

December 30, 2014

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

237349

ENTERED  
Office of Proceedings  
December 30, 2014  
Part of  
Public Record

Re: **STB Finance Docket No. 35861;  
Electronic Filing of Petition for Reconsideration of the Surface Transportation  
Board Decision Issued December 12, 2014 in Proceeding FD-35861 Granting  
California High Speed Rail Authority's Request for Declaratory Order.**

Dear Ms. Brown:

Please find attached hereto for filing in the above-referenced docket my Petition for Reconsideration of the Surface Transportation Board Decision Granting California High Speed Rail Authority's Request for Declaratory Order, the Verification, and the associated Certificate of Service that I hereby submit as a California resident, voter, taxpayer, and stakeholder in the California High Speed Rail Project. The \$300 filing fee which must accompany such petitions has been provided via the Surface Transportation Board's Standard Payment Form that was submitted electronically on December 30, 2024 to Ms. Vivian Hardy (Vivian.Hardy@stb.dot.gov) per the instruction that she provided to me on December 22, 2014 via electronic mail.

If you have any questions regarding this submittal, please do not hesitate to contact me.

Sincerely,

Jacqueline Ayer  
*California Resident, Voter, Taxpayer, and  
Stakeholder in the California High Speed Rail Project.*

2010 West Avenue K, #701  
Lancaster, CA 93536  
(949) 278-8460  
[AirSpecial@aol.com](mailto:AirSpecial@aol.com)

FILED  
December 30, 2014  
Surface Transportation Board

FEE RECEIVED  
December 30, 2014  
Surface Transportation Board

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 35861

CALIFORNIA HIGH-SPEED RAIL AUTHORITY  
PETITION FOR DECLARATORY ORDERS

**PETITION FOR RECONSIDERATION OF  
THE SURFACE TRANSPORTATION BOARD  
DECISION ISSUED DECEMBER 12, 2014  
IN PROCEEDING FD-35861**

Jacqueline Ayer  
*California Resident, Voter, Taxpayer, and  
Stakeholder in the California High Speed Rail Project.*

2010 West Avenue K, #701  
Lancaster, CA 93536  
(949) 278-8460  
[AirSpecial@aol.com](mailto:AirSpecial@aol.com)

Dated: December 30, 2014

## **PREFACE AND SUMMARY OF ARGUMENT**

In accordance 49C CFR § 1115.3(d), this Preface and Summary of Arguments is offered because the attached “Petition for Reconsideration” exceeds 10 pages in length.

### **PREFACE**

I submit this “Petition for Reconsideration of the Surface Transportation Board Decision Granting the California High Speed Rail Authority’s (“CHSRA’s”) Request for Declaratory Order in Proceeding FD-35861” as a California resident, voter, taxpayer and stakeholder in the California High Speed Rail (“HSR”) Project. This Petition, timely filed, identifies substantial material errors provided by the Decision, and based on these errors, I respectfully ask the Board to reconsider the Decision and refrain from granting CHSRA’s Request for Declaratory Order.

### **SUMMARY OF ARGUMENTS**

The Decision involves numerous material errors because it sets forth a number of foundational precepts that are not internally consistent, it relies on an incomplete and even myopic view of how and where CEQA applies to the HSR project, and makes determinations on matters rooted in voter-approved funding initiatives over which it has no jurisdiction.

*The Decision contains elements that are inconsistent and contradictory:*

- 1) The Decision avoids the salient issue of whether CEQA compliance is required by Proposition 1A by relegating it to the courts to decide, yet it ignores two California appellate court decisions that clearly state CEQA compliance is required by Proposition 1A.
- 2) In one place, the Decision asserts that the only regulatory action relevant to ICCTA preemption are third-party CEQA enforcement actions; elsewhere, it asserts preemption over “CEQA as a whole”.
- 3) In one place, the Decision asserts that Proposition 1A is not “the relevant regulatory actions for purposes of our preemption analysis”; elsewhere, it asserts preemption over CEQA “as a whole” (including any CEQA provisions that Proposition 1A may have).
- 4) The Decision asserts it does not infringe on state sovereignty because ICCTA preemption applies to third party CEQA enforcement actions, not CEQA enforcement actions “brought by the state” while at the same time it asserts ICCTA preemption over “CEQA as a whole”.

*The ICCTA Does Not Preempt the CEQA Compliance Provisions Imposed By Proposition 1A.*

