impacts if there are feasible mitigation measures or alternatives that would reduce or avoid the impacts. (Public Resources Code §21002; 21002.1(b).) That is, indeed, an important feature of CEQA, and one that is not part of NEPA. However, CEQA and its case law clarify that “feasible,” as used in determining whether to approve a project, includes policy considerations; specifically, an alternative or mitigation measure can be found infeasible because it is undesirable, e.g., it fails to fully satisfy the objectives associated with the project. (*Mount Shasta Bioregional Ecology Center v. County of Siskiyou* (2012) 210 Cal.App.4th 184, 198; *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 948; *California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 998, 1000 *et seq.*.)

In short, CEQA, unlike federal, state, or local statutes or regulations that could be used to defeat a rail project, does not stand in the way of granting a project approval<sup>12</sup>. All it requires is that before granting such an

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<sup>12</sup> Depending on the complexity of a project, there may be a certain amount of delay involved in doing the necessary environmental review. However, CEQA review is usually coterminous with NEPA review, which is not preempted by the ICCTA. The delay often complained about under CEQA, like that under NEPA, is most often due to claims that the review was not

approval the agency considering the approval have adequate information about the project, its potential environmental impacts, and how those impacts might be avoided or mitigated. The agency, upon issuance of an appropriate SOC, can then approve the project regardless of the severity of the impacts it might cause. In this respect, it differs fundamentally from the statutes at issue in, for example, *City of Auburn* and *Green Mountain*, and the regulation involved in *Assn. of Am. Railroads*. Consequently, CEQA compliance is not, in itself, preempted by ICCTA §10501.<sup>13</sup>

**II. RESPONDENT'S CONSIDERATION OF APPROVAL FOR THE BAY AREA TO CENTRAL VALLEY HIGH-SPEED TRAIN PROJECT, AND ITS ASSOCIATED CEQA ANALYSIS, FALLS UNDER THE MARKET PARTICIPANT EXCEPTION TO PREEMPTION UNDER THE ICCTA.**

The central question presented by Respondent's preemption argument is whether Respondent had any authority at all to reject the Bay Area to Central Valley High-Speed Train Project. In this respect, Respondent was and is in a fundamentally different position than the local officials involved in *City of Auburn*, as well as the other ICCTA preemption cases cited by Respondent.

In each of those cases, a public agency other than the STB was attempting to regulate by way of issuing a permit or enacting regulations, and thereby potentially reject, a private rail project over which the STB had jurisdiction. Thus, for example, in *City of Auburn*, the city required the Burlington Northern Santa Fe Railroad to obtain a local land use permit. In *Green Mountain Railroad*, the State of Vermont required that private railroad company to obtain a state permit to build a train barn. In *Assn. of Am. Railroads*, the South Coast Air Quality District attempted to issue

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done properly. A rigorous review will generally make such claims nothing short of frivolous.

<sup>13</sup> It should be noted that NEPA, like CEQA, is an informational, rather than an action-forcing, statute. Thus NEPA is likewise not preempted by the ICCTA. This is expressly shown here by the fact that the STB relied upon the NEPA analysis done by the Federal Railroad Administration in making its determinations on the high-speed train application before it. (See, S.T.B. Decision FD 35724, submitted with Respondent's June 26, 2013 letter to the Court, at p.2.)

regulations to control operations at a private rail yard. In *Boston and Maine Corp. and Town of Ayer, MA* – Joint Petition for Declaratory Order, No. FD 33971, 2001 WL 458685, a town conservation commission sought to require conditions on approving a railroad project.

In this case, however, Respondent is itself the applicant to the STB for approval of *its own* project. No permit or regulation is involved. Thus Respondent is acting, not as a public agency attempting to regulate a private third party, but as the proprietor of an enterprise, albeit a publicly owned and financed enterprise, making decisions about *its own* rail program. The case law is abundantly clear that in such a situation the state agency falls under the market participant exception to federal preemption doctrine.

**A. FEDERAL PREEMPTION UNDER THE ICCTA ONLY OCCURS IF THE FEDERAL, STATE, OR LOCAL LAW OR REGULATION UNREASONABLY INTERFERES WITH INTERSTATE COMMERCE.**

While the ICCTA’s preemption clause (§10501(b)) appears very broad, preempting remedies provided under Federal or State law with respect to regulation of rail transportation, nevertheless it is limited to regulations that would arguably conflict with the STB’s plenary jurisdiction over the subjects included in subsections (1) and (2) of that clause. In *Assn. of Am. Railroads, supra*, the Ninth Circuit Court of Appeal held that such preemption only applies when the challenged law or regulation imposes an unreasonable burden on interstate commerce. (*Id.* at 1097, 1098.) This narrows the question to whether Respondent’s decision on approving its own project would unduly burden interstate commerce. As explained below, actions falling under the market participant exception to commerce clause preemption are not preempted.

**B. THE MARKET PARTICIPANT EXCEPTION ALLOWS A GOVERNMENTAL AGENCY TO REGULATE ITS OWN BEHAVIOR WITHOUT FEDERAL PREEMPTION.**

The market participant exception to preemption under the U.S. Constitution’s Commerce Clause was formulated in recognition that government agencies do not always act in a regulatory capacity. “The basic distinction drawn in *Alexandria Scrap* [*Hughes v. Alexandria Scrap* (1976)]

426 U.S. 794, 810] between States as market participants and State as market regulators makes good sense and sound law.” (*Reeves v. Stake* (1980) 447 U.S. 429, 436.) The cases since that time have generally recognized that when a state is acting as a participant in the market, rather than as a regulator, federal preemption of state action generally does not apply.

For example, in *Building & Constr. Trades Council v. Assoc. Builders & Contractors* (“*Boston Harbor Cases*”) (1993) 507 U.S. 218, the Massachusetts Water Resources Agency (“MWRA”) negotiated an agreement with the Building & Construction Trades Council to govern construction of sewage treatment facilities that MWRA owned. The agreement required that all contractors bidding on the project abide by the agreement. Associated Builders & Contractors, representing nonunion contractors, sued, claiming the agreement was preempted under the National Labor Relations Act. The Supreme Court rejected that claim. It held that a state authority, when acting as the owner of a construction project and absent specific indication by Congress of a prohibitory intent, was free to take action as the owner, rather than as regulator.

When the MWRA, acting in the role of purchaser of construction services, acts just like a private contractor would act, and conditions its purchasing upon the very sort of labor agreement that Congress explicitly authorized and expected frequently to find, it does not ‘regulate’ the workings of the market forces that Congress expected to find; it exemplifies them. (*Id.* at 233 [quoting from dissent in Court of Appeal’s decision].)

Likewise, in *Tocher v. City of Santa Ana* (9th Cir. 1999) 219 F.3d 1040, the Ninth Circuit Court of Appeal held that a city’s use of a rotational list to determine which company to employ to tow illegally parked and abandoned vehicles was not preempted by the express preemption provision of the Federal Aviation Administration Authorization Act (“FAAAA”), which generally preempts local or state regulations affecting motor vehicle carriers such as trucking companies. The rationale for the law’s preemption clause, parallel with that of the ICCTA, which was passed at approximately the same time, was to promote deregulation of the motor carrier industry. (*Id.* at 1049.) However, the court held that in this case the City of Santa Ana’s “regulation” was not preempted. That was

because the city was only establishing rules and regulations for *its own* contracts with tow companies, not those of the public in general.

In *Cardinal Towing & Auto Repair v. City of Bedford, Texas* (“*Cardinal Towing*”) (5<sup>th</sup> Cir.) 1999 180 F.3d 686, analyzing preemption under the FAAAA, the court applied a two-part test to determine whether state or local governmental actions were preempted by the federal statute’s express preemption clause:

First, does the challenged action essentially reflect the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances? Second, does the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem? (*Id.* at 693.)

The court concluded that the city, which was contracting with a private towing company for towing services for nonconsensual towing of vehicles, was acting in its own proprietary interest in procuring services, and the narrow scope of the action (contracting with a single private towing company) did not have a primary goal of encouraging a general policy.

Most recently, in *Johnson v. Rancho Santiago Community College Dist.* (9<sup>th</sup> Cir. 2010) 623 F. 3d 1011, the 9<sup>th</sup> Circuit applied the *Cardinal Towing* two-part test for federal preemption under two federal statutes, the National Labor Relations Act and the Employment Retirement Income Security Act, the latter of which, like the ICCTA, contains an express preemption clause. In doing so, it analyzed whether the test required satisfying both, or only one prong to qualify for the market participant exception. (*Id.* at 1024.) The court concluded that:

The *Cardinal Towing* test thus offers two alternative ways to show that a state action constitutes non-regulatory market participation: (1) a state can affirmatively show that its action is proprietary by showing that the challenged conduct reflects its interest in efficiently procuring goods or services, or (2) it can prove a negative—that the action is not regulatory—by pointing to the narrow scope of the challenged action. We see no reason to require a state to show both that its action is proprietary and that the action is not regulatory. (*Id.*)

**C. UNDER BOTH PRONGS OF THE *JOHNSON/CARDINAL TOWING* TEST, RESPONDENT’S APPROVAL OF ITS BAY AREA TO CENTRAL VALLEY HIGH-SPEED TRAIN**

**PROJECT IS NOT SUBJECT TO PREEMPTION BY THE ICCTA.**

Applying the two-part *Johnson/Cardinal Towing* test to Respondent's approval of its Bay Area to Central Valley High-Speed Train Project, the result is similar to that found in *Johnson, supra*. Neither the decision nor its accompanying CEQA compliance is preempted by the ICCTA.

