

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35544

DESERTXPRESS ENTERPRISES, LLC AND DESERTXPRESS HSR CORPORATION—
CONSTRUCTION AND OPERATION EXEMPTION—IN VICTORVILLE, CAL. AND
LAS VEGAS, NEV.

Digest:¹ DesertXpress Enterprises, LLC and its subsidiary are permitted to build and operate a 190-mile rail line between Victorville, Cal. and Las Vegas, Nev. The new line will allow DesertXpress to provide high-speed passenger rail service between Southern California and Las Vegas, thereby providing an alternative to automobile travel and air travel between the two areas. This approval to construct is subject to environmental mitigation conditions.

Decided: October 20, 2011

On July 28, 2011, DesertXpress Enterprises, LLC and its wholly-owned subsidiary, DesertXpress HSR Corporation (collectively, DXE), filed a petition under 49 U.S.C. § 10502 for an exemption from the prior approval requirements of 49 U.S.C. § 10901 to construct and operate approximately 190 miles of high-speed passenger rail line between Victorville, Cal. and Las Vegas, Nev. (Line). DXE plans to operate as a common carrier providing passenger rail service on the rail line to be constructed. DXE does not plan to provide freight rail service. No replies to the petition were received.

As discussed below, the Board has participated in a thorough environmental review of the DXE project, which took a “hard look” at environmental impacts, selected a preferred alternative, and recommended extensive environmental mitigation conditions to avoid or minimize that alternative’s potential environmental impacts. After considering the entire record on both the transportation and the environmental issues, we are granting DXE’s petition for exemption, subject to environmental conditions and the condition that DXE build the route designated below as environmentally preferable.²

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² In a decision served on June 27, 2007, the Board issued a declaratory order finding that the planned construction and operation by DesertXpress Enterprises, LLC of a high-speed steel-wheel passenger rail line between Southern California and Las Vegas would require Board approval under the Interstate Commerce Act and would be subject to the federal preemption

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BACKGROUND

DXE Project. DXE, an entity organized under the laws of the State of Nevada, plans to construct and operate approximately 190 miles of double track (one northbound and one southbound track) rail line between Victorville and Las Vegas.³ The Line will be constructed along the Interstate-15 freeway (I-15) corridor, with passenger stations at Victorville and Las Vegas, and will have no at-grade vehicle or pedestrian crossings. DXE states that the Line will use high-speed steel wheel on steel rail electric multiple unit (EMU) trains, which will have a maximum speed of 150 miles per hour, as well as signaling and control systems that are in compliance with the Federal Railroad Administration's (FRA) Positive Train Control requirements. DXE plans to contract with an operator that will be responsible for supplying rolling stock for the Line, managing and operating the system, complying with all applicable safety requirements, and providing system-wide maintenance. Rail operations initially will be conducted between 6 am and 10 pm, but the hours of operation could be extended if passenger demand warrants. DXE anticipates that the operating revenues of the Line will qualify DXE as a Class I railroad under 49 C.F.R. § 1201.1-1.

In its petition, DXE states that the Line is needed to address increasing travel demand and automobile traffic capacity constraints along the I-15 corridor between Southern California and Las Vegas, and that the I-15 freeway has a high frequency of accidents. DXE also states that there are constraints to the expansion of air travel in Southern California. DXE claims that the Line will divert about 3 million automobile trips from the I-15 freeway each year, thus resulting in an improvement in highway safety and a reduction in air pollution and overall fuel consumption.⁴

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provided in 49 U.S.C. § 10501(b). DesertXpress Enterprises, LLC—Petition for Declaratory Order, FD 34914 (STB served June 27, 2007). The Board reaffirmed this determination in a decision issued on May 7, 2010. DesertXpress Enterprises, LLC—Petition for Declaratory Order, FD 34914 (STB served May 7, 2010).

³ DXE states that it does not currently own or operate any rail lines. According to DXE, it was created for the express purpose of developing, constructing, and operating a passenger high-speed rail project between Southern California and Las Vegas. DXE states that it is owned by three companies that are Las Vegas-based limited liability companies, and that the majority shareholder — The Marnell Companies — is an experienced architect and real estate developer with large-scale project development, construction, and finance experience. DXE states that none of its owners owns or operates any rail carriers or rail lines.

⁴ DXE predicts that the project will reduce by about 500 the number of vehicles per peak hour in the peak direction in the first year of operation, with that number increasing eventually to a reduction of 1,400 vehicles per peak hour. DXE additionally states that the reduction of automobile traffic will result in a net decrease in energy consumption equivalent to about 440,000 barrels of oil per year. See DXE Pet. at 8.

