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SURFACE TRANSPORTATION BOARD

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STB FINANCE DOCKET NO. 35724 (Sub-No. 1)
CALIFORNIA HIGH-SPEED RAIL AUTHORITY
– CONSTRUCTION EXEMPTION –

IN FRESNO, KINGS, TULARE AND KERN COUNTIES, CALIFORNIA

PROTEST AND OPPOSITION STATEMENT
OF
KINGS COUNTY WATER DISTRICT AND
CITIZENS FOR CALIFORNIA HIGH-SPEED RAIL ACCOUNTABILITY
TO
PETITION FOR EXEMPTION OF
CALIFORNIA HIGH-SPEED RAIL AUTHORITY

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I. PROCEDURAL HISTORY OF THE PRESENT PETITION AND THE PARTIES PROTESTING AND OPPOSING THE PETITION FOR EXEMPTION.

Kings County Water District and Citizens for California High Speed Rail Accountability hereby protest and oppose the California High-Speed Rail Authority's ("CHSRA" or "Authority") Petition for Exemption under 49 U.S.C. § 10502 from the certification requirements of 49 U.S.C. § 10901.

1. Procedural History and Setting.

The Petition was secretly filed on September 26, 2013 without service on any party who appeared in the proceeding on the Authority's earlier exemption petition filed on March 27, 2013. Nor was the Petition served on any landowner in the Fresno to Bakersfield alignments whose property will be impacted by the Rail Project. Thus, all the parties likely to be interested in the matter, and to oppose it, were kept ignorant of the Petition and the proceedings thereon. As shown below, the Petition has to this day never been served on those landowners and there is no evidence that any notice of the kind that passes constitutional muster has been made on any of those landowners. To date, the process stands as an example of the pseudo-legality of the bureaucratic-administrative state that holds conformance to its own rules more to heart than the spirit of the law.

Under the Board's rules, only 20 days are allowed to respond to a petition involving the largest public works project in California's history. Since no service by the Authority on known interested parties was made, the 20 day deadline ran on October 16, 2013.

This gross violation of due process was eventually brought to the Board's attention, after individual citizens decided they better check up on what their government was doing. The Board then released a decision dated December 3, 2016 granting an extension to Christmas Eve, December 24, 2013, for interested parties to submit "comments" on the petition. It was then pointed out to the Board that there still had been no service of the petition and that the response date was in the best tradition of bureaucratic legerdemain.

The Board then issued a decision dated December 20, 2013 extending the response date to February 14, 2014, and finally ordering the Authority to notify all parties of record in the main docket of this proceeding by January 3, 2014 and to contemporaneously certify having done so to the Board. The Board failed to order actual notice to all landowners within and along the proposed Fresno-to-Bakersfield alignments, relying instead on the fiction of Federal Register notice, in violation of due process. Cf. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (Op. by Jackson, J.).

The Authority failed to comply with the Board's December 20, 2013 Order even though its attorney is a long time former official with the Board. After being informed of this irregularity by both the District and CCHSRA, the Board issued yet another Decision, dated February 3, 2014, noting that on January 24, 2014, the Authority had FINALLY SERVED its September 26, 2013 Petition and the Board's December 20, 2013 decision on all parties of record in the main docket, and directing that replies to the Petition would be due by March 7, 2014.

On February 28, 2014, the Community Coalition on High-Speed Rail (CC-HSR) filed a letter requesting a further extension of the comment period. CC-HSR noted that two rulings of the Sacramento Superior Court affecting funding for the Project are under review before the California Third District Court of Appeal. CC-HSR pointed out that an extension of the comment deadline is warranted because the pending California state court litigation renders uncertain the Authority's ability and plans to finance and build the portion of the Project described in the Petition. CC-HSR argues that "[u]nder the circumstances, to require definitive responses from persons opposed to the Authority's exemption petition would be unrealistic, unfair and not likely helpful to this Board." CC-HSR therefore requested that the deadline for comments on the transportation merits of the proposed transaction be postponed until "15-20 days after the decision of the Third District Court of Appeal on the matters now pending before that court," or, alternatively, "to a date certain in early May of 2014 that it [the Board] could adjust as needed."

On March 6, 2014, the Board issued yet another Decision, this time deciding that the request by CC-HSR cannot be granted, as the Board was unable to reach a majority.¹ Both Board members submitted comments.

One Board member thought that “By the current deadline of March 7, the public will have had more than five months [sic] from the date the Authority’s petition was filed to develop and submit comments on the transportation merits of the proposed construction, and more than eight times the standard comment period of 20 days. See 49 C.F.R. § 1104.13(a).”²

The other Board member

support[s] full public participation in this proceeding. As such, it is unfortunate that the Board cannot agree to extend the comment period on the proposed Fresno-to-Bakersfield Line construction as requested by the Community Coalition on High-Speed Rail. An extension of the current deadline on the project’s transportation merits would be appropriate, particularly given the growing controversy over this project and pending action in state court regarding the project’s future.

2. The Parties.

Kings County Water District. Kings County Water District (“KCWD”) is a California County Water District formed in 1954 under the provisions of California Water Code §§ 30000 et

¹KCWD and CCHSRA understand the President has selected a nominee to fill the third, now vacant, Board seat. The nominee has links to Cambridge Systematics, a firm hired by the Authority to produce the inflated ridership study to justify the financial viability of building in the San Joaquin Valley. KCWD is an amicus in the Prop. 1A or Tos case. The plaintiffs submitted evidence that the Cambridge Systematics study is false. The defendants including the Authority submitted no evidence in opposition. Therefore, the trial court’s findings must conform to the admitted evidence. A nominee affiliated or with links to Cambridge Systematics would be disqualified from sitting on the Board while it decides the Petition filed last September.

The decision also refers to a reply filed by the Authority on March 5, 2014. Needless to say, and consistent with its demonstrated proclivities, at the time of this writing the Authority’s reply has not been received. KCWD and CCHSRA therefore reserve the right to respond to the Authority’s reply when and if it is received.

²KCWD and CCHSRA disagree with this computation of time, for the reasons given above regarding lack of due and legal notice, failure to comply with Board orders, etc. The present procedural setting here is very instructive. If the strict 20-day rule were applied, the Petition should have been granted vel non, as it was without opposition. If the Board’s December 20, 2013 Order was strictly applied, the Petition should have been denied on the basis of the Authority’s failure to comply with that Order within the time allotted. No reason is stated for giving the Authority more leeway than interested and directly impacted parties such as the landowners in the path of the Project.

seq. See Atchison etc. Ry. Co. v. Kings County Water District (1956) 47 Cal.2d 140. The District consists of about 150,000 acres (234 mi²) of highly developed farmland in the northeastern most portion of Kings County. Both “Hanford West” and “Hanford East” alignment alternatives for the passage of the Project across Kings County will pass through lands within the District, causing lasting damage without any benefit to the land and people who live and work in the District.

Citizens for California High-Speed Rail Accountability (CCHSRA). Citizens for California High-Speed Rail Accountability (CCHSRA) is a non-profit mutual benefit corporation. It is composed of people living within Kings County, California, many of whom own land within the California High-Speed Rail Authority's (Authority) proposed alignments in the Fresno to Bakersfield section of its proposed project.

KCWD and CCHSRA submit the following opposition to the Petition.

II. THE LACK OF FINANCIAL FITNESS OF THE PROJECT REQUIRES DENIAL OF THE PETITION.

Vice Chair Begeman, in her December 3, 2013 concurring opinion, expressed the need to evaluate the Project’s “financial fitness,” and rightly so:

The Board should not approve any segment of this enormous public works project unless it first carries out a comprehensive analysis of the segment at issue, including financial fitness. ... Today’s decision acknowledges the growing controversy regarding California’s bond funding process. Considerable federal taxpayers’ dollars are already at stake and the recent court decisions may very likely impact construction timing and costs. ... [W]e should also understand its funding aspects, and then make a decision on a full record. The Authority’s current petition fails to include any details about the project’s finances. That void needs to be corrected before the Board acts further.

Any evaluation of the Project’s “financial fitness” should begin with a review of its funding history. On November 4, 2008, the voters of California approved the “Safe, Reliable High-Speed Passenger Train Bond Act for the 21st Century [Prop. 1A],” a state ballot measure that would provide for the sale of up to \$9.0B in state general obligation bonds to construct a high-speed rail project. But the measure enacted a number of conditions, one of which was that the use of Prop. 1A bond

proceeds could not exceed 50 percent of the total cost of construction for each corridor or usable segment.³

On October 1, 2009, the Authority submitted a series of applications to the FRA for grant funds under the FRA’s High-Speed Intercity Passenger Rail (HSIPR) Program. The Authority was seeking grant funds for its Merced to Fresno and Fresno to Bakersfield sections of its HST project.⁴ The Authority promised in its applications that the Authority would provide 50% matching funds that would come from state bonds and local and private funding. The applications also represented that the project would build 50 miles of new, high-speed-capable track and affiliated structures from Merced to Fresno, and 98 miles of the same from Fresno to Bakersfield, for a total of 148 miles.

In response to the foregoing applications, the Authority received a number of grants in 2010 and 2011. The Authority’s November 3, 2011 Funding Plan summarized the total amount of federal grants it received and the amount of state matching funds that it would use on its Merced to Bakersfield HST project:

ARRA (HSIPR) Pre-construction and construction funding.	\$2,387 million
FY 2010 Appropriation construction funding.	929 million
State matching funds.	<u>2,684 million</u>
TOTAL for the Merced to Bakersfield project.	\$6,000 million ⁵

The terms and obligations of the above grants were consolidated and spelled out in the Grant/Cooperative Agreement, Amendment No. 5, dated December 5, 2012. On pages 2 and 3 (4 and 5 pdf) of the Agreement the total cost of the Authority’s project (148 miles from Merced to Bakersfield) was estimated at \$5,058 million. It shows updated figures for the federal grants and the

³ California Streets and Highways Code, Section 2704.08(a).

⁴ http://www.hsr.ca.gov/About/Funding_Finance/federal_stimulus.html.

⁵ Authority’s *November 3, 2011 Funding Plan*, p. 8 (15 pdf), http://www.hsr.ca.gov/about/funding_finance/Funding_Plan_2011.pdf.

Authority's cost sharing responsibility: \$2,553 million from FRA funding assistance, and \$2,506 million from Grantee's contributions.⁶

The Authority applied for additional federal high-speed train funding in 2011, but failed to receive any. Since then, for whatever reasons, it appears the Authority has failed to submit applications for more federal funding. Considering the huge federal deficits, and being mindful that Congressional representatives from other states are unlikely to vote for additional high-speed rail moneys for California unless they can get like amounts for their own states, the prospects of getting meaningful grants from federal sources in the foreseeable future is unlikely. As for private funding, the Authority has been pursuing it for some years, or says it has, but has yet to identify a single willing investor.

The Authority recently prepared a "Project Update Report to the California State Legislature," dated November 15, 2013.⁷ Under the section on "Construction Costs," Table 2 sets forth the 2012 Business Plan Cost Estimates, expressed in year-of-expenditure dollars for each section:

Merced-Fresno.....	\$5,482 million
Fresno-Bakersfield.....	\$7,711 million ⁸

The Report states that the above figures include \$8 billion in program wide costs (rolling stock, etc) that were prorated across project sections, and that these program wide costs represent about 3% of the project's cost. Therefore, if we reduce the above figures by 3%, the remaining costs for these sections would be:

⁶ *Grant/Cooperative Agreement between FRA and Authority, Amendment No. 5, dated December 5, 2012, p. 8 (10 pdf),* http://www.hsr.ca.gov/docs/about/funding_finance/funding_agreements/FR-HSR-0009-10-01-05.pdf.

⁷ *Authority's Project Update Report to the California State Legislature, November 15, 2013,* http://www.hsr.ca.gov/docs/about/legislative_affairs/SB_1029_project_update_rpt_11_2013.pdf.

⁸ *Ibid.*, p. 12.

Merced-Fresno.....	\$5,318 million
Fresno-Bakersfield.....	7,480 <u>million</u>
TOTAL	\$12,798 million

The Authority’s staff also prepared another recent report: a 70-page document entitled “Staff Recommendation: Preferred Alternative –Fresno to Bakersfield Section,” dated November, 2013.⁹ It estimated the preferred alternatives for the Fresno to Bakersfield section will cost \$7.174 billion (in 2010 dollars).¹⁰ Of course, this number should be escalated to reflect year-of-expenditure costs. Assuming construction primarily occurring in 2015, and assuming a 3% per year cost escalator, this number swells to \$8.074 billion.

As can be seen, the Authority’s most recent estimates do not appear to agree, except that it is clear that its costs are escalating and exceed by a considerable amount the approximately \$6.0 billion it had from federal grants and state bond (Prop. 1A) funds.

When the Authority first applied for federal grant moneys in 2009, it claimed that it would construct 148 miles of HST-capable track and supportive improvements – from Merced to Bakersfield - and that it would cost \$5 billion. Today, it is only planning to build somewhere around 80 miles of track – from Madera to about 40 miles north of Bakersfield, which would cost about \$11 billion, of which it only has about \$6 billion. Therefore, not only are the estimated costs escalating, but the number of miles the Authority expects to construct has been declining significantly.

But it gets dramatically worse. In 2011, the County of Kings, farmer John Tos, and landowner Aaron Fukuda filed a lawsuit against the Authority and other defendants, contending that the Authority and the other defendants had violated a number of the requirements set forth in the

⁹ Authority’s *Staff Recommendation: Preferred Alternative – Fresno to Bakersfield Section, November, 2013*, <http://www.hsr.ca.gov/docs/brdmeetings/2013/brdmtg-item2-attach-fres-baker-staff-recommend-prefer-alternative.pdf>.

¹⁰ *Ibid.*, p. 3-19.

Proposition 1A state ballot measure.¹¹ Following lengthy briefings and a hearing, Sacramento County Superior Court Judge Michael Kenny issued his decision on August 16, 2013 (see **Exhibit A**).

Proposition 1A, entitled the “Safe, Reliable, High-Speed Passenger Train Bond Act for the 21st Century,” was approved by the voters of California in 2008. The measure added a number of new sections and subsections to the California Streets and Highways Code. One of these was Streets and Highways Code § 2704.08(c), which specified that the Authority had to approve a detailed funding plan. In addition to a number of other elements, this funding plan was required to (1) identify its “usable segment,” then (2) identify the sources of all funds to be invested in the usable segment, and then (3) certify that all necessary project level environmental clearances for the usable segment had been completed.

The Authority approved its funding plan dated November 3, 2011. Of the two “usable segments” identified in the funding plan, the Authority later chose the 300-mile section from Merced to the San Fernando Valley, and identified it as its Initial Operating Segment (IOS). The Authority estimated the cost of its IOS at approximately \$31 billion.¹² However, the Court agreed with the Plaintiffs that the funding plan had only identified the funding sources for the Initial Construction Section (ICS), which was the 130-mile section from Madera to Bakersfield. This was \$3.316 billion from federal grants and \$2.684 billion from Prop 1A bond proceeds, for a total of \$6.0 billion. What was the source of the other \$25 billion needed for its Merced to San Fernando Valley “usable segment?” The funding plan did not identify them, and the Court concluded that the Authority had failed to comply with that required element of Section 2704.08(c).

The Court also agreed that the Authority’s funding plan had failed to certify that all necessary clearances for the IOS had been completed. While the Authority claimed that it had completed the

¹¹ *County of Kings, John Tos, Aaron Fukuda vs California High-Speed Rail Authority, et al.*, Sacramento County Superior Court Case No. 34-2011-CU-MC-GDS.

¹² Authority’s 2012 *Business Plan, Executive Summary*, pp. ES-13 (15 pdf), ES-15 (17 pdf), http://www.hsr.ca.gov/docs/about/business_plans/BPlan_2012ExecSum.pdf.

environmental clearances for its Merced to Fresno section, that is not true; a section that it calls the “Chowchilla Wye” has not been completed. Also, its Fresno to Bakersfield EIR/EIS has not been finalized, and the draft EIR/EIS for the sections between Bakersfield and the San Fernando Valley have not been released. No ROD adopted by the FRA exists as in the petition filed last year. There is nothing for the STB to rubber stamp until the Final EIR/EIS is certified and the FRA ROD adopted.

In short, the Court concluded that the Authority’s funding plan did not comply with all of the requirements of § 2704.08(c). The Court put off its decision on remedies until a later hearing. After the remedies hearing, the Court issued its remedies decision on November 25, 2013 (see **Exhibit B**).

The Court issued a Writ of Mandate, directing the Authority to rescind its approval of the November 3, 2011 funding plan. The Court also decided that, other than certain limited costs permitted under § 2704.08(g), no Prop. 1A bond proceeds can be expended for construction or real property acquisition until the second funding plan, described in § 2704.08(d), is approved by the Authority, and that this may not occur until a funding plan fully complying with all of the requirements of § 2704.08(c) is approved first.

This is significant. The Court has effectively limited the use of future Prop. 1A bond funds to complete the ICS. This will remain true until the Authority can comply with § 2704.08(c) by identifying the source of the other \$25 billion needed to complete the IOS. Easy? Obviously not; the Authority has been trying to obtain these additional funds from federal, other state and private sources for years. Yet, it remains empty-handed and is likely to remain so for the foreseeable future.

Suggestions are being made that the Authority will develop a new funding plan that will comply with all of the requirements of § 2704.08(c). For example, it has been suggested that the Authority will adopt a shorter “usable segment,” such as the 130-mile Madera to Bakersfield section. The problem is that even with Prop 1A matching funds the Authority would have only \$6.0 billion to build a segment that, according to the Authority’s recent Report to the State Legislature, will cost about \$12.0 billion. Hence, such a funding plan would again fail to identify all of the funds needed

to complete its “usable segment.” In addition, a funding plan must include a ridership and revenue estimate that confirms that no government subsidy will be needed for its operations. This is why the Authority originally adopted the 300-mile Merced to San Fernando Valley as its usable segment; it was because it claimed that it was the shortest segment that could meet this requirement.

Because of Judge Kenny’s decision, the Authority is now faced with losing almost half of what already was a major shortfall of the funding needed to complete its ICS. In a desperate move, on January 24, 2014 the Authority filed a Petition for an Extraordinary Writ of Mandate with the California Supreme Court. Bypassing the intermediate appellate court (Third District Court of Appeal) and going directly to the Supreme Court was an extraordinary and unusual move. In its Petition, the Authority declared that Judge Kenny’s decisions “imperil the project,” that the Authority “will suffer irreparable injury absent immediate intervention by the [Supreme] Court,” and that these circumstances “warrant extraordinary review by this Court.” See **Exhibit C**, pp. 1, 3, 8.

The Authority’s Petition is verified under penalty of perjury. The Authority admits it does not have the financial wherewithal to construct its Project, much less operate it, even though as recent as January 15, 2014, the Authority’s Chairman, Dan Richards, testified before the House Transportation Subcommittee on Railroads, Pipelines, and Hazardous Materials that the Authority intended to comply with the Superior Court’s decisions.

Nine days later (January 24, 2014), when the Authority filed its 49-page Petition, it claimed:

- "Two rulings of the Sacramento Superior Court ...imperil the [high-speed rail] project ...and threaten state and federal funding for the project." (p. 1)
- "Left undisturbed, the [Validation case] ruling would disrupt the State's ability to finance the high-speed rail project." (p. 1)
- "[T]he trial court's rulings have blocked access to bond funds appropriated by the Legislature for the foreseeable future and cast a cloud of uncertainty over the entire voter-approved project." (p. 10)
- "The consequences flowing from these rulings threaten to choke off funding for high-speed rail . . ." (p. 15)
- "[T]he delay [the Authority] now faces as a result of the court's decision risks the catastrophic, for two reasons. First, the federal grant funds, by their terms, must be

matched by the State and be spent by 2017 [citations omitted]. The kind of delays the Authority now faces puts those billions of dollars in jeopardy, because it is not clear that the bond proceeds will be available in time to match. Second, opponents of the project have used the trial court's ruling to fuel political efforts to withhold the federal grants entirely. (H.R. No. 3893, 113th Cong., 2d Sess. (2014)." (pp. 35-36)

On January 29, 2014, the Supreme Court issued an order refusing to hear the Petition, but ordering that the matter be transferred to the Third District Court of Appeal, and that the matter be heard on an expedited basis.¹³

Let us assume that Judge Kenny's decisions are reversed by the appellate court, and that the Authority is no longer barred by those decisions from accessing those Prop. 1A bond funds. Where does the Authority find itself? It immediately finds itself bumping up against the provisions of Streets and Highways Code § 2704.08(d). This subsection states that "Prior to committing any proceeds of [Prop. 1A] bonds ... the authority shall have approved ... a detailed funding plan. ..."

The subsection (d) funding plan is different from the subsection (c) funding plan that Judge Kenny dealt with. But a (d) funding plan requires many of the same elements as a (c) funding plan, some of which Judge Kenny declared the Authority had not complied with. A (d) funding plan must also designate a "usable segment," and must "identify the sources of all funds to be used" on it, including "allocations or other assurance received from governmental agencies." It must also contain ridership and revenue projections that show that the usable segment "will not require an operating subsidy." Just as the Authority was unable to meet the (c) funding plan requirements, it is certain it will also be unable to meet the requirements of a (d) funding plan. In short, it makes no difference whether the appellate court upholds or reverses Judge Kenny's decisions; the Authority will still be unable to use Prop. 1A bond proceeds.

This leads us to the next logical question: Can the Authority proceed with the project by using the \$3.2 billion in federal grant funds? Perhaps not. The federal grants, by legislation and grant conditions, must be matched. The December 5, 2012 Grant/Cooperative Agreement between

¹³ See **Exhibit D**.

the Authority and the FRA provides that the federal money must be matched. Some of the individual federal grants require a 50% match from California funds (one dollar of California funds for each dollar of federal grant funds). Other federal grants require smaller state matches. Together, the aggregate federal grants to the Authority average about a 49% match from California sources. Under the Grant Agreement, the FRA has the right to cease supplying grant funds if California's ability to match with bond funds becomes uncertain.¹⁴ Indeed, given Judge Kenny's recent decision, it is questionable whether the FRA can legally release any more grant funds to the Authority.

What if the FRA refuses to exercise its right to suspend further advances of federal grant moneys, notwithstanding the problems described above? It means that the Authority only has \$3.2 billion in federal money to spend on its Madera to Bakersfield project. Compared to its most recent estimated cost of about \$11.6 billion for the Madera to Bakersfield section, \$3.2 billion represents only 27% of the amount the Authority estimates it needs to build it, and only about 9% of the \$31.0 billion it estimates it needs to build its Initial Operating Section from Merced to San Fernando Valley. Given these limited funds, what can the Authority build? Does it have the money to only construct 50 miles of an unusable, weed-growing dirt berm with numerous grade-separated road crossings? Does it have the money to install ballast, track, and switching and control systems? But if so, for how many miles? What about electrification, maintenance yards, passenger stations, and rolling stock? The Authority has provided the Board and the public with none of this information.

Some of this information was recently disclosed. The Authority released its draft 2014 Business Plan for public review and comment on February 7, 2014. It is a plan required by Public Utilities Code § 185033, and a final version of it is to be adopted and submitted to the California Legislature no later than May 1, 2014. The plan is supposed to update the estimates, projections and intentions contained in the Authority's 2012 Business Plan. The new plan will be an important

¹⁴ *Grant/Cooperative Agreement between FRA and Authority, Amendment No. 5*, dated December 5, 2012, Attachment 2, pp.2-3 (4-5 pdf), and pp. 37-38 (40-41 pdf), http://www.hsr.ca.gov/docs/about/funding_finance/funding_agreements/FR-HSR-0009-10-01-05.pdf.

document that can shed significant light on many of the issues discussed herein. The Board should extend the deadline for submission of comments and replies by interested parties to a date that allows them adequate time to digest and respond to this Plan in the form it is adopted by the Authority after a public hearing, and submitted in final form to the Legislature.