The ICCTA does not preempt the CEQA compliance provision (or any other provisions) of the voter-approved Proposition 1A funding statute because the Board lacks jurisdiction over such funding statutes. There is *absolutely nothing* in the ICCTA or any other federal statute that grants the Board jurisdiction over how or where or when or why California voters choose to spend taxpayer monies. Therefore, all of the compliance and enforcement provisions mandated in Proposition 1A *including CEQA and the third party lawsuits which attend CEQA*, lay outside the Board's jurisdiction, and are not subject to ICCTA preemption. CHSRA is not obligated to use the free and easy taxpayer funds provided by Proposition 1A. However, CHSRA's ability to use Proposition 1A's taxpayer funds is entirely contingent on CHSRA's commitment to fully comply with the mandatory provisions that attend Proposition 1A, including (among other things) CEQA and its associated third-party enforcement lawsuits. Unfortunately for CHSRA, the Decision appears to prevent CHSRA from making **any** sort of agreement (either voluntary, implied, intentional, or contractual) to comply with CEQA even if CHSRA wishes to do so in exchange for receiving taxpayer funds under Proposition 1A. The only chance that CHSRA has to use Proposition 1A taxpayer funds is for the (ostensibly preempted) CEQA lawsuits to proceed. It is ironic that a Board Decision which intended to reduce HSR project delays by eliminating third-party lawsuit entanglements will ultimately stop the HSR project entirely due to a lack of funding, and it will do so far more quickly and efficiently than any third-party lawsuit could ever have achieved.

*The Decision's analysis of state sovereignty issues is contradictory and unsupported.*

The Decision purports that "enforcement actions" pursuant to CEQA which are "brought by the state" are not preempted, therefore California's state sovereignty somehow remains intact. However, the argument is not logical and the conclusion is a complete non-sequitur. The Decision fails to identify the "enforcement actions" that can be "brought by the state" under CEQA which somehow survive preemption and also preserve state sovereignty. It also fails to explain how such "state enforcement actions" could be pursued in the first place given that CEQA "as a whole" is preempted.

*The Decision's reliance on Friends is misplaced and it ignores distinctions resolved in Friends.*

The Decision accords substantial weight to the Appellate Court decision in *Friends of the Eel River v. North Coast Railroad Authority*, ("*Friends*"), however it ignores crucial distinctions between the CEQA preemption matters resolved in *Friends* and the CEQA preemption matters raised in CHSRA's petition. It also misquotes *Friends* to support an erroneous conclusion regarding ICCTA preemption of CEQA which is not relevant to the CEQA compliance obligations imposed on CHSRA in the construction of the HSR Project and the use of Proposition 1A funds to pay for such construction.

*The Decision's criticism of Atherton is faulty and unsupported*

Much of the general discussion of ICCTA preemption in *Atherton* is presented largely within the context of Proposition 1A compliance, which lies outside of Board jurisdiction and ICCTA preemption. Therefore, the criticism levied by the Decision that *Atherton* failed to acknowledge CEQA's categorical preemption is without merit. The Decision also errs in concluding (without basis) that the *Atherton* court itself "appears to have assumed that CEQA was indeed preempted". Plain reading of *Atherton* shows this is not the case at all.

For these reasons, the Board is asked to refrain from granting CHSRA's Petition.

BEFORE THE  
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35861  
CALIFORNIA HIGH-SPEED RAIL AUTHORITY PETITION FOR DECLARATORY ORDER

**PETITION FOR RECONSIDERATION OF  
THE SURFACE TRANSPORTATION BOARD  
DECISION ISSUED DECEMBER 12, 2014  
IN PROCEEDING FD-35861**

As a California resident, voter, taxpayer and stakeholder in the California High Speed Rail Project (“HSR”), I hereby respectfully file this Petition for Reconsideration of the Surface Transportation Board (“Board”) Decision Granting the California High Speed Rail Authority’s (“CHSRA’s”) Petition for Declaratory Order in Proceeding FD-35861 (“Decision”). This Petition for Reconsideration has been timely filed electronically within 20 days of the service date of the Decision in accordance with 49 U.S.C. § 722(c) and 49 C.F.R. § 1115.3, and it identifies numerous and substantial material errors provided by the Decision. Based on the concern raised herein, I respectfully ask the Board to reconsider the Decision and refrain from granting CHSRA’s Petition.

**BACKGROUND**

In June of 2014, seven lawsuits were filed against CHSRA alleging failure to comply with the California Environmental Quality Act (“CEQA”) when CHSRA certified the Environmental Impact Report (“EIR”) for, and approved, the Fresno to Bakersfield segment of the HSR project <sup>1</sup>. In addition to the CEQA remedies sought in all of these lawsuits, some plaintiffs assert violations of other statutes, such as the Williamson Act, Anti-Discrimination Laws, and the voter-approved Proposition 1A funding statute <sup>2</sup>.

---

<sup>1</sup> The number of lawsuits has now dropped to 6; the City of Bakersfield settled with CHSRA on December 19, 2014.

<sup>2</sup> County of Kings et al v. the California High-Speed Rail Authority (Case No. 34-2014-80001861); County of Kern v. the California High-speed Rail Authority (Case No. 34-2014-80001863); In addition to CEQA violations, both these lawsuits address violations of the Proposition 1A funding statute, California’s Anti-Discrimination Laws, and The Williamson Act.

In October, 2014, CHSRA filed a petition requesting a Declaratory Order (“Request”) with the Board pursuant to its discretionary authority under the Interstate Commerce Commission Termination Act (“ICCTA”). CHSRA’s Petition alleged that the CEQA remedies sought in plaintiffs lawsuits would delay or prevent HSR project construction, and further alleged that, because such remedies are subject to ICCTA preemption, a Board declaration on the matter was ripe. CHSRA’s Petition sought preemption of only the injunctive remedies provided by CEQA, and not the entire CEQA regulation. It also did not seek preemption of the injunctive relief requested in some of the lawsuits pursuant to the Williamson Act, Anti-Discrimination Laws, and Proposition 1A.

