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CERTIFICATE OF SERVICE

**STB Finance Docket No. 35724 (Sub-No. 1), California High-Speed Rail Authority -
Construction Exemption - In Fresno, Kings, Tulare, and Kern Counties**

I hereby certify that, following the Surface Transportation Board's December 20, 2013 decision in the above mentioned proceeding, I have this day caused to be served by first class mail, postage prepaid, a copy of the Petition for Exemption filed by the California High-Speed Rail Authority in this proceeding, as well as a copy of the Board's December 20, 2013 decision in this matter, to all parties of record in the main docket as listed below:

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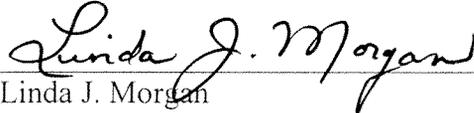
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Dated this 24th day of January, 2014.


Linda J. Morgan
Attorney for California High-Speed Rail Authority

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35724 (Sub-No. 1)

CALIFORNIA HIGH-SPEED RAIL AUTHORITY
—CONSTRUCTION EXEMPTION—
IN FRESNO, KINGS, TULARE, AND KERN COUNTIES, CAL.

Decided: December 20, 2013

By petition filed on September 26, 2013, California High-Speed Rail Authority (Authority), a state agency formed in 1996, seeks an exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10901 for authority to construct an approximately 114-mile high-speed passenger rail line between Fresno and Bakersfield, Cal. (the Line).¹

In a decision served December 4, 2013, and published in the Federal Register on December 9, 2013 (78 Fed. Reg. 73,921), the Board instituted a proceeding and extended the deadline for comments on the transportation merits of the proposed construction to December 24, 2013. The Board also denied the Authority's request that the Board conditionally grant the exemption authority by addressing the transportation aspects of the proposed project before the environmental review process has been completed.

On December 9, 2013, Michael LaSalle filed a letter requesting that the Board require the Authority to notify all landowners within and along the proposed Fresno-to-Bakersfield alignments, as well as all parties of record in the main docket (which pertains to the Merced-to-Fresno segment) of this proceeding and the comment deadline. LaSalle also requests that the Board amend the comment deadline to a reasonable time following the Authority's and the Federal Railroad Administration's issuance of the Final Environmental Impact Report/Environmental Impact Statement (EIR/EIS) and after their final decisions regarding the proposed project, including alignments and station locations, have been made. On December 16, 2013, the Community Coalition on High Speed Rail filed a letter joining in LaSalle's requests.

On December 12, 2013, the Citizens for California High Speed Rail Accountability (CCHSRA) filed a letter requesting that the Board extend the comment period to January 31,

¹ By decision served June 13, 2013, in California High-Speed Rail Authority—Construction Exemption—in Merced, Madera, & Fresno Counties, Cal., FD 35724 (the main docket), the Board granted an exemption for the Authority to construct the first 65-mile segment of the planned California High-Speed Train System (HST System), between Merced and Fresno, California. The Line is the second segment of the proposed HST System.

2014, because it only recently became aware of the petition and because the December 24 deadline coincides with the holiday season.² CCHSRA also requested that the Board consider providing notice to all impacted landowners in Fresno, Kings, Tulare, and Kern Counties.

Notice of the Proceeding. Both LaSalle and CCHSRA request that all affected landowners be given direct notice of this proceeding. Generally, however, publication in the Federal Register is legally sufficient notice to interested or affected parties.³ Moreover, attempting to identify and provide direct notice to all landowners who might potentially be affected would be unworkable.⁴ Also, ample notice of the proposed construction project and opportunity to participate in the environmental review for the proposed project have been provided through the EIR/EIS process. That process included five public meetings in 2009 on the potential scope of the Draft EIR/EIS, three public hearings in 2011 on the Draft EIR/EIS, and three public hearings in 2012 on the Revised Draft EIR/Supplemental Draft EIS. All the meetings and hearings were held in the project area including Fresno and Bakersfield.