III. THE CURRENT PROJECT SHOWS A LACK OF INDEPENDENT UTILITY.

The Authority admitted early on in its November 3, 2011 Funding Plan that “the Authority does not plan to operate high-speed train service along the ICS [its Merced to Bakersfield section]. Such service will only occur upon completion of the Initial Operating Section [300-mile section from Merced to San Fernando Valley].”¹⁵

However, the State of California has only granted the Authority authorization and responsibility over “high-speed passenger train service,” which it defines as trains running in excess of 125 mph.¹⁶ The Authority has no authority or jurisdiction over non-high-speed trains, such as Amtrak. Currently, Caltrans is responsible for operating the San Joaquin Amtrak route, which currently runs fourteen daily passenger trains through the San Joaquin Valley on Burlington Northern Santa Fe (BNSF) tracks.¹⁷ These trains stop at Amtrak stations in Merced, Madera, Fresno, Hanford, Corcoran, Wasco and Bakersfield. The San Joaquin route is the fifth busiest Amtrak corridor in the nation, with a ridership of over a million passengers per year.¹⁸ However, the Authority’s new track alignments between Madera and Bakersfield leave the BNSF corridor for many stretches and bypass the current Amtrak stations in Fresno, Hanford and Corcoran by significant distances.

¹⁵ Authority’s November 3, 2011 Funding Plan, p. 4 (11 pdf), http://www.hsr.ca.gov/docs/about/funding_finance/Funding_Plan_2011.pdf.

¹⁶ California Public Utilities Code § 185032.

¹⁷ San Joaquin Amtrak Schedule, <http://www.amtrak.com/ccurl/946/633/san-joaquin-schedule-071513.pdf>.

¹⁸ San Joaquin Joint Powers Authority website, Item 4.3 of Staff Report for May 24, 2013 Board Meeting, pp. 17-18 pdf, <http://www.acerail.com/about/regional-governance-for-san-joaquin-rail-service>.

When the Board granted the Authority's Petition for Exemption for the Merced to Fresno section of its HST project, it wrote on pages 5 and 6 of its June 13, 2013 decision that:

“The Authority asserts that use of this initial section prior to the start of high-speed rail service will meet one of the requirements to receive ARRA funding. Under HSIPR guidelines, to receive ARRA funding, any project must have independent utility. To have independent utility, the project, as part of the creation of a new high-speed rail service, needs to provide ‘tangible and measurable benefits even if no additional investments’ are made in further developing the same high-speed rail service. The Authority states that this requirement is met in this case because the first step of the Project’s implementation plan will be to improve the existing San Joaquin intercity service [San Joaquin Amtrak].”¹⁹

The Board went on to add on page 12 of its June decision that “The Authority states that the first portion of the HST System to be constructed ‘will become operational by allowing Caltrans to operate expanded San Joaquin [Amtrak] service between Bakersfield and Merced’” and that “making this portion of the HST System available for immediate use by Amtrak provides for ‘independent utility’ consistent with the funding requirements of ARRA.” This statement merely parrots the Authority’s unfounded representations, is purely conclusory, and points up the pseudo-legal nature of these proceedings.

The Authority’s current Petition claims on page 8 that its Fresno to Bakersfield section, together with its Merced to Fresno section, “will be available for immediate use for improved and faster service on Amtrak’s San Joaquin intercity passenger rail line prior to initiation of HST service on the line in 2022, thus providing for independent utility of the constructed segment.”

The Board’s prior conclusion of “independent utility” relied entirely upon the Authority’s representation or implication that Caltrans would run its Amtrak trains on the new track. The Board also seems to have assumed that the Authority’s Project included the concurrent construction of new train stations along the new track at Fresno, Hanford and Corcoran. However, the Authority has made no commitments, and has no plans for a station at Corcoran, and it has no funding allocated for the construction of new stations along the new tracks at Fresno and Hanford. Rather, Fresno and Hanford are expected to build stations at their expense. But there is no evidence that either city has

¹⁹ Surface Transportation Board, Docket No. FD-35724-0, June 13, 2013 Decision, p. 8.

the financial wherewithal to accomplish this task. If this is the case, then there will be no independent utility for the new tracks because there will be no stations adjacent to the new track from which passengers can board and detrain.

Not only has the Authority has been less than forthright in both of its Petitions for Exemption regarding the station issue, but it has also not disclosed to the Board in either of its Petitions the existence and effect of AB 1779 (see **Exhibit E**). This California statute was signed into law by Governor Brown on September 29, 2012, **six months before** the Authority filed its **first** Petition for Exemption on March 27, 2013 for the Merced to Fresno section (which was really only Madera to Fresno because the Chowchilla Wye was removed from the Final EIR/EIS by the Authority's settlement of the suit brought by the City of Chowchilla).

AB 1779 provides for the creation of a San Joaquin Joint Powers Authority (JPA). The administration and operation of the San Joaquin Amtrak route is to be transferred from Caltrans to the JPA sometime between June 30, 2014 and June 30, 2015. The JPA came into existence by the swearing in of Board Members and the adopting of By-Laws at its Board meeting on March 22, 2013.²⁰ During its Board meeting of September 27, 2013, the JPA adopted a schedule whereby it plans to conclude and sign an Interagency Transfer Agreement, transferring administration of the San Joaquin Amtrak route from Caltrans to the JPA on or about June 30, 2014.²¹

Based on AB 1779, decisions regarding the running of Amtrak trains, including whether any of them would be operated on the new track (if ever built), will be that of the JPA, not Caltrans. Why did the Authority not disclose to the Board the enactment of AB 1779 and its effect? Why did the Authority mislead the Board by suggesting that Caltrans would decide that Amtrak trains would run on the new track, and that Caltrans would have the authority to make those decisions when the

²⁰San Joaquin Joint Powers Authority website, Board Meeting Agenda and Minutes of March 22, 2013, <http://www.acerail.com/about/regional-governance-for-san-joaquin-rail-service>.

²¹ Ibid., Board Meeting Agenda and Minutes of September 27, 2013.

new track was completed? How could the Authority do this when it knew or should have known that Caltrans would not be the agency making that decision?

Will the JPA eventually decide to operate Amtrak trains on the new track? No one knows. But the possibility exists that the JPA will eventually decide that it sees no net benefit in diverting Amtrak trains off of its existing BNSF route, especially if there are no passenger stations to serve the new line.

AB 1779 raises another troublesome problem. It has been reported at JPA Board meetings that train fare revenues only cover 55% of the operational costs of the San Joaquin Amtrak corridor. The other 45% must be covered by an annual subsidy from the State. In fact, a staff report stated that “the San Joaquin intercity passenger rail service is expected to continue to depend on state funds to subsidize its operations.”²² AB 1779 goes on to provide that the State will guarantee subsidizing the San Joaquin operations for three years immediately following the effective date of the transfer agreement, but it makes no provision for any State financial support thereafter.²³

Since the newly-created JPA has no revenue-raising ability besides train fares, it does not have the ability to cover the 45% operational shortfall without state support, in other words, without a significant subsidy. If the JPA operated Amtrak service is incorporated into the HSR project, Prop. 1A prohibits the subsidy of state support. There is no assurance that four or more years from now there will even be an Amtrak passenger train service to run on the new track.

Given these facts, it is appropriate to return to the important “independent utility” issue addressed in the Board’s June 13, 2013 decision: Does the Project provide “tangible and measurable benefits even if no additional investments are made” in further developing the high-speed rail

²² San Joaquin Joint Powers Authority website, Item 4.3 of Staff Report for May 24, 2013 Board Meeting, p. 18 pdf available at: <https://www.acerail.com/About/Regional-Governance-for-San-Joaquin-Rail-Service/Previous-Board-Meetings/Complete-SJJPA-May-2013-Packet.pdf>.

²³ Subsection (d) of amendment to Section 14070.4 of the California Government Code (AB 1779).

project? The answer will depend on whether upon completion of construction of the Madera to Bakersfield section of track there will be passenger train stations to serve the new track, and even if there are, will there be a San Joaquin Amtrak operating at the time? And if there is, will the JPA see sufficient benefit to decide to run Amtrak trains on the new track? Neither the Authority nor the JPA has answered these questions.

What can the Authority do in the midst of all this to help the Board make a finding that the Authority's project has "independent utility?" At a minimum, the Board can require the Authority (1) to commit funds to the contemporaneous construction of new passenger stations on the new line at Fresno, Hanford and Corcoran, (2) to obtain a decision from the JPA Board committing that it will run Amtrak trains on the new track when it is completed, and (3) to get the California State Legislature to amend AB 1779 so as to guarantee operational subsidies that will sustain San Joaquin Amtrak operations long-term. Anything short of that falls short of establishing the required "independent utility."

IV. THE AUTHORITY DOES NOT MEET ALL OF THE POLICIES SET FORTH IN 49 U.S.C. § 10101.

The Authority supports its request for exemption by paraphrasing the relevant provisions of 49 U.S.C. § 10502(a):

Under 49 U.S.C. § 10502 (a), however, the Board must [sic] exempt a proposed rail line construction from the detailed application procedures of § 10901 if it finds that (1) those procedures are not necessary to carry out the transportation policy of 49 U.S.C. § 10101 *and* (2) either (a) the transaction or service is of limited scope; or (b) regulation is not needed to protect shippers from the abuse of market power.

The Authority's Petition argues that its Fresno to Bakersfield Project should be exempted from the requirements of § 10901 because "Exemption [of the construction of the Project from regulation under 10901] Will Promote Rail Transportation Policy [§ 10101]."

Let us examine, therefore, how the Authority went about supporting its argument that its project will "further the goals of the nation's rail transportation policy." There are fifteen different railroad industry policy elements set forth in § 10101, whereby concerns over any one of them can

give the Board justification to become involved in order to ensure that these policy elements will be protected.

While the Authority mentioned the language set forth in subsections (2), (4), (5), (7) and (14) of the §10101 policies, it conveniently ignored others that would be its most troublesome. The policy elements that the Authority failed to mention, but which are very relevant in this matter, are (emphasis added):

- (1) to allow, to the maximum extent possible, competition and the *demand for services to establish reasonable rates* for transportation by rail.
- (4) to ensure the development and *continuation of a sound rail transportation system* with effective competition among rail carriers and other modes, *to meet the needs of the public* and the national defense.
- (8) to operate transportation facilities and equipment *without detriment to the public health* and safety.

Already mentioned is that the Authority's new line will bypass the current Amtrak stations at Fresno, Hanford, and Corcoran, and that the Authority either has no funding or plans or both to construct replacement stations at these locations. In light of this, the Authority should have to show how future operations on the new rail line will sustain and not diminish or have an adverse effect on passenger train service or convenience for the train-traveling public living in or near these towns.

With respect to policy element (1) above, we want to know how future operations on the new line might affect the reasonability of rates or fares charged. If changes in the Amtrak system produce reductions in ridership by reducing or eliminating service in Fresno, Hanford and Corcoran, can suppressed use put increased pressure on raising fare rates above what would have occurred had no changes in the current Amtrak service been instituted? If there is a cessation of state subsidies in four years, as is feared, would not this compel the JPA to raise fares 100% in order to generate the revenue needed to continue its San Joaquin Amtrak service?

With respect to policy element (4) above, we also need to know whether the operation of the new rail line will ensure continuation of a passenger train service that will "meet the needs of the public." How will passenger service be different and how will such differences affect the public's

needs? Since we pointed out how these Amtrak decisions will be made by the San Joaquin JPA, should we not hear from the JPA as to its plans? This cannot proceed to act on the petition without this and vital other information.

With respect to policy element (8) above, regarding public health and safety, we will mention that Corcoran recently closed its only hospital. A person in Corcoran who has no car can presently board Amtrak in Corcoran and for a fare that is less than the cost of driving can get off the station in Hanford only a few hundred yards from the hospital. With the new line by-passing current stations in these two towns, how will that affect such persons?

The Authority simply makes inadequate and unsupported assertions in its Petition. Should not the Board require far more? Based on what little is known, we have justifiable fears that the Authority's new line will be harmful to the train-riding public. In the absence of greater detail and properly supported facts, it makes it difficult for us, the concerned public, to adequately respond. Until the Authority can satisfactorily address and put these concerns to rest, the Board should refuse to grant the Authority's request for an exemption.

V. THE POSITION OF THE UNION PACIFIC AND BURLINGTON NORTHERN SANTA FE RAILROADS CANNOT BE IGNORED IN THIS PROCEEDING.

Many miles of the Authority's proposed Fresno to Bakersfield alignments are located contiguous to, and maybe even within, the rights-of-way of both the Union Pacific Railroad (UP) and the Burlington Northern Santa Fe Railroad (BNSF).

In the past, the UP expressed concerns and objections to the Authority's plans. For example, it submitted a letter dated April 23, 2010 to the Authority as a comment to the FRA and Authority's Bay Area to Central Valley Revised Draft Program EIR/EIS. The letter concluded with:

“The Union Pacific made its position regarding use of its rights of way from the high-speed rail corridor on many occasions. Union Pacific objects to the location of the high-speed rail corridor so close to UP's operations as to be a safety hazard. Finally, Union Pacific objects

to the location of the corridor so that it takes existing rail-served customers or acts as a barrier to all future rail-served developments.”²⁴

UP also submitted another comment letter to the Authority dated October 12, 2011, objecting to its proposed interference with potential future customers. It repeats UP's objections that “no part of the high-speed rail system may be located on Union Pacific’s property.”²⁵

The BNSF has expressed similar concerns. In its April 16, 2013 letter to the Authority, BNSF said that there is “too much ambiguity at this time for a productive review of these plans [plans described by the Authority in its Merced to Fresno EIR and its March 26, 2013 STB Petition for Exemption].”²⁶ The letter went on to ask the Authority for a draft agreement that “contains a scope of work and budget that can be reviewed and for the Authority to specify the corridor alignment.” The latter request cannot have been complied with since the Authority’s Board has not yet adopted the final alignments, which are to be selected from a number of alternatives.

The BNSF letter also stated that the foregoing draft agreement must “address the safety implications, risk mitigation strategy and liability associated with any construction near or adjacent to our track as well as for future operations.”

The letter went on, saying that the “BNSF has not agreed to or acquiesced in any proposed or potential alignment or change in service in the San Joaquin Valley involving our railroad, whether on, near, or adjacent to our current right of way, or which could affect access to our line by present

²⁴See **Exhibit F**. UP also stated:

The Authority's position statement as quoted above is unacceptable to Union Pacific. UP will not negotiate with the Authority regarding sale of right of way or rail spurs. UP will protest against and assist its existing rail-served customers in the event that the Authority attempts to take the property and operations of such customers by eminent domain. [¶] The mitigation strategies suggested by the Authority in Section 4.1.5 are unacceptable to Union Pacific. No part of the high-speed corridor may be located on UP's rights of way. Therefore, mitigation for UP is not an issue. UP will not permit any of its trackage or facilities (such as team tracks) to be taken or relocated.

²⁵See **Exhibit G**.

²⁶See **Exhibit H**.

or future freight customers.” This language shows that the BNSF is as concerned as the UP about the proposed alignments blocking future access to their tracks. Equally significant, it may be suggesting that any changes or decisions in Amtrak traffic will also need the consent of BNSF.

Moving Amtrak trains from BNSF lines to the new lines could affect the BNSF’s passenger and freight traffic scheduling, and could reduce BNSF’s income. A contract may exist between BNSF and the administrator of Amtrak that deals with these issues. If this is the case, then a determination of whether the Merced to Bakersfield section would have “independent utility” will involve the decisions of not only the JPA but also of the BNSF.

The Authority fails to disclose these issues, and also fails to disclose whether the UP and BNSF are even aware of the Authority filing its September 26, 2013 Petition. In its recent Certificate of Service, the Authority’s attorneys did not show that they had served copies of the Petition on the two railroads. The positions of the two railroads are relevant and important. The Board should not dismiss this issue, as it did in its June 13, 2013 decision (p. 20 n. 104). In that footnote the Board confirms that the Authority has not reached the required Agreements with the railroads (which also include the San Joaquin Valley Railroad). So far as this remains the case, the Petition should be forthwith denied. The fact that the railroads are not parties is not good reason to dismiss th issue that the Authority is required to reach agreements acceptable to the railroads. The failure to meet this requirement is yet another reason to deny the Petition.

VI. THE AUTHORITY HAS FAILED TO COMPLY WITH THE REQUIREMENT THAT IT REACH SATISFACTORY AGREEMENTS WITH THE RAILROADS.

The most recent amendment to the Grant Agreement between the Authority and the FRA (dated 12/21/2012), states on page 8 that “The Grantee [Authority] represents that it has entered into and will abide by, or will enter into and abide by, a written agreement, in form and content satisfactory to FRA, with any railroad owning property on which the Project is to be undertaken, . . . *The Grantee may not obligate or expend any funds (federal, state, or private) for final design and/or construction of the Project, or any component of the Project, without receiving FRA's prior*

written approval of the executed railroad agreement satisfying the requirements of this section."²⁷

[Emphasis added] The plain terms of these provisions mean that all current expenditures by the Authority, and which are being permitted by the FRA, are illegal and may constitute violations of the False Claims Act. The Authority cannot use the argument, uncritically accepted in the first proceeding, that its Petition must be granted to allow construction to commence. Under the Grant Agreement, no final design or construction expenditures are permitted. Any that are made are illegal unauthorized expenditures of taxpayers' money.

The Authority's website discloses no comprehensive written, signed agreements posted between the Authority and the BNSF or UPRR (or SJVR). If the Authority has such agreements, the Board should require copies of them so that it can ensure that this condition of the Grant Agreement has been sufficiently fulfilled and to help make a determination that the Authority's new line would have no problematic effect on UPRR's and BNSF's interstate freight commerce.

On the other hand, if, after all these years, the Authority has still not concluded comprehensive written, signed agreements with the BNSF and UPRR, then one must wonder why. What is the problem or holdup? Why, under the requirements of the Grant Agreement, would the FRA allow the Authority to obligate or spend further federal grant funds until this important condition remains unfulfilled? On the contrary, such expenditures are illegal per se.

VII. OTHER TERMS AND CONDITIONS OF FEDERAL HSIPR GRANTS MAY BE IN DANGER OF BEING VIOLATED.

On June 23, 2009, the FRA published in the *Federal Register* the regulations governing applications for and awarding of grants under the High-Speed Intercity Passenger Rail (HSIPR) Program.²⁸ These regulations include a provision that "FRA will require a rigorous analysis of benefits and costs of proposed projects, with a focus on the transportation service and output

²⁷ *Grant/Cooperative Agreement between FRA and Authority*, Amendment No. 5, dated December 5, 2012, p. 8 (10 pdf), http://www.hsr.ca.gov/docs/about/funding_finance/funding_agreements/FR-HSR-0009-10-01-05.pdf.

²⁸74 Fed. Reg. 29900-29925.

measures that are fundamental to estimating other public benefits.” It also goes on to state that, as plans are updated, “plans for financing the project would be updated and refined to reflect accurately the expected year-of-expenditure costs and cash flow projections.” These plans must detail “sources, reliability and feasibility of funding.”

There have been so many changes to the Authority’s project since it applied to the FRA in 2009, that a review of current circumstances should be instituted by the FRA to ensure that criteria for the grants are still being met and whether the terms and conditions of the grant can still be complied with. Given the just announced audit by the Office of Inspector General (OIG) of the Department of Transportation (DOT) it is unlikely this has been done, but in any event, the Board should withhold a decision on the Authority’s Petition until the Board receives and reviews a current FRA analysis of the project’s compliance with Grant criteria in light of updated circumstances.

VIII. THE FRA IS BEING SUBJECTED TO YET ANOTHER AUDIT BY THE DOT OIG.

The FRA has continued to enable the Authority to evade the requirement to match federal and state monies on an ongoing basis. Perhaps for this reason, on March 5, 2014, the OIG announced it would conduct a second audit of the FRA’s HSIPR grant amendment and oversight process. The OIG’s Memorandum (see **Exhibit I**) speaks for itself (emphasis added):

The Federal Railroad Administration’s (FRA) high speed intercity passenger rail (HSIPR) grant program is intended to help address the Nation’s transportation challenges by investing in an efficient high speed rail network. Since 2009, Congress has appropriated over \$10 billion for this program. As of September 2013, FRA had obligated nearly all and disbursed approximately \$1.4 billion. Nearly 85 percent of the funding obligated to date has been dedicated to 6 corridors, with the California corridor receiving the largest portion—\$3.9 billion.

We previously reported that FRA’s lack of an effective grants administration framework may be putting Federal funds at risk. [Fn. 1] In December 2013, the Chairman of the House Committee on Transportation and Infrastructure’s Subcommittee on Railroads, Pipelines, and Hazardous Materials requested we evaluate FRA’s processes for negotiating, amending, and overseeing compliance with HSIPR grant agreements. Accordingly, our objectives will be to evaluate FRA’s policies, procedures, and processes for (1) amending HSIPR grant agreements, and (2) identifying and mitigating funding risks to federally-funded HSIPR projects. Fn. 1 states: OIG Report Number CR-2012-178, Completing a Grants Management Framework Can Enhance FRA’s Administration of the HSIPR Program, Sept. 11, 2012.

IX. THE AUTHORITY IS PLANNING TO ENCROACH ON AND TO CONDEMN LAND CONSTITUTING FEDERALLY GRANTED RAILROAD RIGHT OF WAY (FGROW) LAND.

On December 13, 2013 the California State Public Works Board²⁹ (SPWB) adopted a Resolution of Necessity (RON), a necessary procedural prerequisite to filing an eminent domain case, for property located at 2222 G St., Fresno, CA. The RON is attached as **Exhibit J**. The maps attached to the RON (Exhibits A, B and C) show that the Authority's right of way will encroach on the FGROW currently held by UP. Under the 1862 and/or the 1866 Acts,³⁰ UP's predecessors the Central Pacific Railroad Company, or the Southern Pacific Railroad, were granted FGROWs that were 200' or 100' on each side of the track. The Authority only believes the FGROW is 50' on the track center line. For reference see **Exhibit K** (street and aerial views of 2222 G St.), **Exhibit L**, and **Exhibit M** (right of way appraisal maps RW-M4018 and RW-M4019).³¹

On March 3, 2014, the SPWB filed a condemnation complaint to take 2222 G St., Fresno, CA (Fresno County Superior Court Case no. 14CECG00643 MWS), in which UP is also a

²⁹Pursuant to California Government Code §§ 15770, 15850-15866, esp. § 15853(a), the SPWB initiates and prosecutes eminent domain proceedings for state agencies except the California Department of Transportation and the California Department of Water Resources.

³⁰See, Act of July 1, 1862 (12 Stat. 489) § 2 (200' FRGOW each side of track), § 9, § 10; Act of July 27, 1866 (14 Stat. 292), §§ 2 (100' each side of track), § 7, § 18. The Board would no doubt have better information than KCWD or CCHSRA, but the latter understand that the Central Pacific built south from Sacramento under the Authority of the 1862 Act, and that the line of the CP and the SP, building north under the authority of the 1866 Act, met at or about the location of Goshen Junction northwest of Visalia, and that SP then built a branch line west from Goshen Junction, through what are now Hanford, Armona, Lemoore, Huron and eventually to Coalinga, CA. The result of these events is that the UP FGROW through Fresno is 200' on each side of the track as per the 1862 Act. The law governing a FGROW depends on the Act under which it was granted. See Opinion M-37025, Office of the Solicitor, Department of the Interior (November 4, 2011) at p. 6, n. 13 (partially withdrawing portions of Opinion M-36964, 96 I.D. 439 (1989) pertaining to the scope or rights under an 1875 Act FGROW).