On December 12, 2014, the Board issued a Decision granting CHSRA’s Request. In fact, the Board granted far more than what CHSRA requested, because it granted ICCTA preemption from the entire CEQA statute, not just the injunctive remedies. The Decision involves numerous material errors because it sets forth a number of foundational precepts that are not internally consistent, it relies on an incomplete and even myopic view of how and where CEQA applies to the HSR project, and makes determinations on matters rooted in voter-approved funding initiatives over which it has no jurisdiction. This Petition for Reconsideration is respectfully submitted to shed light on these material errors and persuade the Board to reconsider the Decision.

## **CONTENT OF THE BOARD’S DECISION**

With regards to issues I have raised in this proceeding, the Decision lays out the following essential elements:

- A decision on CEQA preemption for the Fresno-Bakersfield HSR segment is now “ripe” because construction activities have begun, and several plaintiffs in lawsuits filed against CHSRA have requested permanent injunctive relief. [Decision page 5]
- The Board intends to inform the courts on its views of CEQA preemption as it relates to the HSR project, and that it is uniquely qualified to do so given its role as the agency authorized by Congress to administer the ICCTA. [Decision page 5]

- The Board finds it impractical to separate prohibitive injunctive remedies available under CEQA from a court’s ability to enforce CEQA compliance, and further observes that CEQA cannot be enforced if courts cannot halt CHSRA’s activities in order to compel compliance. [Decision page 10]
- The “core issue” resolved by the Decision is “whether CEQA *as a whole* is preempted”. [Decision page 10]
- The Decision asserts that CEQA is categorically preempted by the ICCTA; this declaration applies to the whole of CEQA. [Decision page 10]
- The Decision asserts that third-party CEQA lawsuits constitute an attempt to regulate a project that is directly regulated by the Board, and are therefore preempted by the ICCTA [Decision page 10].
- The Decision asserts ICCTA preemption over CEQA requirements with which CHSRA has made any “implied agreement” to comply. [Decision page 10-11]
- The Decision purports that agreements made by CHSRA to comply with CEQA unreasonably interfere with interstate commerce and are not enforceable under the ICCTA. [Decision page 11]
- The Decision characterizes CHSRA’s prior CEQA compliance activities as “voluntary”. [Decision page 11]
- The Decision characterizes CEQA compliance as merely an “alleged” requirement of the voter-approved Proposition 1A funding statute. [Decision page 13]
- The Decision declines to “interpret the requirements of Proposition 1A”, and leaves that “for a state court to decide”. [Decision page 13]
- Regarding the Board’s preemption analysis under the ICCTA, the “relevant regulatory actions” are the “third-party CEQA suits”. [Decision page 14]
- The Proposition 1A HSR funding statute is not a “regulatory action relevant” to the Board’s ICCTA preemption analysis, rather the relevant regulatory actions are the “third-party CEQA enforcement suits”. [Decision page 14]
- The Board’s ICCTA preemption analysis concludes that the Decision does not infringe on state sovereignty because the “CEQA enforcement actions” that are being preempted “are not being brought by the state”. [Decision page 14]

## **THE DECISION MATERIALLY ERRS BY SETTING FORTH DETERMINATIONS THAT ARE INTERNALLY INCONSISTANT AND CONTRARY**

Several aspects of the Decision are internally inconsistent and contradictory:

The Decision will not affirm that using Proposition 1A funds requires CEQA compliance as “that is for a state court to decide” WHILE AT THE SAME TIME it ignores two different appellate court decisions clearly stating CEQA compliance is required by Proposition 1A<sup>3</sup>.

The Board has completely ignored the very state court decisions it purports to defer to, and fails to explain this “oversight”.

The Decision asserts that the Proposition 1A funding statute is not “the relevant regulatory actions for purposes of our preemption analysis” WHILE AT THE SAME TIME it asserts ICCTA preemption over CEQA “as a whole” (which includes CEQA provisions in Proposition 1A).

Limiting ICCTA preemption to exclude Proposition 1A and expanding ICCTA preemption to encompass “CEQA as a whole” are two very different edicts that are entirely contradictory in light of the court-established fact that Proposition 1A itself requires CEQA compliance.

The Decision asserts that the only regulatory action relevant to ICCTA preemption is third-party CEQA enforcement lawsuits, WHILE AT THE SAME TIME it asserts ICCTA preemption over “CEQA as a whole”. Limiting ICCTA preemption to just third-party CEQA enforcement lawsuits and expanding ICCTA preemption to encompass “CEQA as a whole” are two very different and contrary edicts. Yet, the Board’s Decision appears to adopt both.