However, given the significant public interest in this proceeding, the Board will require the Authority to notify all parties of record in the main docket by providing them with a copy of its petition for exemption in this sub-docket, as well as a copy of this decision, by January 3, 2014, and to certify contemporaneously to the Board that it has done so. Those parties, and any other interested persons who wish to participate in this sub-docket as a party of record, will then have until January 21, 2014, to notify the Board of their intent to participate in this sub-docket as a party of record. Only persons who participate as a party of record in this sub-docket by filing a notice of intent or filing comments (or both) will be entitled to service of pleadings and subsequent Board decisions in this sub-docket.

Extension of the Comment Period. In recognition of the new notice procedure set forth above, and taking into consideration the requests for an extension of the current comment deadline, we will extend the deadline for comments on the transportation to February 14, 2014. This extension should provide sufficient time for interested persons to comment on the proposed transaction.

Waiver of service requirement for individual private citizens. The Board is interested in encouraging public participation by all interested persons in this proceeding. As was done in the main docket,⁵ to help create a comprehensive record that embodies the full spectrum of interests

² In a letter filed on December 17, 2013, William Descary, a Bakersfield resident, also requests an extension of the comment period to January 31, 2014, in light of the holiday season.

³ Friends of Sierra R.R. v. ICC, 881 F.2d 663, 667-68 (9th Cir. 1989) (citing Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947)); accord State of Cal. ex rel. Lockyer v. FERC, 329 F.3d 700, 707 (9th Cir. 2003).

⁴ See Nat'l Trails Sys. Act & R.R. Rights of Way, EP 702, slip op. at 7-8 (STB served Feb. 16, 2011).

⁵ See Cal. High-Speed Rail Auth.—Constr. Exemption—in Merced, Madera, & Fresno Cntys., Cal., FD 35724 (STB served May 14, 2013).

involved and to facilitate the ability of individual private citizens to participate in that process, the service requirements of 49 C.F.R § 1104.12(a), which require every document filed with the Board to be served upon all parties to the proceeding, will be waived for individual private citizens who file comments in this proceeding. Thus, filings made by individual private citizens will be included in the public record of this proceeding (and posted on the Board's website) regardless of whether the filings comply with the service requirements of § 1104.12(a). All other parties of record, including citizen organizations, are expected to comply with the Board's service requirement regulations and serve all parties of record listed on the Board's service list for this proceeding.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Replies to the petition for exemption are due by February 14, 2014.
2. As discussed above in this decision, the Authority must notify all parties of record in the main docket of this proceeding of the proposed transaction by January 3, 2014, and certify contemporaneously to the Board that it has done so.
3. Any person who wishes to participate in this proceeding as a party of record must file with the Board a notice of intent to participate by January 21, 2014.
4. The service requirements under 49 C.F.R. § 1104.12(a) are waived for individual private citizens participating in this proceeding.
5. This decision will be published in the Federal Register.
6. This decision is effective on its service date.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.



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VIA HAND DELIVERY

234905

September 26, 2013

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street SW
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Re: STB Finance Docket No. 35724 (Sub-No. 1), California High-Speed Rail Authority—Construction Exemption—In Fresno, Kings, Tulare and Kern Counties, California

Dear Ms. Brown:

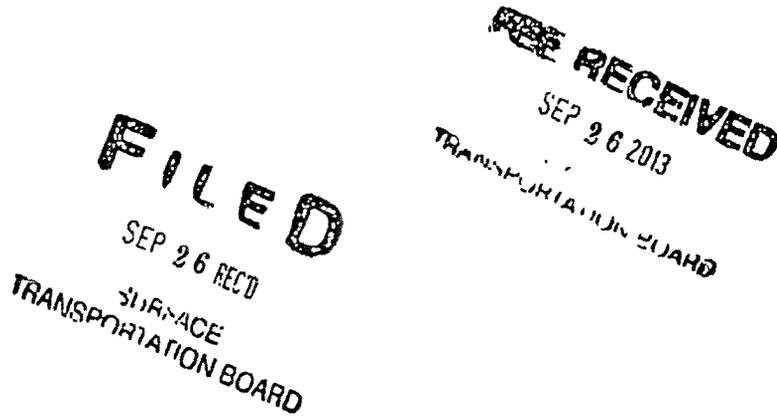
Enclosed for filing in the above-referenced docket are the original and ten copies of a Petition for Exemption of California High-Speed Rail Authority (the "Authority"). Also enclosed is a disc containing the enclosed filings and two checks totalling \$76,700 for the filing fee.

Please time and date stamp the extra copy of the filing and return it with our messenger. If you have any questions, please contact me.

Respectfully submitted,

Linda J. Morgan
Attorney for California High-Speed Rail Authority

Enclosures



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BEFORE THE
SURFACE TRANSPORTATION BOARD

234905

FINANCE DOCKET NO. 35724 (SUB-NO. 1)

CALIFORNIA HIGH-SPEED RAIL AUTHORITY
— CONSTRUCTION EXEMPTION —
IN FRESNO, KINGS, TULARE, AND KERN COUNTIES, CALIFORNIA

PETITION FOR EXEMPTION



FILED

SEP 26 REC'D

SURFACE
TRANSPORTATION BOARD

FILE RECEIVED

SEP 26 2013

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Dated: September 26, 2013

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35724 (SUB-NO. 1)

CALIFORNIA HIGH-SPEED RAIL AUTHORITY
— CONSTRUCTION EXEMPTION —
IN FRESNO, KINGS, TULARE, AND KERN COUNTIES, CALIFORNIA



PETITION FOR EXEMPTION

Pursuant to 49 U.S.C. § 10502, California High-Speed Rail Authority (“Authority”) hereby petitions the Surface Transportation Board (“Board”) for an exemption from the prior approval requirements of 49 U.S.C. § 10901 for the construction by the Authority of an approximately 114-mile-long dedicated high-speed passenger rail line between Fresno, CA and Bakersfield, CA (the “Fresno to Bakersfield HST Section”).¹ The Fresno to Bakersfield HST Section is the second of nine sections of the planned California High-Speed Train System (“HST System”), and the second of four sections of the HST System’s Initial Operating Segment (“IOS”).² The Authority respectfully requests that the Board conditionally grant the requested exemption in a decision effective by December 31, 2013, subject to the entry of a final decision after completion of environmental review by the Board and its federal and state partners

¹ See Fresno to Bakersfield HST Section map attached hereto as Exhibit A.

² The Board determined that it has jurisdiction over the construction of the HST System, and authorized construction of the first of the four sections of the IOS, the Merced to Fresno HST Section. *Cal. High-Speed Rail Auth.—Construction Exemption—In Merced, Madera and Fresno Counties, Cal*, STB Finance Docket No. 35724 (STB served June 13, 2013) (“*Merced to Fresno Decision*”). As of this date, CHSRA has not commenced construction.

BACKGROUND

I. PETITIONER

The Authority is a state agency formed and organized under the laws of the State of California in 1996, and has responsibility for planning, designing, constructing, and operating the HST System.

II. THE HST SYSTEM AND THE FRESNO TO BAKERSFIELD HST SECTION

The Fresno to Bakersfield HST Section is the second of nine sections of the planned California HST System, a high-speed passenger rail system that will provide intercity, high-speed passenger rail service on more than 800 miles of rail line throughout California, connecting the major population centers of Sacramento, the San Francisco Bay Area, the Central Valley, Los Angeles, the Inland Empire, Orange County, and San Diego.