On the first prong, Respondent is seeking solely to make efficient market-based decisions on the nature of its own high-speed rail operation before bringing it before the STB for that agency's review and approval. This interest is shown, for example, by Respondent's concern for issues such as ridership and revenue. (*See, e.g., Bay Area/California High-Speed Rail Ridership and Revenue Forecasting Study, Statewide Model Validation. Final, 4 SAR 9458 et seq.*)

Respondent may argue that its concern for environmental impacts falls outside of the reach of "efficient procurement of goods and services" and falls instead in the prohibited realm of attempting to influence rail transportation policy. However, a proprietary interest in one's own project, whether public or private, need not be limited to purely pecuniary considerations. Especially when the proprietor is a public agency, its legitimate proprietary reach extends to how its enterprise will affect the welfare of its customers/citizens.

Further, both private and public enterprises share an interest in maintaining the goodwill of the public. Thus, for example, many private corporations, including such major companies as Chevron, Shell Oil Company, and Pacific Gas & Electric Company, have established programs to promote energy efficiency, alternative fuel development, and sustainability, even though they may not, in the short run, be the most effective generators of corporate profits.<sup>14</sup> Indeed, Google, Inc. has adopted as its corporate motto, "Don't Be Evil." (See, Exhibit A to Appellants' Request for Judicial Notice.)

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<sup>14</sup> *See, e.g., Park & Koehler, The Responsible Enterprise: Where citizenship and commerce meet* in *Business Trends 2013* (Canning & Kosmowski, edit., Deloit University Press, 2013) pp. 38-45, Exhibit B to Appellants' Request for Judicial Notice..

In *Engine Manufacturers Assn. v. South Coast Air Quality Management Dist.* (9<sup>th</sup> Cir. 2007) 498 F.3d 1031, 1046-1047 the 9<sup>th</sup> Circuit held that a state agency's requirement that public agencies' proprietary projects be conducted in an environmentally benign manner fell within the market participant exception to preemption under the Clean Air Act. Similarly here, the State of California's requirement<sup>15</sup> that Respondent comply with the environmental disclosure requirements of CEQA, and, indeed, that Respondent's proprietary project seek to avoid harmful environmental impacts, is within the ambit of "efficient" procurement by a genuine market participant.

As to the second prong, Respondent's action here merely approved its own project, which would then eventually be submitted for consideration by the STB. Respondent's application of CEQA compliance to that project was mandated both by California statute and by the Proposition 1A bond measure that would eventually provide funding for the project.<sup>16</sup> However, neither Respondent's approval of the project nor its CEQA analysis was primarily intended to encourage a general policy; not even as environmentally benign a policy as making the railroad project "environmentally friendly." As explained above in section I, the CEQA review of the policy merely provided Respondent with information on the project's environmental consequences that the State (and its voters) felt was important for Respondent to have in hand before making its internal decision on moving the project forward.

Respondent's actual decision of whether to move the project forward was, like the Air Quality Management District's decision on applying an air quality regulation to the state's own fleet of vehicles in *Engine Manufacturers Assn., supra*, restricted to its own proprietary interest. Indeed, it was considerably narrower than the Air District's decision. That

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<sup>15</sup> This requirement is set forth not only in the CEQA statute itself, but in the bond act (Proposition 1A) that provides partial funding for the Project. That act requires that Respondent certify to the legislature and the Department of Finance, prior to even requesting funding for project construction activities, that all project level environmental clearances necessary to proceed to construction had already been obtained.

<sup>16</sup> See, Streets & Highways Code §2704.08(c)(2)(K).

decision applied to all of the state's vehicles. Respondent's decision applied only to its own proposed rail line.

Thus just based on the narrow nature of Respondent's decision, which affected nothing but the agency itself, it is not subject to preemption. This is obvious by comparing the decision here with, for example, the air district's decision in *Assn. of Am. Railroads, supra*. In that case, the adoption of the regulation was intended to affect not the air board, but private commercial railroad lines using the rail yard in question. (*Id.* at 1096.) The air board's action was intended to influence and regulate not itself, but external entities involved in rail transport, thereby directly impinging on the STB's plenary jurisdiction over those matters. (*Id.* at 1098.) Here, Respondent's CEQA-guided decision on moving its own project forward no more impinged on STB's jurisdiction than would, for example, Union Pacific Railroad's internal decision about whether to move forward to the STB its own proposal to establish a new freight line.

Having satisfied both prongs of the *Johnson/Cardinal Towing* test, Respondent's decision-making on its Bay Area to Central Valley High-Speed Train Project, and for that matter on its overall high-speed rail program, as well as the CEQA environmental review associated with those decisions, falls well within the market participant exception to federal preemption. Therefore, neither Respondent's decision on approving its project, nor the CEQA review associated with that decision, is subject to preemption under the ICCTA.

**D. THE ICCTA'S PREEMPTION CLAUSE DOES NOT EXPRESSLY OR IMPLIEDLY PREEMPT THE ACTIONS OF A STATE PURSUING ITS OWN PROPRIETARY INTERESTS.**

Respondent might finally, in desperation, grasp at the argument that the ICCTA's preemption clause was broad enough to preclude application of the market participant exception. This argument was considered and rejected, as applied to the Clean Air Act, in *Engine Manufacturers. Assn., supra*, 498 F.3d at 1044. Similar considerations call for its rejection here as well.

As with the Clean Air Act, nothing within the ICCTA indicates that Congress intended to prevent a state, acting in its proprietary role as the owner of a rail line, from making decisions about how to conduct that rail business. Indeed, it would be highly anomalous, and perhaps a violation of the Tenth Amendment, for the federal government to try to insist that the STB's authority under the ICCTA extend to dictating to a sovereign state what proposal it should submit to the STB for its consideration, especially when Respondent's proposed rail line would operate solely within the State of California.

**III. RESPONDENT'S ARGUMENT THAT NEPA, RATHER THAN CEQA, SHOULD GOVERN ITS PROJECT'S ENVIRONMENTAL REVIEW WAS A CHOICE OF LAWS DEFENSE THAT WAS WAIVED BY NOT BEING RAISED IN THE TRIAL COURT.**

As explained above, Respondent's review of its own project under CEQA was not preempted as a matter of jurisdiction by the ICCTA. Consequently, any argument that Respondent should have been allowed to review its project under NEPA only was not jurisdictional. Rather, it was a choice of laws claim. The governing law in such cases, as already provided to the Court, is *Karlsson v. Ford Motor Co.* (2006) 140 Cal.App.4<sup>th</sup> 1202, 1236. As in that case, a claim first raised on appeal is deemed waived.

**CONCLUSION**

It is perplexing that the Attorney General, the chief legal officer within California's executive branch of government, is seeking to undermine the enforcement of CEQA, one of the most significant environmental laws enacted by California's legislative branch. Presumably, the Attorney General believes that Respondent's compliance with NEPA is "good enough." Yet the legislative branch, despite pressure from some sectors, has resolutely rejected attempts to eliminate CEQA compliance for projects evaluated under NEPA.

Regardless of the motive, Respondent's, and the Attorney General's, assertion of preemption is misplaced. CEQA is not a regulatory statute like those that have triggered preemption. Rather it is a disclosure statute that aids in informed decision-making. Further, the legislative and voter

mandates that Respondent comply with CEQA in evaluating its decisions on its own high-speed rail system fall squarely within the Market Participant Exception to federal preemption. For all these reasons, Respondent's assertion that application of CEQA to the high-speed rail project is preempted by the ICCTA should be rejected.

Dated: September 15, 2013

Respectfully submitted,

A handwritten signature in cursive script that reads "Stuart M. Flashman". The signature is written in black ink and is positioned above a horizontal line.

Stuart M. Flashman  
Attorney for Appellants

## CERTIFICATION

I, Stuart M. Flashman, as the attorney for the appellants herein, hereby certify that the above brief, exclusive of caption, tables, exhibits, and this certification, contains 4,902 words, as determined by the word-counting function of my word processor, Microsoft Word for Windows 2002.

Dated: September 15, 2013

A handwritten signature in black ink, appearing to read "Stuart M. Flashman", written in a cursive style.

Stuart M. Flashman

# ATTACHMENT 2

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FOR THE THIRD APPELLATE DISTRICT**

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Civil No. C070877

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**TOWN OF ATHERTON, *et al.***

**Plaintiffs/Appellants**

**v.**

**CALIFORNIA HIGH SPEED RAIL AUTHORITY,**

**Defendant/Respondent**

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**On Appeal from the Superior Court of the State of California  
in and for the County of Sacramento  
The Honorable Michael P. Kenny**

**Sacramento County Superior Court Case Numbers  
34-2008-8000022CUWMGDS and 34-2010-80000679CUWMGDS**

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**APPLICATION AND SUPPLEMENTAL BRIEF OF  
AMICUS CURIAE PRESERVE OUR HERITAGE**

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October 1, 2013

**VIA OVERNIGHT COURIER**

Honorable Vance W. Raye  
Administrative President Justice  
Court of Appeal, Third Appellate District  
914 Capitol Mall, 4th Floor  
Sacramento, California 95814

Re: **Preserve Our Heritage Application to File Amicus Brief**  
*Town of Atherton, et al. v. California High Speed Rail Authority*  
Court of Appeal, Third Appellate District, Case No. C070877

Dear Presiding Justice Raye:

With this Application, Save Our Heritage respectfully requests leave to file the enclosed Amicus Curiae Brief in support of Appellants in *Town of Atherton, et al. v. California High Speed Rail Authority*, Court of Appeal, Third Appellate District, case number C070877, pursuant to California Rules of Court, rule 8.200, subdivision (c). This amicus curiae brief specifically addresses the Court's July 8, 2013, request for supplemental briefing on the following questions:

1. Does federal law preempt state environmental law with respect to California's high-speed rail system? (See *City of Auburn v. United States Government* (9th Cir. 1998) 154 F.3d 1025; *Association of American Railroads v. South Coast Air Quality Management Dist.* (9th Cir. 2010) 622 F.3d 1094.)
2. Assuming that federal law does, in fact, preempt state law in this area, is the preemption in the nature of an affirmative defense that is waived if not raised in the trial court or is the preemption jurisdictional in nature? (See

*International Longshoreman's Ass'n, AFL-CIO v. Davis* (1986) 476 U.S. 380, 390-391 [90 L.Ed.2d 389]; *Elam v. Kansas City Southern Ry. Co.* (5th Cir. 2011) 635 F.3d 796, 810; *Girard v. Youngstown Belt Ry. Co.* (Ohio 2012) 979 N.E.2d 1273, 1280.)