³¹From the aerial view, also note the obstacle formed by the embankment supporting the California Highway 180 overcrossing of the FGROW. This embankment is known from site visits to be only about 36 feet from the UP track. Also note the SJVR wye to the north of the overcrossing. Efforts to date fail to disclose how the Authority ROW will surmount both the 180 embankment issue and the SJVR wye issue. The only alternatives are trenching or tunneling. Tunneling would require a boring machine larger than that being used to bore the Alaska Way Viaduct replacement tunnel in Seattle, currently the largest boring machine extant.

defendant,³² to take the property described in the RON. As shown above this purported taking would include portions of a FGROW. The state court has no jurisdiction to grant a judgment in condemnation to take land subject to a FGROW, the ultimate disposition of which remains subject to the power of Congress under the Property Clause of the Constitution.³³

The Board lacks such power and cannot countenance actions of the Authority which impinge on the ownership or disposition of a FGROW. Nor can the Board grant a “construction exemption” for a project which will encroach on or “take” any portion of a FGROW. Accordingly, on this ground alone, the Board cannot approve the Petition, nor even entertain it.

X. CONCLUSION: THE PETITION SHOULD BE DENIED ON ACCOUNT OF NUMEROUS SUBSTANTIAL ISSUES THAT REQUIRE RESOLUTION IN A PROCEEDING BROUGHT UNDER 49 U.S.C. § 10901 OR THAT MAY BE BEYOND THE BOARD’S JURISDICTION.

Given the scale and importance of this project and its potential impact on Central Valley residents, the Board may wish to consider holding a public hearing in the San Joaquin Valley to examine in greater detail all of the issues raised above. KCWD and CCHSRA also extend a personal invitation to the Board and/or its staff for a personal tour of the proposed project to allow it to gain a better understanding of the situation.

Simply on the face of the Petition, including the virtual absence of any supporting evidence, substantial or otherwise, the Authority cannot reasonably expect the Board to exempt the Authority from its review, evaluation, guidance and supervision, particularly at the stage where no Final EIR/EIS or FRA ROD exists, no final decisions on alignments chosen, etc. Yet, the Authority seems to think so. The Authority’s attitude is not surprising. The Authority’s proclivities continue to display arrogance, imperiousness, presumptuousness, and less than forthrightness, the same

³²People ex rel. State Public Works Board v. Frank Solomon, Jr., Trustee of the Frank Solomon, Jr., Living Trust, Dated February 7, 2002; Frank Solomon, Jr.; Bank of Sacramento; First American Title Insurance Company; Union Pacific Railroad Company, Successor-in Interest to Southern Pacific Railroad, and Does One through Twenty, inclusive.

³³See, e.g., P.L. 99-614, November 6, 1986 (100 Stat. 3481), §§ 4-6, conveying certain lands abandoned by SP to the City of Coalinga, CA. These lands had been acquired by SP under the 1866 Act.

institutional personality traits expressed in the Petition. The Authority's unsubstantiated assertions should be regarded with skepticism. The Board should exercise its statutory duty to ensure that the Authority will not trample upon any of the policy elements enumerated in §10101, and do no harm to public convenience and need.

It should also be mentioned that the Authority has not yet demonstrated that there will be sufficient investors willing to purchase Prop. 1A bonds, the proceeds of which not only are needed to fund the construction of the ICS, but must also serve as matching funds to the federal FRA/ARRA grant. In other words, if there are no Prop. 1A funds, no federal funds should be available either even though the FRA is enabling the Authority at the present time by advancing taxpayer money without requiring the state match.

The Board is in a position to explore this important issue and to prevent the distinct possibility that this "Project" will end up as a "stranded investment" or environmental disaster of destroyed homes, divided farms and weed-growing piles of abandoned dirt. The Board is in a position not only to deny the Authority's Petition, but also to require a certificate so that this project becomes subject to important protective conditions imposed by the Board.

The Board missed its chance to make the right decision on the rush to judgment on the first Petition, believing the false representations that "construction" had to start in Summer 2013. Such assertions, variously repeated, have been proven false.³⁴ Since then, things have only gotten worse

³⁴Simple analysis would disclose that since the Authority, at that time, had yet to award the "design-build" contract, no "construction" would start for some time. The Authority has not disclosed what notices to proceed, if any, it has issued to date. A "design-build" contract requires a final, accepted design before any construction may begin. Under California Government Code § 13332.19(b) and § 8 of SB 1029 (2013), funds appropriated for the "build" portion of the project may be expended only after the SPWB and the Department of Finance have approved the performance criteria and concept drawings for the design-build contract. Due to the characteristic lack of openness and transparency that have come to characterize the Authority and the project, whether the SPWB and Department of Finance approved have these performance criteria and concept drawings for the design-build contract is unknown. If these agencies have done so, it is not known where one finds such approvals. It is not a public process. In addition, funds to acquire rights of way for the project are subject to the same requirements as funds for construction, so that without an approved design and with its specific alignment, funds for such acquisitions may not be expended. Whether these laws are being obeyed is not clear at this time.

for the Authority. Adverse legal rulings have mounted, and the Authority has been forced to rely on a legal strategy that basically says it is above the normal processes of the law and should get what it wants. Now the Board has a second chance and should make the right ruling by denying the Petition and rescinding the approval of the prior Petition as having been improvidently granted.

PRAYER FOR RELIEF

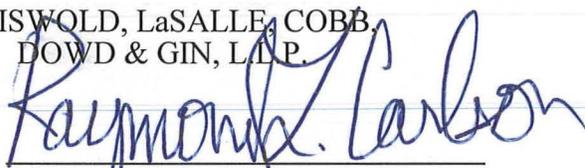
Therefore, based upon the foregoing, KCWD and CCHSRA respectfully request:

1. That the Petition be denied;
2. That the approval of the prior Petition be rescinded, as having been improvidently granted;
3. That the Authority be ordered to file for permission to construct the new rail road;
4. That the Board conduct the necessary or appropriate proceedings; and
5. That the Authority be ordered that it is not to commence construction until it has sought and obtained the certificate required by 49 U.S.C. § 10901.

DATED: March 7, 2014.

Respectfully Submitted,

GRISWOLD, LaSALLE, COBB,
DOWD & GIN, L.L.P.

By: 

RAYMOND L. CARLSON
Attorneys for Kings County Water District
and Citizens for California
High Speed Rail Accountability

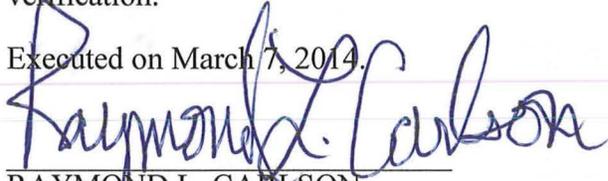
EXHIBIT LIST AND EXHIBITS

- NOTE: In some cases, due to length, the form of the Exhibits attached include cited pages or cited pages plus other select pages. The intent in identifying these Exhibits is that the entirety of each Exhibit is included for purposes of the record of this proceeding.
- EXHIBIT A Ruling on Submitted Matter: Petition for Writ of Mandate, dated and filed August 16, 2013
- EXHIBIT B Ruling on Submitted Matter: Remedies on Petition for Writ of Mandate, dated and filed November 25, 2013
- EXHIBIT C Petition for Extraordinary Writ of Mandate, Application for Temporary Stay, and Memorandum of Points and Authorities filed January 24, 2014 (pp. 1, 3, 8 only)
- EXHIBIT D En Banc Order transferring Petition for writ of mandate to Court of Appeal, Third Appellate District, California High-Speed Rail Authority et al., Petitioners, v. Superior Court of Sacramento, Respondent, John Tos et al., Real Parties in Interest, Supreme Court no. S216091, filed January 29, 2014
- EXHIBIT E AB 1779, Stats. 2012, c. 801
- EXHIBIT F Letter dated April 23, 2010, Union Pacific Railroad to Dan Leavitt, Deputy Director, California High-Speed Rail Authority, regarding Bay Area to Central Valley Revised Draft Program EIR/EIS Comments
- EXHIBIT G Letter dated October 12, 2011, Union Pacific Railroad to California High-Speed Rail Authority, regarding Union Pacific Comments on the Authority's Merced to Fresno Draft EIR/EIS
- EXHIBIT H Letter dated April 16, 2013, BNSF Railway Company to Joseph Metzler regarding PB-BNSF-3146-California High Speed Rail Authority Rail Service Concepts for 2018-2025 BNSF Network Capacity Models
- EXHIBIT I Memorandum dated March 5, 2014, Michael Behm, Assistant Inspector General for Rail, Maritime, Hazmat Transport, and Economic Analysis, Office of Inspector General, U.S. Department of Transportation, to Federal Railroad Administrator
- EXHIBIT J Resolution of Necessity of the State Public Works Board Authorizing Condemnation For [sic] Real Property in the County of Fresno, State of California, for the California High-Speed Rail Authority, dated December 13, 2013
- EXHIBIT K Street and aerial views of property at 2222 G St. Fresno, CA, referred to in Exhibit J (note the property is already being put to public use as a State Department of Corrections Parole Office)
- EXHIBIT L Right of Way Appraisal Map RW-M4018 dated January 7, 2013
- EXHIBIT M Right of Way Appraisal Map RW-M4019 dated January 7, 2013

VERIFICATION

I, Raymond L. Carlson, verify under penalty of perjury that the foregoing is true and correct to the best current information and belief and that I am qualified and authorized to file this verification.

Executed on March 7, 2014.

A handwritten signature in blue ink that reads "Raymond L. Carlson". The signature is written in a cursive style with a large initial "R".

RAYMOND L. CARLSON

Attorney for Kings County Water District
and Citizens for California High-Speed
Rail Accountability

CERTIFICATE OF SERVICE

California High Speed Rail Authority Petition for Exemption of the Fresno to Bakersfield HST Section (Finance Docket No. 35724 (Sub-No. 1))

I hereby certify that, following the Surface Transportation Board's direction in the above mentioned proceeding, I have this day caused to be served by first class mail, postage prepaid, a copy of the comments provided to the STB to all of the parties of record in the main docket as listed below:

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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.

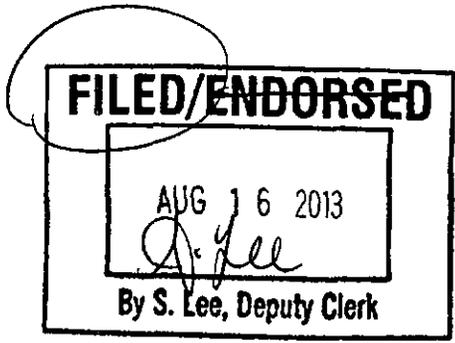
DATED: March 7, 2014.


KATIE ASKINS

EXHIBIT “A”

PROTEST AND OPPOSITION STATEMENT
OF
KINGS COUNTY WATER DISTRICT AND
CITIZENS FOR CALIFORNIA HIGH-SPEED RAIL ACCOUNTABILITY
TO
PETITION FOR EXEMPTION OF
CALIFORNIA HIGH-SPEED RAIL AUTHORITY

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

**JOHN TOS, AARON FUKUDA,
COUNTY OF KINGS**

Case No. 34-2011-00113919-CU-MC-GDS

Plaintiffs and Petitioners,

v.

**RULING ON SUBMITTED MATTER:
PETITION FOR WRIT OF MANDATE**

**CALIFORNIA HIGH SPEED RAIL
AUTHORITY, et al.,**

Defendants and Respondents.

Introduction

This ruling addresses the first phase of a two-part proceeding in which John Tos, Aaron Fukuda and the County of Kings assert numerous challenges to the on-going program to build a high-speed railroad system for California.¹

The principal respondent is the California High Speed Rail Authority, the agency charged with administering the planning and construction of the system. Petitioners have also named several state officials as respondents, including: Jeff Morales, the current CEO of the Authority; the Governor; the State Treasurer; the Director of the Department of Finance; the Acting Director of the Department of Business,

¹ For the sake of convenience, these parties will be referred to as "petitioners" in this ruling, which addresses their writ of mandate claims.

1 Transportation and Housing; and the State Controller.²

2 In this phase of the proceeding, the petitioners focus on the validity of the funding plan the
3 Authority approved for the project in November, 2011. Petitioners contend that the Authority failed to
4 comply with certain statutory requirements governing the content of the funding plan. They seek issuance
5 of a writ of mandate under Code of Civil Procedure section 1085 which would direct the Authority to
6 rescind its approval of the plan. Petitioners further seek relief in the form of writs of mandate directing the
7 Authority and other respondents to rescind any additional approvals they have made in furtherance of the
8 high-speed rail program in reliance on the funding plan.

9 The Court heard oral argument by the parties in this writ of mandate phase of the proceeding on
10 May 31, 2013. At the close of the hearing, the Court took the matter under submission for issuance of a
11 written ruling. A second phase of this proceeding is to be scheduled, if necessary, after the final ruling on
12 this first phase has been issued. The second phase will address petitioners' non-writ claims for Code of
13 Civil Procedure Section 526a taxpayer standing relief to prevent alleged illegal expenditures of public
14 funds, and their claims for declaratory and injunctive relief.

15 Factual and Legal Background

16 The proposed high-speed rail system is to be financed through the sale of bonds.³ The funding
17 plan at issue in this case is a document the Authority was required by law to prepare, approve, and submit
18 to specified governmental entities as a prerequisite for requesting an appropriation of bond proceeds to
19 begin building the project. This legal requirement was imposed on the Authority through the electorate's
20 passage of Proposition 1A in November, 2008.

21 Proposition 1A is entitled the "Safe, Reliable, High-Speed Passenger Train Bond Act for the 21st
22 Century", and added Sections 2704-2704.21 to the Streets and Highways Code.⁴ Section 2704.08(c)(1)
23 addresses the funding plan at issue here. It provides:
24

25
26 ² The Court also granted the Kings County Water District leave to file a brief as an *amicus curiae*. The Court has received and considered its brief in making this ruling.

27 ³ A separate action is pending before the Court for validation of the bonds. That action is not addressed in this ruling.

28 ⁴ All references to statutes in this ruling are to the Streets and Highways Code unless otherwise stated.

1 No later than 90 days prior to the submittal to the Legislature and
2 the Governor of the initial request for appropriation of proceeds of bonds
3 authorized by this chapter for any eligible capital costs on each corridor,
4 or usable segment thereof, identified in subdivision (b) of Section
5 2704.04, other than costs described in subdivision (g), the authority shall
6 have approved and submitted to the Director of Finance, the peer review
7 group established pursuant to Section 185035 of the Public Utilities Code,
8 and the policy committees with jurisdiction over transportation matters
9 and the fiscal committees in both houses of the Legislature, a detailed
10 funding plan for that corridor or a usable segment thereof.

11 Section 2704.08(c)(2) addresses the content of the funding plan, stating that “[t]he plan shall
12 include, identify, or certify to all” of a list of items set forth in Section 2704.08(c)(2), subsections (A)
13 through (K).

14 Petitioners contend that the Authority did not comply with the statute by making the required
15 identification and certification of items (D) and (K).

16 Item (D) requires the funding plan to identify the following:

17 The sources of all funds to be invested in the corridor, or usable
18 segment thereof, and the anticipated time of receipt of those funds based
19 on expected commitments, authorizations, agreements, allocations, or
20 other means.

21 Item (K) requires the funding plan to make the following certification:

22 The authority has completed all necessary project level
23 environmental clearances necessary to proceed to construction.

24 The Authority has lodged an administrative record with the Court which contains the funding plan
25 at issue here.⁵ The Authority approved the funding plan on November 3, 2011.⁶ The funding plan
26 explicitly incorporated by reference a second document entitled “California High-Speed Rail Program
27 Draft 2012 Business Plan”, which provided additional detail supporting the funding plan.⁷

28 As required by Section 2704.08(c)(1), the funding plan identified the “corridor, or usable segment
thereof” in which the Authority was proposing to invest bond proceeds as one of two alternative Initial

⁵ See, Administrative Record (“A.R.”), pp. AG000057-73.

⁶ See, Resolution #HSRA11-23 (“Resolution Approving Funding Plan for Submission Pursuant to Streets and
Highways Code Section 2704.08, Subdivision (c)”), A.R., p. AG000953.

⁷ That document, referred to in this ruling as the “draft 2012 Business Plan”, is found in the administrative record at
pages AG000074-298. The draft 2012 Business Plan is incorporated into the funding plan at AG000059.

1 Operating Sections ("IOS"): either a "usable segment" of approximately 290 miles from Bakersfield in the
2 south to San Jose in the north; or an alternative "usable segment" of approximately 300 miles from Merced
3 in the north to San Fernando in the south.⁸

4 Either option would include a segment the Authority referred to as the Initial Construction Section
5 ("ICS"), a segment of approximately 130 miles from just north of Bakersfield at the southern end to north
6 of Fresno at the northern end.⁹ The ICS would be built first, with the remainder of the chosen IOS (north
7 or south) to be built later. However, the funding plan explicitly addressed, and was required to address,
8 the entirety of the chosen IOS, and not merely the ICS.

9 Section D of the funding plan addressed the identification of funding sources for the chosen IOS
10 as required by Section 2704.08(c)(2)(D).

11 First, the funding plan stated that "all necessary funding sources for the ICS have been identified",
12 and described those sources as \$2.684 billion in state bond funds and \$3.316 billion in federal grants.¹⁰
13 The funding plan further stated that the combined amount of approximately \$6 billion "...represents the
14 full amount of funding the Authority believes is needed to complete the Initial Construction Section."¹¹

15 The full cost of completing the chosen IOS, on the other hand, was projected to be in excess of
16 \$24 billion for IOS North, and in excess of \$26 billion for IOS South.¹² With regard to funding for the
17 entirety of either IOS, the funding plan stated:

18
19 Upon identification of additional funding sources, the Authority
20 intends to continue construction beyond the ICS to commence either the
21 IOS North or the IOS South. For planning purposes, construction of the
22 remainder of the IOS North or IOS South is estimated to be performed
23 between 2015 and 2021 to reach completion of the initial Usable Segment.
24 The anticipated timing of the identification of these additional funds for the
25 initial Usable Segment would be not later than 2015 to enable procurement

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⁸ See, A.R., page AG000060. In a Revised 2012 Business Plan adopted in April, 2012, the Authority identified the
IOS South as "the preferred implementation strategy", i.e., the usable segment covered by the funding plan, and thus
identified the IOS South as the segment to be built. (See, A.R., p. AG001938.) The Authority's selection of the IOS
South over the IOS North is not at issue in this phase of the proceeding.

⁹ *Id.*

¹⁰ See, A.R., p. AG0000065.

¹¹ See, A.R., p. AG000059.

¹² See, A.R., p. AG000064.

1 of construction-related services at that time. The timing of distribution and
2 receipt of the funds then would correspond to the timing of anticipated
expenditures.

3 The draft 2012 Business Plan discusses the potential future funding
4 sources and the timing of the funding needs, to construct the Usable
Segments.¹³

5 The draft 2012 Business Plan contains a discussion of potential funding sources for the completion
6 of the chosen IOS. It states generally that “[t]he IOS will require a mix of funding from federal, state and
7 local sources to support construction in the years 2015 to 2021. Committed funding for this period is not
8 fully identified.”¹⁴

9 The draft 2012 Business Plan describes a variety of existing federal programs which could provide
10 funding for the California high speed rail program, notably the Federal Railroad Administration High-
11 Speed Intercity Passenger Rail Program and Passenger Rail Improvement Act of 2008.¹⁵ It then describes
12 several potential federal transportation funding and financing programs, not yet in existence, which could
13 provide additional funding if enacted.¹⁶ A combination of Qualified Tax Credit Bonds and federal grants
14 is shown as an example of potential funding for construction beyond the ICS, but the 2012 draft Business
15 Plan explicitly states that “...with the exception of construction funding for the ICS, the mix, timing, and
16 amount of federal funding for later sections of the [high-speed rail project] is not known at this time.”¹⁷

17 Section G of the funding plan addresses the certifications the Authority was required to make,
18 including the certification required by Section 2704.08(c)(2)(K), specifically, that all project level
19 environmental clearances necessary to proceed to construction had been completed. The certification was
20 as follows:

21
22 In connection with the Initial Construction Section, the Authority will
23 have, prior to expending Bond Act proceeds requested in connection with

24 ¹³ See, A.R., p. AG000067.

25 ¹⁴ See, A.R., p. AG000202.

26 ¹⁵ See, A.R., p. AG000203-204.

27 ¹⁶ See, A.R., p. AG000204-207. The 2012 draft Business Plan also describes potential sources of locally-generated
revenue and private funds that could be developed and used after the construction of the IOS. (See, A.R., p.
AG000208-209.

28 ¹⁷ See, A.R., p. AG000208.

1 this funding plan, completed all necessary project level environmental
2 clearances necessary to proceed to construction.

3 Furthermore, in connection with the Initial Construction Section, the
4 Authority already has completed the following necessary steps: The draft
5 environmental impact reports/environmental impact statements for the
6 Merced to Fresno and Fresno to Bakersfield segments were released for
7 public comment on August 9, 2011. Public comment closed on October
8 13, 2011. The revised draft environmental impact reports/environmental
9 impact statements for the Fresno to Bakersfield segment will be reissued
10 in spring of 2012 for further public comment.

11 The following steps are scheduled to be completed before construction is
12 to commence: The Record of Decision/Notice of Determination
13 (ROD/NOD) is expected to be obtained for the Merced to Fresno segment
14 by April 2012, and for the Fresno to Bakersfield section by November
15 2012.¹⁸

16 After its approval of the funding plan, the Authority submitted the plan to the governmental
17 entities specified in Section 2704.08(c)(1). Petitioners filed their petition and complaint on November 14,
18 2011, shortly after the Authority approved the funding plan. On July 18, 2012, while this action was
19 pending, the Legislature enacted Senate Bill 1029, which appropriated state bond funds and available
20 federal funds for the construction of IOS South.¹⁹

21 Standard of Review

22 When administrative action is under review, a writ of traditional mandamus under Code of Civil
23 Procedure section 1085 is available to correct an abuse of discretion on the part of the agency. In
24 reviewing a petition for such a writ, the court must review the record of proceedings to determine whether
25 the agency abused its discretion, namely, whether its action was arbitrary, capricious, entirely lacking in
26 evidentiary support, unlawful, or procedurally unfair. The petitioner has the burden of establishing an
27 abuse of discretion. (See, *Khan v. Los Angeles City Employees' Retirement System* (2010) 187 Cal. App.
28 4th 98, 105-106.)

In this phase of the proceeding, petitioners raise the issue of whether the Authority's approval of
the funding plan was unlawful because the content of the plan did not comply with statutory requirements.

¹⁸ See, A.R., p. AG000072 (footnote in original omitted).

¹⁹ See, A.R., p. AG002784-2797.

1 There are no disputes of fact in connection with this issue, because the only relevant facts involve the
2 content of the challenged portions of the funding plan, and that content is not disputed. The issue raised
3 here therefore is the purely legal issue of whether the Authority's action was consistent with applicable
4 law. This is an issue on which the Court is authorized to exercise its independent judgment. (See,
5 *Associated Builders & Contractors, Inc. v. San Francisco Airports Commission* (1999) 21 Cal. 4th 352,
6 361; *California Correctional Peace Officers' Association v. State of California* (2010) 189 Cal. App. 4th
7 330, 335.)²⁰

8 Discussion

9 Having exercised its independent judgment in this matter as authorized by law, the Court
10 concludes that the Authority abused its discretion by approving a funding plan that did not comply with
11 the requirements of law. Specifically, the identification of the sources of all funds to be invested in the
12 IOS and the certification regarding completion of necessary project level environmental clearances did not
13 comply with the requirements set forth in the plain language of Section 2704.08(c)(2), subsections (D) and
14 (K). The reasons for the Court's conclusion are set forth in the following sections.