---

<sup>3</sup> In *Town of Atherton, et al v. California High Speed Rail Authority*, the Appellate Court declared “Proposition 1A, as we discuss *post*, included compliance with CEQA as a feature of the HST” and “The Legislature did not exempt the HST from compliance with CEQA. The reasonable inference, therefore, was that the Legislature intended the HST to comply with CEQA and that Proposition 1A was presented to the voters with the expectation that CEQA would apply and the voters ratified the proposition based on this expectation”, and “In making this argument, the Authority ignores that its power is circumscribed by the provisions of Proposition 1A, the voter-approved bond measure to fund the HST. The Authority’s discretion is not unfettered; it must follow the directives of the electorate. As explained *ante*, one of those directives is compliance with CEQA.” Also, In *California High Speed Rail Authority v. The Superior Court of Sacramento County* with John Tos et Al Real Parties in Interest, the Appellate Court deemed that it was not necessary to issue a writ of mandate to ensure that the CHSRA would fully comply with Proposition 1A’s CEQA requirements because CEQA itself obligates CHSRA to fully comply with CEQA. The Appellate Court concluded that “.....a writ of mandate does not lie if the public agency has an obligation to perform under another law.... The Authority has repeated frequently that it will have all the requisite environmental clearances before construction begins; CEQA certainly demands nothing less. The Tos real parties, in fact concede that state and federal law require environmental clearance before starting construction. **Because the Authority must comply with CEQA before the project proceeds**, a writ of mandate is not necessary”. [emphasis added]. The Appellate Court clearly lays out the fact that, as a public agency, CHSRA is obligated to comply with CEQA. It is based solely on this established certainty that the Court declined to issue a writ of mandate to ensure that CHSRA complied with Proposition 1A’s CEQA provisions. The Appellate Court conclusions clearly affirm 1) CEQA compliance is mandated by Proposition 1A; and 2) CEQA itself mandates CHSRA’s CEQA compliance.

The Decision asserts it does not infringe on state sovereignty because ICCTA preemption applies to third party CEQA enforcement actions, not CEQA enforcement actions “brought by the state” WHILE AT THE SAME TIME it asserts ICCTA preemption over “CEQA as a whole”. Leaving the door open to CEQA enforcement actions “brought by the state” and contemporaneously shutting the door entirely on all CEQA actions through ICCTA preemption of CEQA “as a whole” are two very different and contrary edicts. Yet, the Decision appears to adopt both. The Decision also fails to articulate how the state could even bring an enforcement action under CEQA.

**THE DECISION ERRS IN ASSERTING THAT THE ICCTA PREEMPTS “CEQA AS A WHOLE” BECAUSE IT DOES NOT PREEMPT THE CEQA COMPLIANCE PROVISIONS IMPOSED BY PROPOSITION 1A.**

Setting aside the Decision’s failure to recognize multiple court decisions which squarely establish CEQA compliance as a fundamental requirement of the Proposition 1A funding statute, there still remains the inescapable fact that the ICCTA does not preempt the CEQA compliance provision (or any other provisions) of the Proposition 1A funding statute because the Board lacks jurisdiction over such funding statutes. CHSRA is not obligated to use the free and easy taxpayer funds provided by Proposition 1A, but if CHSRA hopes to do so, then it must find a way to ensure that the entire HSR Project fully complies with all CEQA provisions (includes legal remedies such as third-party enforcement lawsuits which are part and parcel of CEQA’s compliance provisions) despite the Board’s Decision that the ICCTA preempts “CEQA as a whole”.

*There are no compulsory requirements for CHSRA to use Proposition 1A funds, but CEQA compliance will attach if CHSRA does use Proposition 1A funds.*

CHSRA was created by state statute [CPUC § 185000-185012] in 1996, long before Proposition 1A was passed by California voters. The enabling statute which created CHSRA imposes no requirement or obligation on CHSRA to use public funds to construct the HSR Project. To the contrary, it specifically engenders private sector participation in HSR construction [CPUC § 185010 (j)]. Similarly, Proposition 1A does not compel CHSRA’s to use the taxpayer funds provided therein; in fact Proposition 1A obligates CHSRA to obtain

substantial funds from sources other than California taxpayers [CSHC §2704.07]. Neither CHSRA's existence nor purpose is secured in, or tethered by, Proposition 1A, which itself imposes no compulsory obligation on CHSRA to avail itself of Proposition 1A taxpayer funds to construct the HSR project. There are no state regulations that require CHSRA to use Proposition 1A taxpayer funds, either. CHSRA's voluntary use of the free and easy taxpayer funds provided by Proposition 1A is a choice. However, CHSRA's voluntary use of Proposition 1A's taxpayer funds is entirely contingent on CHSRA's *active commitment* to fully comply with the mandatory provisions that attend Proposition 1A, including (among other things) CEQA and its associated third-party enforcement lawsuits. The fact that CHSRA even requested ICCTA preemption over any part of CEQA raises a substantial barrier to receiving Proposition 1A funds in future because it demonstrates that CHSRA is not committed to complying with CEQA, and has no intention of complying with CEQA.