California Rules of Court, rule 8.200, subdivision (c), requires an amicus curiae applicant to "state the applicant's interest and explain how the proposed amicus curiae brief will assist the court in deciding the matter." (Cal. Rules of Court, rule 8.200, subd. (c)(2).) Further, an applicant must identify any outside monetary contribution, and state whether any assistance in preparing the brief was provided by a party or counsel for a party in the pending appeal.

**A. Preserve Our Heritage's Interest In This Appeal**

Preserve Our Heritage is a grassroots organization which advocates sound planning and responsible decision-making by elected officials that will sustain, protect, and enhance the principles California citizens deeply value as part of our State's heritage. Specifically, Preserve Our Heritage is devoted to the safekeeping of the San Joaquin Valley's agricultural resources, and the threat presented to these vital economic assets and important biological resources by the encroachment of suburban and urban development that permanently removes agricultural acreage and further diminishes fragile water supply without provision for its replacement or enhancement. The California High Speed Rail project is of particular concern to Preserve Our Heritage and its stakeholders, and it has advocated extensively on this issue in conjunction with other community-based organizations, including the Merced and Madera County Farm Bureaus.

Preserve Our Heritage was an active participant in the federal Surface Transportation Board ("STB") proceedings, docket number FD 35724, which culminated in the STB's decision to exercise federal jurisdiction over the California High Speed Rail system. Preserve Our Heritage has an interest in the issues raised in the Court's supplemental briefing request in this appeal because the question of federal preemption arises directly from the STB's exercise of jurisdiction, which the High Speed Rail Authority (the "Authority") asserts has preempted its obligations under the California Environmental Quality Act ("CEQA"), by invoking the express preemption clause of the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. § 10501, subdivision (b).

Preserve Our Heritage also has a specific interest in protecting California's agricultural and environmental resources through the enforcement of state environmental law, including the CEQA. It therefore strongly opposes the Authority's position that the STB's exercise of jurisdiction exempts the Authority, a state agency, from complying with CEQA, which expressly governs the discretionary decision-making authority of California state agencies. A holding that the ICCTA permits a state agency from complying with the state's own environmental laws will significantly weaken the application of CEQA with respect to state transportation agencies.

**B. Preserve Our Heritage Will Assist The Court In Deciding This Appeal**

Preserve Our Heritage offers a unique combination of factual and legal expertise that will assist this Court in deciding the issues raised in its request for supplemental briefing. Preserve Our Heritage is intimately familiar with the history of High Speed Rail in California. It has provided public comment in the course of the Authority's CEQA and NEPA environmental proceedings, and has taken positions at numerous legislative and administrative hearings related to the project, including the STB proceedings at issue here, and hearings before state and federal legislators. Preserve Our Heritage has also been a party to prior CEQA litigation involving High Speed Rail, including *County of Madera v. California High Speed Rail Authority*, Sacramento County Superior Court case number 2012-80001165.

Counsel for Preserve Our Heritage provide significant legal expertise in both federal preemption and environmental law. Oliver W. Wanger, Esq. served as a federal district court judge for the United States District Court for the Eastern District of California for twenty years, and in that capacity decided numerous complex federal preemption and environmental cases. John P. Kinsey, Esq. has litigated numerous environmental law cases in both the state and federal courts. He has the unique experience of both having litigated several cases involving federal preemption of state environmental states and regulations, as well as having litigated numerous cases arising under CEQA. He regularly teaches CEQA classes to environmental professionals, and has served as the President of the Association of Environmental Professionals – Central Chapter, since 2010. His published cases include: *POET, LLC v. California Air Resources Board* (2013) 218 Cal.App.4th 681 (CEQA); *Friends of Roeding Park v. City of Fresno* (E.D.Cal. 2012) 843 F.Supp.2d 1152 (NEPA); and *Rocky Mountain Farmers Union v. Goldstene* (E.D.Cal. 2011) 843 F.Supp.2d 1071 (federal preemption).

In the enclosed Amicus Curiae Brief, Preserve Our Heritage presents arguments not asserted in any brief filed to date in this action. Specifically, the Authority, as a California state agency with discretionary decision-making capacity, is legally obligated to comply with CEQA notwithstanding the STB's exercise of jurisdiction pursuant to the ICCTA. While the ICCTA preempts state and local agencies from enforcing their regulatory authority against private rail carriers, the ICCTA does not, and cannot, preempt the authority of California law, including CEQA, to regulate and govern the discretionary decision-making authority of a California state agency.

**C. No Monetary Or Other Assistance Was Provided In Preparing This Brief**

This Application and the enclosed Amicus Curiae Brief was fully funded by Preserve Our Heritage, a California non-profit mutual benefit corporation, and prepared entirely by its retained counsel. No party to this appeal authored any portion of this Application or the enclosed Brief, nor did any party make any monetary contribution intended to fund the preparation thereof.

**WANGER JONES HELSLEY PC**

October 1, 2013

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**D. Conclusion**

Preserve Our Heritage has a significant interest in the outcome of this appeal, particularly with respect to the important and controversial issues raised in the Court's request for supplemental briefing. Preserve Our Heritage is uniquely positioned to assist the Court in deciding this matter, with significant factual knowledge of the California High Speed Rail project, the Authority, and the issues raised in this action. Further, counsel preparing this Application and Amicus Curiae Brief offer extensive legal expertise on the preemption and environmental law issues presented here. For these and all the foregoing reasons, Save Our Heritage respectfully requests this Court grant its Application to file an Amicus Curiae Brief in support of Appellants in this appeal.

Respectfully submitted,

WANGER JONES HELSLEY PC



Oliver W. Wanger

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Daren A. Stemwedel

Attorneys for Preserve Our Heritage

Cc: See attached proof of service.

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## INTRODUCTION

The High Speed Rail Authority (the "Authority") argues CEQA is preempted by the Interstate Commerce Commission Termination Act ("ICCTA"), based on the erroneous premise that a federal preemption statute excuses a California state agency's compliance with the State's own environmental laws. The Authority contends it is itself a regulated entity, and the ICCTA preempts the State from burdening it with CEQA compliance.

This is not an accurate depiction of the Authority's character as a state agency, nor of CEQA's applicability. The Authority is a political subdivision of the State, subject to the State's sovereign control. The Authority's duty to comply with CEQA is a function of its organization and existence as a state agency. State law prohibits the Authority from making discretionary decisions without giving due consideration to resulting environmental effects. Any discretionary decision the Authority makes without CEQA compliance exceeds California's limitations on the Authority's powers, as the California Legislature has expressly required the Authority to comply with state environmental laws, such as CEQA. The public has been vested with specific remedies to redress such violations. Those remedies are not preempted by the ICCTA.

Unlike cases such as *City of Auburn*<sup>1</sup> and *Association of American Railroads*,<sup>2</sup> regulatory control is not being imposed upon the Authority by some outside government entity. Rather, under CEQA, the Authority is responsible for reviewing the environmental effects of *its own*

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<sup>1</sup> *City of Auburn v. United States Government* (9th Cir. 1998) 154 F.3d 1025.

<sup>2</sup> *Association of American Railroads v. South Coast Air Quality Management Dist.* (9th Cir. 2010) 622 F.3d 1094.

discretionary decisions. Because the California Legislature has required the Authority to comply with state environmental laws, the Authority's obligation to comply with CEQA is merely an internal control not subject to preemption (as opposed to external state or local regulatory controls burdening a private carrier's ability to develop interstate commerce). Express preemption cannot apply to excuse the Authority from complying with its own and state-mandated rules compelling it to evaluate the environmental consequences of its actions.

This is because States are vested with expansive sovereign powers to limit and control the authority of their political subdivisions. The United States Supreme Court has long held that a State has absolute and sovereign control over the powers entrusted to its agencies. (See, e.g., *Nixon v. Missouri Municipal League* (2004) 541 U.S. 125, 140; *Claiborne v. Brooks* (1884) 111 U.S. 400, 410.) "It is purely a question of local policy with[in] each state what shall be the extent and character of the powers which its various political organizations shall possess." (*Platt v. City and County of San Francisco* (1910) 158 Cal. 74, 82.)

Under these principles, a federal express preemption statute, such as in the ICCTA, cannot "interpos[e] federal authority between a State and its municipal subdivisions" absent an "unmistakably clear" congressional intent to do so in the language of the statute. (*Nixon, supra*, 541 U.S. at 140-141 [citing *Gregory v. Ashcroft* (1991) 501 U.S. 452, 460].) The ICCTA contains no such clear and unmistakable language. Rather, the well-settled purpose of the ICCTA is to abrogate burdens on interstate commerce imposed on *private* rail carriers by state and local regulation. The statute contains no notion of modifying the balance of state and federal sovereign authority.

This is not a hypothetical exercise. It is undisputed that high speed rail will permanently alter the Central California landscape, including thousands of acres of irreplaceable prime farmlands. If only NEPA applies to the high speed rail project, the Authority will be under no legal obligation to adopt feasible mitigation measures, as required by state law, to compensate for the significant environmental impacts of high speed rail. This would significantly invade state sovereignty, as the well-settled public policy of this State weighs heavily against permitting a state agency to radically alter the environment, absent CEQA's requirement that all feasible mitigation measures be adopted.