The total cost of constructing the Line is estimated at \$6.5 billion. According to a ridership study prepared in April 2011, there is a predicted annual average ridership of over 6.49 million round trips in the initial years of the Line's operation, and 8.93 million round trips in Year 35 of the Line's operation. Based on the ridership forecasts, DXE states that the Line's fare revenues will cover project and financing costs. DXE expects to complete final design for the Line by the end of 2011 and to begin construction shortly thereafter.

According to DXE, the project will generate major economic benefits. DXE states that, during both construction and operation, the Line is expected to create over 88,000 primary and secondary jobs in California and Nevada, and will have a \$3 billion impact on the economy of Clark County, Nev. (where Las Vegas is located) and a \$5.6 billion impact on the economy of San Bernardino, Cal., which includes Victorville.

Because rail construction authority is permissive and the market will ultimately determine whether the proposed Line is built, DXE contends that there is no need here for compliance with the prior approval requirements of 49 U.S.C. § 10901, and that an exemption under 49 U.S.C. § 10502 is warranted.

DISCUSSION

Rail Transportation Analysis. The construction of new railroad lines requires prior Board authorization through issuance of a certificate under 49 U.S.C. § 10901 or, as requested here, through an exemption under 49 U.S.C. § 10502 from the prior approval requirements of § 10901. Section 10901(c) is a permissive licensing standard that directs us to grant rail line construction proposals "unless" we find the proposal "inconsistent with the public convenience and necessity." Thus, Congress has established a presumption that rail construction projects are in the public interest unless shown otherwise. See Mid States Coal. for Progress v. STB, 345 F.3d 520, 557 (8th Cir. 2003).

Under § 10502(a), we must exempt a proposed rail line construction from the detailed application procedures of § 10901 when we find that: (1) those procedures are not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101; and (2) either (a) the proposal is of limited scope, or (b) the full application procedures are not necessary to protect shippers from an abuse of market power.

Based on the record before us, we conclude that the proposed construction project qualifies for an exemption from the § 10901 prior approval requirements. Detailed scrutiny of the proposed construction under § 10901 is not necessary to carry out the rail transportation policy. The proposed Line will allow DXE to transport passengers by rail from Southern California to Las Vegas, thus providing additional transportation options and alleviating automobile congestion on the I-15 freeway, while also reducing air pollution and overall fuel consumption. The proposed Line also will alleviate constraints on the expansion of air travel in Southern California and is expected to have a projected multi-billion dollar beneficial impact on the economies of both Nevada and California. Thus, the proposed Line will help to ensure the development and continuation of a sound rail transportation system and foster sound economic conditions in transportation. 49 U.S.C. §§ 10101(4), (5). Exempting the proposed Line from the

requirements of § 10901 will also minimize the need for federal regulation and reduce regulatory barriers to entry, in furtherance of 49 U.S.C. §§ 10101(2), (7). An exemption also will promote energy conservation as the Line will divert automobile and air traffic, and reduce congestion and air pollution, consistent with the goal of 49 U.S.C. § 10101(14).

In addition, consideration of the proposed Line under § 10901 here is not necessary to protect shippers from an abuse of market power. The proposed Line will not be used to provide freight rail transportation to shippers, nor will it cause any shipper to lose access to a rail option as a result of the proposed construction.⁵

Environmental Analysis. In reaching our decision, we have also considered the environmental impacts associated with the proposed Line. The National Environmental Policy Act (NEPA) requires federal agencies to examine the environmental effects of proposed federal actions and to inform the public concerning those effects. Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 97 (1983). Under NEPA and related environmental laws, we must consider significant potential beneficial and adverse environmental impacts in deciding whether to authorize a railroad construction project as proposed, deny the proposal, or grant it with conditions (including environmental mitigation conditions). The purpose of NEPA is to focus the attention of the government and the public on the likely environmental consequences of a proposed action before it is implemented in order to minimize or avoid potential adverse environmental impacts. Marsh v. Or. Natural Res. Council, 490 U.S. 360, 371 (1989). While NEPA prescribes the process that must be followed, it does not mandate a particular result. See Mid States, *supra*, 345 F.3d at 533-34. Thus, once the adverse environmental effects have been adequately identified and evaluated, an agency may conclude that other values outweigh the environmental costs. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350-51 (1989).

There has been a thorough NEPA review in this case. In July 2006, FRA began work on the environmental review for the proposed Line, publishing a notice of intent to prepare an Environmental Impact Statement (EIS) examining the anticipated environmental effects of constructing and operating the proposed Line.⁶ The Board through its Office of Environmental Analysis (OEA) participated throughout the environmental review as a cooperating agency,⁷

⁵ Given this finding under 49 U.S.C. § 10502(a)(2)(B) regarding the probable effect of the proposed Line on market power, we need not determine under 49 U.S.C. § 10502(a)(2)(A) whether the transaction is limited in scope.