15 Identification of Sources of Funds for the IOS:

16 Subsection (D), on its face, required the Authority to address funding for the entire IOS.
17 Moreover, it required the Authority to identify sources of funds that were more than merely theoretically
18 possible, but instead were reasonably expected to be actually available when needed. This is clear from
19 the language of the statute requiring the Authority to describe the "anticipated time of receipt of those
20 funds based on expected commitments, authorizations, agreements, allocations, or other means."
21 (Emphasis added.) Such language, especially the use of the highlighted terms "anticipated" and
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24 ²⁰ Petitioners and the Authority have submitted requests for judicial notice. Each also has objected to at least some
25 portion of the request submitted by the other. The requests are somewhat ambiguous because much of the attached
26 material appears to be unrelated to this phase of the case, but rather pertains to the non-writ portion of the case. As
27 will be clear from this ruling, the Court has not found it necessary to rely on any judicially-noticed evidence or
28 materials in resolving the issues presented by petitioners' first-phase writ of mandate claims. The Court has relied
solely on the administrative record and the text of Proposition 1A. All phase I requests for judicial notice are
therefore denied on the ground that the materials in question are unnecessary to the resolution of this matter. (See,
County of San Diego v. State of California (2008) 164 Cal. App. 4th 580, 613, fn. 29) This ruling does not address
any requests for judicial notice applicable to the second phase of this case, which the Court will rule on at the
appropriate time.

1 “expected”, indicates that the identification of funds must be based on a reasonable present expectation of
2 receipt on a projected date, and not merely a hope or possibility that such funds may become available.

3 While the approved funding plan adequately addressed the availability of funds for construction of
4 the ICS, it did not do so for the entire IOS as the statute requires. The funding plan itself explicitly stated
5 that funds for construction of the remainder of the IOS would be identified at a later time (“not later than
6 2015”).²¹ It thus candidly acknowledged that the funds could not be identified as of the date of approval of
7 the funding plan. Similarly, the 2012 draft Business Plan, which was incorporated into the funding plan,
8 candidly acknowledged that committed funding for construction of the IOS in the years 2015 to 2021 “is
9 not fully identified”, and that “the mix, timing, and amount of federal funding for later sections of the HSR
10 is not known at this time.”²² This language demonstrates that the funding plan failed to comply with the
11 statute, because it simply did not identify funds available for the completion of the entire IOS.
12

13 Moreover, it is clear from the text of the 2012 draft Business Plan that all potential federal sources
14 of funds for construction beyond the ICS are described as theoretical possibilities and not as sources of
15 funds reasonably expected actually to be available starting in 2015.

16 For example, the discussion of funding under existing federal programs such as the High-Speed
17 Intercity Passenger Rail Program and Passenger Investment and Improvement Act of 2008 explicitly
18 recognizes that both programs are funded through the annual federal General Fund appropriations process,
19 and that “...the appropriations process makes the timing and amount of funding more uncertain [than
20 programs funded through a dedicated trust fund] at best.”²³ Thus, to “increase the potential” of actually
21 obtaining funding through these programs, “...the Authority and other California officials will need to
22 team with other states and high-speed rail stakeholders across the nation to promote high-speed rail as a
23 program of national interest.”²⁴ This discussion makes it clear that funding from these sources cannot
24 reasonably be expected to be available without significant further work and legislative advocacy, and that,
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26 ²¹ See, A.R., p. AG000067.

27 ²² See, A.R., p. AG000202, AG000208.

28 ²³ See, A.R., p. AG000204.

²⁴ *Id.*

1 in reality, there were no anticipated or expected commitments, authorizations, agreements, allocations, or
2 other means of receiving such funds at the time the Authority approved the funding plan.

3 Similarly, the discussion of funding through new federal transportation funding and financing
4 programs (including a new dedicated trust fund structure, availability payments, and qualified tax credit
5 bonds) explicitly acknowledged that these sources are not presently available because such programs do
6 not yet exist. As a result, "...it may take several years working with other stakeholders in the high-speed
7 rail sector to obtain passage of the desired federal legislation."²⁵ This language makes it absolutely clear
8 that there is, in reality, no reasonably anticipated time of receipt for any of the potential new federal funds
9 described in the funding plan and the 2012 draft Business Plan, and that there are no expected
10 commitments, authorizations, agreements, allocations, or other means of actually receiving such funds.

11 The Court therefore concludes that the funding plan does not comply with the plain language of
12 Section 2704.08(c)(2)(D), because it does not properly identify sources of funds for the entire IOS.

13 **Environmental Clearances:**

14 Subsection (K), on its face, requires the Authority to certify that it has completed all necessary
15 project level environmental clearances necessary to proceed to construction. As the language from the
16 funding plan quoted above demonstrates, the plan does not address project level environmental clearances
17 for the entire IOS at all, but only addresses the ICS. Moreover, the funding plan explicitly states that
18 project level environmental clearances have not yet been completed even for the ICS. It is therefore
19 manifest that the funding plan does not comply with the plain language of the statute.
20

21 The Authority's contention that the certification of environmental clearances may address only the
22 ICS is not persuasive. The concept of an "Initial Construction Section" does not appear anywhere in
23 Section 2704.08(c), which explicitly requires the funding plan to address a "corridor, or usable segment
24 thereof". In this case, it is the IOS South, and not the ICS, that the Authority explicitly defined as the
25 "corridor, or usable segment thereof" that the funding plan addresses.

26 The Authority places undue emphasis on the fact that subsection (K) does not use the term
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28 ²⁵ *Id.*

1 “corridor, or usable segment thereof”. Although this is true, subsection (K) does refer to “construction”.
2 All other uses of the term “construction” in Section 2704.08(C)(2) clearly pertain to the “corridor, or
3 usable segment, thereof” that the funding plan is to address. Notably, subsection (G) requires certification
4 that the “[c]onstruction of the corridor or usable segment thereof can be completed as proposed in the
5 plan”. Moreover, the funding plan as a whole is required to address the “corridor, or usable segment
6 thereof”, and not some portion of that corridor or segment. The reference to “construction” in subsection
7 (K) therefore is most reasonably interpreted as pertaining to the entire “corridor, or usable segment
8 thereof” addressed by the funding plan, and not to the ICS, which is merely a portion of that corridor or
9 usable segment.

10 In addition, the Authority’s argument that certification of environmental clearances for the ICS is
11 sufficient apparently would lead to the unreasonable and unintended result of essentially requiring no
12 certificate of environmental clearances for the remainder of the IOS. Section 2704.08(d) requires the
13 Authority to prepare and approve a second funding plan and submit it to the Director of Finance and the
14 Chairperson of the Joint Legislative Budget Committee prior to committing any proceeds of bonds for
15 expenditure for construction and real property and equipment acquisition on each corridor, or usable
16 segment thereof, with the exception of costs described in subdivision (g). The second funding plan is
17 required to address many of the same subjects as the funding plan under review here, but it is not required
18 to address the completion of project level environmental clearances. Thus, if the Authority’s interpretation
19 is accepted, and the initial funding plan is required to address environmental clearances for only a portion
20 of the entire “corridor, or usable segment thereof”, the completion of environmental clearances for the
21 remainder of the corridor or usable segment may never be certified before funds are committed for
22 expenditure. The Authority offers no authority to support the proposition that a statute that clearly was
23 drafted to require the Authority to address all aspects of project feasibility in detail would have left open
24 the possibility that such a significant factor as the certification of environmental clearances for a
25 significant portion of the corridor or usable segment could be incomplete before the expenditure of funds
26 begins. Such a proposition appears to be in fundamental conflict with the intent of the statute as a whole,
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1 and the Court does not accept it.

2 Similarly, the Authority's contention that its certification complied with the substance of the
3 funding plan reporting requirement for environmental clearances is unpersuasive. The substance of that
4 requirement is amply clear from the language of the statute itself: the Authority is to certify that project
5 level environmental clearances are complete. A certification that such clearances will be completed by
6 some later date obviously fails to comply.

7 **Remedy**

8 The Court's conclusion that the funding plan did not comply with statutory requirements raises the
9 issue of the proper remedy. The briefing submitted by the petitioners suggests several possible remedies.

10 In their opening brief, petitioners argue that the Court should issue a writ of mandate commanding
11 the Authority to rescind its approval of the November 3, 2011 funding plan, and remand the matter to the
12 Authority with directions to proceed in accordance with the requirements of Proposition 1A.²⁶

13 Also in the opening brief, petitioners argue that the writ should command the Authority to rescind
14 any subsequent approvals it may have made or issued in reliance on the funding plan or on the legislative
15 appropriation they assert was improperly approved in reliance on the funding plan, including requests for
16 proposals and contract approvals.²⁷

17 The opening brief also argues that the writ should command the other respondents/defendants to
18 rescind any approvals they may have granted or issued in improper reliance on the funding plan, and to
19 take any further actions on such matters in full accordance with the requirements of Proposition 1A.²⁸

20 Thus, in the opening brief, petitioners focus potential relief on the invalidation of the funding plan
21 itself and on the invalidation of subsequent approvals taken in reliance on the funding plan. Their
22 argument mentions the subsequent legislative appropriation in passing, but does not explicitly state that the
23 Court should invalidate the appropriation itself. The Second Amended Petition and Complaint does not
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26 ²⁶ See, petitioners' Trial Brief, Part 1 – Opening Brief in Support of Motion for Peremptory Writ of Mandate, p.
26:12-14.

27 ²⁷ *Id.*, p. 26:14-18.

28 ²⁸ *Id.*, p. 26:19-22.

1 explicitly seek such relief, and does not name the Legislature as a respondent.

2 In their reply brief, petitioners reiterate their argument that the Court should declare the funding
3 plan to be invalid and order it to be rescinded, and also declare any actions taken in reliance on that plan to
4 be invalid, describing any such actions as *ultra vires* acts.²⁹ In addition, petitioners also assert for the first
5 time that the Court's writ should extend to the legislative appropriation made on the basis of the funding
6 plan. They argue that the finding of *ultra vires* acts should extend to legislative action taken on the basis
7 of the funding plan, i.e., to the subsequent appropriation pursuant to SB 1029. Petitioners state the
8 argument as follows:

9
10 If the Funding Plan is declared invalid and ordered rescinded as
11 being in violation of the bond measure's requirements, it follows that the
12 Authority's request for an appropriation, submitted in reliance on that
13 Funding Plan, was also invalid. Further, if the request for appropriation
14 was invalid, so [too] must be the appropriation [made] in response to that
15 request. Essentially, Defendants have built a house of cards upon the
16 basis of a Funding Plan that violated the terms of the bond measure. If
17 the Funding Plan is invalid, the entire house of cards must collapse along
18 with it.³⁰

19 Based on its finding that the funding plan did not comply with the requirements of Section
20 2704.08(c)(2), the Court is satisfied that issuance of a writ of mandate directing the Authority to rescind its
21 approval of the November 3, 2011 funding plan may, as a matter of abstract right, be an available remedy
22 in this case. However, the Court is not yet convinced that invalidation of the funding plan, by itself, would
23 be a remedy with any real, practical effect. Unless the writ also invalidated the legislative appropriation for
24 the high-speed rail program or subsequent approvals (such as contracts) made in furtherance of the
25 program, issuance of the writ would have no substantial or practical impact on the program. As a matter
26 of general principle, a writ will not issue to enforce a mere abstract right, without any substantial or
27 practical benefit to the petitioner. (See, *Concerned Citizens of Palm Desert v. Board of Supervisors* (1974)
28 38 Cal. App. 3rd 257, 270.)³¹ The Court accordingly will address the issue of whether writ relief should

29 See, petitioners' Reply Brief in Support of Motion for Peremptory Writ of Mandate, p. 8:20-23.

30 *Id.* p. 9:1-8.

31 See also, *Derr v. Busick* (1923) 63 Cal. App. 134, 140: "Moreover, the issuance of the writ of mandate is not altogether a matter of right, but it involves the consideration of its effect in promoting justice. If it should

1 extend to invalidating the legislative appropriation made on the basis of the funding plan, or to invalidating
2 subsequent approvals by the Authority or other respondents. If such relief is available, a writ to invalidate
3 the funding plan should issue.

4 The Court finds that the writ should not issue in this case to invalidate the legislative appropriation
5 made through SB 1029. The Court reaches this conclusion on substantive and procedural grounds.

6 The substantive ground for the Court's conclusion is that petitioners have not demonstrated that
7 the Authority's non-compliance with the funding plan requirements of Section 2704.08(c)(2) rendered the
8 subsequent legislative appropriation invalid. Nothing in Section 2704.08(c)(2), or elsewhere in
9 Proposition 1A, provides that the Legislature shall not or may not make an appropriation for the high-
10 speed rail program if the initial funding plan required by Section 2704.08(c)(2) fails to comply with all the
11 requirements of the statute. Lacking such a consequence for the Authority's non-compliance, Proposition
12 1A appears to entrust the question of whether to make an appropriation based on the funding plan to the
13 Legislature's collective judgment. The terms of Proposition 1A itself give the Court no authority to
14 interfere with that exercise of judgment.

15
16 The procedural ground for the Court's conclusion is that petitioners did not seek invalidation of
17 the legislative appropriation in the Second Amended Petition and Complaint, and raised the issue for the
18 first time only in their reply brief.³² As a general rule, arguments raised for the first time in a reply brief
19 will not be considered. (See, *Reichardt v. Hoffmann* (1997) 52 Cal. App. 4th 754, 764; *American Drug*
20 *Stores, Inc. v. Stroh* (1992) 10 Cal. App. 4th 1446, 1453.) As the Third District Court of Appeal explained
21 in the appellate context:

22 Obvious considerations of fairness in argument demand that the
23 appellant present all of his points in the opening brief. To withhold a
24 point until the closing brief would deprive the respondent of his
25 opportunity to answer it or require the effort and delay of an additional
brief by permission. Hence the rule is that points raised in the reply brief
for the first time will not be considered, unless good reason is shown for

26 affirmatively appear that it would be an idle thing to issue it, that thereby no wrong could possibly be remedied or no
27 right could possible be enforced or promoted, the court would naturally refuse to issue the writ because it would
answer no legitimate purpose in the scheme of the law."

28 ³² As noted above, petitioners did not name the Legislature as a party in this case.

1 failure to present them before.

2 (See, *Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal. App. 3rd 325, 335, fn. 8.)

3 The same considerations of fairness apply here. Accordingly, the Court will not invalidate the
4 legislative appropriation for the high-speed rail program through issuance of a writ of mandate.

5 Based on this ruling, the issuance of a writ of mandate invalidating the funding plan may have real
6 and practical effect in this case only if the writ may also invalidate subsequent approvals by the Authority
7 or other respondents. The Court concludes that it cannot determine whether the writ may do so based on
8 the briefing submitted by the parties. That briefing – particularly the briefing submitted by petitioners –
9 deals with the issue of subsequent approvals only in general terms, without identifying the exact nature of
10 the subsequent approvals the writ would affect. A general order invalidating all subsequent approvals,
11 however, may not be appropriate given the terms of Section 2704.08(g), which provides that “[n]othing in
12 this section shall limit use or expenditure of proceeds of bonds...up to an amount equal to 7.5 percent of
13 the aggregate principal amount of bonds...” for purposes specified in that subdivision.

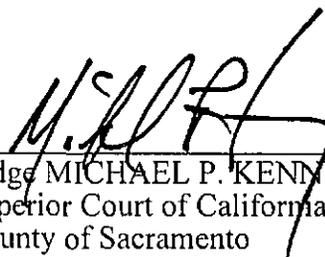
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15 The Court further notes that Section 2704.08(d) requires the Authority, prior to committing any
16 proceeds of bonds for the project, to prepare and approve a second funding plan and submit it to the
17 Director of Finance and the Chairperson of the Joint Legislative Budget Committee, along with a report
18 prepared by independent parties. That subdivision also provides that the Authority may not enter into
19 commitments to expend bond funds and accept offered commitments from private parties until the
20 Director of Finance finds that the plan is likely to be successfully implemented as proposed. Proposition
21 1A thus appears to preclude the Authority from committing or spending bond proceeds on the high-speed
22 rail project until a second funding plan is prepared and approved, except for expenditures falling within the
23 terms of subdivision (g).

24 The Court cannot determine whether a writ should issue to invalidate subsequent approvals by the
25 Authority or other respondents (and thus, whether a writ should issue to invalidate the funding plan) until
26 it is able to determine what subsequent approvals have been made, and whether such approvals involve the
27 commitment of proceeds of bonds or expenditures of bond proceeds within the scope of Section 2704.08,
28

1 subdivisions (d) or (g). The Court therefore directs the parties to submit supplemental briefing on those
2 issues.

3 The parties are directed to meet and confer and contact the Clerk of this Department to set a date
4 for a hearing on the remedy issues addressed in the supplemental briefing, and to meet and confer to
5 arrange a briefing schedule. The briefing schedule shall provide for an opening brief to be filed by
6 petitioners, an opposition brief to be filed by the Authority, and a reply brief to be filed by petitioners. The
7 briefing schedule shall provide that the reply brief shall be filed no later than seven days prior to the
8 hearing.

9
10 DATED: August 16, 2013

11 
12 Judge MICHAEL P. KENNY
13 Superior Court of California,
14 County of Sacramento

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CERTIFICATE OF SERVICE BY MAILING
(C.C.P. Sec. 1013a(4))

I, the undersigned deputy clerk of the Superior Court of California, County of Sacramento, do declare under penalty of perjury that I did this date place a copy of the above-entitled **RULING ON SUBMITTED MATTER** in envelopes addressed to each of the parties, or their counsel of record or by email as stated below, with sufficient postage affixed thereto and deposited the same in the United States Post Office at 720 9th Street, Sacramento, California.

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Superior Court of California,
County of Sacramento

Dated: August 16, 2013

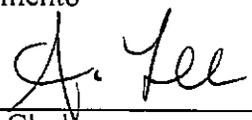
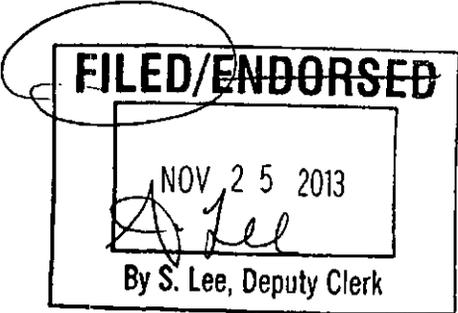
By: S. LEE 
Deputy Clerk

EXHIBIT “B”

PROTEST AND OPPOSITION STATEMENT
OF
KINGS COUNTY WATER DISTRICT AND
CITIZENS FOR CALIFORNIA HIGH-SPEED RAIL ACCOUNTABILITY
TO
PETITION FOR EXEMPTION OF
CALIFORNIA HIGH-SPEED RAIL AUTHORITY

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

**JOHN TOS, AARON FUKUDA,
COUNTY OF KINGS**

Plaintiffs and Petitioners,

v.

**CALIFORNIA HIGH SPEED RAIL
AUTHORITY, et al.,**

Defendants and Respondents.

Case No. 34-2011-00113919-CU-MC-GDS

**RULING ON SUBMITTED MATTER:
REMEDIES ON PETITION FOR WRIT OF
MANDATE**

Introduction

On August 16, 2013, the Court issued a ruling in this matter finding that defendant/respondent California High Speed Rail Authority abused its discretion by approving a detailed funding plan under Streets and Highways Code section 2704.08(c) that did not comply with the requirements of subdivisions (c)(2)(D) and (K) of that statute. In that ruling, the Court directed the parties to submit further briefing on the issue of remedies.¹

Principally, the Court directed the parties to address the issue of whether issuance of a writ of mandate directing the Authority to rescind its approval of the November 3, 2011 funding plan would be a remedy with any real and practical effect. The Court also directed the parties to address the issue of

¹ In this ruling, the Court refers to defendant/respondent California High Speed Rail Authority as "the Authority", and to plaintiffs/petitioners John Tos, et al., as "plaintiffs".

1 whether the writ should address subsequent actions by the Authority, such as contract approvals, as well as
2 whether any such approvals involve the commitment or expenditure of Proposition 1A bond proceeds.

3 The parties have filed briefing and supporting evidence in response to the Court's ruling. On
4 November 8, 2013, the Court held a hearing on the issue of remedies and heard oral argument by counsel
5 for the parties. At the close of the hearing, the Court took the matter under submission.

6 The Court has considered the evidence submitted by the parties, as well as their oral and written
7 arguments, and now issues its ruling on remedies.

8 **Preliminary Procedural and Evidentiary Issues**

9 The Authority's special application to strike or disregard argument in plaintiffs' reply brief, or for
10 permission to file a surreply brief, is denied. Plaintiffs' reply brief did not raise entirely new arguments,
11 but rather addressed and rebutted arguments in the Authority's opposition brief. The Authority was not
12 precluded from addressing plaintiffs' rebuttal arguments in full at the hearing.

13 All requests for judicial notice filed by the parties in this phase of the proceedings are granted, and
14 all evidentiary objections are overruled.

15 **Issuance of a Writ of Mandate**

16 The primary issue of concern to the Court in relation to remedies was whether issuance of a writ of
17 mandate directing the Authority to rescind its approval of the November 3, 2011 funding plan would have
18 any real and practical effect. Based on the briefing and evidence the parties have submitted, the Court is
19 satisfied that issuance of the writ would have a real and practical effect in this case.

20 Specifically, the Court is persuaded that the preparation and approval of a detailed funding plan
21 that complies with all of the requirements of Streets and Highways Code section 2704.08(c) is a necessary
22 prerequisite for the preparation and approval of a second detailed funding plan under subdivision (d) of the
23 statute, which in turn is a necessary prerequisite to the Authority's expenditure of any bond proceeds for
24 construction or real property and equipment acquisition, other than for costs described in subdivision (g).
25

26 The conclusion that the subdivision (c) funding plan is a necessary prerequisite to the subdivision
27 (d) funding plan is supported by the fact that only the first funding plan is required to make the critical
28

1 certification that the Authority has completed “all necessary project level environmental clearances
2 necessary to proceed to construction”. (See, Streets and Highways Code section 2704.08(c)(2)(K).) The
3 subdivision (d) funding plan is not required to address environmental clearances. Thus, the subdivision (d)
4 funding plan, as a precondition for proceeding to construction, depends upon the adequacy of the
5 subdivision (c) funding plan in at least one critical respect.

6 In the absence of a valid subdivision (c) funding plan making the required certification of
7 environmental clearances, the Authority could prepare and submit a subdivision (d) funding plan and
8 proceed to commit and spend bond proceeds without ever certifying completion of the necessary
9 environmental clearances. As plaintiffs argue, proceeding to construction without all required project-
10 level environmental clearances could result in substantial delays in the project, or even a need to redesign
11 or relocate portions of the project, potentially at great cost to the State and its taxpayers. Streets and
12 Highways Code section 2704.08 is carefully designed to prevent that from happening, but that design is
13 frustrated if obvious deficiencies in the first funding plan are essentially ignored.

14 Issuance of a writ of mandate directing the Authority to rescind its approval of the November 3,
15 2011 funding plan based on the finding that the funding plan did not comply with all of the requirements
16 of subdivision (c) thus will have a real and practical effect: it will establish that the Authority has not
17 satisfied the first required step in the process of moving towards the commitment and expenditure of bond
18 proceeds.

19 The Court therefore grants the petition for writ of mandate, and orders that a writ of mandate shall
20 issue pursuant to Code of Civil Procedure section 1085, directing the Authority to rescind its approval of
21 the November 3, 2011 funding plan.