Ultimately, the Authority is not a regulated entity, but is rather a political subdivision of the State. As such, the Authority draws all of its powers from the State, and is subject to state-mandated limitations on the exercise of its powers. Because the State Legislature has expressly required the Authority to comply with CEQA, federal preemption would directly interfere with the State's own internal control over the Authority by removing state-mandated limitations on the Authority's jurisdiction, contrary to the limitations of federal authority under the Supremacy Clause.

As such, this Court should find that the Authority's obligation to perform under CEQA is not preempted by the ICCTA.

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## ARGUMENT

**A. Unlike Private Rail Carriers, the Authority Retains Discretionary Approval Authority Over the High Speed Rail Project, and the Laws and Procedures Governing the Exercise of that Discretion, Like CEQA, Are Not Preempted By the ICCTA**

In its supplemental brief, the Authority argues that as a rail carrier, any state or local regulatory burden placed upon it is preempted by federal law, including any obligation to comply with CEQA. The flaw in this reasoning is that although the Authority is a developer and owner of a rail system, it is not a private entity subject to the exercise of discretion by another state or local agency. Rather, the Authority *is* the State, and will continue to exercise discretionary approval authority over the High Speed Rail Project. The Authority cannot make these discretionary decisions in a vacuum; rather, the case law makes plain that the Authority's exercise of discretion regarding the High Speed Rail Project continues to be subject to the Authority's own internal decision-making practices and procedures, including CEQA.

The State of California has sovereign and absolute authority to establish the extent and character of the powers vested in its state agencies. (See, e.g., *Nixon v. Missouri Municipal League* (2004) 541 U.S. 125, 140-141.) As a result, the Supreme Court has found that a federal express preemption statute, such as in the ICCTA, cannot "interpos[e] federal authority between a State and its municipal subdivisions" absent an "unmistakably clear" congressional intent to do so in the language of the statute, which the ICCTA does not provide. (*Ibid.*; see 49 U.S.C. § 10501(b).)

Here, the California legislature has expressly required the Authority to comply with state environmental laws for the protection of the

public. (Sts. & Hy. Code § 2704.08, subd. (c)(2)(K); see Senate Daily Journal, 2011-2012 Reg. Sess., pp. 4447-4448 [letter from Sen. Mark Leno stating the legislature's intent that Section 2704.08 refer to both CEQA and NEPA].) If this Court finds that the ICCTA preempts CEQA review by the Authority here, it would directly interpose federal authority between the State and its agency – *i.e.*, the Authority – by allowing the Authority to continue to have discretionary approval authority over the High Speed Rail Project, while at the same time excusing the Authority from complying with state environmental laws and regulations governing the exercise of that discretion.

Such a result would be flatly inconsistent with federal law. Both the United States and California Supreme Courts have long held that a State has absolute power over its internal affairs, including “the extent and character of the powers which its various political organizations shall possess.” (*Platt v. San Francisco* (1910) 158 Cal. 74, 82; see also *Claiborne v. Brooks* (1884) 111 U.S. 400, 410 [“the extent and character of the powers (of a State’s) various political and municipal organizations . . . is a question that relates to the internal constitution of the body politic of the State”].) The California Supreme Court recently reiterated this rule in *California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, holding the state has plenary power to both create and abolish its political subdivisions, as well as to determine the nature of the powers held by those entities. (*Matosantos, supra*, 53 Cal.4th at 255 [citing *Hunter v. Pittsburgh* (1907) 207 U.S. 161, 178-179; *Board of Supervisors v. Local Agency Formation Com.* (1992) 3 Cal.4th 903, 914-915].)

Any federal preemption statute that would “threaten[] to trench on the States’ arrangements for conducting their own governments

should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power . . . ." (*Nixon, supra*, 541 U.S. at p. 140.) "If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." (*Gregory v. Ashcroft* (1991) 501 U.S. 452, 460 [quoting *Atascadero State Hospital v. Scanlon* (1985) 473 U.S. 234, 242]; see *Nixon, supra*, at pp. 140-141; see also *Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 485 [presumption that Congress did not intend to preempt state law is hard to overcome].)

*Nixon v. Missouri Municipal League* (2004) 541 U.S. 125, is closely on point. In *Nixon*, a Missouri statute barred state political subdivisions from providing or offering for sale telecommunications services. (*Nixon, supra*, 541 U.S. at p. 129.) A group of Missouri municipalities sought relief under the federal Telecommunications Act of 1996, 47 U.S.C. § 253, which preempted "state and local laws and regulations expressly or effectively 'prohibiting the ability of any entity' to provide telecommunications services." (*Id.* at p. 128.) The Court noted, "[i]n familiar instances of regulatory preemption under the Supremacy Clause, a federal measure preempting state regulation in some precinct of economic conduct carried on by a private person or corporation simply leaves the private party free to do anything it chooses consistent with the prevailing federal law." (*Id.* at p. 133.) "But no such simple result would follow from federal preemption meant to unshackle local governments from entrepreneurial limitations." (*Ibid.*) The problem with freeing a state political subdivision from the State's own limiting authorities is that "the liberating preemption would come only by interposing federal authority between a State and its municipal subdivisions, which our precedents teach,

'are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them *in its absolute discretion.*'” (*Id.* at p. 140 [emphasis added] [quoting *Wisconsin Public Intervenor v. Mortier* (1991) 501 U.S. 597, 607-608].)

As in *Nixon*, where State law prohibited state political subdivisions from providing or offering for sale telecommunications services, the California legislature has made plain here that the Authority's decision-making process is subject to numerous state laws dictating its form, function, and powers, (see, e.g., Pub. Util. Code § 185020, *et seq.*), including state environmental laws such as CEQA. (Sts. & Hy. Code § 2704.08, subd. (c)(2)(K); see Senate Daily Journal, 2011-2012 Reg. Sess., pp. 4447-4448 [letter from Sen. Mark Leno stating the legislature's intent that Section 2704.08 refer to both CEQA and NEPA].) A finding that the Authority's state-mandated environmental review process is preempted by ICCTA would directly “interpos[e] federal authority” between the State and the Authority by directly overriding the State's express limitation on the Authority's discretion. (*Nixon, supra*, 541 U.S. at 140.)

Here, there is no express language in the ICCTA providing that a state, such as California, may not limit the discretionary authority of a state agency to evaluate the environmental consequences of its actions. Indeed, the STB record of proceedings confirms that the STB did not intend its decision to preempt the Authority's ability to conduct further review under CEQA. Indeed, the STB's June 13 Decision discussed at length the joint CEQA and NEPA environmental review conducted by the Authority. The Decision refers to ongoing CEQA review for further high speed rail segments under the programmatic EIR/EIS process, and references further review under another state regulatory agency, the State Historic

Preservation Office ("SHPO"), which is at risk for further preemption under the Authority's line of reasoning. The Decision contains no suggestion that California CEQA and SHPO review will cease under its jurisdiction. (See *California High-Speed Rail Authority – Construction Exemption – In Merced, Madera and Fresno Counties, Cal.* (S.T.B. Jun. 13, 2013) No. FD 35724, 2013 WL 3053064, slip op. at pp. 8, 27.) Yet now, contrary to the STB's own Decision, the Authority seeks to avoid review of its decisions under CEQA, including the imposition of mitigation measures.

CEQA is among the state laws that determine the extent and character of those powers, and imposes certain procedural and substantive limitations on any discretionary approval undertaken by the Authority, particularly those which may impact the environment. (See, e.g., Pub. Resources Code § 21080; 1 Kostka & Zischke, *supra*, § 1.19, pp. 17-18.) Here, there is no question that Authority retains discretionary approval authority over the High Speed Rail Project. This discretionary approval authority remains subject to the State's own directive to comply with state environmental laws for the protection of the public. (See Sts. & Hy. Code § 2704.08, subd. (c)(2)(K).) Because preemption here would directly interfere with the State's internal control of its own agency's exercise of discretion, the ICCTA does not preempt the Authority's environmental review obligations under CEQA.

In light of the foregoing, the cases cited by the Authority are inapplicable here. Specifically, in the Authority's supplemental brief, nearly every case cited, including *City of Auburn* and *Association of American Railroads*,<sup>3</sup> involves a *private* rail carrier, seeking relief against

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<sup>3</sup> In addition to *City of Auburn* and *Association of American Railroads*, the Authority cites *Adrian & Blissfield R. Co. v. Village of*

external regulation by state and local governments. The Authority cites only one STB decision involving a publicly owned rail carrier. (See *North San Diego County Transit Development Board – Petition for Declaratory Order* (S.T.B. Aug. 19, 2002) No. FD 34111, 2002 WL 1924265.) However, that case is inapplicable here because that public agency was not seeking relief from its own internal CEQA obligations, but rather those sought to be imposed by another public entity, the City of Encinitas. (*Id.* at pp. \*1-2; see also *City of Encinitas v. North San Diego County Transit Development Bd.* (S.D.Cal. 2002) 2002 WL 34681621, \*4.)

Those cases are plainly distinguishable. Unlike the above cases, the State has imposed limitations on its own agency – the Authority – requiring the Authority to comply with state environmental laws, including CEQA. Thus, rather than being an external regulatory barrier to development, CEQA in this case serves as an *internal* control, compelled by the state legislature, governing the procedures under which the Authority may take discretionary action that affects the environment. (See Sts. & Hy. Code § 2704.08, subd. (c)(2)(K); Senate Daily Journal, 2011-2012 Reg. Sess., pp. 4447-4448. See also Pub. Resources Code § 21080, subd. (a).) In its brief, the Authority invokes federal preemption as grounds

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*Blissfield* (6th Cir. 2008) 550 F.3d 533, 535; *New Orleans & Gulf Coast Ry. Co. v. Barrois* (5th Cir. 2008) 533 F.3d 321, 325-326; *Green Mountain R.R. Corp. v. Vermont* (2d Cir. 2005) 404 F.3d 638, 640; *CSX Transp., Inc. v. Georgia Public Service Com'n* (N.D.Ga. 1996) 944 F.Supp. 1573, 1575; *People v. Burlington Northern Santa Fe R.R.* (2012) 209 Cal.App.4th 1513, 1516; *Jones v. Union Pacific Railroad* (2000) 79 Cal.App.4th 1053, 1056; *DesertXpress Enterprises, LLC – Petition for Declaratory Order* (S.T.B. June 25, 2007) No. FD 34914, 2007 WL 1833521; and *Joint Petition for Declaratory Order – Boston and Maine Corporation and Town of Ayer, MA* (S.T.B. Apr. 30, 2001) No. FD 33971, 2001 WL 458685; all of which involve private rail carriers seeking relief from state and local regulation.

to avoid state law that limits the exercise of its discretion. No such relief is available here, because the Authority cannot escape the fact it is a political subdivision of the State, subject to the State's self-imposed internal controls, and not a private rail carrier.