The Authority plans two phases for the HST System: Phase 1 (to be constructed in stages dependent on funding availability) will connect San Francisco to Los Angeles/Anaheim via Pacheco Pass and the Central Valley, through a combination of dedicated high-speed rail infrastructure blended with existing commuter rail systems on the northern-most segment (between San Jose and San Francisco) and the southern-most segment (between Los Angeles and Anaheim). Phase 2 will extend the system from Los Angeles to San Diego and from Merced to Sacramento. The Authority plans to contract with a passenger rail operator to commence HST System operations in 2022, once it has completed construction of the IOS of the HST System between Merced and the San Fernando Valley, including four HST Sections: Merced-Fresno, Fresno-

Bakersfield, Bakersfield-Palmdale, and Palmdale-Los Angeles.³ The HST System will use state-of-the-art, electrically powered, high-speed, steel-wheel-on-steel-rail technology, including contemporary safety, signaling, and automated train-control systems, with trains capable of operating up to 220 mph.⁴ More than 200 weekday trains will service the statewide intercity travel market.⁵

The approximately 114-mile-long Fresno to Bakersfield HST Section that is the subject of this Petition is an essential component of the full HST System. The Fresno to Bakersfield HST Section would connect a Fresno station, a potential Kings/Tulare Regional station in the Hanford/Visalia/Tulare area, and a Bakersfield station. At its northern terminus of Fresno, the Fresno to Bakersfield HST Section will connect to the Merced to Fresno HST Section, which was approved for construction by the Board in the *Merced to Fresno Decision*. At the Fresno to Bakersfield HST Section's southern terminus of Bakersfield, the HST line will continue to Los Angeles via Palmdale.⁶ The Authority will construct the Fresno to Bakersfield HST Section with two fully grade-separated dual-mainline tracks with four tracks at stations.⁷ The Authority intends to complete construction of the IOS first construction segment – including the Fresno to Bakersfield HST Section – by December 2018, and to start HST service in 2022.⁸

³ See the Authority's Revised 2012 Business Plan at 2-29, available at http://www.hsr.ca.gov/docs/about/business_plans/BPlan_2012_rpt.pdf

⁴ See Revised Draft EIR/Supplemental Draft EIS at 2-3, available at http://www.hsr.ca.gov/Programs/Environmental_Planning/revised_draft_fresno_bakersfield.html.

⁵ *Id.* at 1-1.

⁶ *Id.* at 1-1.

⁷ *Id.* at 1-32

⁸ The Authority does not seek operating authority over the Fresno to Bakersfield HST Section or the Merced to Fresno HST Section at this time because the Authority does not yet have an operating plan and therefore could not provide the Board with the information it would need to consider a petition for exemption with respect to operations.

III. ENVIRONMENTAL AND HISTORIC RESOURCES REVIEW

Beginning in 2000, the Authority and FRA have used a joint, tiered environmental review process for the HST System.⁹ "Tiering" of environmental documents means addressing a broad, general program in an initial programmatic or first-tier environmental document, then analyzing the complete details of related "second-tier" projects in subsequent documents.¹⁰ The Authority and FRA have prepared two programmatic (Tier 1) EIR/EIS documents to select preferred alignments and station locations to advance for project-level analysis in Tier 2 EIR/EISs. The California HST System as approved through Tier 1 decisions has been divided into nine individual sections for more detailed, second-tier analysis. The nine sections were identified by certain operating characteristics, including the requirement that they terminate at or proximate to station locations in larger urban centers. The individual project sections tier from decisions made during the programmatic decision and are units of the whole system that can be combined together as necessary due to funding and constructability constraints.

The Fresno to Bakersfield HST Section, the subject of this Petition, is the second of the nine individual sections undergoing Tier 2 environmental review. The Authority

⁹ See *Fresno to Merced Decision*, slip op. at 7-8; Revised Draft EIR/Supplemental Draft EIS at 1-28 to 1-30. FRA is the lead agency for federal environmental reviews of the Fresno to Bakersfield HST Section under NEPA. Federal cooperating agencies include the Board and the Bureau of Reclamation. Other agencies with specific review or permitting roles include the U.S. Army Corps of Engineers ("USACE"), the U.S. Environmental Protection Agency ("EPA"), the U.S. Fish and Wildlife Service ("USFWS") and the National Marine Fisheries Service ("NMFS").