22 The Court also asked the parties to address the issue of whether the writ should invalidate any
23 subsequent approvals made by the Authority in reliance on the November 3, 2011 funding plan. Plaintiffs
24 focused on the Authority’s approval of construction contracts with CalTrans and Tutor-Perini-Parsons,
25 arguing that those contracts necessarily involve the present commitment of bond proceeds for
26 construction-related activities that do not fall within the so-called “safe harbor” provision of Streets and
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1 Highways Code section 2704.08(g). Much of the argument on this issue centered on the Authority's
2 present use of federal grant money, which is not governed by Proposition 1A, and whether the manner in
3 which such federal funds were being used and spent virtually guarantees that Proposition 1A bond
4 proceeds eventually will have to be spent under these two contracts in order to satisfy federal matching
5 fund requirements.

6 The Court has reviewed the evidence submitted by the parties and is not persuaded that approval
7 of the two contracts at issue, or the use of federal grant money thus far, necessarily amounts to the present
8 commitment of Proposition 1A bond funds for activities outside the scope of subdivision (g).
9 Significantly, the Authority demonstrated that the two contracts contain termination clauses. Thus, the
10 Authority is not necessarily committed to spending the full face amount of those contracts. Similarly,
11 plaintiffs did not demonstrate convincingly that federal grant money that has been spent so far and that
12 currently is projected to be spent necessarily exceeds the amount of funds available to the Authority from
13 funds other than Proposition 1A bond proceeds, and therefore inevitably must be matched with Proposition
14 1A bond proceeds. It is simply unclear at this time how the pattern of spending on the project will
15 develop.
16

17 The Court therefore concludes that the writ of mandate should not include any provision directing
18 the Authority to rescind its approval of the CalTrans or Tutor-Perini-Parsons contracts.

19 Other Remedies

20 In their briefing and argument, plaintiffs ask the Court to order other remedies, including an
21 injunction prohibiting the Authority from submitting a funding plan pursuant to subdivision (d) until it
22 prepares and approves a funding plan that complies with subdivision (c); a temporary restraining order or
23 injunction prohibiting the Authority from using federal grant money while this action is pending; and an
24 order directing a full accounting of past and projected expenditures on the high-speed rail project.

25 The Court finds that none of these remedies are appropriate at this point in the proceedings.

26 There is no evidence before the Court that indicates that the Authority is preparing, or is ready to
27 submit, a subdivision (d) funding plan at this point. There is thus no basis for concluding that the
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1 Authority is threatening to violate any applicable law or order of this Court relating to the preparation and
2 submission of such a plan, and no basis for issuing injunctive relief to halt such action.

3 There is also no evidence before the Court that the Authority is using, or planning to use, federal
4 grant money in violation of any applicable law or order of this Court. Plaintiffs' argument that an
5 injunction is necessary to prevent the commitment of Proposition 1A bond funds or the waste of federal
6 funds while this action is pending is not persuasive. As discussed above, the Court is not persuaded that
7 the Authority's use and projected use of federal grant money necessarily amounts to the present
8 commitment of Proposition 1A bond proceeds. Moreover, the Authority's use of federal grant money is
9 not regulated by Proposition 1A or its funding plan requirements.

10 Finally, the Court finds no proper basis on which to order a full accounting. Plaintiffs have not
11 demonstrated that there has been any impropriety in the expenditure of federal grant money, or of other
12 funds subject to the funding plan requirements of Streets and Highways Code section 2704.08(c) or (d),
13 that would require an accounting as a remedy.

14 The Court accordingly denies all requests for remedies other than the issuance of a writ of
15 mandate directing the Authority to rescind its approval of the November 3, 2011 funding plan.

16
17 **Plaintiffs' Remaining Writ Claims and Status of Individual Defendants**

18 The Authority requests dismissal of plaintiffs' remaining writ of mandate claims. At the hearing
19 on this matter, counsel for plaintiffs agreed on the record that, aside from the writ of mandate claims
20 addressed in the Court's August 16, 2013 ruling, all other writ of mandate claims were not ripe and could
21 be dismissed, and that plaintiffs intended to proceed on their claims under Code of Civil Procedure section
22 526a. The Court therefore orders all remaining writ of mandate claims dismissed.

23 The Authority also requests dismissal of all individual defendants named in this case. The request
24 for dismissal is denied on the ground that some or all of the individual defendants may be proper parties in
25 the remaining causes of action under Code of Civil Procedure section 526a, as they may have a role in the
26 use and expenditure of Proposition 1A bond proceeds, and could be necessary parties if any injunctive
27 relief is ordered. The writ of mandate that will be issued pursuant to the Court's August 16, 2013 ruling
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1 shall direct only the Authority to take specified action, and shall not direct any action on the part of any of
2 the individual defendants.

3 As previously agreed in an informal status and scheduling conference held with the Court on
4 November 8, 2013, all parties are directed to appear for a continued status and scheduling conference in
5 Department 31 at 1:30 p.m. on Friday, December 13, 2013 to address further proceedings, including trial,
6 on plaintiffs' claims under Code of Civil Procedure section 526a.

7 **Conclusion**

8 The petition for writ of mandate is granted for the reasons stated in the Court's ruling issued on
9 August 16, 2013. A writ of mandate shall issue pursuant to Code of Civil Procedure section 1085
10 directing the Authority to rescind its approval of the November 3, 2011 funding plan. No other relief is
11 ordered at this time.

12 Counsel for plaintiffs is directed to prepare an order granting the petition and a writ of mandate in
13 accordance with the Court's rulings in this matter; submit them to opposing counsel for approval as to
14 form in accordance with Rule of Court 3.1312(a); and thereafter submit them to the Court for signature
15 and issuance of the writ in accordance with Rule of Court 3.1312(b).
16

17
18
19 DATED: November 25, 2013

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21 _____
22 Judge MICHAEL P. KENNY
23 Superior Court of California,
24 County of Sacramento
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CERTIFICATE OF SERVICE BY MAILING
(C.C.P. Sec. 1013a(4))

I, the undersigned deputy clerk of the Superior Court of California, County of Sacramento, do declare under penalty of perjury that I did this date place a copy of the above-entitled **RULING ON SUBMITTED MATTER** in envelopes addressed to each of the parties, or their counsel of record or by email as stated below, with sufficient postage affixed thereto and deposited the same in the United States Post Office at 720 9th Street, Sacramento, California.

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Dated: November 25, 2013

Superior Court of California,
County of Sacramento

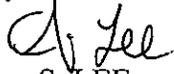
By: 
S. LEE
Deputy Clerk

EXHIBIT “C”

PROTEST AND OPPOSITION STATEMENT
OF
KINGS COUNTY WATER DISTRICT AND
CITIZENS FOR CALIFORNIA HIGH-SPEED RAIL ACCOUNTABILITY
TO
PETITION FOR EXEMPTION OF
CALIFORNIA HIGH-SPEED RAIL AUTHORITY

In the Supreme Court of the State of California

CALIFORNIA HIGH-SPEED RAIL
AUTHORITY, HIGH-SPEED PASSENGER
TRAIN FINANCE COMMITTEE, GOVERNOR
EDMUND G. BROWN JR., TREASURER BILL
LOCKYER, DIRECTOR OF DEPARTMENT OF
FINANCE MICHAEL COHEN and SECRETARY
OF THE STATE TRANSPORTATION AGENCY
BRIAN KELLY,

Petitioners,

v.

THE SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO,

Respondent,

JOHN TOS, AARON FUKUDA, COUNTY OF
KINGS, HOWARD JARVIS TAXPAYERS
ASSOCIATION, COUNTY OF KERN, FIRST
FREE WILL BAPTIST CHURCH, EUGENE
VOILAND, CITIZENS FOR CALIFORNIA
HIGH-SPEED RAIL ACCOUNTABILITY,
KINGS COUNTY WATER DISTRICT, and
UNION PACIFIC RAILROAD COMPANY,

Real Parties In Interest.

Case No.

Sacramento Superior Court, Case Nos. 34-2011-0113919; 34-2013-00140689
Dept. 31; The Honorable Michael P. Kenny, Judge; Tel: (916) 874-6353

PETITION FOR EXTRAORDINARY WRIT OF MANDATE, APPLICATION FOR TEMPORARY STAY, AND MEMORANDUM OF POINTS AND AUTHORITIES STAY REQUESTED BY MARCH 1, 2014

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DOUGLAS J. WOODS
Senior Assistant Attorney General
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Attorneys for Petitioners

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to rules 8.208 and 8.488 of the California Rules of Court, Petitioners California High-Speed Rail Authority, et al. hereby certify, through their undersigned counsel, that there are no interested entities or persons that must be listed in this certificate.

Dated: January 24, 2014

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California

A handwritten signature in cursive script that reads "Stephanie Zook". The signature is written in black ink and is positioned between the name of the Attorney General and the signature of the Deputy Attorney General.

STEPHANIE F. ZOOK
Deputy Attorney General
Attorneys for Petitioners

INTRODUCTION

California voters approved the sale of \$9.95 billion in general obligation bonds to build the largest infrastructure project in the State's history: a high-speed rail system connecting California's major population centers. Beyond serving as an engine of economic growth, high-speed rail will improve the environment by curbing automobile dependency and the need to build new roads and airports, thereby reducing air pollution and the greenhouse gases that are causing global warming.

Since the project's inception, opponents of high-speed rail have tried to block its construction. Now, two rulings of the Sacramento Superior Court—which are otherwise unreviewable as a practical matter—imperil the project by erecting obstacles found nowhere in the voter-approved bond act. These erroneous rulings turn the requirements of the high-speed rail bond act on their head, threaten state and federal funding for the project, and urgently warrant review by this Court in an exercise of its original writ jurisdiction. (Cal. Rules of Court, rule 8.486(a)(1).)

In the first of two companion cases, the trial court refused to validate approximately \$8.6 billion in bonds because it found no evidentiary basis for the declaration of the High-Speed Passenger Train Finance Committee (the "Committee") that issuing these bonds was "necessary and desirable." The fact that the court's analysis is unsupported by any case authority signals its error. In fact, the Committee's conclusion that bond issuance is necessary or desirable is not a substantive determination that requires a particular quantum of evidence.

Left undisturbed, this ruling will disrupt the State's ability to finance the high-speed rail system as well as other projects funded with general obligation bonds. Given the trial court's failure to articulate what record might support a determination of necessity or desirability, it will be more difficult for public finance lawyers to deliver the specialized legal opinions

Absent review by this Court and a stay of the writ, the future of the high-speed rail system may effectively be determined by two superior court rulings untethered from the law approved by the Legislature and the voters to build it. The statewide importance of this project and the legal issues presented warrant extraordinary review by this Court.

PETITION FOR WRIT OF MANDATE

JURISDICTION

This Court has jurisdiction. (Cal. Const., art. VI, § 10; Code Civ. Proc., § 1085.)

AUTHENTICITY OF EXHIBITS

All exhibits accompanying this Petition are true and correct copies of original documents on file with the respondent court except Tabs 7-9, which are true and correct copies of the original reporter's transcripts of the May 31, 2013 hearing on the petition for writ of mandate and the November 8, 2013 hearing on the remedies issue in *Tos, et al. v. California High-Speed Rail Authority, et al.*, Sacramento Superior Court Case No. 34-2011-00113919 ("*Tos*") and the September 27, 2013 hearing on the bond validation action in *High Speed Rail Authority, et al. v. All Persons Interested*, Sacramento Superior Court Case No. 34-2013-00140689 (the "Validation Action"). The exhibits are incorporated herein by reference as though fully set forth in this petition and are paginated consecutively from page HSR00001 through HSR09538 in the concurrently-filed Appendix of Exhibits. The exhibits are referenced by their tab and, where applicable, by page number (e.g., Tab 1, HSR00001).

PARTIES

1. Petitioners High-Speed Rail Authority and High-Speed Passenger Train Finance Committee are plaintiffs in the Validation Action.

22. No prior petitions have been filed in either action.
23. Additional factual and procedural history is set forth in the memorandum of points and authorities immediately following the petition.

ISSUES PRESENTED

24. The issues presented by this writ petition are:
 - a. Whether, in a validation proceeding, a court may withhold validation of bonds despite the Committee's determination that it is "necessary or desirable" to issue bonds, solely for lack of record evidence supporting that determination.
 - b. Even if so, whether in this case there was sufficient evidence to validate the high-speed rail bonds authorized by the Bond Act and the Committee.
 - c. Whether a claim lies in mandamus to challenge the adequacy of the Authority's funding plan.
 - d. Even if so, whether a writ may issue preventing the Authority from spending duly appropriated funds unless and until it rescinds and re-adopts a first funding plan.

APPEAL IS AN INADEQUATE REMEDY AND INJURY TO THE PETITIONERS WOULD BE IRREPARABLE ABSENT IMMEDIATE RELIEF

25. Because appeal is an inadequate remedy and Petitioners will suffer irreparable injury absent immediate intervention by this Court, the writ should be granted.

26. Both decisions are effectively unreviewable on appeal. The issue is time. The Authority is faced with a Hobson's choice: it can pursue appeals that may take years to resolve and incur the exorbitant costs, fiscal and otherwise, that will attend the delays, or accept and comply with the orders, likely mooting an appeal, and attempt to move the project forward on the trial court's and private parties' terms. That is not a real choice

EXHIBIT “D”

PROTEST AND OPPOSITION STATEMENT
OF
KINGS COUNTY WATER DISTRICT AND
CITIZENS FOR CALIFORNIA HIGH-SPEED RAIL ACCOUNTABILITY
TO
PETITION FOR EXEMPTION OF
CALIFORNIA HIGH-SPEED RAIL AUTHORITY

S216091
IN THE SUPREME COURT OF CALIFORNIA
En Banc

CALIFORNIA HIGH-SPEED RAIL AUTHORITY et al., Petitioners,

v.

SUPERIOR COURT OF SACRAMENTO COUNTY, Respondent;
JOHN TOS et al., Real Parties in Interest.

The petition for writ of mandate is transferred to the Court of Appeal, Third Appellate District. The court is directed to expedite its consideration of this matter. Real Parties in Interest are to serve and file an expedited preliminary opposition (Cal. Rules of Court, rule 8.487, subd. (a)) in the Court of Appeal by Monday, February 3, 2014. Petitioners, by February 10, 2014, must serve and file in the Court of Appeal an expedited reply to the preliminary opposition. (See Cal. Rules of Court, rule 8.487, subd. (a) [preliminary opposition and reply]; 1.10, subd (c) [shortening time within which a party must perform].)

SUPREME COURT
FILED

JAN 29 2014

Frank A. McGuire Clerk

Deputy

Cantil-Sakauye
Chief Justice

Kennard
Associate Justice

Baxter
Associate Justice

Werdegar
Associate Justice

Chin
Associate Justice

Corrigan
Associate Justice

Liu
Associate Justice

EXHIBIT “E”

PROTEST AND OPPOSITION STATEMENT
OF
KINGS COUNTY WATER DISTRICT AND
CITIZENS FOR CALIFORNIA HIGH-SPEED RAIL ACCOUNTABILITY
TO
PETITION FOR EXEMPTION OF
CALIFORNIA HIGH-SPEED RAIL AUTHORITY

BILL NUMBER: AB 1779 CHAPTERED
BILL TEXT

CHAPTER 801
FILED WITH SECRETARY OF STATE SEPTEMBER 29, 2012
APPROVED BY GOVERNOR SEPTEMBER 29, 2012
PASSED THE SENATE AUGUST 29, 2012
PASSED THE ASSEMBLY AUGUST 30, 2012
AMENDED IN SENATE AUGUST 24, 2012
AMENDED IN SENATE AUGUST 21, 2012
AMENDED IN SENATE AUGUST 6, 2012
AMENDED IN SENATE JUNE 27, 2012
AMENDED IN ASSEMBLY MAY 25, 2012
AMENDED IN ASSEMBLY APRIL 19, 2012
AMENDED IN ASSEMBLY APRIL 17, 2012
AMENDED IN ASSEMBLY APRIL 9, 2012
AMENDED IN ASSEMBLY MARCH 29, 2012

INTRODUCED BY Assembly Member Galgiani
 (Coauthors: Assembly Members Dickinson, Olsen, and Perea)
 (Coauthors: Senators Cannella, Padilla, and Wolk)

FEBRUARY 21, 2012

An act to amend Sections 14031.8, 14070.2, 14070.4, and 14070.6 of, and to repeal and add Article 5.4 (commencing with Section 14074) of Chapter 1 of Part 5 of Division 3 of Title 2 of, the Government Code, relating to transportation.

LEGISLATIVE COUNSEL'S DIGEST

AB 1779, Galgiani. Intercity rail agreements.

Existing law authorizes the Department of Transportation to contract with Amtrak for intercity rail passenger services and provides funding for these services from the Public Transportation Account. Existing law, until December 31, 1996, authorized the department, subject to approval of the Secretary of Business, Transportation and Housing, to enter into an interagency transfer agreement under which a joint powers board assumes responsibility for administering the state-funded intercity rail service in a particular corridor. Existing law, with respect to a transferred corridor, requires the board to demonstrate the ability to meet performance standards established by the secretary.

This bill would authorize the department, with approval of the secretary, to enter into interagency transfer agreements for additional intercity rail corridors, to be entered into between June 30, 2014, and June 30, 2015. The bill would require the agreements to cover the initial 3-year period after the transfer, and would authorize subsequent extensions by mutual agreement. If agreements are not entered into by that the expiration of that period, the bill would require the secretary to report to the Governor and the Legislature by June 30, 2016, as specified.

This bill would specifically authorize an additional interagency

transfer agreement to be entered into with respect to the San Joaquin Corridor, as defined, if a joint powers authority and governing board are created and organized. In that regard, the bill would provide for the creation of the San Joaquin Corridor Joint Powers Authority, to be governed by a board of not more than 11 members. The bill would provide that the board shall be organized when at least 6 of the 11 agencies elect to appoint members. The bill would provide for the authority to be created when the member agencies enter into a joint powers agreement, as specified. The bill would provide for future appointments of additional members if the service boundaries of the San Joaquin Corridor are expanded.

Existing law requires the level of service to be funded by the state pursuant to a transfer agreement to not be less than the current number of intercity round trips operated in a corridor and serving the same endpoints.

This bill would require the level of service funded by the state to remain the same during the first 3 years following the effective date of the transfer agreement, and would require the entity assuming responsibility for a corridor to provide that level of service. The bill would prohibit termination of feeder bus services except for specified reasons.

Existing law provides for the allocation of state funds by the secretary to a joint powers board under an interagency transfer agreement based on the annual business plan for the intercity rail corridor and subsequent appropriation of state funds. Existing law states that the interagency transfer agreement may provide that any additional funds required to operate the intercity rail service during a fiscal year shall be provided by a joint powers board from jurisdictions that receive service.

This bill, if local resources are made available for operating the intercity rail service, would require a vote of the local agency providing the resources, and would require the concurrence of the joint powers board in that regard.

This bill would authorize the secretary to adopt new performance standards for intercity rail services. The bill would require the San Joaquin Joint Powers Authority to protect existing services and facilities and seek to expand service, as specified.

Existing law authorizes the department and any entity that assumes administrative responsibility for passenger rail services through an interagency transfer agreement to contract with specified entities for the use of tracks and other facilities and for the provision of passenger rail services.

This bill would require a contractor under an agreement described above to agree that its labor relations shall be governed by a specified federal act relating to labor relations on railroads.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. This act shall be known and may be cited as the Intercity Passenger Rail Act of 2012.

SEC. 2. (a) The Legislature finds and declares all of the following:

(1) An intercity rail passenger system, linking major urban centers and complemented by feeder bus services that provide access to outlying areas and destinations, is an important element of the state's transportation system, and shall remain a state-funded

program.

(2) The state has a continuing interest in the provision of cost-effective intercity rail passenger services and has a responsibility to coordinate intercity rail passenger services statewide.

(3) Since 1976, the state has invested over one billion eight hundred million dollars (\$1,800,000,000) in capital improvements and operating support for intercity rail passenger service and must ensure the protection of that investment.

(4) Intercity rail service and ridership increases will result in more jobs, improve air quality, and help promote sustainable development.

(b) The Legislature, through the enactment of this act, intends all of the following:

(1) The Secretary of Business, Transportation and Housing shall be responsible for the overall planning, coordination, and budgeting of the intercity passenger rail service.

(2) If the secretary determines that transferring responsibility for intercity passenger rail service in a particular corridor or corridors to a statutorily created joint powers agency would result in administrative or operating cost reductions, the secretary may authorize the Department of Transportation to enter into an interagency transfer agreement to effect a transfer of those administrative functions, consistent with this act.

(3) Any intercity rail corridor for which administrative responsibility has been transferred to a joint powers board through an interagency transfer agreement shall remain as a component of the statewide system of intercity rail corridors.

(4) The public interest requires expansion of the state intercity rail program in order to keep pace with the needs of an expanding population.

(5) For not less than a three-year period following the effective date of the interagency transfer agreement, the level of state funding for intercity rail service in each corridor shall be maintained at a level equal to at least the level of service funded by the state in the corridor as of the effective date of the interagency transfer agreement, thus providing fiscal stability that will allow appropriate planning and operation of these services.

SEC. 3. Section 14031.8 of the Government Code is amended to read:

14031.8. (a) The Secretary of Business, Transportation and Housing shall establish, through an annual budget process, the level of state funding available for the operation of intercity passenger rail service in each corridor.

(b) Where applicable, operating funds shall be allocated by the secretary to the joint powers board in accordance with an interagency transfer agreement that includes mutually agreed-upon rail services. Funds for the administration and marketing of services, as appropriate, shall also be transferred by the secretary to the joint powers board, subject to the terms of the interagency transfer agreement.

(c) The joint powers board or local or regional entities may augment state-provided resources to expand intercity passenger rail services, or to address funding shortfalls in achieving agreed-upon performance standards. The joint powers board or local or regional agencies may identify and secure new supplemental sources of funding for the purpose of expanding or maintaining intercity rail passenger

service levels, which may include state and federal intercity rail resources. Local resources may be available to offset any redirection, elimination, reduction, or reclassification by the state of state resources for operating intercity passenger rail services identified in subdivision (b) only if the local resources are dedicated by a vote of the local agency providing funds, with the concurrence of the joint powers board.

(d) The department may provide any support services as may be mutually agreed upon by the joint powers board and the department.

(e) Operating costs shall be controlled by dealing with, at a minimum, the Amtrak cost allocation formula and the ability to contract out to Amtrak or other rail operators as a part of federal legislation dealing with Amtrak reauthorization.

(f) (1) Not later than June 30, 2014, the secretary shall establish a set of uniform performance standards for all corridors and operators to control cost and improve efficiency.

(2) To the extent necessary, as determined by the secretary, performance standards may be modified not later than July 30, 2015, or the effective date of the interagency transfer agreement, whichever comes first.

(3) Feeder bus services that provide connections for intercity rail passengers shall not be terminated unless the bus services fail to meet the cost-effectiveness standard described in paragraph (3) of subdivision (a) of Section 14035.2.

SEC. 4. Section 14070.2 of the Government Code is amended to read:

14070.2. (a) If authorized by the secretary, the department may, through an interagency transfer agreement, transfer to a joint powers board, and the board may assume, all responsibility for administering intercity passenger rail service in the corridor, including associated feeder bus service. Upon the date specified in the agreement, the board shall succeed to the department's powers and duties relative to that service, except that the department shall retain responsibility for developing budget requests for the service, consistent with the annual business plan as approved by the secretary for the service, through the state budget process, which shall be developed in consultation with the board, and for coordinating service in the corridor with other intercity passenger rail services in the state.

(b) An interagency transfer agreement may be executed on or after June 30, 2014, but not later than June 30, 2015, subject to negotiation and approval by the state and the board. The interagency transfer agreement between the department and the board shall cover the initial three-year period after the transfer, but may be extended thereafter by mutual agreement. If an interagency agreement is not entered into on or before June 30, 2015, the secretary shall provide a report to the Governor and the Legislature on or before June 30, 2016, explaining why an acceptable agreement has not been developed, with specific recommendations for developing an acceptable interagency agreement.