In short, Nothing in the ICCTA purports to intrude upon California's sovereignty, and even the STB itself contemplates further state regulatory activity and application of CEQA to the Authority's future decisions and approvals. While the ICCTA may provide for STB jurisdiction over certain aspects relating to the construction and operation of the high speed rail project, any such preemptive authority does not permit the STB to intrude upon the internal controls and limitations the State has placed upon the Authority, its own agency, requiring the Authority to comply with state environmental laws, including CEQA, without unconstitutionally interfering with the State of California's sovereign authority. Accordingly, the Authority's environmental review obligations under CEQA are not preempted by the ICCTA.

**B. The Federal Invasion Of State Sovereignty Implicated In Excusing State Agency Compliance With CEQA Would Permit The Authority To Radically Alter California's Environment Without Requiring Feasible Mitigation Measures**

The Authority argues the public and the environment will be adequately protected under federal environmental laws, such as NEPA. (See High Speed Rail Authority Supplemental Brief, at p. 13.) This ignores one of the key differentiating features between CEQA and NEPA. Under CEQA, the Authority will be obligated to implement all feasible mitigation measures, whereas under NEPA, it must merely engage in "a reasonably complete *discussion* of possible mitigation measures." (See Pub. Resources

Code § 21002.1, subd. (b); *Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912, 937 [CEQA]; cf. *N. Alaska Env'tl. Ctr. v. Kempthorne* (9th Cir. 2006) 457 F.3d 969, 979 [emphasis added] [NEPA].) Under NEPA, the public has no assurance that the drastic alteration of the environment imposed by high speed rail will be mitigated to the extent feasible.

California voters approved the high speed rail project under Proposition 1A on the condition and expectation that the environmentally destructive effects of this wholly *intrastate* project would be mitigated to the extent feasible. (See Sts. & Hy. Code § 2704.08, subd. (c)(2)(K); Pub. Resources Code § 21002.1, subd. (b).) Despite this clear mandate, the Authority now invokes a federal preemption doctrine, intended only to reduce burdens on interstate commerce, to violate the express will of California voters, who placed specific environmental preconditions upon the powers granted to the Authority to drastically alter the State's environment. It is difficult to imagine a circumstance where federal preemption will exact a more egregious and destructive invasion of state sovereignty.

**C. Federal Preemption Is Further Limited By The Market Participant Doctrine**

Ultimately, the Authority is not a regulated entity. It is a political subdivision of the State, subject to the State's sovereign control. The Authority is itself a regulator, with jurisdiction vested in it by the State over the development of the high speed rail system. (See Pub. Util. Code § 185020, *et seq.*) The Authority's regulatory control over the portions of the high speed rail system at issue in this case is exempted from the preemptive effects of federal law under the "market participant" doctrine.<sup>4</sup>

<sup>4</sup> A further extensive discussion of the market participant doctrine as applied here is provided in the brief of amicus curiae Citizens for California

The market participant doctrine provides that “even where a federal statute pre-empts state regulation in an area, state action in that area is not preempted so long as it is proprietary rather than regulatory.” (*Engine Mfrs. Ass’n v. South Coast Air Quality Management Dist.* (9th Cir. 2007) 498 F.3d 1031, 1041 [citing *Building & Constr. Trades Council v. Associated Builders & Contractors* (1993) 507 U.S. 218, 226-227].) It is undisputed that the California high speed rail project is a proprietary project owned and developed by the State, and under the control of the Authority. (See Sts. & Hy. Code § 2704.04; Pub. Util. Code § 185030, *et seq.*)

The availability of the market participant doctrine resolves an apparent paradox the Authority’s argument presents. If federal preemption abrogates the Authority’s internal decision-making procedures and responsibilities required by, then it would be logical to conclude that any State-imposed limitation on the Authority’s power would likewise be preempted. Further, the Authority itself is a state regulatory agency, and will continue to regulate the California high speed rail system for the foreseeable future. Under the Authority’s reasoning with regard to ICCTA preemption, the Authority’s own regulatory power would be preempted. This produces an illogical result, as it would either paralyze the Authority’s ability to construct and operate the project, or require its complete federalization under the auspices of the STB, which is not a builder or operator of railroads. However, the fact that the Authority regulates the high speed rail system in a proprietary capacity provides an exception to the preemptive power of federal law.

In short, whether the Authority characterizes itself as a regulated entity or as a regulator, federal preemption is not available as to

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High-Speed Rail Accountability, filed September 24, 2013, at pp. 34-49. These arguments will not be repeated here.

the Authority's own internal and proprietary decision-making practices and procedures to enable it to avoid its duty to protect the public under CEQA.

**CONCLUSION**

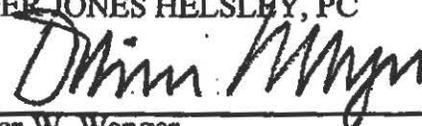
The State of California has sovereign and absolute control over the extent and character of the powers vested in its state agencies, including the Authority. With CEQA, the California legislature set express procedural and substantive limitations on the Authority's powers. The State's sovereign ability to set such limitations is entitled to great deference, as the federal government may interpose itself between the State and its agencies only with an express, unmistakable congressional statement of intent to do so, which is not found in the ICCTA's preemption clause.

For these, and all the foregoing reasons, amicus curiae Preserve Our Heritage respectfully requests this Court defer to the sovereignty of the State of California, and decline the Authority's invitation to apply federal preemption in a manner that expands the character and extent of the Authority's powers beyond those granted by the State to the detriment and devastation of thousands of acres of California farmland and environmentally sensitive areas.

DATED: October 1, 2013.

WANGER JONES HELSLBY, PC

By

  
Oliver W. Wanger  
Attorneys for Amicus Curiae  
PRESERVE OUR HERITAGE

**PROOF OF SERVICE**

My business address is 265 East River Park Circle, Suite 310, Post Office Box 28340, Fresno, California 93729. I am employed in Fresno County, California. I am over the age of 18 years and am not a party to this case.

On the date indicated below, I served the foregoing document(s) described as **APPLICATION AND SUPPLEMENTAL BRIEF OF AMICUS CURIAE PRESERVE OUR HERITAGE** on all interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as noted below.

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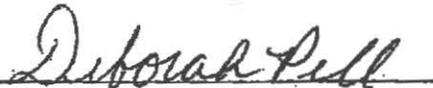
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**EXECUTED ON** October 1, 2013, at Fresno, California.

  X   (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

  
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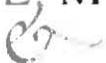
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# ATTACHMENT 3

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August 8, 2014

The Honorable Barbara J. R. Jones  
Presiding Justice  
California Court of Appeal  
First Appellate District, Division Five  
350 McAllister Street  
San Francisco, CA 94102

Re: *Friends of the Eel River v. North Coast Railroad Authority et al.*  
*Californians for Alternatives to Toxics v. North Coast Railroad*  
*Authority et al.*; Consolidated Case Nos. A139222, A139235,  
Supplemental Letter Brief

**I. Introduction**

Pursuant to the Court's Order dated July 29, 2014, Appellants Friends of the Eel River and Californians for Alternatives to Toxics submit this joint supplemental letter brief regarding *Town of Atherton v. California High Speed Rail Authority* (2014) \_\_ Cal.App.4th \_\_ [2014 WL 3665045] ("*Atherton*"). The Court's Order asked the parties to focus particularly on *Atherton's* "discussion of the market participation doctrine and whether that doctrine may be asserted by parties other than the state agency alleged to be a market participant." Order at 2. As set forth below, the *Atherton* decision is squarely on point for the issues in this case. It correctly holds that (1) California's choice to include compliance with the California Environmental Quality Act ("CEQA") as part of owning

and operating a state-owned railroad is clearly state participation in the marketplace and not subject to preemption; and (2) CEQA petitioners may “invok[e] the market participation doctrine [a]s part of petitioners’ [CEQA] challenge.” *Atherton*, 2014 WL 3665045 at \*13.

**II. Under *Atherton* and Well-Established Law, NCRA’s CEQA Review Was Proprietary and Thus Not Preempted by the ICCTA.**

*Atherton* addresses the question of whether the Interstate Commerce Commission Termination Act (49 U.S.C. § 10101 *et seq.*) (“ICCTA”) preempts compliance by a state railroad agency with CEQA. *Atherton* holds that under the well-established market participation exception to preemption, the ICCTA does not preempt CEQA compliance undertaken by a public agency acting in a proprietary, non-regulatory capacity as an owner of a public rail line. *Atherton*’s holding applies with equal force to Respondents’ preemption contention in this case.

**A. *Atherton* Correctly Holds that, Under the Long Standing Market Participant Doctrine, the ICCTA Does Not Preempt a State’s Proprietary Actions.**

*Atherton* follows decades of U.S. Supreme Court and federal Circuit cases holding that, to the extent that they prohibit state action at all, a variety of federal statutes and the dormant Commerce Clause bar only state *regulation* of private entities. *See Atherton*, 2014 WL 3665045 at \*9-10 (citing, among others, *Hughes v. Alexandria Scrap Corp.* (1976) 426 U.S. 794; *Building & Trade Council v. Associated Builders* (1993) 507 U.S.