¹⁰ See Revised Draft EIR/Supplemental Draft EIS at 1-28. The environmental documents for individual or "second-tier" projects may incorporate by reference analyses already completed in the first-tier document to address many large-scale, nonsite-specific resources and issues, while focusing the second-tier analysis on site-specific effects not previously considered. Tiering environmental documents avoids repetitive evaluations of issues when sufficiently addressed in a first-tier analysis. *Id.*

identified the Fresno to Bakersfield HST Section termini as the station sites in Fresno and Bakersfield. This is consistent with the Tier 1 decisions and permits full analysis and consideration of the potential impacts of construction and operation of the Fresno to Bakersfield HST Section.

The Authority and FRA commenced the joint environmental review process for the Fresno to Bakersfield HST Section in 2009. The agencies held scoping meetings for the Fresno to Bakersfield HST Section in March 2009. The Authority and FRA issued a joint Draft EIR/EIS for the Fresno to Bakersfield HST Section in August 2011, and issued a Revised Draft EIR / Supplemental Draft EIS for the Fresno to Bakersfield HST Section in July 2012, in order to include additional route and station options.¹¹ The Board is reviewing the environmental record for the Fresno to Bakersfield HST Section, and by letter from FRA the Board has been formally designated a cooperating agency for the purposes of the entire HST System

After considering public and agency comments, the Authority and FRA will identify a preferred alignment alternative, site for each station, and a preferred heavy maintenance facility alternative. The Authority and FRA will prepare a Final EIR/EIS that will include responses to comments and a description of the preferred alternative and proposed mitigation. FRA then expects to issue a Record of Decision ("ROD") for compliance with NEPA. The ROD will describe the project and alternative considered; describe the selected alternative; make environmental findings and determinations with regard to air quality conformity, Endangered Species Act, Section 106, Section 4(f), and environmental justice, and require mitigation measures

¹¹ See *id.* at 7-12

The Fresno to Bakersfield HST Section is being thoroughly reviewed from an environmental perspective and, consistent with FRA's Procedures for Considering Environmental Impacts, 64 Fed. Reg. 28545 at 28556 (May 26, 1999), the final EIR/EIS will "reflect that there has been compliance with the requirements all applicable environmental laws and orders", including the National Historic Preservation Act of 1966 (16 U.S.C. 470 et seq.) ("NHPA"), the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.), the federal Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) ("ESA"), and other environmental review laws and executive orders."¹²

In accordance with FRA's NEPA procedures, the Final EIR/EIS for the Fresno to Bakersfield HST Section is being prepared concurrently with and integrated with analyses and related studies required by applicable environmental laws and executive orders.¹³ The Final EIR/EIS will reflect "compliance with all applicable environmental laws and orders."¹⁴ The Authority respectfully requests that the Board, as a cooperating agency, adopt the environmental documentation that results from the extensive environmental review process for the Fresno to Bakersfield HST Section.

DISCUSSION

I. The Authority Has Properly Segmented the HST System for Board Review

In order to meet FRA funding requirements, including the requirement that the Fresno to Bakersfield HST Section demonstrate "independent utility,"¹⁵ the Authority

¹² 40 C.F.R. 1502.25(a).

¹³ 64 Fed. Reg. 28545, 28554, § 14

¹⁴ *Id.* at 28556, § (r), *see also* ROD §§ 2.1-2.4, at 7-11; and §§ 9.1-9.7 at 35 to 40.