⁶ FRA was the lead agency in the environmental review because it has some jurisdiction and expertise related to high-speed train operations and railroad safety.

⁷ The regulations of the Council on Environmental Quality implementing NEPA encourage agencies with shared licensing authority over projects to reduce paperwork and duplication of efforts by working together on environmental reviews. 40 C.F.R. § 1501.6. In such instances, cooperating agencies work together under the lead of one agency, and the EIS that results gives all agencies with licensing authority over the project the environmental information they need to perform their regulatory responsibilities.

along with the Bureau of Land Management (BLM), the Federal Highway Administration (FHWA), and the National Park Service.⁸ See 40 C.F.R. § 1501.6. In its role as a cooperating agency, the Board provided its expertise in rail transportation and independently assessed the environmental analysis to ensure that the Board met its NEPA responsibilities. FRA, with the assistance of the cooperating agencies, issued a Draft EIS in March 2009, a Supplemental Draft EIS in August 2010, and a Final EIS in October 2010. The Board provided feedback and comments through OEA on all phases of the EIS preparation, including responding to public and agency comments on the Draft EIS and Supplemental Draft EIS. OEA also participated in public meetings that were held in Las Vegas, Barstow, and Victorville in July 2006 and April 2009, and in meetings with interested Native American Tribes and staff from BLM's California field office. FRA published its Record of Decision (ROD) on July 8, 2011. In the ROD, FRA approved the environmentally preferred alternative for the route, facilities, and technology (Selected Alternative), subject to 146 mitigation measures to avoid or minimize potential adverse environmental impacts.⁹

The EIS and the ROD examine the existing environmental setting of the proposed Line, assess the potential effects that would result from its construction and operation, and include environmental mitigation measures designed to appropriately reduce any resulting adverse effects. Specifically, the Draft EIS presents the Line's purpose and need, and considers a reasonable range of alternatives for alignments, station sites, maintenance, and train technology options. The Supplemental Draft EIS examines several modifications to the Line, such as an additional station site option in Victorville, two new rail alignment options, modifications to the Victorville and Las Vegas maintenance facilities, and adjustments to the rail alignment, and responds to the public comments on the Draft EIS. The Final EIS evaluates these alternatives, addresses the public comments on the Supplemental Draft EIS, and identifies the preferred alternative for the rail alignment, facilities and technology.¹⁰

As the EIS shows, a reasonable range of alternatives (both within and outside of the I-15 corridor) were considered for the proposed Line, including a No-Action Alternative.¹¹ Under the No-Action Alternative, the proposed rail line would not be constructed and individuals traveling between Southern California and Las Vegas would continue to use the existing forms of transportation. The EIS explains that, while the No-Action Alternative would have fewer initial environmental impacts, it would eventually result in more air pollution and overall fuel consumption because it would not provide an alternative to automobile travel on I-15 or air

⁸ The U.S. Fish and Wildlife Service, the Environmental Protection Agency, the U.S. Army Corps of Engineers, the Federal Aviation Administration, the Advisory Council on Historic Preservation, the Native American Heritage Commission, the California and Nevada Departments of Transportation, and the California and Nevada Offices of Historic Preservation also consulted with FRA on this project.

⁹ The ROD is attached to the petition for exemption. See DesertXpress Pet. for Exemption, Exhibit D (July 28, 2011).

¹⁰ See Section 4.3 of the Final EIS.

¹¹ See Chapter 2 of the Draft EIS, Supplemental Draft EIS, and Final EIS.

travel to and from Las Vegas. In addition, it would not meet the purpose and need of the proposed project.

As part of the alternatives analysis, two different train operating technologies were considered for the proposed Line: diesel-electric multiple unit train (DEMU train technology) and electrical multiple unit train (EMU train technology). FRA adopted the EMU locomotive technology because it would provide faster top and average train speeds (reducing overall travel time) and would have the capacity to carry more passengers than the DEMU trains.

The EIS also identifies and evaluates the potential environmental impacts that each of the studied alternatives for the proposed Line would likely have on the following resource areas: land use and community impacts, including impacts to property owners and environmental justice communities; growth, including impacts to area jobs and economic development; farmlands and grazing lands; utilities and emergency services; traffic and transportation; visual resources; cultural, archaeological and paleontological resources; hydrology and water quality; geology and soils; safety issues, such as hazardous materials; air quality and global climate change; noise and vibration; energy; biological resources; and cumulative impacts. During the environmental review, commenters expressed the most concern about impacts to species, such as the desert tortoise; noise impacts on sensitive receptors (e.g., residences, hotels, motels) in the Barstow, Yermo, and Las Vegas metropolitan areas; impacts to cultural, archaeological, and paleontological resources; visual impacts; and potential impacts related to hazardous materials.