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218 (“*Boston Harbor*”); *Engine Mfrs. Assn. v. South Coast Air Quality Management Dist.* (9th Cir. 2007) 498 F.3d 1031, 1040-43); *see also, e.g., Building & Construction Trades Dept. v. Allbaugh* (D.C. Cir. 2002) 295 F.3d 28; *Mason & Dixon Lines Inc. v. Steudle*, 683 F.3d 289 (6th Cir. 2012). Likewise, the ICCTA preempts only certain state *regulation* of private rail transportation. *See, e.g., Atherton*, 2014 WL 3665045 at \*6; *Fla. E. Coast Ry. Co. v. City of W. Palm Beach* (11th Cir. 2001) 266 F.3d 1124, 1331, 1337-39; Appellant Friends of the Eel River Opening Brief (“FOER OB”) at 16-17; Appellant Californians for Alternatives to Toxics Appellate Opening Brief (“CATS OB”) at 30-34.

The corollary to this rule is that when a state acts as a market participant, rather than as a regulator, that action is not preempted. *See Boston Harbor*, 507 U.S. at 229; *Atherton*, 2014 WL 3665045 at \*9-10; FOER OB at 20-24; CATS OB at 42-47. For preemption analysis, this distinction between market participation and market regulation is known as the “market participant doctrine.” At the heart of this doctrine is the recognition that state agencies must enter the market in a variety of ways—from managing public property, to undertaking public works projects, to buying and selling goods and services, to subsidizing private enterprises—to carry out their responsibilities. *See, e.g., Boston Harbor*, 507 U.S. at 227. Absent a clear indication of contrary congressional intent, courts will not infer that federal law prevents states from negotiating the terms and conditions of these proprietary interactions. *Id.* at 231-32. Nor can federal law be used to escape these terms and conditions. *Atherton*, 2014 WL 3665045 at \*12.

Following this long standing doctrine, *Atherton* holds that when a public rail carrier is acting in its capacity as the owner of property (*e.g.*, the rail line) or a purchaser of goods and services (*e.g.*, rail services), it has the same freedom to protect its interests as private entities do. The rail carrier has a legitimate proprietary interest in the “efficient procurement of needed goods and services.” *Atherton*, 2014 WL 3665045, at \*9-10. This means “procurement that serves the state’s purposes.” *Id.* at \*10. The *Atherton* court further held that “[u]ndergoing full CEQA review . . . serves the state’s interest in reducing adverse environmental impacts as part of its proprietary action in owning and constructing” the rail line. *Id.* *Atherton* determined that “[d]ue to the State’s proprietary role with respect to the [High Speed Train (“HST”)], as well as the provisions of Proposition 1A (the voter-approved initiative bond measure to fund the HST) and the [High Speed Rail] Authority’s established practice of complying with CEQA, the market participation doctrine applies.” *Id.* at \*4.

In both *Atherton* and this case, citizens sought to enforce a public agency’s duty to comply with CEQA. The High Speed Rail Authority (“Authority”) and the North Coast Railroad Authority (“NCRA”) are both public agencies created by the California Legislature to engage in the business of owning rail lines and providing rail service. In both cases, state law and the agencies’ governing policies require CEQA compliance, and both agencies have a long history of conducting CEQA review for that compliance. When the adequacy of their CEQA compliance was challenged, both public railroad agencies

recently argued that CEQA is preempted by the ICCTA. *Atherton* rejected this position. It correctly found that the market participation doctrine applies to rail service undertaken by a public agency using public money, with a commitment to and long history of efforts at CEQA compliance. *Id.* at \*9.

**B. As in *Atherton*, the Market Participant Exception to Preemption Applies Here.**

**1. NCRA's Actions and Status as a Public Agency Are Analogous to the Situation in *Atherton*.**

To determine whether challenged agency conduct falls within the market participant exception, courts perform a contextual analysis that considers whether the agency's conduct is proprietary. *Atherton* focused on the two-prong test presented in *Cardinal Towing & Auto Repair, Inc. v. City of Bedford* (1999) 180 F.3d 686: (1) does a "challenged action essentially reflect the entity's own interest in its efficient procurement of needed goods and services" when compared with typical private parties; or (2) "does the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem?" *Atherton*, 2014 WL 3665045 at \*9 (quoting *Cardinal Towing*, 180 F.3d at 693). The *Atherton* court then considered five factors showing that the Authority's CEQA review was intertwined with its proprietary actions, thus satisfying the *Cardinal Towing* market participant test. Each of those factors exists here as well.

First, the court reviewed Proposition 1A, which provided funding for the High Speed Rail Project, and related legislation. It found that as a California agency, the Authority must comply with CEQA under Public Resources Code section 21080. *Id.* at \*11. The Legislature had not exempted the Authority from that obligation. To the contrary, Proposition 1A recognized that CEQA review was a necessary component of the Authority's rail project. *Id.*

Here, multiple statutes and regulations also confirm that NCRA must comply with CEQA for its rail project. When it created NCRA, the Legislature did not exempt the agency from its obligation to comply with CEQA. *See* Gov. Code § 93000 *et seq.* (NCRA authorizing legislation). Instead, like *Atherton*, the legislation that has funded NCRA's project, the Traffic Congestion Relief Act ("Relief Act"), requires CEQA compliance. *Id.* § 14556.13(b)(1) (requiring funding applicants to "specify the scope of work, the cost, and the schedule for . . . separate phases of work" including "environmental review"), § 14556.50 (allowing NCRA to apply for funds). The California Transportation Commission—the agency that implements the state's Traffic Congestion Relief Program—has also adopted guidelines requiring a funded project's "implementing agency" to comply with "the requirements of CEQA." App:9:84:2373-74.<sup>1</sup> Moreover, NCRA's own regulations acknowledge its obligation to comply with CEQA.

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<sup>1</sup> Citations to Petitioners' Consolidated Appendix In Lieu of Clerk's Transcripts appear as "App:[volume]:[tab]:[page]."

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AR:20:10623, 10633-37 (NCRA's policy and procedures manual broadly requiring CEQA compliance "for activities within the jurisdiction of the agency").<sup>2</sup> These statutes and regulations all confirm that from inception through funding, the Legislature intended NCRA to comply with CEQA.

Second, the *Atherton* court found that Proposition 1A actually *funded* part of the Authority's environmental review for its rail project. *Atherton*, 2014 WL 3665045 at \*11. It is undisputed that NCRA has similarly received Relief Act funding for its CEQA documents, including the EIR challenged in this case. *See, e.g.*, AR:13:6795-96, 6931-32.

Third, the court focused on a statement in the record that the High Speed Rail Project could not proceed without "all necessary project level environmental clearances." *Atherton*, 2014 WL 3665045 at \*12. Here, the record is replete with similar statements acknowledging NCRA's obligation to comply with CEQA. For instance, NCRA's Executive Director stated to the Surface Transportation Board ("STB"), under penalty of perjury, that NCRA "is required to comply with the California Environmental Quality Act" prior to rail operations. AR:13:6574. The Executive Director has made similar representations to the Marin County Superior Court. App:13:100:3643-45. Even NCRA's legal counsel has represented in court that NCRA's "status as a public agency applying for public funds trumps its preemption as a rail carrier and obligates NCRA to determine

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<sup>2</sup> Citations to the Administrative Record appear as "AR:[volume]:[page]."

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whether CEQA is applicable by its terms.” App:13:100:3660-61; *see also* App:13:100:3624 (“The lease agreement itself has a condition precedent that NCRA comply with CEQA prior to NWP Co. taking possession of the property”). Like *Atherton*, these representations further show that CEQA compliance is a necessary component of NCRA’s rail project.

Fourth, the *Atherton* court observed that the Authority had a “*longstanding* practice of complying with CEQA in connection with” its rail project, preparing numerous environmental documents. *Atherton*, 2014 WL 3665045 at \*12. Similarly here, NCRA has for years maintained it must comply with CEQA for the rail line, and has issued numerous CEQA notices and review documents. For the current project, NCRA issued two notices of preparation, a draft EIR, a revised draft EIR, a final EIR, a mitigation monitoring and reporting program, CEQA findings, and EIR certification. AR:1:18-74, 132-527; 2:547-4:1346; 5:1932-6:2851. In addition to the EIR challenged here, NCRA has prepared many other CEQA documents to reopen its rail line, including categorical exemptions and negative declarations. AR:16:7996 (Notice of Exemption); SAR 195 (NCRA internal memo, categorical exclusion for repairs will be issued); App:13:100:3644 (describing NCRA’s initial preparation of a negative declaration for its project).

Additionally, NCRA has repeatedly represented to its partners, its sister agencies, and the public that it is required to comply with CEQA just like any other California

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agency. These representations are found in documents submitted to the California Transportation Commission. *See* AR:13:6632 (2006 report), 6791 (November 2006 application for Commission funding). They are found in NCRA's Lease with NWP Co. (AR:13:6731), and in dealings with SMART and the City of Novato. AR:17:8911; App.14:104:3830. They are found in NCRA's own reports. *See* AR:9:4696 (2001 Strategic Plan Update), 4715, 4716, 4740 (2002 Capital Assessment Report); App:8:77b:2091, 2093 (February 2007 Strategic Plan Update); SAR 192-193. And they are found in public representations contained in its environmental documents and elsewhere. AR:4:1367; 7:3423, 3427-29, 3477, 3481-83; 16:0800; SAR:197:49 (EIR will study impact of operations). These representations also reveal that CEQA compliance has always been a necessary component of NCRA's efforts to reopen the rail line.