¹⁵ FRA, which administers the Authority's federal funding, has determined that a project has "independent utility" if "it will result, upon completion, in the creation of new or substantially improved High-Speed Rail/Intercity Passenger Rail service, and will provide tangible and measurable benefits even if no additional investments in the same High-Speed

has identified a portion of the Merced to Fresno HST Section and this Fresno to Bakersfield HST Section as the first construction portions of the HST System. This first construction portion, including the Fresno to Bakersfield HST 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.¹⁶ FRA and the Authority determined that the Central Valley is the best location for the initial construction, with service extending south to Palmdale and the San Fernando Valley and north to San Jose to link with blended service to Metrolink in the south and Caltrain in the north. The authority has met FRA's "independent utility" requirement (and, by extension, the Board's similar requirement) because the Fresno to Bakersfield HST Section would feature dedicated passenger track capable of higher speeds, thereby improving existing Amtrak San Joaquin operations. It would also include a basic station design for non-electrified service in Fresno, at the planned Fresno Station.

In granting construction authority for the contiguous Merced to Fresno HST Section, the Board established a test to determine whether a proposed construction project has independent utility and is appropriate for Board review. The Board "will look at whether the proposed segment has logical termini and transportation benefits even if subsequent phases are never constructed. If [the Board] find[s] that it does have independent utility, the segment will be suitable for the agency's consideration, even though it may ultimately be part of a larger planned project that is not currently before

¹⁵ "Rail/Intercity Passenger Rail service are made." Fed. R.R. Admin., *High-Speed Intercity Passenger Rail Program*, 74 Fed. Reg. 29900 at 29905 (June 23, 2009).

¹⁶ Revised Draft EIR/Supplemental Draft EIS at 2-108.

the Board.”¹⁷ Just as with the adjoining Merced to Fresno HST Section, the Fresno to Bakersfield HST Section “has clear, logical termini” in the cities of Fresno and Bakersfield – the fifth and ninth largest cities in California, respectively.¹⁸ For all the reasons cited by the Board in the *Merced to Fresno Decision*, the Fresno to Bakersfield HST System will have independent utility, even without the construction of additional facilities, and the Fresno to Bakersfield HST Section is appropriate for Board review.¹⁹

II. The Proposed Construction Is Presumptively in the Public Interest

As a result of the relaxation of the “public convenience and necessity” standard brought about by the ICC Termination Act of 1995, the Board has adopted a general presumption that rail construction projects should be approved.²⁰ As the Board has explained.

[I]n enacting the ICC Termination Act of 1995, Pub L No 10488, 109 Stat. 803, Congress intended to facilitate rail construction by changing the statutory standard from requiring approval if the agency finds that a project is consistent with the public convenience and necessity (PC&N) to requiring approval *unless* the agency finds the project is inconsistent with the PC&N. Under this new standard, proposed rail construction projects are to be given the benefit of the doubt.²¹

¹⁷ *Merced to Fresno Decision*, slip op. at 16 (citing Ninth Circuit precedent utilizing a similar concept).

¹⁸ *Merced to Fresno Decision*, slip op. at 16.

¹⁹ *See id.*, slip op. at 16-17 (citing, among other things, interim use of HST track by Amtrak resulting in improved service on the San Joaquin route contributing to increased mobility).

²⁰ *See id.*, slip op. at 17-18, *Mid States Coal. for Progress v STB*, 345 F.3d 520, 557 (8th Cir. 2003); *Class Exemption for the Construction of Connecting Track Under 49 U.S.C. 10901*, 1 S.T.B. 75, 79 (1996), *accord Dakota, Minn. & E R R Corp –Construction into the Powder River Basin*, STB Finance Docket No. 33407, slip op. at 17 (STB served Dec. 10, 1998).

²¹ *The Burlington N. & Santa Fe Ry. Co.—Construction and Operation Exemption—Seadrift and Kamey, TX*, STB Finance Docket No 34003, slip op. at 4 (STB served June 19, 2001) (citation omitted). *See also Alaska R.R. Corp.—Construction and Operation Exemption—Rail Line between N. Pole and Delta Junction, AK*, STB Finance Docket No 34658, slip op. at 5 (STB served Jan. 6, 2010) (“*Alaska R.R. Corp*”).