FRA determined that the project would likely result in adverse impacts to sensitive biological resources; cultural and paleontological resources; hydrological resources; visual resources; localized traffic near the proposed passenger stations in Victorville and Las Vegas; land use, including business displacement; communities located in the project area; noise levels; utility infrastructure and emergency services; air quality (as a result of pollutant emissions during construction); and existing grazing land allotments. Several of these impacts would affect communities in the project area.

FRA also determined that the Selected Alternative would likely have environmental benefits through the diversion of automobile traffic from the I-15 freeway to the Line. This traffic diversion would likely result in reduced air emissions and fuel consumption by automobiles, as well as improved safety through the diversion of automobile traffic from the I-15 freeway to the safer passenger rail transportation offered on the Line.

FRA imposed 146 mitigation measures in its ROD to eliminate or minimize potential adverse effects. FRA's mitigation includes extensive measures to protect the threatened desert tortoise, such as the installation of fencing to keep tortoises out of active construction areas and the installation of culverts to allow tortoises to pass through areas once construction is completed. Mitigation is also included to avoid or minimize impacts to sensitive species such as banded gila monsters, Mojave fringe-toed lizards, big horned sheep, American badgers, and several protected bat and bird species.

To mitigate potential adverse noise impacts to sensitive receptors such as residences, hotels, and motels located along the proposed rail alignment, the ROD requires DXE to install 4-

foot high noise barriers along the Line. Other measures require DXE to locate special track work (known as “crossovers”) that are major sources of noise and vibration away from residential areas and to install building insulation where noise barriers are infeasible.

To minimize the Line’s potential adverse visual impacts, the ROD requires DXE to develop design-build plans that will minimize the visual disruption from rail, station, and maintenance facility features on the surrounding environment. The ROD also requires contour grading to reduce the visual appearance of cut and fill slopes associated with the Line, and light/glare reduction strategies to reduce adverse impacts to visual resources.

Because construction and operation of the Line would affect more than 200 cultural and paleontological resources, a Programmatic Agreement (PA) was negotiated and signed by FRA, the cooperating agencies, the California and Nevada State Historic Preservation Officers, and DXE, pursuant to Section 106 of the National Historic Preservation Act.¹² The PA sets out steps to avoid or minimize adverse effects to cultural and paleontological resources, as well as requirements for Tribal monitoring of construction activities to ensure protection of resources important to Native American Tribes.¹³

On September 22, 2011, after the ROD was issued, OEA prepared and issued a memorandum making final environmental recommendations for this proceeding, which is available on the Board’s website.¹⁴ OEA’s memorandum summarizes the environmental review process and key environmental issues associated with the proposed Line. OEA recommends that, if DXE’s petition is granted, the Board should adopt FRA’s EIS for purposes of complying with NEPA and the Board’s environmental rules, and should approve construction and operation of the Selected Alternative, subject to the environmental mitigation measures set forth in FRA’s ROD.

After reviewing the entire environmental record, we are satisfied that the EIS prepared by FRA, with our participation along with other cooperating agencies, has taken the requisite “hard look” at the potential environmental impacts associated with the proposed Line as required by NEPA. The EIS adequately assesses the environmental impacts discovered during the course of the environmental review, considers a reasonable range of alternatives, including a No-Action Alternative, and includes appropriate mitigation to avoid or minimize potential environmental effects. No mitigation beyond that already imposed by FRA has been shown to be warranted here.

As explained in the ROD, FRA’s Selected Alternative is the alternative that best satisfies the purpose and need for the proposed Line and minimizes impacts to the environment by utilizing an existing transportation corridor where practicable.

¹² 16 U.S.C. § 470f.

¹³ The Las Vegas Paiute Tribe signed the PA as a concurring party.

¹⁴ The Board’s website is located at www.stb.dot.gov.

CONCLUSION

After weighing the various transportation and environmental concerns and considering the entire record, the Board finds that the petition for exemption should be granted and that DXE may build the FRA-designated Selected Alternative, subject to compliance with the environmental mitigation measures set forth by FRA in Appendix A of the ROD.

As conditioned, this action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Under 49 U.S.C. § 10502, the Board exempts the construction and operation of the above-described passenger Line and related rail facilities from the prior approval requirements of 49 U.S.C. § 10901, subject to the environmental mitigation measures set forth by FRA in Appendix A of the ROD, and the requirement that DXE build the FRA-designated Selected Alternative.¹⁵

2. Notice will be published in the Federal Register on October 26, 2011.

3. Petitions to reopen must be filed by November 15, 2011.

4. This decision shall be effective on November 25, 2011.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey.

¹⁵ See DesertXpress Pet. for Exemption, Exhibit D (July 28, 2011).