Finally, the *Atherton* court recognized that ample ICCTA precedent establishes that a rail carrier's voluntary commitments defeat preemption because such commitments reflect "the carrier's own determination and admission that the agreements would not unreasonably interfere with interstate commerce." *Atherton*, 2014 WL 3665045 at \*12 (quoting *Joint Petition for Declaratory Order—Boston and Maine Corporation and Town of Ayer, MA.* ( STB, Apr. 30, 2001, No. 33971) 2001 STB Lexis 435 at pp. \*18–\*19). The court then held Proposition 1A was akin to a contract. *Id.* As Petitioners have extensively briefed, NCRA has entered multiple agreements with the state, with NPW Co., and with the City of Novato, all of which require NCRA to comply with CEQA for its rail Project.

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CATS OB at 12-15, 17, 47-50; FOER OB at 7-12; Appellants' Joint Reply Brief at 6-11.

Just as in *Atherton*, these agreements stem from NCRA's proprietary determination that CEQA compliance would not interfere with interstate commerce. Rather, CEQA compliance was a necessary step to secure funding for and ultimately reopen the rail line.

For all of these reasons, the market participant exception is equally as applicable here as it was in *Atherton*.

**2. The Facts Here Present an Even Stronger Justification than Those in *Atherton* for Applying the Market Participant Exception.**

Beyond the factors considered in *Atherton*, additional facts weigh in favor of applying the market participant doctrine here. That is, NCRA has engaged in additional proprietary behavior in opening its rail line. NCRA not only received state funding for its project like the Authority in *Atherton*, it also entered into negotiated agreements with California Transportation Commission that contained explicit representations that NCRA would prepare the EIR challenged here in exchange for such funds. AR:9:4620-46; 16:8563. The Commission even paid for the EIR. AR:13:6795-96, 6931-32. And the EIR itself acknowledges that it considers impacts from Commission-funded work. *See, e.g.*, AR:16:8080, 8572 (funding allocated for repairing Black Point Bridge); AR:2:574, 658-59, 728 (EIR considering impacts from repairing Black Point Bridge). Such contract terms like NCRA's CEQA compliance are not preempted, but rather proper conditions placed on the management of the state funds. *See Northern Illinois Chapter of Associated*

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*Builders and Contractors, Inc. v. Lavin* (7th Cir. 2005) 431 F.3d 1004, 1006 (conditions placed on grant funds for a financed project are not “regulation” subject to preemption); *Engine Mfrs. Assn.*, 498 F.3d at 1043, 1048 (under the market participant doctrine, the Air District properly imposed otherwise preempted vehicle pollution standards on state-purchased vehicles).

Second, NCRA entered the marketplace to procure rail carrier services. This action was taken under the express terms of NCRA’s authorizing legislation, which tasks NCRA with reopening the rail line, but anticipates public-private agreements to facilitate that end. Gov. Code §§ 93010(a), 93020. NCRA accordingly issued a request for proposals, and NWP Co. submitted a bid. AR:13:6607, 6640-6722. In negotiating a lease agreement with NWP Co. for such services, NCRA explicitly conditioned the lease on NCRA’s CEQA compliance. AR:13:6731. It advised that the Lease “does not authorize NWP Co to take possession of the property or to commence operations” until this condition (NCRA’s compliance with CEQA) is satisfied. App:14:104:3831, ¶ 50. NCRA’s request for proposals, and ultimately, its negotiated lease agreement with NWP Co., including the CEQA compliance term, are classic examples of a public agency engaging private entities in the marketplace. As multiple courts including the Supreme Court have found, preemption does not reach such proprietary conduct. *See, e.g., Boston Harbor*, 507 U.S. at 227.

**C. *Atherton* Correctly Holds that the *City of Auburn* Line of Cases Is Inapplicable Where a State Agency Is Pursuing Its Own Rail Project.**

Respondents have relied heavily on the Ninth Circuit's opinion in *City of Auburn v. U.S. Government* (1998) 154 F.3d 1025 to claim that the ICCTA broadly preempts CEQA's application to rail projects. But *Atherton* notably recognizes that "federal cases subsequent to *City of Auburn* have found the ICCTA does not preempt all state and local environmental laws." 2014 WL 3665045 at \*8. Instead, the ICCTA preempts only state "regulation" that results in an "interference with rail transportation." *Id.* at \*6 (citation omitted); *see also id.* at \*7 ("What matters is the degree to which the challenged regulation burdens rail transportation.") (citation omitted). This is the case even for categorical or facial preemption claims. *Id.* at \*6. In *Auburn*, the STB found, and the Ninth Circuit affirmed, that the ICCTA preempted a State's "permitting process" for construction of a private rail line. 2014 WL 3665045 at \*8-9. In *Atherton*, as well as in this case, the STB did not find ICCTA preemption.

*Atherton* correctly holds that where, as here, there is no regulation of a private railroad, much less burdensome regulation, *Auburn* and similar cases dealing with permitting regulation are simply inapplicable. *Id.* As in *Atherton*, there is no permit at issue for a private railroad here. Rather, there is a public railroad, owned by a public agency, which is engaged in marketplace activities to provide rail service on a public rail line. California public agencies, such as the Authority and NCRA, must comply with

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CEQA when approving their own discretionary projects or expending public funds. *Atherton*, 2014 WL 3665045 at \*11 (citing Pub. Res. Code § 21080); Pub. Res. Code §§ 21065(a), 21100. The ICCTA does not preempt such CEQA compliance, which furthers the State's proprietary interests in managing its property and funds (*i.e.*, market participation) and not as a prerequisite to granting a permit for a private project (*i.e.*, market regulation). As *Atherton* correctly holds, *Auburn* is not on point.

Respondents may claim that *Auburn* applies here because this case, unlike *Atherton*, involves a private rail carrier. However, as explained above, NWP Co. does not own the rail line, NCRA does. In entering the lease agreement with NCRA, NWP Co. readily agreed to NCRA's CEQA compliance. AR:13:6731. As NWP Co. itself has argued: "NWPCo is not even a proper 'real party in interest' in this action because NWPCo neither applied for nor received any approval challenged in this action." App:9:83:2314; *see also* App:9:83:2322 ("At no point after the STB's approvals did NWPCo submit any applications or other requests for approval to operate the line to NCRA."), 2335 ("When NCRA applied to the CTC for disbursement of TCRA funds, it did so on its own behalf and for its own benefit pursuant to its statutory mission to deliver freight service on the line"). Thus, by NWP Co.'s own admission, NCRA was not acting in an "approval agency" or regulatory capacity in conducting CEQA review for the Project. There is no "permitting process" at issue here. *Auburn* is inapposite.

**D. *Atherton* Correctly Distinguishes the DHL Cases and the California Supreme Court Has Subsequently Granted Review of *Grupp v. DHL Express*.**

The Respondent in *Atherton*, like Respondents here, argued that the market participant doctrine cannot apply to “a generally applicable state regulatory law—here CEQA—standing alone.” *Atherton*, 2014 WL 3665045 at \*13 (internal quotations omitted). In *Atherton*, the Authority initially cited *DHL Express (USA), Inc. v. State of Florida, ex rel. Grupp* (Fla. 2011) 60 So.3d 426, as well as related cases in New York for this proposition. After the Authority submitted its briefing, the California Court of Appeal issued a related decision in *Grupp v. DHL Express (USA), Inc.* (2014) 225 Cal.App.4th 510, 524 (“*Grupp Ca.*,” collectively the “*Grupp cases*”). See *Atherton*, 2014 WL 3665045 at \*13. As with the Florida and New York *Grupp* cases, the California *Grupp* case decided that the market participant doctrine did not exempt state law False Claims Act claims from preemption. *Id.* As an initial matter, the California Supreme Court recently granted review in *Grupp Ca.* 2014 WL 3746953, review granted July 30, 2014, S218754. Thus, the case is no longer good law. Cal. Rules Ct., rule 8.1105(e).

In any event, *Atherton* correctly distinguishes all three *Grupp* cases, which involved lawsuits against DHL, a private shipper, for violation of the states’ respective false claims acts. *Atherton*, 2014 WL 3665045 at \* 13. DHL argued the suits were preempted by federal law, but the plaintiffs argued the market participation exception applied because the States had general contracts with DHL for shipping services. *Id.* The

respective courts found that the market participation exception did not apply because the lawsuits clearly sought to regulate DHL's conduct by imposing civil penalties and treble damages. *Id.* This was not part of the bargain that DHL made to provide shipping services to the State. *Id.* This stands in contrast to the situation here and in *Atherton*, where CEQA does not impose such penalties, and regulation of a third party is not at issue. *Atherton* emphasized this critical distinction:

While the plaintiffs in the *Grupp* cases sought to regulate the behavior of a third party, DHL, the remedy sought here [in *Atherton*] would apply *only* to this final revised PEIR. Here, application of the market participation doctrine will serve to regulate only the state's own behavior, and such regulation was agreed to by the state and required by Proposition 1A.

*Atherton*, 2014 WL 3665045 at \*13 (emphasis in original).

This distinction applies equally here—applying the market participation doctrine will regulate only NCRA's behavior. As explained, the presence of NWP Co. does not alter this analysis because the CEQA compliance at issue is for NCRA's rail line, not NWP Co.'s. Further, unlike DHL in the *Grupp* cases, NWP Co. expressly acknowledged and agreed to NCRA's obligation to comply with CEQA in its business decision to operate the rail line. AR:13:6731; App:8:77b:2068, 2093; 14:104:3768-69. The *Grupp* cases are not relevant here.

**III. *Atherton* Correctly Holds that CEQA Petitioners Have the Ability to Raise the Market Participant Exception to Preemption.**

In *Atherton*, the Authority claimed that only an agency could argue that a governmental action was proprietary in nature and not subject to preemption under the market participant doctrine. *Atherton*, 2014 WL 3665045 at \*12-13. The Authority argued that CEQA petitioners did not have the right to raise the market participant doctrine as an exception to preemption. The Authority's position is akin to Respondents' here, who contend that CEQA Petitioners do not have the right to argue that "CEQA is not a 'regulation' for preemption purposes because the obligation to comply with it arises out of a contract." Joint Response Brief of Respondent and Real Party in Interest ("Response Brief") at 75.