In the Decision, the Board appears to assert ICCTA preemption over any compulsory CEQA compliance requirement that is imposed on CHSRA as a state agency seeking to construct and operate the HSR project. Notably, this element of the Decision does not apply to Proposition 1A's CEQA compliance requirement because CHSRA is not under any compulsory obligation to use the free and easy taxpayer money provided by Proposition 1A. However, the Decision also includes a "catch-all" prohibition that asserts "any implied agreement to comply with CEQA that potentially could have the effect, through the mechanism of a third-party enforcement suit, of prohibiting the construction of a rail line authorized by the Board unreasonably interferes with interstate commerce by conflicting with our exclusive jurisdiction and by preventing the Authority from exercising the authority we have granted it". While it is unclear the extent to which the Board considers an "agreement" to be "implied", the Decision does cite *Blanchard Sec. Co. v. Rahway Valley R.R.*, 191 F. App'x 98, 100 (3d Cir. 2006) which determined that actual contract provisions (which are hardly "implied" agreements) could be preempted by the ICCTA. Thus it appears that the Decision specifically prevents CHSRA from making *any* sort of agreement (either voluntary, implied, intentional, or contractual) to comply with CEQA even if CHSRA wishes to do so in exchange for receiving taxpayer funds under Proposition 1A.

By eliminating every conceivably opportunity that CHSRA may have to comply with CEQA, the Decision has essentially “shut the door” on CHSRA’s use of Proposition 1A taxpayer funds to construct the HSR Project. In other words, CHSRA’s use of Proposition 1A’s taxpayer funds is contingent on compliance with CEQA, and since the Decision prevents CHSRA from complying with CEQA, CHSRA will never qualify for Proposition 1A funding. It is ironic that a Board Decision which intended to reduce HSR project delays by eliminating third-party lawsuit entanglements will ultimately stop the HSR project entirely due to a lack of funding, and it will do so far more quickly and efficiently than any third-party lawsuit could ever have achieved.

*The Board lacks jurisdiction over, and the ICCTA does not preempt, Proposition 1A provisions:*

The ICCTA grants exclusive Board jurisdiction over “transportation by rail carriers”, and state/local actions subject to ICCTA preemption include 1) The imposition of regulatory, permitting, or environmental preclearance requirements that, by their nature, could deny a rail carrier the opportunity to conduct rail operations; 2) The regulation of matters that are directly regulated by the Board; and 3) Any action that has the effect of unreasonably burdening or interfering with railroad transportation. State actions which do not meet the circumstances described in these categories are not subject to ICCTA preemption.

None of these circumstances are presented by Proposition 1A, therefore no Proposition 1A provisions are subject to Board jurisdiction or ICCTA preemption *including CEQA compliance and the attendant third party lawsuit remedies it provides*, to wit:

1) Proposition 1A is merely a voter-approved funding statute which CHSRA can choose to ignore merely by foregoing taxpayer funding for HSR Project construction. Proposition 1A does not impose any preclearance requirements on the HSR project, and it does not deny CHSRA the opportunity to conduct any aspect of the HSR Project; rather it denies CHSRA the opportunity to use taxpayer funds to *pay for* railway operations until full compliance with all Proposition 1A provisions (including CEQA) is achieved.

2) Proposition 1A merely specifies the conditions under which certain California taxpayer funds may be spent. The Board does not regulate California funding statutes, therefore the matters regulated by Proposition 1A are not subject to ICCTA preemption.

3) Proposition 1A is merely a funding statute and its provisions are imposed on CHSRA only as a condition of receiving taxpayer fund disbursements. Proposition 1A does not interfere with, burden, or even address “railroad transportation”; it merely identifies the circumstances under which taxpayer funds can be expended to further “railroad transportation”. Therefore, no Proposition 1A provisions are subject to ICCTA preemption.

There is *absolutely nothing* in the ICCTA or any other federal statute that grants the Board jurisdiction over how or where or when or why California voters choose to spend taxpayer monies. Therefore, all of the compliance and enforcement provisions mandated in Proposition 1A *including CEQA and the third party lawsuits which attend CEQA*, lay outside the Board’s jurisdiction, and are not subject to ICCTA preemption. An attempt by the Board to assert ICCTA preemption over the voter-approved Proposition 1A taxpayer funding statute would be tantamount to the Board *ordering* California tax payers to pay for a *federal* railway project which explicitly avoids the very conditions under which the taxpayers supported the funding statute in the first place.

**THE APPLICATION OF ICCTA PREEMPTION TO THE ONGOING THIRD-PARTY CEQA LAWSUITS FOR THE FRESNO-BAKERSFIELD HSR SEGMENT CONSTITUTES AN IRREVERSIBLE AND INSURMOUNTABLE PROHIBITION ON THE USE OF PROPOSITION 1A FUNDS IN THE FUTURE.**

CEQA’s third-party lawsuit enforcement provisions have very tight and stringent timeframes which must be met for the lawsuits to proceed to trial. If the third-party CEQA lawsuits that have been brought pursuant to the Fresno-Bakersfield HSR segment are stopped (through operation of ICCTA preemption), they cannot be reinstated. More importantly, if they are stopped, then CHSRA will not meet Proposition 1A’s CEQA compliance provisions and will therefore lose any opportunity to use Proposition 1A taxpayer funds to construct this segment<sup>4</sup>. Simply put, CHSRA will be ineligible to receive Proposition 1A taxpayer funds if it is prevented from proceeding with the CEQA lawsuits