(c) The secretary shall require the board to demonstrate the ability to meet the performance standards established by the secretary pursuant to subdivision (f) of Section 14031.8.

SEC. 5. Section 14070.4 of the Government Code is amended to read:

14070.4. (a) An interagency transfer agreement between the department and a joint powers board, when approved by the secretary,

shall do all of the following:

(1) Specify the date and conditions for the transfer of responsibilities and identify the annual level of funding for the initial three years following the transfer and ensure that the level of funding is consistent with and sufficient for the planned service improvements within the corridor.

(2) Identify, for the initial year and subsequent years, the funds to be transferred to the board including state operating subsidies made available for intercity rail services in the corridor, and funds currently used by the department for administration and marketing of the corridor, with the amounts adjusted annually for inflation and in accordance with the business plan.

(3) Specify the level of service to be provided, the respective responsibilities of the board and the department, the methods that the department will use to assure the coordination of services with other rail passenger and feeder bus services in the state, and the methods that the department will use for the annual review of the business plan and annual proposals on funding and appropriations.

(4) Describe the terms of use by the board of car and locomotive train sets and other equipment and property owned by the department and required for the intercity service in the corridor, including, but not limited to, the number of units to be provided, liability coverage, maintenance and warranty responsibilities, and indemnification issues.

(5) Describe auditing responsibilities and process requirements, reimbursement and billing procedures, the responsibility for funding shortfalls, if any, during the course of each fiscal year, an operating contract oversight review process, performance standards and reporting procedures, the level of rail infrastructure maintenance, and other relevant monitoring procedures.

(b) Use of the annual state funding allocation, as set forth in the interagency transfer agreement, shall be described in an annual business plan submitted by the board to the secretary for review and recommendation by April 1 of each year. The business plan, when approved by the secretary, shall be deemed accepted by the state. The budget proposal developed by the department for the subsequent year shall be based upon the business plan approved by the secretary. The business plan shall be consistent with the interagency agreement and shall include a report on the recent as well as historical performance of the corridor service, an overall operating plan including proposed service enhancements to increase ridership and provide for increased traveler demands in the corridor for the upcoming year, short-term and long-term capital improvement programs, funding requirements for the upcoming fiscal year, and an action plan with specific performance goals and objectives. The business plan shall document service improvements to provide the planned level of service, inclusion of operating plans to serve peak period work trips, and consideration of other service expansions and enhancements. The initial business plan shall be consistent with the immediately previous plans developed by the department pursuant to Section 14036 and the January 2014 business plan developed by the High-Speed Rail Authority pursuant to Section 185033 of the Public Utilities Code. Subsequent business plans shall be consistent with the immediately previous plans developed by the department and the authority. The business plan shall clearly delineate how funding and accounting for state-sponsored intercity rail passenger services shall be separate from locally sponsored services in the corridor.

Proposals to expand or modify passenger services shall be accompanied by the identification of all associated costs and ridership projections. The business plan shall establish, among other things: fares, operating strategies, capital improvements needed, and marketing and operational strategies designed to meet performance standards established in the interagency transfer agreement.

(c) Based on the annual business plan and the subsequent appropriation by the Legislature, the secretary shall allocate state funds on an annual basis to the board. As provided in the interagency agreement, any additional funds that are needed to operate the passenger rail service during the fiscal year shall be provided by the board from jurisdictions that receive service. In addition, the board may use any cost savings or farebox revenues to provide service improvements related to intercity service. In any event, the board shall report the fiscal results of the previous year's operations as part of the annual business plan.

(d) The level of service funded by the state during the first three years following the effective date of the transfer agreement shall in no case be less than the number of intercity round trips operated in a corridor and serving the end points served by the intercity rail corridor as of the effective date of the interagency transfer agreement. Subject to Section 14035.2, the level of service funded by the state shall also include feeder bus service with substantially the same number of route miles as the current feeder system, to be operated in conjunction with the trains. For that same three-year period, the board shall continue to provide at least the same level of intercity rail and feeder bus services as were in operation on the effective date of the interagency transfer agreement, except that the interagency transfer agreement shall not prohibit the board from reducing the number of feeder bus route miles if the board determines that a feeder bus route is not cost effective as provided in Section 14035.2.

(e) Nothing in this article shall be construed to preclude expansion of state-approved intercity rail service.

(f) Local resources may be available to offset any redirection, elimination, reduction, or reclassification by the state of state resources for operating intercity rail services identified in subdivision (b) only if the local resources are dedicated by a vote of the local agency providing the funds, with the concurrence of the board.

SEC. 6. Section 14070.6 of the Government Code is amended to read:

14070.6. The department and any entity that assumes administrative responsibility for intercity passenger rail services through an interagency transfer agreement, may, through a competitive solicitation process, contract with the National Railroad Passenger Corporation (Amtrak) or with organizations not precluded by state or federal law to provide intercity passenger rail services, and may contract with rail corporations and other rail operators for the use of tracks and other facilities and for the provision of intercity passenger services on terms and conditions as the parties may agree. The department is deemed to be a third-party beneficiary of the contract, and the contract shall not contain any provision or condition that would negatively impact on or conflict with any other contracts the department has regarding intercity passenger rail services. Any entity that succeeds the department as sponsor of state-supported intercity passenger rail services through an

interagency transfer agreement is deemed an agency of the state for all purposes related to intercity passenger rail services, including Section 5311 of Title 49 of the United States Code. If the intercity passenger rail service is operated by a contractor, the contractor shall, as a condition of entering into an operating agreement with the entity, agree that its labor relations shall be governed by the federal Railway Labor Act (45 U.S.C. Sec. 151 et seq.).

SEC. 7. Article 5.4 (commencing with Section 14074) of Chapter 1 of Part 5 of Division 3 of Title 2 of the Government Code is repealed.

SEC. 8. Article 5.4 (commencing with Section 14074) is added to Chapter 1 of Part 5 of Division 3 of Title 2 of the Government Code, to read:

Article 5.4. San Joaquin Corridor

14074. As used in this article, the following terms have the following meanings:

(a) "Authority" or "San Joaquin Joint Powers Authority" means a joint exercise of powers agency formed under Chapter 5 (commencing with Section 6500) of Division 7 of Title 1 for purposes of assuming administrative responsibility for the San Joaquin Corridor under an interagency transfer agreement pursuant to Article 5 (commencing with Section 14070).

(b) "Board" means the governing board of the San Joaquin Joint Powers Authority established under Section 14074.2.

(c) "San Joaquin Corridor" or "corridor" means the Los Angeles-Bakersfield-Fresno-Stockton-Sacramento-Oakland intercity passenger rail corridor.

14074.2. (a) There shall be created the San Joaquin Joint Powers Authority Board, subject to being organized pursuant to the provisions of this article. Except as otherwise provided in subdivisions (b) and (c), the board shall be composed of not more than 11 members, as follows:

(1) One member of the board of directors of the Sacramento Regional Transit District, appointed by that board.

(2) One member of the board of directors of the San Joaquin Regional Rail Commission, appointed by that board, who shall be a resident of San Joaquin County.

(3) One member of the board of directors of the Stanislaus Council of Governments, appointed by that board.

(4) One member of the board of directors of the Merced County Association of Governments, appointed by that board.

(5) One member of the board of directors of the Madera County Transportation Commission, appointed by that board.

(6) One member of the board of directors of the Fresno Council of Governments, appointed by that board.

(7) One member of the board of directors of the Kings County Association of Governments, appointed by that board.

(8) One member of the board of directors of the Tulare County Association of Governments, appointed by that board.

(9) One member of the board of directors of the Kern Council of Governments, appointed by that board.

(10) One member of the board of directors of a regional transportation agency or rail transit operator that serves Contra Costa County, appointed by the Contra Costa Transportation Authority,

who shall be a resident of the county.

(11) One member of a regional transportation agency or rail transit operator that serves Alameda County, appointed by the Board of Supervisors, who shall be a resident of the county.

(b) The board shall be organized when at least six of the agencies described in paragraphs (1) to (11), inclusive, of subdivision (a) elect to appoint a member to serve on the board prior to December 31, 2013. Once organized, those agencies described in paragraphs (1) to (11), inclusive, of subdivision (a) that have not yet appointed members to serve on the board may elect to appoint a member to serve and be represented on the board at any time thereafter.

(c) If the rail service boundaries of the San Joaquin Corridor are extended, an additional member from each additional county receiving rail service may be added to the board pursuant to Section 14074.6.

(d) The authority shall protect existing services and facilities and seek to expand service as warranted by ridership and available revenue.

14074.4. The authority shall be created only if the agencies that would be represented on the board enter into a joint exercise of powers agreement to form the authority.

14074.6. The board shall make its decisions in accordance with the votes of its members, with a majority vote required for all matters with the exception of the approval of the business plan, revisions to that plan, and the addition of new members pursuant to subdivision (c) of Section 14074.2, which shall require a two-thirds vote of the members.

14074.8. The Steering Committee of the Caltrans Rail Task Force shall remain in existence. If a joint powers authority is formed pursuant to this article and an interagency transfer agreement is executed pursuant to subdivision (b) of Section 14070.2, the Steering Committee of the Caltrans Rail Task Force shall become the Steering Committee of the San Joaquin Joint Powers Authority for the purpose of advising the joint powers board.

EXHIBIT “F”

PROTEST AND OPPOSITION STATEMENT
OF
KINGS COUNTY WATER DISTRICT AND
CITIZENS FOR CALIFORNIA HIGH-SPEED RAIL ACCOUNTABILITY
TO
PETITION FOR EXEMPTION OF
CALIFORNIA HIGH-SPEED RAIL AUTHORITY



Jerry Wilmoth
General Manager Network Infrastructure

April 23, 2010

Dan Leavitt
Deputy Director
California High-Speed Rail Authority
925 L Street, Suite 1425
Sacramento, California 95814

Attn: Bay Area to Central Valley Revised Draft Program EIR Material Comments

Dear Mr. Leavitt:

In accordance with Section 1.3 of the revised draft program EIR identified above, dated March 4, 2010, Union Pacific Railroad Company submits the following comments regarding the revisions set forth in said revised EIR.

All of Union Pacific's previous written comments and objections submitted to the Authority, for this program segment and all other project and program segments, including the Union Pacific letters attached to the revised EIR, are incorporated herein and remain fully valid and effective.

Chapter 2 – Revised Project Description and Revised Impact Analysis:

San Jose to Gilroy

San Jose (Diridon) to Lick – Union Pacific previously has advised the Authority that it must have no less than twenty-five feet (25') clear and available from right of way line to center line of the No. 1 main track (the UPRR freight and Amtrak track). It appears from the drawings in Chapter 2 of the revised EIR that in some locations, UP's No. 1 main line would be pushed eastward with less than fifteen feet (15') available. This will severely impact our mechanized maintenance functions and greatly hinder our ability to clear derailments. The Authority's plans allowing less than the required twenty-five feet (25') in this segment need to be revised.

Lick to Gilroy – Chapter 2 of the revised EIR appears to locate the high-speed rail corridor immediately adjacent to UP's east right of way line throughout this segment. The proposed alignment provides no buffer space between the high-speed and freight-Caltrain corridors. Where the high-speed corridor is elevated (such as at Morgan Hill), the edge of the elevated platform or structure will be exactly on UP's extended right of way line. Union Pacific previously has advised the Authority that an alignment that abuts UP's right of way line is unacceptable for two reasons: it is potentially unsafe and it prevents all future rail development on that side of the right of way.

Where the high-speed corridor is to be located between UP's right of way and Monterey Highway, UP requests that an adequate buffer space be maintained between the nearest high-speed track and UP's right of way line. The width of such buffer space shall meet UP's existing standards, i.e., be no less than fifty feet (50'), and comply with all FRA regulations and requirements. Where Monterey Highway is not adjacent to the high-speed corridor, UP requests that the corridor right of way be separated from its right of way line by at least one hundred feet (100') and meets all FRA regulations.

Gilroy Station – Chapter 2 indicates that the Gilroy station will be located on UP's right of way east of the existing Caltrain depot. This property is currently held for commercial or industrial development and will not be made available to the Authority. As shown previously, UP will defend against any legal action to take such property by eminent domain. UP has made this position clear to the Authority (and to the City of Gilroy) on many prior occasions and such position has not changed.

Altamont Pass Corridor – Union Pacific has not taken any position regarding this alternative corridor and does not do so at this time. UP has previously advised the Authority concerning the potential use of UP's rights of way in the East Bay and over Altamont Pass. Those comments remain operative.

Chapter 3 – Union Pacific Railroad's Statements.

This chapter of the revised EIR attaches and discusses UP's previous written statements and comments regarding location of the high-speed corridor on its rights of way. The revised EIR does not accurately characterize and summarize UP's position, i.e., that no part of the high-speed corridor may be located on UP's right of way.

The Authority, in preparing the revised EIR, appears to have disregarded UP's statements and position with reference to the alignment of the high-speed corridor in the Lathrop to Merced and Chowchilla to Merced segments. Based on drawings and photographs in the revised EIR, the Authority intends to locate the high-speed corridor either on UP's right of way (either at-grade or elevated) in Manteca, Modesto, Salida, Turlock, Atwater and Merced, or immediately adjacent thereto. This is not acceptable. UP's position has been made clear from the outset of high-speed rail planning and is plainly stated in the letters attached to the revised EIR.

UP reiterates its position once again: no part of the high-speed rail corridor may be located on (or above, except for overpasses) UP's rights of way at any location. To the extent that the Authority ignores this position, its revised EIR is deficient.

Chapter 4 – Impacts to Union Pacific Freight Operations.

Section 4.1.4 states the Authority's position as follows:

HST alignments will be designed to minimize impacts to existing UPRR business-serving spurs where feasible. The Authority will work with UPRR for those locations where design of the HST alignment may affect these business-serving spurs. The following options will be jointly evaluated in concert with the UPRR:

- *The HST alignment will be grade-separated (trench, tunnel, or aerial) from the UPRR spur.*
- *The Authority will negotiate with the UPRR to acquire the business-serving spur.*
- *If possible, the spur will be reconstructed so as not to interfere with HST operations.*

With regard to the business implications of acquiring properties adjacent to the railroad operating rights-of-way that may prohibit or reduce the likelihood of future business-serving spurs and associated potential business opportunities for UPRR, the Authority is fully aware that there currently is no prohibition to acquiring property adjacent to existing privately-owned railroad rights-of-way. UPRR will retain authority to serve those businesses on properties or track rights-of-way owned by the UPRR.

Union Pacific's position on the Authority's plans to locate the high-speed corridor immediately adjacent to UP's right of way has been made quite clear in its comments to the Merced-Sacramento Project Level EIR dated February 25, 2010. Those comments are incorporated herein.

To reiterate the main points of UP's position, no part of the high-speed corridor may be located on any rights of way owned or operated by UP, whether at grade or grade separated. For overpasses, all supporting piers must be completely off the right of way. Locating the high-speed corridor immediately adjacent to UP's right of way raises serious safety issues and creates a barrier against any future rail-served development on that side. California's economic and environmental needs cannot be served if future freight rail development is summarily prohibited by high-speed rail. Adequate free property must be provided adjacent to the right of way to allow for such future rail-served development.

The Authority's position statement as quoted above is unacceptable to Union Pacific. UP will not negotiate with the Authority regarding sale of right of way or rail spurs. UP will protest against and assist its existing rail-served customers in the event that the Authority attempts to take the property and operations of such customers by eminent domain.

The mitigation strategies suggested by the Authority in Section 4.1.5 are unacceptable to Union Pacific. No part of the high-speed corridor may be located on UP's rights of way. Therefore, mitigation for UP is not an issue. UP will not permit any of its trackage or facilities (such as team tracks) to be taken or relocated.

Union Pacific's Safety Concerns and Objections.

The revised EIR fails to analyze the safety risks inherent in locating the high-speed corridor immediately adjacent to a narrow, 60 or 100-foot-wide, freight rail right of way carrying mainline freight trains at speed. Although Union Pacific and other railroads over the years have made astonishing progress in reducing freight train derailments, major derailments still occur. In most instances, derailments will remain within the confines of the rail right of way, but some derailments may propel rail cars onto the tracks of an adjacent passenger operation. A freight train derailment that coincides with passage of a 200-plus m.p.h. HSR train – which would not have the safety protections of current passenger rail equipment – could result in one of the worst rail accidents in American history, with dozens or even hundreds of fatalities. The chances of such an occurrence would be small, but even small chances, given enough time, become increasingly likely. The Authority must consider, and develop mitigation options, for this risk. These mitigations should

include moving the high-speed corridor as far from the freight rail tracks as possible and may include FRA-approved crash walls, intrusion detection, and interlocked signal systems. Union Pacific will hold the Authority responsible for a decision that fails to prevent this type of accident.

Conclusion and Summary.

Union Pacific has made its position regarding use of its rights of way for the high-speed rail corridor clear on many occasions. Union Pacific objects to location of the high-speed corridor so close to UP's operations as to be a safety hazard. Finally, Union Pacific objects to the location of the corridor so that it takes existing rail-served customers or acts as a barrier to all future rail-served developments.

Please direct all questions or comments to the undersigned.

Sincerely,



Jerry S. Wilmoth
General Manager – Network Infrastructure

EXHIBIT “G”

PROTEST AND OPPOSITION STATEMENT
OF
KINGS COUNTY WATER DISTRICT AND
CITIZENS FOR CALIFORNIA HIGH-SPEED RAIL ACCOUNTABILITY
TO
PETITION FOR EXEMPTION OF
CALIFORNIA HIGH-SPEED RAIL AUTHORITY

Submission 586 (Jerry S. Wilmoth, Union Pacific Railroad, October 12, 2011)



Jerry Wilmoth
General Manager Network Infrastructure

October 12, 2011

California High-Speed Rail Authority
770 L Street, Suite 800
Sacramento, CA 95814

Re: Union Pacific Railroad Comments to Merced to Fresno Draft EIR/EIS

Dear High-Speed Rail Authority:

Union Pacific Railroad Company (Union Pacific) submits the following comments related to the Merced to Fresno Draft Environmental Impact Report/Statement (DEIR) in accordance with the guidelines on the California High-Speed Rail Authority's (Authority) website. Replies or requests for additional information from Union Pacific should be addressed to the undersigned.

1. Failure to Accurately and Consistently Address Union Pacific's Property Rights.

As Union Pacific has already stated in previous comments, no part of the high-speed rail system may be located on Union Pacific's property. This has not changed -- Union Pacific requires preservation of its entire operating right of way.

One of the difficulties in reviewing the DEIR is that it contains incomplete and contradictory information about property issues touching on Union Pacific's rights. While the DEIR makes statements about not encroaching on Union Pacific's property, its drawings show unmistakable encroachments in the Fresno and Merced station areas. A stark example is an emergency vehicle access road for the Authority's use that would be located on the Union Pacific right of way near the Fresno station. The Authority's plans show this emergency vehicle access road crossing Union Pacific's mainline tracks at grade at two locations. For safety and public policy reasons, Union Pacific opposes the addition of any new grade crossings over its tracks.

Another example of a possible encroachment is that drawings related to the BNSF Alternative are mislabeled in a way that shows part of Union Pacific's right of way belonging to BNSF. This error misleads a person reviewing the plans to believe that the high-speed rail alignment will be adjacent to BNSF right of way along a three-mile stretch leading into the Merced station when in fact this section of the high-speed rail alignment is adjacent to Union Pacific's property.

UNION PACIFIC RAILROAD 10031 Foothills Blvd. Roseville, CA 95747 ph. (916) 789-6360

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California High-Speed Rail Authority
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Other examples of encroachments and inconsistencies exist, but it is not possible to fully evaluate and comment on them because the Authority's materials do not provide sufficient detail to identify property lines and measurements. This is a pervasive problem throughout the DEIR. From Union Pacific's review, it does not appear that right of way boundaries are depicted on any of the Authority's maps, and they are shown with insufficient precision on its drawings. To offer one example of the problem, Sheet T3003-A depicts features near the proposed Merced station. The drawing makes no reference to Union Pacific property or facilities, but this station would be located immediately adjacent to and apparently encroach upon the Union Pacific right of way. Remarkably, the DEIR does not address the extent of such potential acquisitions. To the contrary, it states that the plans call for no encroachments at all and relies on avoidance of encroachments as a basis for avoiding environmental impacts.

As a further example of this kind of inconsistency, the DEIR asserts that encroachments will be avoided while also stating that the project design "[u]ses shared right-of-way when feasible." (DEIR Executive Summary, p. S-9.) While this statement may be intended to refer to sharing right of way with other operators, the DEIR does not say so. Clarity on this point is essential.

2. Failure to Acknowledge Acquisitions for Eminent Domain Purposes.

Union Pacific reserves the right to make further comments and defend its interests against any eminent domain or other action related to the Authority's plans that would involve an encroachment upon or acquisition of Union Pacific's operating property. Union Pacific will not surrender or convey any property that could be used to support freight railroad operations.

Compliance with the California Environmental Quality Act (CEQA) is a prerequisite for the exercise of eminent domain authority. Accordingly, the Authority cannot attempt to condemn any Union Pacific property in reliance on an EIR that claims to avoid any acquisitions of such property. If this document is finalized without addressing such acquisitions and the Authority later wishes to pursue condemnation, a Supplemental EIR/EIS would be necessary.

3. Failure to Evaluate Impacts of Alignments Adjacent to Union Pacific's Right of Way.

There are three alternative high-speed rail alignments identified between Merced and Fresno: the UPRR/SR 99 Alternative, the BNSF Alternative, and the Hybrid Alternative. All three alternative alignments are adjacent to Union Pacific's Fresno Subdivision in the Fresno and Merced areas. In the Fresno area, the high-speed rail line passes over Union Pacific's main line at Herndon (San Joaquin River) and parallels the railroad's right of way on the west all the way into the Fresno station. At Merced the BNSF alternative utilizes the west side of Union Pacific's right of way from the south city limits.

The UPRR/SR 99 alternative is adjacent to Union Pacific almost the entire distance between these station areas. The BNSF alternative is adjacent to BNSF's main line between these areas. The Hybrid alternative is essentially the UPRR/SR 99 alignment with a wide bypass around downtown Madera, some of which would utilize the BNSF main line.

In short, even if there were no encroachments, all three alternatives would materially impact Union Pacific's right of way and operations. Yet the DEIR fails to recognize or evaluate any potential impacts, temporary or permanent, on Union Pacific's operations:

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Submission 586 (Jerry S. Wilmoth, Union Pacific Railroad, October 12, 2011) - Continued

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As the HST alternatives do not encroach on the freight rail corridors, they would not have a direct effect on freight operations. After construction, freight operation would continue as it currently does and vehicle miles would change in accordance with service plans of the UPRR and BNSF. No effects on freight rail operations are anticipated. DEIR Section 3.2 Transportation, p. 36.

This conclusion is false. All three alternative alignments place the high-speed rail line immediately adjacent to Union Pacific's main line at various locations. Such placement permanently forecloses any expansion by Union Pacific on that side of its right of way. This would include both capacity expansion and new spurs to industrial and agricultural shippers.

Moreover, the DEIR is vague about just how close the project alignment would be to Union Pacific's line. Under the heading of "UPRR Adjacency" (p. 2-41), the DEIR states that "the alternative is designed to avoid the existing UPRR operations right-of-way and active rail spurs to the greatest extent possible." There is no clear explanation of the configuration or minimum separation where space constraints may bring the lines into close proximity, or even encroachments where avoidance is not possible. As an example, Figure 2-29 merely shows a 100 foot separation in one short segment. Even where the high-speed rail line would be 125 feet or more from Union Pacific's main line, the buffer zone would not be usable for capacity or customer service. The DEIR fails to recognize or evaluate these impacts.