The *Atherton* Court rejected the Authority's claim. While noting the posture of the case was "unusual, to say the least," the court found there is "no direct authority for [the Authority's] proposition that only a state entity can invoke the market participation doctrine." *Atherton*, 2014 WL 3665045 at \*12-13. The court held that "[i]t is clear that citizens have standing to bring suits to enforce CEQA. Here, invoking the market participation doctrine *is part of petitioners' challenge to the final revised PEIR.*" *Id.* at \*13 (citation omitted) (emphasis added).

As in *Atherton*, this case presents an "unusual" situation where another public agency, NCRA, is also "inexplicably arguing for federal preemption instead of defending

the application of state law.” *Id.* at \*12. However, as *Atherton* holds, “the power to ‘invoke’ the [market participant] doctrine” is not reserved for the agency alone. *Id.* Rather, the doctrine may be invoked by CEQA Petitioners in the course of their challenge to certification of an environmental document. *Id.* at \*12-13.

As set forth above, the market participant doctrine is an exception to preemption. When an agency acts in its proprietary capacity in the marketplace, its actions are not regulation. *Boston Harbor*, 507 U.S. at 227-28. The court undertakes a contextual analysis of the nature of the challenged action, reviewing a number of factors (such as the public nature of the project), to determine if the exception applies. *Id.* at 227-33; *Atherton*, 2014 WL 3665045 at \*11-13. No one party—such as the state agency—can make that determination. *Atherton*, 2014 WL 3665045 at \*12-13.

In contrast to the market participant doctrine where the court’s inquiry is directed to whether a governmental action is proprietary, standing involves the court’s determination whether a particular person or entity has the ability to challenge that action in the first instance. Generally, to demonstrate standing to sue a person or entity must show only that it has a sufficient “beneficial interest” in the action to be affected by it, and the standard is far less strict in public interest cases. *See, e.g., U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP)* (1973) 412 U.S. 669, 689-90 (environmental groups showed sufficient interest to confer standing to challenge decision involving railroad rates by predecessor to STB); *Bozung v. Local Agency Formation Com.*

(1975) 13 Cal.3d 263, 272 (broad standing rules apply in environmental cases); Code Civ. Proc., § 1086; FOER OB at 30-31; CATS OB at 24-25. Here, as in *Atherton*, it is undisputed that Petitioners have standing to bring their CEQA claims challenging NCRA's certification of the final EIR and approval of the Project. *See* Response Brief at 75. The preemption and market participation analysis occurs as "*part of petitioners' challenge*" to the final EIR. *Atherton*, 2014 WL 3665045 at \*13 (emphasis added).

Respondents will undoubtedly attempt to distinguish this case from *Atherton* on the grounds that Petitioners' claims must sound in contract, not writ of mandate, because NCRA's CEQA obligation allegedly arises solely from contracts. This argument fails because it is legally and factually incorrect. As detailed above (*supra*, Part I), NCRA's CEQA obligation arises from its status as a public agency created by the California Legislature to own and manage a public rail line, one component of which includes its business agreements. All of these circumstances demonstrate that NCRA's actions relate to the management of public property and funds, and do not constitute regulation of a private entity.

The Authority was unable to provide, and the *Atherton* court did not find, any authority for the proposition that only the State agency can invoke the market participation doctrine to defeat a preemption claim. *Atherton*, 2014 WL 3665045 at \*12-13. As *Atherton* held, public agencies must comply with CEQA as a condition of exercising their discretion to approve a public project. *Id.* at \*11 (citing Pub. Res. Code §

21080). There, the Authority's CEQA responsibility arose from both its status as a public agency and its longstanding history of CEQA compliance, and also from "a voter approved bond measure [which] is characterized as 'either contractual or analogous to a contract.'" *Id.* at \*12.<sup>3</sup> Thus, the Authority's "discretion is not unfettered; it must follow the directives of the electorate. As explained *ante*, one of those directives is compliance with CEQA." *Id.* Similarly here, the legislative history of NCRA shows that it has an obligation to comply with CEQA when acting to open the public rail line and provide rail service. Petitioners have standing to bring their suits to enforce that obligation.

As *Atherton* states, there is no direct authority holding that a third party is barred from raising a market participant or similar theory to demonstrate that preemption does

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<sup>3</sup> While the *Atherton* court, in its preemption analysis, analogized the bond measure "to a contract," *id.*, at \*12, it did not require the petitioners to have a contract claim as the basis of their standing to enforce CEQA. It would be incorrect to require such a contract claim because, as *Atherton* explains, arguments surrounding an agency's agreement to comply with CEQA are properly determined as part of petitioners' CEQA writ action. *Id.* at \*13; *see also Bunnett v. Regents of Univ. of California* (1995) 35 Cal.App.4th 843, 847-48 (petitioners must bring a writ action when aggrieved by an agency decision, even if that decision arose from a contractual agreement); *Associated General Contractors*, 195 Cal.App.4th at 752, 754 (writ of mandate action brought by third party challenging governmental agreement with trade unions); FOER OB at 30. The same analysis applies here. Moreover, the pleadings in this case sufficiently allege the relevant facts and, even if such a contract action were somehow required here (unlike in *Atherton*), could be treated as such. Code Civ. Proc. § 452 ("In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties"); *Buxbom v. Smith* (1944) 23 Cal.2d 535, 542 ("The subject matter of an action and the issues involved are determinable from the facts alleged rather than from the title of the pleading"); Appellants' Joint Reply at 53; App:1:8, 10, 12; 1:5:42, 44. Finally, if the Court finds the allegations currently insufficient, Petitioners restate their request for leave to amend the Petition. Code Civ. Proc. § 473(a)(1); *Aubry v. Tri-City Hosp. Dist.* (1992) 2 Cal.4th 962, 970-71 (granting plaintiffs leave to amend their complaint to allege a third-party beneficiary theory in order to claim prevailing wage rights under a public works contract that incorporated California's prevailing wage law); App:5:47:1212; Reporter's Transcript (May 8, 2013) at 6.

not apply. *Id.* at \*13. On the other hand, there are several cases where third parties raised such theories, and the courts did not hold those parties were precluded from doing so. *See Atherton*, 2014 WL 3665045 at \*13 (noting that “in none of the *Grupp* cases did the court rule that only the state could invoke the market participant doctrine”); *see also County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 957-62; *Alameda Newspapers, Inc. v. City of Oakland* (9th Cir. 1996) 95 F.3d 1406, 1411-12, 1417 (third party union had standing to intervene in dispute between newspaper owner and City, and had the ability to raise the market participant doctrine to defeat preemption of City’s actions) (questioned on other grounds). Additionally, the market participation doctrine has been raised in numerous cases involving actions other than breach of contract. *See, e.g., Johnson v. Rancho Santiago Community College Dist.* (9th Cir. 2010) 623 F.3d 1011, 1016-17 (declaratory and injunctive relief); *Engine Mfrs. Assn.*, 498 F.3d at 1037 (same); *Associated General Contractors of America v. San Diego Unified School District* (2011) 195 Cal.App.4th 748, 754, 758 (writ of mandate); *Burns Internat. Security Services Corp. v. County of Los Angeles* (2004) 123 Cal.App.4th 162, 165, 173-76 (injunctive and declaratory relief).

Additionally, the Court of Appeal’s holding in *County of Amador* establishes that Petitioners, in conjunction with their CEQA challenge, may argue that NCRA’s actions are not preempted because those actions are proprietary. *See County of Amador*, 76 Cal.App.4th at 958-62. In *County of Amador*, the County petitioner brought petition for

writ of mandate challenging an agreement between the local Irrigation District and Pacific Gas and Electric Company for the sale of a hydro-electric facility. *Id.* at 940, 965. The petition alleged that the Irrigation District failed to comply with CEQA in entering the agreement. *Id.* The Irrigation District argued that petitioners' CEQA challenge was preempted by the Federal Power Act. *Id.* at 941. The court noted that while the Federal Power Act broadly preempts state regulation of hydroelectric facilities, it does not preempt governmental actions relating to proprietary water rights. *Id.* at 957-58. The court found that because the sale agreement involved consumptive water uses, the Federal Power Act does not preempt CEQA review of the transaction. *Id.* at 958-62; *see also* FOER OB at 28; Appellants' Joint Reply at 27. *County of Amador* involves a situation similar to *Atherton* and this case, where CEQA petitioners who were not a public agency engaged in a proprietary action were still entitled to show the proprietary nature of the governmental action to establish that preemption does not apply.

#### **IV. Conclusion**

In sum, under *Atherton* and well-established law, the ICCTA does not preempt Petitioners' CEQA claims. Even assuming the ICCTA preempts CEQA in other contexts, there is no preemption where a public agency's environmental review stems from its status as a public agency entering the marketplace in its legislatively-mandated efforts to reopen a public rail line. As *Atherton* holds, the market participation exception to preemption applies in such circumstances. Furthermore, as *Atherton* holds, Appellants



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AMY J. BRICKER

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**PROOF OF SERVICE**

***Friends of the Eel River v. North Coast Railroad Authority, et al.  
Case No. A139222, A139235  
California Court of Appeal - First District***

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the City and County of San Francisco, State of California. My business address is 396 Hayes Street, San Francisco, CA 94102.

On August 8, 2014, I served true copies of the following document(s) described as:

**SUPPLEMENTAL LETTER BRIEF**

on the parties in this action as follows:

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Executed on August 8, 2014, at San Francisco, California.

/s/  
Sean P. Mulligan

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August 8, 2014  
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