---

<sup>4</sup> In its petition, CHSRA claims [on Page 9] that it “completed the CEQA process when it completed and certified the EIR (jointly with a federal EIS under NEPA) for the Fresno-Bakersfield HST Segment in May of 2014”. This is completely untrue; no CEQA process is ever complete until all the remedies provided by CEQA are fully exhausted. As CHSRA acknowledges, [See Petition page 10] CEQA provides enforcement remedies, and these remedies are specifically being implemented by the very CEQA lawsuits that CHSRA now seeks to avoid via ICCTA preemption. The fact that CHSRA has even petitioned the Board for ICCTA preemption of these lawsuits is *prima facie* evidence that CHSRA’s CEQA process is certainly *not* complete.

it now faces. CHSRA cannot have it both ways; it cannot have Proposition 1A taxpayer dollars after requesting federal preemption to sidestep the very compliance obligations which gave rise to Proposition 1A taxpayer funding in the first place. The only chance that CHSRA has to use Proposition 1A taxpayer funds is for the existing CEQA lawsuits (over which the Board asserts ICCTA preemption) to proceed.

### **THE DECISION INCLUDES CONTRADICTORY STATEMENTS REGARDING WHAT IS SPECIFICALLY PREEMPTED BY THE ICCTA**

On page 12, the Decision clarifies that it cannot properly separate CEQA's prohibitive remedies from its other injunctive remedies, and therefore addresses "whether CEQA as a whole - which is usually enforced through a third-party enforcement action - is preempted...". The Decision then affirms that CEQA is indeed preempted. It appears that the Board intends for this determination to strip CHSRA of all the CEQA compliance obligations it has as a state agency constructing the state-owned Fresno-Bakersfield HSR segment (including the CEQA requirement to prepare, certify, and implement an EIR). However, on page 14, the Decision appears to limit the scope and extent of ICCTA preemption by asserting that "the relevant regulatory actions for purposes of our preemption analysis here are the third-party CEQA enforcement suits". Under these circumstances, CHSRA would still be obligated to prepare and implement a legally sufficient EIR for the Fresno-Bakersfield segment. The Decision adopts both of these contradictory edicts, and fails to clearly define what is preempted, and what is not.

### **THE BOARD'S ANALYSIS OF STATE SOVEREIGNTY ISSUES IS BOTH CONTRADICTORY AND INSUPPORTABLE IN LAW.**

The Board's analysis [Decision page 14] concludes that ICCTA preemption of "third-party attempts to enforce CEQA against a state agency does not infringe upon California's state sovereignty because the CEQA enforcement actions are not being brought by the state. Rather, the enforcement actions in state court are being brought by third parties against a state agency under the guise of state law." Not only does the logic of this entire premise fail, but the conclusion regarding state sovereignty is a complete non-sequitur. Reconciling the elements of this "analysis" simply raises more questions, such as:

- Why is it asserted here that ICCTA preemption applies merely to “third-party” CEQA enforcement lawsuits when in fact the Decision clarifies that CEQA “as a whole” is preempted?
- What is meant by the Decision when it refers to an enforcement action “brought by the state”? Clearly the term “state” as it is used here encompasses far more than just a “state agency”<sup>5</sup>. Is a “political subdivision” of a “state” that is created statutorily by the “state” part of the “state”? If not, why not?
- Precisely what does a CEQA enforcement action “brought by the state” look like? According to the State of California Natural Resources Agency<sup>6</sup>, CEQA is: “a self-executing statute. Public agencies are entrusted with compliance with CEQA *and its provisions are enforced, as necessary, by the public* through litigation and the threat thereof” [emphasis added]. In other words, what CEQA provisions provide the enforcement actions “brought by the state” upon which the Decision relies here?
- Even assuming *arguendo* that CEQA “enforcement actions” could be “brought by the state”, how could such actions proceed when CEQA itself is preempted “as a whole”?
- Precisely how is California’s sovereignty preserved through the action of unidentified “state enforcement actions” brought under CEQA?

The Board’s contention that it does not infringe on state sovereignty because the ICCTA does not preempt CEQA enforcement actions “brought by the state” is nothing more than insubstantial vapor. The “state” enforcement actions under CEQA that the Decision presumes exist and even relies upon to preserve state sovereignty are not described or even identified. And in any case, even if they did exist, they are ostensibly preempted by the ICCTA anyway because the Decision declares that CEQA itself is preempted “as a whole”. Aside from being nonsensical and self-contradictory, the “analysis” of state sovereignty issues presented in the Decision demonstrates a fundamental lack of understanding regarding what CEQA does and how CEQA works.

---

<sup>5</sup> California Government Code 8557 clarifies that “state agencies” refers only to entities working within the executive branch of the state government, which is hardly representative of the entire “state”.

<sup>6</sup> The California Natural Resources Agency is the California state agency tasked with adopting the CEQA Guidelines, and assisting public agencies in the interpretation of CEQA. See <http://resources.ca.gov/ceqa/more/faq.html#enforce>.