These are substantial issues, but they are not new – Union Pacific raised them in previous comments. Any constraints on freight rail capacity and expansion opportunities impact state and federal public policies and Union Pacific's commercial interests. For the DEIR to summarily conclude that the proposed high-speed rail project would have no effect on freight rail operations shows that the Authority has not sufficiently investigated, analyzed, and addressed these issues.

4. Failure to Address Construction Encroachments and Adjacency Impacts.

During construction of the high-speed rail line, impacts on adjacent freight rail operations could be significant. The DEIR states that "common construction impacts on all HST alternatives [include]: . . . Areas adjacent to freeways and/or existing rail lines where existing overcrossings would be modified or relocated" (p. 3.2-30) and that construction staging includes "structure construction to accommodate staged access of traffic across highway and rail right-of way" (p. 3.2-33). The DEIR also notes that: "After construction, freight operation would continue as it currently does" (p. 3.2-36). Yet there is no analysis of impacts on freight rail during construction itself, beyond those brief statements, and no mitigation is provided for such impacts. Work on the high-speed rail line not only could physically affect Union Pacific's property, but also could affect the ability to conduct freight operations. Given the close proximity of the Union Pacific line, measures to avoid or reduce such impacts are essential.

To further illustrate this deficiency, one would anticipate that the Authority may wish to access the high-speed rail line from Union Pacific's property at some locations during construction. This would require acquiring temporary access rights from Union Pacific and may disrupt freight operations. Yet, while the DEIR (p. 3.2-30) acknowledges encroachments and the need for temporary construction easements affecting parking areas, roadways, pedestrian lanes, bicycle lanes and parks, this list does not include freight railroad lines (p. 3.2-30).

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California High-Speed Rail Authority
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Union Pacific notes that the Draft EIR/EIS for the Fresno to Bakersfield section of the high-speed rail project acknowledges the potential construction impacts on freight operations and the need for temporary "shoofly" tracks to divert freight rail lines as a specific mitigation measure:

10. Protection of freight and passenger rail during construction. Repair any structural damage to freight or public railways, and return any damaged sections to their original structural condition. If necessary, during construction, a "shoofly" track would be constructed to allow existing train lines to bypass any areas closed for construction activities. Upon completion, tracks would be opened and repaired, or new mainline track would be constructed, and the "shoofly" would be removed. Draft EIR/EIS, Fresno to Bakersfield Section, page 3.2-83.

Similar language would appear to be necessary to include in the DEIR for the Merced to Fresno section.

586-2

5. Failure to Evaluate Safety Risks and Mitigation.

In addition to inadequate evaluation of operational impacts, the DEIR fails to adequately discuss and evaluate the safety impacts inherent in high-speed operation. Along significant portions of all three alternative alignments, the high-speed corridor will be immediately adjacent to Union Pacific's right of way. Elsewhere, the plans call for high-speed trains to operate within 100 feet of Union Pacific freight trains. The DEIR does not clearly identify the proposed separation between track centerlines and right of way lines for each of the three alternatives. The failure to clearly identify separations and encroachments prevents Union Pacific from fully evaluating the safety implications of the different high-speed alignments.

The Authority proposes placing no safety barriers of any kind along the high-speed rail right of way where adjacent freight tracks are more than 102 feet away. (DEIR Section 3.11 Safety and Security, p. 23.) Where freight tracks are closer, the DEIR merely offers that some type of barrier "may" be required. It lists types of barriers that may be appropriate but provides almost no information about the standards to which they would be built. This leaves the railroad unable to evaluate and comment on the sufficiency of the suggested barriers.

The Federal Railroad Administration will likely require definite barriers and other safety measures between high-speed rail and freight trains. The DEIR fails to mention the jurisdiction and potential involvement of the FRA.

Union Pacific notes that the Authority's decision to require no barriers when freight and high-speed rail tracks are at least 102 feet apart appears to be based entirely on the use of random factual assumptions rather than an engineering study or other reliable authority. The Authority likewise cites no study or other authority for its standard that would permit freight and high-speed tracks to be as close to each other as 29 feet as long as a barrier is in place between them. The distance separating tracks is among the most important safety considerations for this project. Standards related to track spacing and the plans based on them cannot be valid and reasonable unless they are based on reliable authorities.

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Submission 586 (Jerry S. Wilmoth, Union Pacific Railroad, October 12, 2011) - Continued

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The deficiencies related to safety described above render the DEIR inadequate for all of the proposed alternative alignments. In short, while the DEIR acknowledges the possibility of high-speed rail and freight derailments (pp. 3.11-15, 23), it provides inadequate analysis of the risk that a derailment on one system may pose to trains and people on the other.

586-3

6. Any Flyover Must Comply With Union Pacific's Engineering Standards.

All three of the Authority's proposed alignments call for the high-speed tracks to cross over the Union Pacific right of way on a flyover structure at Herndon. If the Castle Air Base site is selected for the high-speed rail maintenance facility, the DEIR calls for additional construction at the north end of Merced, including an additional flyover of the Union Pacific tracks and some parallel high-speed rail operation. The drawings attached to the DEIR lack sufficient detail to permit Union Pacific to fully evaluate the proposed design of these flyovers. Any such structure must meet Union Pacific's engineering standards. These standards require that a flyover clear-span the right of way with no intermediate support structures and maintain a minimum vertical clearance of 23 feet 4 inches between the top of the freight rail and the bottom of the flyover structure for the full width of the right of way. A copy of Union Pacific's vertical clearance standard is enclosed for reference. Any pier located within 15 feet of Union Pacific's property must meet AREMA heavy pier construction (crash wall) standards. Footings for piers may not encroach onto Union Pacific's property.

7. The Authority's Plans for Grade-Separated Road Crossings May Not Preclude Future Grade Separation of Adjacent Union Pacific Tracks.

The Authority's plans call for multiple grade-separated road crossings. Where these grade separations are constructed near Union Pacific's right of way, they may prevent future grade separation of crossings on Union Pacific's line. For example, in Madera, the design of at least one high-speed rail flyover above a public street will leave insufficient space for construction of a future grade separation of an existing public grade crossing. Federal and state public policies as well as Union Pacific's safety standards call for elimination of grade crossings wherever practicable. The Authority's project must be designed in such a way that grade separation of nearby freight lines remains possible.

8. Failure to Ensure Sufficient Area for Required Freight Operational Activities.

Union Pacific conducts a number of activities on its rights of way that are ancillary to the operation of trains. Many of these activities are undertaken to comply with standards administered by the Federal Railroad Administration. For example, under 49 C.F.R. Part 213, Union Pacific must comply with minimum safety requirements for railroad tracks, signal systems, roadbeds, and adjacent areas. Certain requirements imposed by the California Public Utilities Commission also apply to conditions on a railroad right of way. In addition to following these regulatory standards, Union Pacific has adopted its own standards for the safe and efficient operation of the railroad.

In areas of proximity between the Union Pacific right of way and the high-speed rail alignment, sufficient space must be maintained for such operational and maintenance activities. Space must also be preserved for access and activities related to improvements that Union Pacific makes to its property from time to time, including construction of new facilities. Union Pacific reserves the right to make more specific comments about these issues as the Authority clarifies its proposals through a revised DEIR.

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California High-Speed Rail Authority
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9. Failure to Adequately Address Other Environmental Issues.

Union Pacific notes several other elements of the DEIR that appear to be deficient but are of a more technical nature that would require significant discussion to fully address here. Given the necessity for the Authority to revise and recirculate the DEIR to correct the deficiencies described above, Union Pacific elects only to briefly flag these additional issues in these comments. It does so in an effort to help guide the Authority's further development of its documentation and to preserve Union Pacific's ability to address these issues in more detail if they remain unaddressed in the revised DEIR and if their resolution may have a possible effect on Union Pacific's interests.

A. The DEIR does not adequately address land use, displacement, and environmental justice impacts of the proposed project. This is another consequence of the lack of consistency and clarity about potential land acquisitions that would be required for the Authority's project.

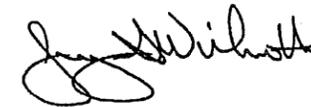
B. The DEIR does not adequately address impacts on natural resources, such as sensitive species and habitat, wetlands, hydrology, and water quality that could result from the Authority's efforts to avoid safety and operational problems due to overlapping or close alignments.

C. The Authority appears to omit, understate, or under-analyze several aspects of construction, maintenance, and operation of the proposed project that will have an impact on the DEIR's air-quality analysis.

10. Conclusion.

For the sake of efficiency, after the Authority addresses the deficiencies described in these comments, Union Pacific invites the Authority to share its proposed plans with Union Pacific for informal review in order to identify potential issues and solutions before circulating a revised DEIR.

Sincerely,



Jerry S. Wilmoth
 General Manager Network Infrastructure

Attachment - 1) UPRR Vertical Clearance Standards

UNION PACIFIC RAILROAD 10031 Foothills Blvd. Roseville, CA 95747 ph. (916) 789-6360

EXHIBIT “H”

PROTEST AND OPPOSITION STATEMENT
OF
KINGS COUNTY WATER DISTRICT AND
CITIZENS FOR CALIFORNIA HIGH-SPEED RAIL ACCOUNTABILITY
TO
PETITION FOR EXEMPTION OF
CALIFORNIA HIGH-SPEED RAIL AUTHORITY



DJ Mitchell II
Assistant Vice President
Passenger Operations

BNSF Railway Company
P.O. Box 961034
2600 Lou Menk Drive
Fort Worth, Texas
76161-0034
(817) 352-1230
(817) 234-7454
dj.mitchell@bnsf.com

April 16, 2013

Mr. Joseph J. Metzler
Manager- Operations and Maintenance
Project Management Team for CAHSRA
On the behalf of the NCRPWG
Parsons Brinckerhoff
303 Second Street
Suite 700 North
San Francisco, CA 94107

RE: PB-BNSF-3146--California High Speed Rail Authority-Rail Service Concepts for 2018-2025 BNSF Network Capacity Models

Dear Mr. Metzler:

This is in reference to your letter and the request you forwarded in February on behalf of the California High Speed Rail Authority for modeling and review of various proposed passenger rail blended service plans

We have generally reviewed and looked over these plans, but we are at a point in our understanding of intercity passenger rail planning in the San Joaquin Valley that we are at present unable to proceed to more specific planning or review of these materials. This is in light of frankly a great deal of ambiguity and contradictions in the different materials that have been forwarded, in the public statements being made and in the absence of any kind of understanding or agreement with the public agency sponsors of these programs. It is unclear what plans are ready to be progressed on behalf of the Authority and under what terms we should consider them.

In that regard, six intercity rail service options have been forwarded which may be internally inconsistent with respect to the extent to which they would involve BNSF right of way, trackage, or the construction of new railroad sometimes adjacent to and sometimes over BNSF right of way. It is also unclear the extent to which these options would use conventional FRA compliant rolling stock at speeds below 90 MPH or other alternatives.

With respect to truly high speed passenger rail service, elements of the options under consideration appear to be inconsistent with materials or plans that the Authority has submitted in descriptions to the Surface Transportation Board for exemption, and what the Authority has submitted for environmental review. Thus, there appears to be too much ambiguity at this time for a productive review of these plans.

In order to progress this effectively, we ask that the Authority provide us with a draft engineering agreement that contains a scope of work and budget that can be reviewed and for the Authority to specify the corridor alignment that is the realistic plan they might be advancing. As we have emphasized since our first discussions with prior officers of the Authority, it will also be essential



to address the safety implications, risk mitigation strategy and liability associated with any construction near or adjacent to our track as well as for future operations. We would then be in a better position to have meaningful discussions on how this could progress. BNSF has not agreed to or acquiesced in any proposed or potential alignment or change in service in the San Joaquin Valley involving our railroad, whether on, near, or adjacent to, our current right-of-way, or which could affect current or future rail service on our line, or could affect access to our line by present or future freight customers. In order for BNSF to progress any particular segment we will need to understand how these issues are addressed as to the entire proposed line through the San Joaquin Valley.

By the same token, we are not clear with whom we are actually negotiating or what agency would be the responsible entity progressing these plans, whether they are for truly high speed service or for what is being called Blended Service. For that reason I am copying Frank Vacca of CAHSRA and Bill Bronte of Caltrans to help us understand how all of this is to progress, and please feel free to forward this letter to the various parties copied on your initial letter to us as appropriate. With respect to the Authority's two Blended Service options and Caltrans' three service options A, B, and C, we believe it is necessary for the appropriate public agency intercity passenger rail sponsors to make some key decisions:

- Determine which one of the five conventional train speed options should be used as the foundation for any additional service agreement negotiations;
- Confirm that the service option selected consists of Amtrak service as part of its existing network and normal operations, whether operating on BNSF track or facilities constructed by the Authority;
- Identify a lead agency with which BNSF would negotiate;
- Provide BNSF with a projected timeline for the implementation of the proposed additional service; and,
- Confirm, as discussed in recent meetings, that Design-Build will not be used as a project delivery method where CHSRA construction will impact BNSF property or customers.

The different options and scenarios of your various alternative plans, some of which are very aggressive levels of passenger train service, could require significantly different capital infrastructure requirements to permit service and analysis of impacts on future freight service capacity and even access to our own line as a result of potential parallel structures along the right-of-way. In a similar vein, if the agencies envision something along the lines of the Amtrak metrics and standards to apply to this service for measurement of on-time performance, that will also involve significantly increased infrastructure and capital investment to ensure future intercity passenger rail service compatible with the preservation of freight capacity and mobility.

While we appreciate the work Parsons Brinckerhoff has been doing on this project, it is now essential that we have direct contact with whatever authority we would be negotiating definitive agreements if these projects are to be progressed. Therefore, as indicated earlier, we are copying Messrs. Vacca and Bronte for their determination of which agency we should be working with



on which agreement for which service. When we are advised with whom at the appropriate agency we should discuss how best to progress this, we can plan a follow-up call or meeting to include myself and Rick Weicher as we coordinate these efforts for BNSF, consistent with our previous direct meetings with prior representatives for and officers of the California High Speed Rail Authority.

Sincerely,

A handwritten signature in black ink, appearing to read "DJ Mitchell II".

DJ Mitchell II
Passenger Operations

- cc: Frank Vacca, Chief Program Manager, California High-Speed Rail Authority
Bill Bronte, Division Chief, Division of Rail, Caltrans
Karen Greene Ross, Assistant Chief Counsel, California High-Speed Rail Authority
Gil Mallery, Parsons Brinkerhoff
Rick Weicher, BNSF Railway
Walt Smith, BNSF Railway

EXHIBIT “I”

PROTEST AND OPPOSITION STATEMENT
OF
KINGS COUNTY WATER DISTRICT AND
CITIZENS FOR CALIFORNIA HIGH-SPEED RAIL ACCOUNTABILITY
TO
PETITION FOR EXEMPTION OF
CALIFORNIA HIGH-SPEED RAIL AUTHORITY



Memorandum

**U.S. Department of
Transportation**

Office of the Secretary
of Transportation
Office of Inspector General

Subject: **INFORMATION**: Audit Announcement –
Federal Railroad Administration's High Speed
Intercity Passenger Rail Grant Amendment and
Oversight Processes
Project No. 14C3003C000

Date: March 5, 2014

From: Mitchell Behm 
Assistant Inspector General for Rail, Maritime,
Hazmat Transport, and Economic Analysis

Reply to: JA-50
Attn. of:

To: Federal Railroad Administrator

The Federal Railroad Administration's (FRA) high speed intercity passenger rail (HSIPR) grant program is intended to help address the Nation's transportation challenges by investing in an efficient high speed rail network. Since 2009, Congress has appropriated over \$10 billion for this program. As of September 2013, FRA had obligated nearly all and disbursed approximately \$1.4 billion. Nearly 85 percent of the funding obligated to date has been dedicated to 6 corridors, with the California corridor receiving the largest portion—\$3.9 billion.

We previously reported that FRA's lack of an effective grants administration framework may be putting Federal funds at risk.¹ In December 2013, the Chairman of the House Committee on Transportation and Infrastructure's Subcommittee on Railroads, Pipelines, and Hazardous Materials requested we evaluate FRA's processes for negotiating, amending, and overseeing compliance with HSIPR grant agreements. Accordingly, our objectives will be to evaluate FRA's policies, procedures, and processes for (1) amending HSIPR grant agreements, and (2) identifying and mitigating funding risks to federally-funded HSIPR projects.

We plan to begin this audit immediately and will contact your audit liaison to schedule an entrance conference. The audit will take place at FRA Headquarters in Washington, DC, and other locations, as needed. If you have any questions or require

¹ OIG Report Number CR-2012-178, *Completing a Grants Management Framework Can Enhance FRA's Administration of the HSIPR Program*, Sept. 11, 2012.

additional information, please contact me at (202) 366-9970, or Kerry R. Barras, Program Director, at (817) 978-3318.

cc: FRA Audit Liaison, RAD-41
DOT Audit Liaison, M-1

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EXHIBIT “J”

PROTEST AND OPPOSITION STATEMENT
OF
KINGS COUNTY WATER DISTRICT AND
CITIZENS FOR CALIFORNIA HIGH-SPEED RAIL ACCOUNTABILITY
TO
PETITION FOR EXEMPTION OF
CALIFORNIA HIGH-SPEED RAIL AUTHORITY

RESOLUTION OF NECESSITY OF THE STATE PUBLIC WORKS BOARD
AUTHORIZING CONDEMNATION FOR REAL
PROPERTY IN THE
COUNTY OF FRESNO, STATE OF CALIFORNIA,
FOR THE CALIFORNIA HIGH SPEED RAIL AUTHORITY

Frank Solomon, Jr., Trustee of the Frank Solomon Jr., Living Trust, dated February 7, 2002 as to an undivided 75% interest and Frank Solomon, Jr., a married man as his sole and separate property, as to an undivided 25% interest.

**FB-10-0110, FB-10-0110-01-01, FB-10-0110-02-01
RON 2013-0010**

WHEREAS, pursuant to the High-Speed Rail Act (Division 19.5 of the Public Utilities Code), the California High-Speed Rail Authority (Authority) is authorized to develop and construct a high-speed train system (Project) as defined in Streets and Highways Code section 2704.01(e); and

WHEREAS, in 2008 the voters of California approved Proposition 1a, authorizing monies from the High-Speed Passenger Train Bond fund in support of this Project, in 2009 and 2010 the federal government approved funds in support of the portion of this Project extending from San Francisco to Anaheim, and in 2012, through Chapter 152, Statutes of 2012, the Legislature appropriated funds for the acquisition and build phases of the Initial Operating Segment, Section 1 of the Project, extending from Madera to near Bakersfield; and

WHEREAS, the Property Acquisition Law, commencing with Section 15850 of the Government Code, authorizes the State Public Works Board ("PWB") to select and acquire in the name of the State of California ("State") with the consent of the State agency concerned, the fee or any lesser right or interest in any real property necessary for any State purpose or function; and

WHEREAS, the Property Acquisition Law further authorizes the PWB to acquire property by condemnation, in the manner provided for in Title 7 (commencing at section 1230.010) of Part 3 of the Code of Civil Procedure and this resolution is adopted pursuant to Code of Civil Procedure section 1245.230 in furtherance thereof; and

WHEREAS, a legal description of the Acquisition Property is attached as Exhibit A; and

WHEREAS, the State through the Authority has caused to be prepared an appraisal of the Acquisition Property that has been approved by the State Department of General Services which reflects just compensation for the Acquisition Property; and

WHEREAS, the Authority on behalf of the PWB, made an offer to purchase the Acquisition Property from Frank Solomon, Jr., Trustee of the Frank Solomon Jr., Living Trust, dated February 7, 2002 as to an undivided 75% interest and Frank Solomon, Jr., a married man as his sole and separate property, as to an undivided 25% interest, the owner of record. The offer was made for the full amount established by the State's appraisal and included a summary of the basis upon which the amount had been determined as required by Government Code section 7267.2. Negotiations to acquire the parcel have been unsuccessful.

NOW, THEREFORE, BE IT RESOLVED by the PWB after notice and hearing pursuant to Code of Civil Procedure section 1245.235 and due consideration that it finds, determines and hereby declares:

1. The public interest and necessity require the proposed Project; and
2. The proposed Project is planned and located in a manner that will be most compatible with the greatest public good and the least private injury; and
3. The Acquisition Property described in Exhibit A is necessary for the proposed Project and is to be acquired by eminent domain pursuant to the Property Acquisition Law and Code of Civil Procedure section 1240.410 in that the property being acquired includes a remnant that would be of little market value; and
4. The offer required by Government Code section 7267.2 has been made to the owner or owners of record.

BE IT FURTHER RESOLVED that, pursuant to authority contained in the Property Acquisition Law, the Acquisition Property more particularly described in Exhibit A to this Resolution be acquired in the name of the State of California by a proceeding or proceedings in eminent domain in accordance with provisions of the Code of Civil Procedure.

BE IT FURTHER RESOLVED that the State Department of Transportation, on behalf of the PWB and the Authority, is authorized to prepare and prosecute such proceedings, actions or suits in the proper court having jurisdiction thereof as necessary to acquire the Acquisition Property.

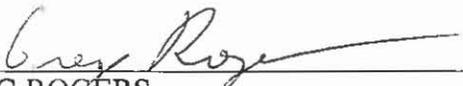
This resolution shall take effect immediately upon its adoption.

PASSED AND ADOPTED this 13th day of December, 2013, by the following vote:

AYES: 3

NOES: 0

ABSENT: 0



GREG ROGERS
Executive Director to the
State Public Works Board

Approval recommended:

	HSR	Caltrans Legal
Initial:	<u>GRB</u>	<u>CLB</u>
Date:	<u>11/18/13</u>	<u>11/18/13</u>

EXHIBIT "A"

RESOLUTION OF NECESSITY

LEGAL DESCRIPTION OF ACQUISITION PROPERTY

FB-10-0110

RON 2013-0010

RESOLUTION OF NECESSITY
LEGAL DESCRIPTION

FB-10-0110-1-FEE

For rail purposes, that portion of land situated in the City of Fresno, County of Fresno, State of California, being a portion of that certain parcel described in Document No. 2003-0212563, recorded September 8, 2003, noted as "Doc. No. 97062812, O.R.F.C." and "Doc. No. 97135372, O.R.F.C.", and as shown on that certain Record of Survey, recorded in Book 42 of Record of Surveys, page 88, all Official Records of said county, said portion described as follows:

COMMENCING at the northwest corner of said parcel, said point being on the northeasterly line of "G" Street at the intersection of the southeasterly line of the State of California Freeway 180 overpass as shown on said Record of Survey; thence North 55°40'07" East 231.47 feet along the northwesterly line of said parcel to the **POINT OF BEGINNING**; thence continuing along said northwesterly line North 55°40'07" East 64.89 feet to the southwesterly line of the Union Pacific Railroad Right of Way and the beginning of a non-tangent curve, concave southwesterly and having a radius of 3,769.50 feet (a radial line from the radius point to the beginning of said curve bears North 40°11'07" East); thence southeasterly 94.08 feet along said curve, through a central angle of 01°25'48"; thence leaving said southwesterly line South 39°41'02" East 208.07 feet; thence South 40°02'36" East 142.42 feet to the northwesterly line of Divisadero Street as shown on said Record of Survey; thence South 60°44'11" West 81.41 feet along said northwesterly line; thence leaving said northwesterly line North 40°03'24" West 127.50 feet; thence North 39°41'02" West 307.12 feet to the **POINT OF BEGINNING**.

The bearings and distances used in the above description are based on the California Coordinate System 1983, Zone 4, as shown on Record of Survey, Book 58, pages 71 to 72, Epoch 2007.00. Multiply distances shown above by 1.000066514 to obtain ground level distances.

This real property description has been prepared by me, or under my direction, in conformance with the Professional Land Surveyors' Act.