The Board has further explained that neither “under the exemption criteria of § 10502 nor under the prior approval requirements of § 10901 is there a requirement of a showing of public need for the facilities proposed to be constructed.”²²

III. The Proposed Construction Meets the § 10502 Exemption Criteria for Line Construction Under § 10901

Construction of a new rail line requires prior Board approval pursuant to 49 U.S.C § 10901. Under 49 U.S.C. § 10502(a), however, the Board must exempt a proposed rail line construction from the formal application procedures of § 10901 if it finds that (1) those § 10901 procedures are not necessary to carry out the rail transportation policy (RTP) of 49 U.S.C § 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.²³ The legislative history of the exemption provisions, as well as Interstate Commerce Commission (“ICC”), Board, and judicial precedent, demonstrates that the Board is to apply these provisions broadly.²⁴ As explained in detail below, the proposed Fresno to Bakersfield HST Section complies with the § 10502 exemption criteria and therefore should be exempted from § 10901’s detailed application procedures.

A. An Exemption Will Promote Rail Transportation Policy

With regard to the Fresno to Bakersfield HST Section, the § 10901 detailed application procedures are not necessary to carry out the RTP, and this § 10502

²² *Ill. Cent. R.R. Co.—Construction and Operation Exemption—In E. Baton Rouge Parish, LA*, STB Finance Docket No 33877, slip op. at 2 (STB served May 25, 2001) (“*Ill. Cent. R.R. Co.*”).

²³ *See, e.g., Merced to Fresno Decision*, slip op. at 22.

²⁴ *See, e.g., Am. Trucking Ass’ns v. ICC*, 656 F.2d 1115, 1119 (5th Cir. 1981) (explaining that the ICC was charged with the responsibility of actively pursuing exemptions for transportation and service that comply with the section’s standards); H.R. Rep. No. 96-1430, at 105 (1980) (explaining that the ICC was charged with removing “as many as possible of the Commission’s restrictions”).

exemption proceeding provides ample process through which the Board can carry out the RTP. As the Board found in the *Merced to Fresno Decision*, the State of California “has determined it has a need for a high-speed passenger rail system because it believes that the existing passenger transportation infrastructure in California is operating at or near capacity and more passenger service will be needed to meet demand and future growth. The complete HST System that is planned (of which the Fresno to Bakersfield HST Section is just a part) would connect virtually all of California’s major population centers.”²⁵

Just as with the Merced to Fresno HST Section, the Fresno to Bakersfield HST Section at issue here “would be a valuable addition to the passenger rail transportation system in California.”²⁶ Fresno and Bakersfield “are two of the largest cities in the San Joaquin Valley,” and both “are centers of metropolitan areas and are economic hubs within the region.”²⁷ The Fresno to Bakersfield HST Section would also “provide and enhance intermodal competition and increase capacity, as well as promote the development of a sound rail transportation system to meet the needs of the traveling public, consistent with 49 U.S.C. §§ 10101(4) and (5).”²⁸

Again, just as with the Merced to Fresno HST Section, the Fresno to Bakersfield HST Section at issue here “would be consistent with the goal of 49 U.S.C. § 10101(14)” because the diversion of automobile traffic to the new electrified rail line. “would promote energy conservation and energy savings, relieve capacity constraints that have resulted in

²⁵ *Merced to Fresno Decision*, slip op. at 22.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*, slip op. at 23.

increasing congestion and travel delays on interstate highways, and reduce congestion and air pollution.”²⁹