## **THE DISCUSSION OF, AND DECISIONAL RELIANCE ON, *FRIENDS* IGNORES IMPORTANT DISTINCTIONS IN MATTERS RESOLVED IN *FRIENDS*.**

The Decision places great weight on the recent Appellate Court decision in *Friends of the Eel River v. North Coast Railroad Authority*, 178 Cal. Rptr. 3d 752 (Ct. App. 2014) (“*Friends*”), however it ignores crucial distinctions between the CEQA preemption matters resolved in *Friends* and the CEQA preemption matters raised in CHSRA’s petition. This glaring error is amplified by the fact that the *Friends* court itself identifies the distinction and clarifies its existence, yet it is completely ignored by the Decision. In *Friends*, the court clarifies that “requiring a CEQA analysis as part of the process for determining *where* to place a rail line, which was at issue in *Atherton*, differs from requiring a CEQA analysis as a condition of resuming rail operations, at issue in the present case”. *Friends* specifically addressed the CEQA preemption pursuant to a state agency’s project involving the resumption of railway operations on an existing and fully constructed rail line, and the *Friends* court determined that, under those limited circumstances, CEQA was preempted. Like *Atherton*, *Friends* recognizes the substantial difference between ICCTA preemption of a local agency’s permit process and ICCTA preemption of the CEQA environmental review of a decision on railroad alignments. Not only does the Decision fail to perceive this significant difference, it completely obliterates it.

In addition, the Decision misquotes<sup>7</sup> *Friends* to support the Board’s erroneous conclusion that CEQA imposes an impermissible state preclearance requirement on the HSR project which is preempted by the ICCTA [see page 12]. The Board’s decisional reliance on *Friends* is misplaced. In *Friends*, the Appellate Court declared that a “state statute requiring environmental review as a condition to a railroad operation is preempted by the ICCTA”.

---

<sup>7</sup> The Decision states “Indeed, another California Court of Appeal in *Eel River*, 178 Cal. Rptr. 3d at 769-70, recently explained that the environmental review process under CEQA, though it serves a laudable and important purpose, qualifies as a state preclearance requirement that ‘could significantly delay or even halt a project in some circumstances,’ and therefore is categorically preempted”. The Court of Appeal said nothing of the kind. To be precise, the Court of Appeal stated: “While CEQA serves a laudable and important purpose, [t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.’ [Citations.]” (*Fidelity Federal Sav. & Loan Assn. v. de la Cuesta* (1982) 458 U.S. 141, 153.). A proper analysis of this statement reveals that it is inapposite to the CEQA compliance requirements imposed by Proposition 1A because the ICCTA does not preempt voter-approved taxpayer funding statutes, thus there is no conflict between federal law and the CEQA compliance obligations imposed by Proposition 1A.

This holding is not relevant to the CEQA compliance obligations imposed on CHSRA in the use of Proposition 1A funds to construct the HSR Project. To be clear, Proposition 1A is *not* a “state statute requiring environmental review as a condition to any railroad operation”; rather it is a state statute requiring environmental clearance as a condition of using taxpayer funds to *pay* for a railroad operation. Therefore, the CEQA compliance requirements imposed on CHSRA pursuant to Proposition 1A do not meet the ICCTA preemption standard established by *Friends*.

### **THE DECISION’S CRITICISM OF *ATHERTON* IS FAULTY AND UNSUPPORTED**

The general discussion of ICCTA preemption in *Atherton* is presented largely within the context of Proposition 1A compliance, which, as shown previously, lies outside of Board jurisdiction and ICCTA preemption. Therefore, the criticism levied against *Atherton* in the Decision is without merit. Specifically, the Board asserts [Decision page 12]: “Moreover, the court in *Atherton* failed to acknowledge another reason why CEQA is categorically preempted by § 10501(b): that because environmental review under CEQA attempts to regulate where, how, and under what conditions the Authority may construct the Line, the application of CEQA here would constitute an attempt by a state to regulate a matter directly regulated by the Board – the construction of a new rail line as part of the interstate rail network”. In this, the Decision errs, because the CEQA environmental review requirements imposed by Proposition 1A that are addressed in *Atherton* are not categorically preempted by § 10501(b) because they do not regulate where, how, or under what conditions CHSRA may construct the HSR Project. Rather, they regulate where, how and under what conditions taxpayer funds are used to *pay for* the HSR Project. It is hard to decide which is worse; the fact that the Decision criticizes the *Atherton* court for failing to acknowledge an issue that does not exist, or the fact that the Board itself fails to recognize that Proposition 1A’s CEQA compliance requirements are not, and cannot be, categorically preempted by the ICCTA.

The Decision also wrongly states [Page 12] that “the *Atherton* court appears to have assumed that CEQA was indeed preempted, but then held that an exception to federal preemption.... applied”. *Atherton* does not assert, or even suggest, that CEQA is preempted,

and it certainly does not assume that CEQA remedies under Proposition 1A are preempted. To the contrary, *Atherton* specifically states that “It is less clear and certainly subject to dispute whether requiring review under CEQA before deciding on the alignment of the HST from the Central Valley to the San Francisco Bay Area has a comparable potential effect to deny the railroad the ability to conduct its operations and activities”. This concept is echoed in *Friends*, as discussed above. In any case, these Decisional statements addressing Atherton, and the implications behind them, are fraught with error.