Signature


Brian L. Stockinger P.L.S. 6995

Date

NOV. 19 2013



RESOLUTION OF NECESSITY
LEGAL DESCRIPTION

FB-10-0110-01-01(EXCESS)

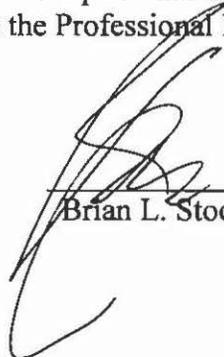
For rail purposes, that portion of land situated in the City of Fresno, County of Fresno, State of California, being a portion of that certain parcel described in Document No. 2003-0212563, recorded September 8, 2003, noted as "Doc. No. 97062812, O.R.F.C." and "Doc. No. 97135372, O.R.F.C.", and as shown on that certain Record of Survey, recorded in Book 42 of Record of Surveys, page 88, all Official Records of said county, said portion described as follows:

BEGINNING at the northwest corner of said parcel, said point being on the northeasterly line of "G" Street at the intersection of the southeasterly line of the State of California Freeway 180 overpass as shown on said Record of Survey; thence North 55°40'07" East 231.47 feet along the northwesterly line of said parcel; thence leaving said northwesterly line South 39°41'02" East 307.12 feet; thence South 40°03'24" East 127.50 feet to the northwesterly line of Divisadero Street as shown on said Record of Survey; thence along said northwesterly line of Divisadero Street South 60°44'11" West 64.78 feet; thence North 89°46'41" West 63.47 feet to the northeasterly line of said "G" Street, said point being the beginning of a non-tangent curve, concave southwesterly and having a radius of 1,049.93 feet (a radial line from the radius point to the beginning of said curve bears North 45°16'39" East); thence along said northeasterly line of line of "G" street, northwesterly 369.23 feet along said curve through a central angle of 20°08'57"; thence North 64°52'10" West 54.32 feet to the **POINT OF BEGINNING**.

The bearings and distances used in the above description are based on the California Coordinate System 1983, Zone 4, as shown on Record of Survey, Book 58, pages 71 to 72, Epoch 2007.00. Multiply distances shown above by 1.000066514 to obtain ground level distances.

This real property description has been prepared by me, or under my direction, in conformance with the Professional Land Surveyors' Act.

Signature



Brian L. Stockinger P.L.S. 6995

NOV. 15, 2013
Date



RESOLUTION OF NECESSITY
LEGAL DESCRIPTION

FB-10-0110-02-01 (EXCESS)

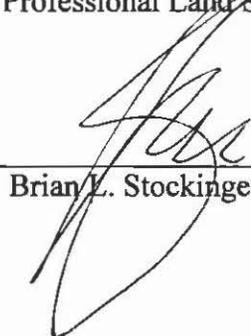
For rail purposes, that portion of land situated in the City of Fresno, County of Fresno, State of California, being a portion of that certain parcel described in Document No. 2003-0212563, recorded September 8, 2003, noted as "Doc. No. 97062812, O.R.F.C." and "Doc. No. 97135372, O.R.F.C.", and as shown on that certain Record of Survey, recorded in Book 42 of Record of Surveys, page 88, all Official Records of said County, said portion described as follows:

COMMENCING at the northwest corner of said parcel, said point being on the northeasterly line of "G" street at the intersection of the southeasterly line of the State of California freeway 180 overpass as shown on said Record of Survey; thence North 55°40'07" East 296.36 feet along the northwesterly line of said Frank Solomon, Jr. parcel to the southwesterly line of the Union Pacific Railroad right of way and the beginning of a non-tangent curve, concave to the southwest and having a radius of 3769.50 feet (a radial line from the radius point to the beginning of said curve bears North 40°11'07" East); thence southeasterly 94.08 feet along said curve, through a central angle of 01°25'48" to the **POINT OF BEGINNING**; thence continuing 28.18 feet along said 3769.50 foot radius curve, through a central angle of 00°25'42"; thence continuing along said Union Pacific Railroad right of way the following two (2) courses: southeasterly along a R.R. 1/2 taper 149.02 feet in length, South 47°19'40" East 186.03 feet to the northwesterly line of Divisadero Street as shown on said Record of Survey; thence South 60°44'11" West 50.80 feet along said northwesterly line; thence leaving said northwesterly line North 40°02'36" West 142.42 feet; thence North 39°41'02" West 208.07 feet to said northwesterly line of said Frank Solomon, Jr. parcel and the **POINT OF BEGINNING**.

The bearings and distances used in the above description are based on the California Coordinate System 1983, Zone 4, as shown on Record of Survey, Book 58, pages 71 to 72, Epoch 2007.00. Multiply distances shown above by 1.000066514 to obtain ground level distances.

This real property description has been prepared by me, or under my direction, in conformance with the Professional Land Surveyors' Act.

Signature



Brian L. Stockinger P.L.S. 6995

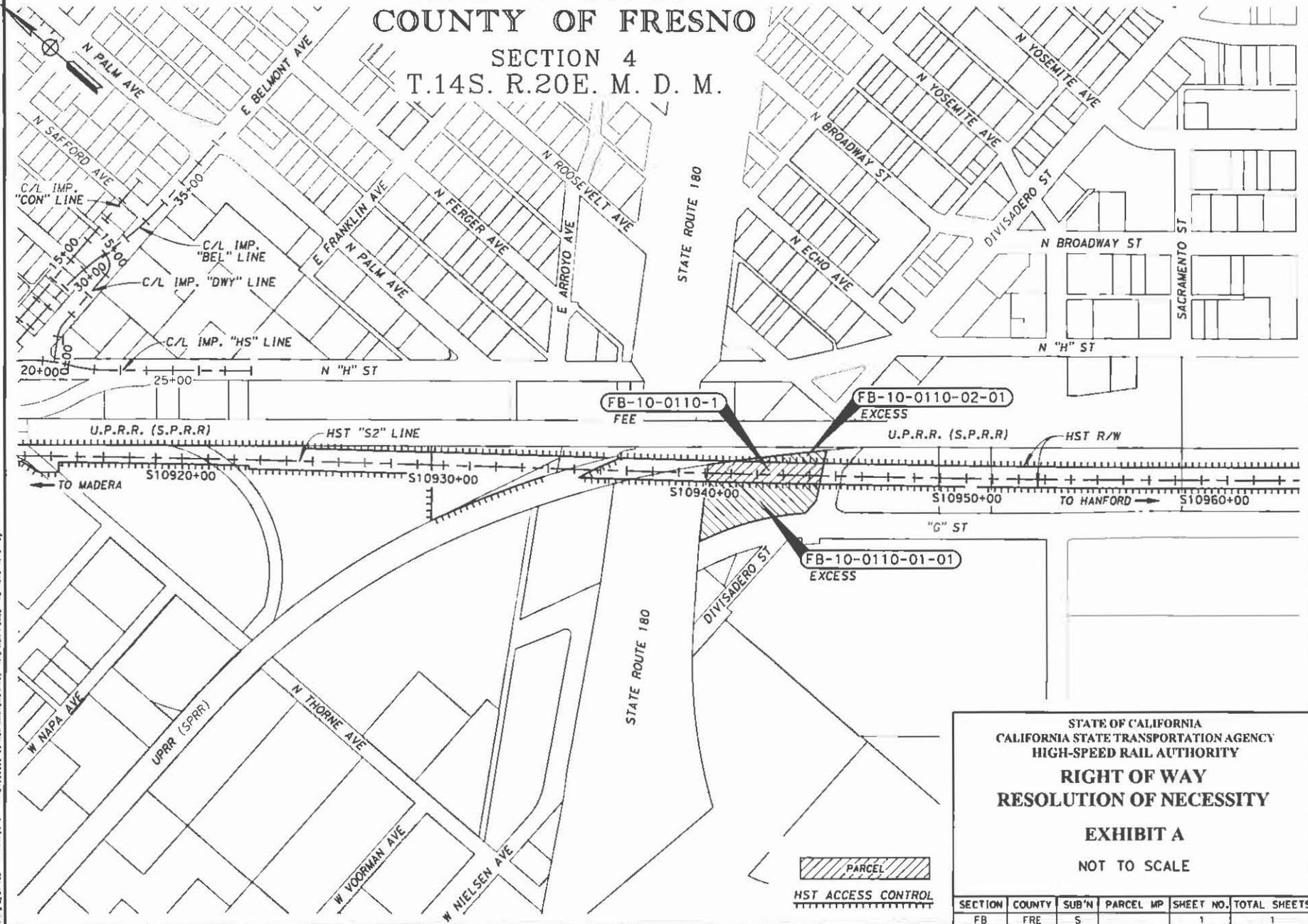
NOV 19, 2013
Date



NOTE: The State of California or its officers or agents shall not be responsible for the accuracy or completeness of digital images of this map.

CITY OF FRESNO COUNTY OF FRESNO

SECTION 4
T.14S. R.20E. M. D. M.



STATE OF CALIFORNIA
CALIFORNIA STATE TRANSPORTATION AGENCY
HIGH-SPEED RAIL AUTHORITY

RIGHT OF WAY RESOLUTION OF NECESSITY

EXHIBIT A

NOT TO SCALE

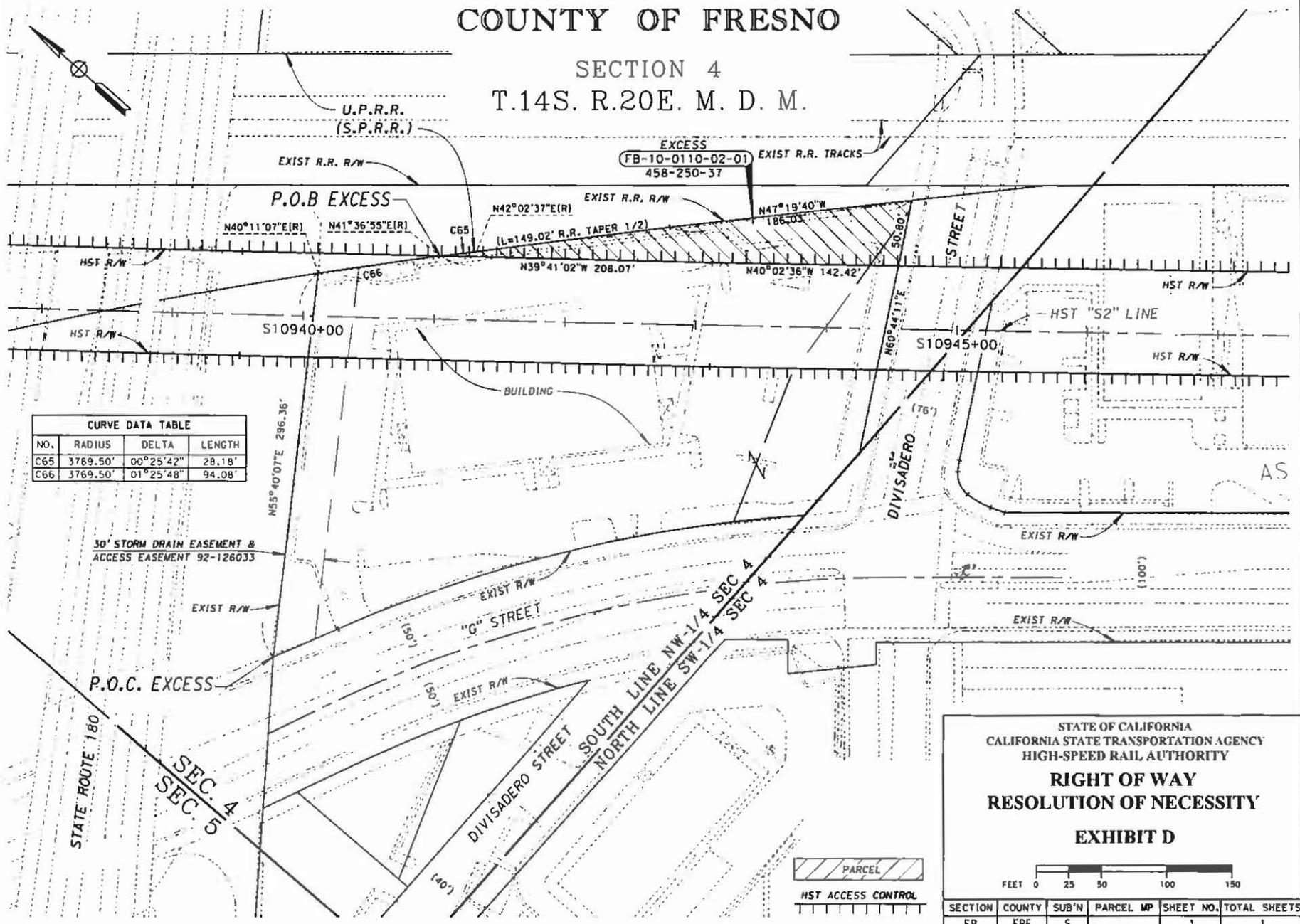
SECTION	COUNTY	SUB'N	PARCEL MP	SHEET NO.	TOTAL SHEETS
FB	FRE	S		1	1

15:25:00 11/14/2013 P:\2185805-09-ROW\RESOLUTIONS\FRESNO\10-01.dwg

CITY OF FRESNO COUNTY OF FRESNO

NOTE: The State of California or its officers or agents shall not be responsible for the accuracy or completeness of digital images of this map.

SECTION 4
T.14S. R.20E. M. D. M.



CURVE DATA TABLE			
NO.	RADIUS	DELTA	LENGTH
C65	3769.50'	00°25'42"	28.18'
C66	3769.50'	01°25'48"	94.08'

STATE OF CALIFORNIA
CALIFORNIA STATE TRANSPORTATION AGENCY
HIGH-SPEED RAIL AUTHORITY

RIGHT OF WAY RESOLUTION OF NECESSITY

EXHIBIT D

FEET 0 25 50 100 150

SECTION	COUNTY	SUB'N	PARCEL MP	SHEET NO.	TOTAL SHEETS
FB	FRE	S		1	1

11/14/2013 11:14:20:3 P:\37460001\04-000\MASTERS\9921_14_15_00\PLANETS\14-15-00\10_04.dwg

EXHIBIT “K”

PROTEST AND OPPOSITION STATEMENT
OF
KINGS COUNTY WATER DISTRICT AND
CITIZENS FOR CALIFORNIA HIGH-SPEED RAIL ACCOUNTABILITY
TO
PETITION FOR EXEMPTION OF
CALIFORNIA HIGH-SPEED RAIL AUTHORITY

G-Street



Exit Street View

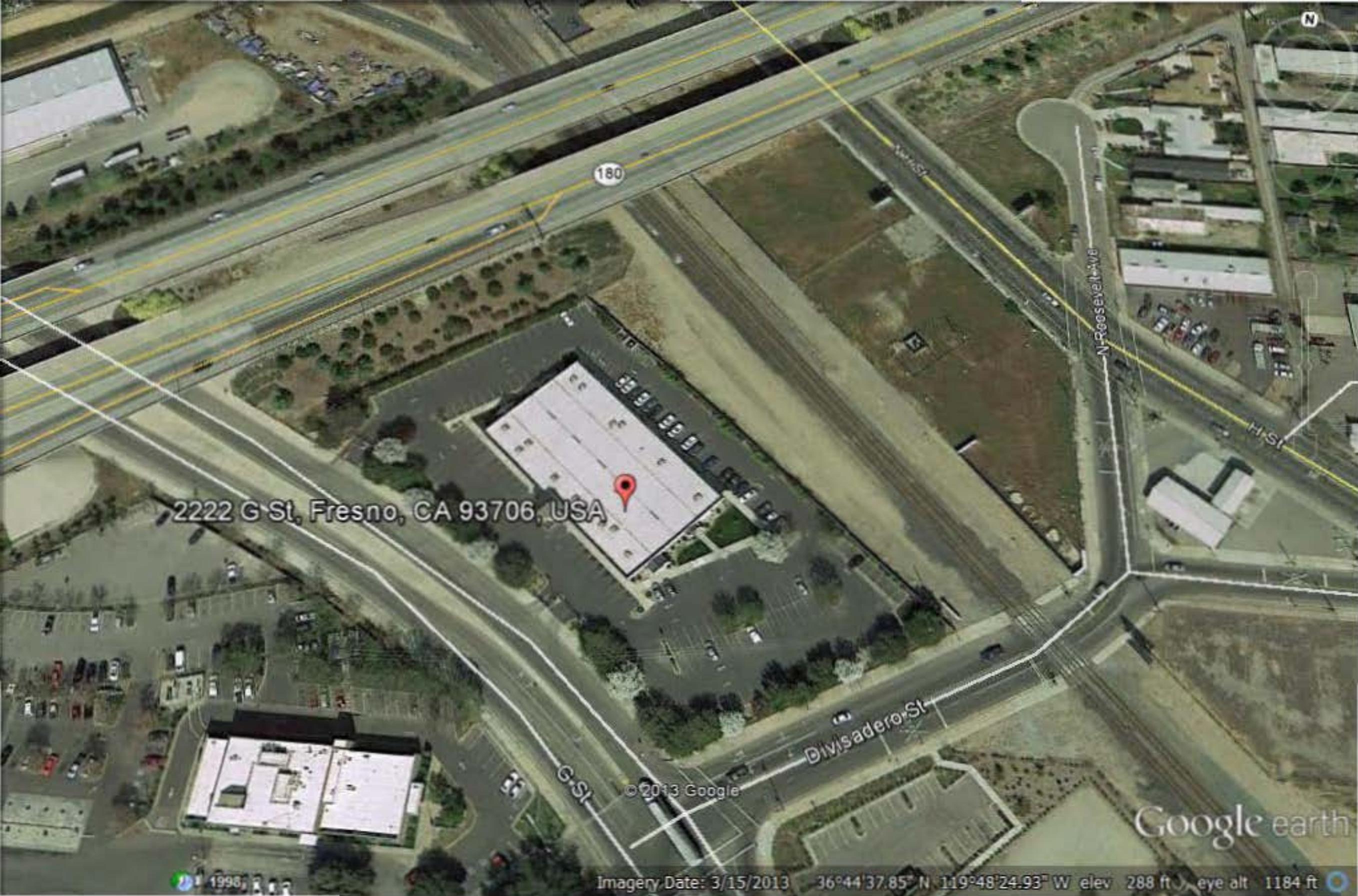


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Google earth

[Report a problem](#)

36°44'39.00" N 119°48'25.54" W elev 313 ft eye alt 296 ft



2222 G St, Fresno, CA 93706, USA

180

N Roosevelt Ave

H St

Divisadero St

G St

©2013 Google

Google earth

1998

Imagery Date: 3/15/2013 36°44'37.85" N 119°48'24.93" W elev 288 ft eye alt 1184 ft

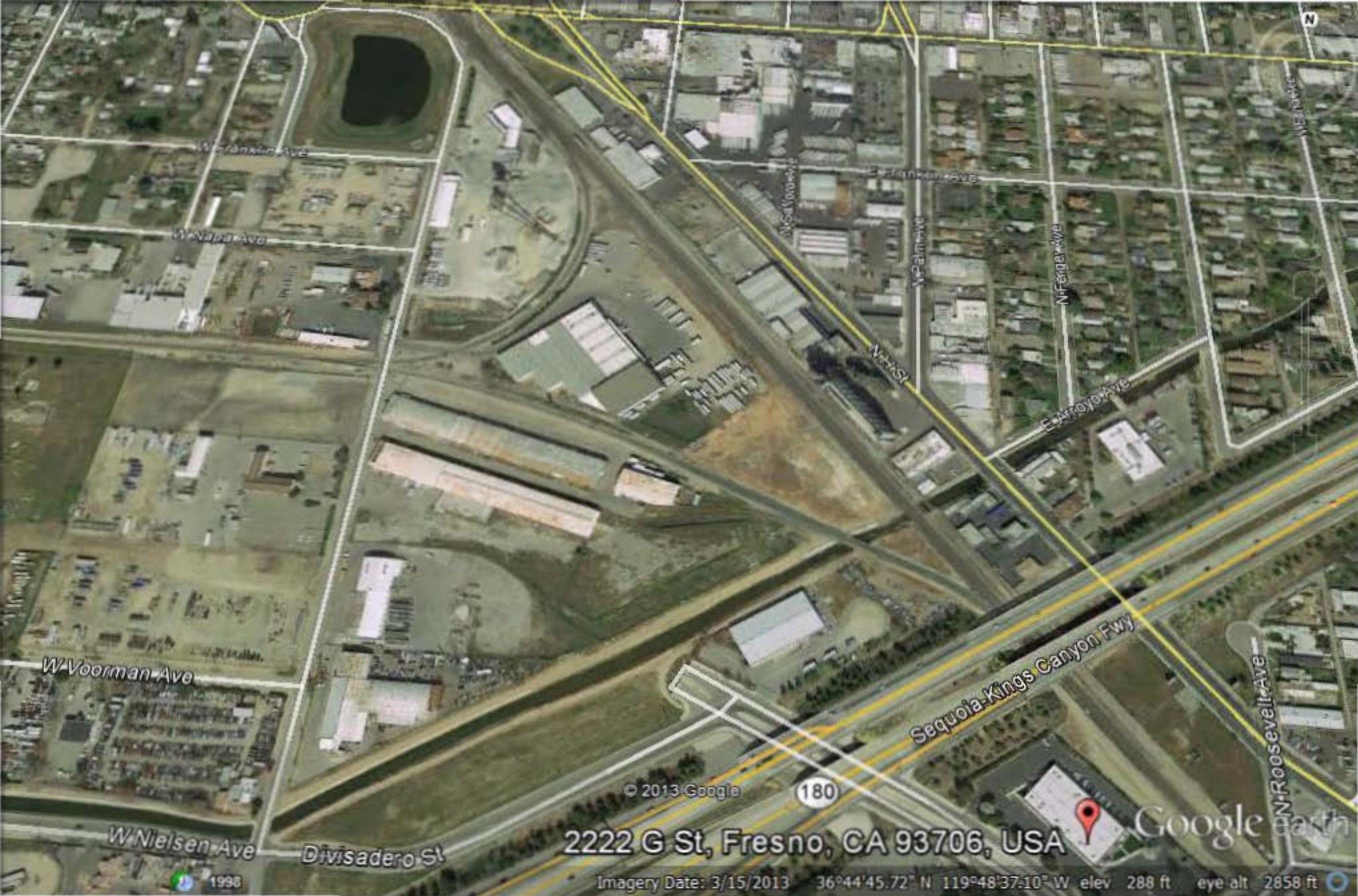
2222 G St, Fresno, CA 93706, USA

© 2013 Google

Google earth

Imagery Date: 3/15/2013 36°44'40.02" N 119°48'26.25" W elev 288 ft eye alt 2858 ft

1998



W Franklin Ave

W Napa Ave

W Voorman Ave

W Nielsen Ave

Divisadero St

W Franklin Ave

N Park St

N Palm Ave

N Fenger Ave

E Arroyo Ave

Sequoia-Kings Canyon Fwy

N Roosevelt Ave

© 2013 Google

180

2222 G St, Fresno, CA 93706, USA

Google earth

Imagery Date: 3/15/2013 36°44'45.72" N 119°48'37.10" W elev 288 ft eye alt 2858 ft

1998

EXHIBIT “L”

PROTEST AND OPPOSITION STATEMENT
OF
KINGS COUNTY WATER DISTRICT AND
CITIZENS FOR CALIFORNIA HIGH-SPEED RAIL ACCOUNTABILITY
TO
PETITION FOR EXEMPTION OF
CALIFORNIA HIGH-SPEED RAIL AUTHORITY

EXHIBIT “M”

PROTEST AND OPPOSITION STATEMENT
OF
KINGS COUNTY WATER DISTRICT AND
CITIZENS FOR CALIFORNIA HIGH-SPEED RAIL ACCOUNTABILITY
TO
PETITION FOR EXEMPTION OF
CALIFORNIA HIGH-SPEED RAIL AUTHORITY