## **CONCLUSION**

For the reasons set forth above, I respectfully request that the Board reconsider the Decision, and refrain from Granting CHSRA’s Petition.

Respectfully submitted;



Jacqueline Ayer  
*California Resident, Voter, Taxpayer, and  
Stakeholder in the California High Speed Rail Project.*

2010 West Avenue K, #701  
Lancaster, CA 93536  
(949) 278-8460  
[AirSpecial@aol.com](mailto:AirSpecial@aol.com)

December 30, 2014

**VERIFICATION**

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

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

Executed On: December 30, 2014

Sincerely,



Jacqueline Ayer  
*California Resident, Voter, Taxpayer, and  
Stakeholder in the California High Speed Rail Project.*

2010 West Avenue K, #701  
Lancaster, CA 93536  
(949) 278-8460  
[AirSpecial@aol.com](mailto:AirSpecial@aol.com)

CERTIFICATE OF SERVICE

I hereby certify that the foregoing "Petition For Reconsideration Of The Surface Transportation Board Decision Issued December 12, 2014 In Proceeding FD-35861" was served on the 30<sup>th</sup> of December, 2014 by electronic mail or first class mail, postage prepaid, on the following parties:

Arnone, James <a href="mailto:james.arnone@lw.com">james.arnone@lw.com</a>	Alden, Mary <a href="mailto:malden@smilandlaw.com">malden@smilandlaw.com</a>	Carol Bender 13340 Smoke Creek Avenue Bakersfield, CA 93314
Carstens, Douglas <a href="mailto:dpc@cbcearthlaw.com">dpc@cbcearthlaw.com</a> <a href="mailto:mnb@cbcearthlaw.com">mnb@cbcearthlaw.com</a>	Stuart M. Flashman <a href="mailto:Stu@Stuflash.com">Stu@Stuflash.com</a>	Alan Scott <a href="mailto:A_Scott1318@Comcast.net">A_Scott1318@Comcast.net</a>
Collins, Charles <a href="mailto:ccollins@co.kern.ca.us">ccollins@co.kern.ca.us</a> <a href="mailto:nmisner@co.kern.ca.us">nmisner@co.kern.ca.us</a>	73 <sup>rd</sup> Assembly District Representative State Capitol P. O. Box 942849 Sacramento, CA 94249-0073	Richard S. Edelman <a href="mailto:REdelman@odsalaw.com">REdelman@odsalaw.com</a>
Descary, William C. 604 Plover Court Bakersfield, CA 93309-1336	Hon. Jeff Denham U.S. House Of Representatives Washington, DC 20515	Kathy Hamilton <a href="mailto:Katham3@Aol.com">Katham3@Aol.com</a>
Gennaro, Virginia <a href="mailto:vgennaro@bakersfieldcity.us">vgennaro@bakersfieldcity.us</a> <a href="mailto:aheglund@bakersfieldcity.us">aheglund@bakersfieldcity.us</a>	Hon. Kevin McCarthy Congress Of the United States 2421 Rayburn House Office Building Washington, DC 20515	Hon. Andy Vidak <a href="mailto:Andy@Vidakrances.com">Andy@Vidakrances.com</a>
Hall, Jamie <a href="mailto:jamie.hall@channellawgroup.com">jamie.hall@channellawgroup.com</a>		Union Pacific Railroad <a href="mailto:blaine.green@pillsburylaw.com">blaine.green@pillsburylaw.com</a> <a href="mailto:Andrew.Bluth@Pillburylaw.com">Andrew.Bluth@Pillburylaw.com</a>
Martin, George F. <a href="mailto:gmartin@bortonpetrini.com">gmartin@bortonpetrini.com</a> <a href="mailto:Bpbak@Bortonpetrini.com">Bpbak@Bortonpetrini.com</a>	Hon. David G. Valadao United States House Representatives 1004 Longworth House Office Bldg. Washington, DC 20515	Jason Holder <a href="mailto:Jason@Holderecolaw.com">Jason@Holderecolaw.com</a>
Ouellette, Michelle <a href="mailto:Michelle.Ouellette@bbklaw.com">Michelle.Ouellette@bbklaw.com</a>	Hon. Devin Nunes U.S. House Of Representatives Longworth House Office Bldg. Suite 1013 Washington, DC 20515	Scott A. Kronland <a href="mailto:Skronland@Altber.com">Skronland@Altber.com</a>
Sheys, Kevin M. <a href="mailto:ksheys@nossaman.com">ksheys@nossaman.com</a>		Michael Wolly <a href="mailto:mwolly@zwerdling.com">mwolly@zwerdling.com</a>

---

Jacqueline Ayer  
2010 West Avenue K, #701  
Lancaster, CA 93536  
(949) 278-8460  
[AirSpecial@aol.com](mailto:AirSpecial@aol.com)