Consistent with §§ 10101(2) and 10101(7), an exemption would both minimize the need for federal regulatory control over the rail transportation system and reduce regulatory barriers to entry. Specifically, an exemption would promote these policies by minimizing the time and administrative expense associated with the construction. Regulatory barriers to new capacity and infrastructure improvements in particular should be minimized when possible in order to promote and maintain stable economic growth in this sector of the economy. These provisions “reflect the overriding intent of the exemption statute: unless there is a good reason for full regulation, [the Board] should be looking toward exemption or relaxation of unneeded regulatory burdens.”³⁰ Here, just as with the Merced to Fresno HST Section, “given the significant amount of public information and prior government analysis regarding the Fresno to Bakersfield HST Section that is available to the Board,” the Board should “eliminate unnecessary delay by processing [this] construction request under the more streamlined exemption provision . . .”³¹

B. Regulation is Not Needed to Protect Shippers from the Abuse of Market Power

The second component of the test for exemption is stated in the alternative — either the proposed construction project must be of limited scope or the Board must find that regulation of the transaction is not needed to protect shippers from the abuse

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

of market power.³² The Fresno to Bakersfield HST Section clearly satisfies the latter test. In the *Merced to Fresno Decision*, the Board extended the statutory market power abuse test from freight rail shippers to rail passengers.³³ Just as with the Merced to Fresno HST Section, the Fresno to Bakersfield HST Section will be “essentially neutral with regard to market power in the freight rail industry,” because the Fresno to Bakersfield HST Section will not be used to provide freight rail transportation and no shippers will lose access as a result of the Fresno to Bakersfield HST Section.³⁴ Furthermore, the Fresno to Bakersfield HST Section will not “result in an abuse of market power detrimental to the traveling public,” for all the reasons cited by the Board in the *Merced to Fresno Decision*.³⁵

IV. The Board May Conditionally Grant the Exemption Effective By December 31, 2013

The Authority has entered into a design-build contract to construct a 29-mile segment of the HST System, comprised of approximately 5 miles of track and facilities within the boundaries of the Fresno to Bakersfield HST Section in the vicinity of Fresno and approximately 24 miles of track and facilities covered by the exemption granted in the *Merced to Fresno Decision*. The Authority’s design-build contract requires the Authority to give the contractor separate notices to proceed with construction of the 5-mile and 24-mile segments. The notice to proceed for the 5 miles of track and facilities must be issued by July 12, 2014. If the Authority cannot issue the notice on the 5-mile segment by July 12th, it will be removed from the contract and the Authority will need

³² If the Board concludes that regulation of the transaction is not needed to protect against abuse of market power, the Board “need not determine whether the transaction is limited in scope” *Id.* at 25, n. 118.

³³ *See id.* at 24-25.

³⁴ *Id.* at 24.

³⁵ *See id.* at 24-25.

to re-negotiate the price for the construction of the 24-mile segment and the price and timetable for the 5-mile segment. Since the construction contract does not contain a separate price for the 5-mile and 24-mile segments, this could result in a substantial aggregate increase in the cost of construction of the two segments.

There is a possibility that the Board will have a vacancy as of January 1, 2014. Given the Authority's July 12th notice to proceed deadline, the possibility of a Board vacancy is of concern to the Authority. However, the Board has authority to grant conditional approval of construction exemptions.³⁶ Although the Board does not do so absent compelling circumstances, there would be compelling circumstances in this case because conditional approval would avoid circumstances which could require the Authority to pay a higher price for the construction of the initial segment of the HST System. Accordingly, if a Board vacancy becomes imminent, the Authority respectfully requests that the Board conditionally grant this Petition subject to the completion of the environmental review process, and issue a decision effective by December 31, 2013.

By granting conditional approval, the Board would not diminish its authority to consider environmental matters when it issued a final decision following the completion of the environmental review,³⁷ and granting conditional approval would not avoid the possibility that the Board is unable to render a final decision on the Petition due to a

³⁶ *Alaska R.R. Corp.—Construction and Operation Exemption—Rail Line Between Eielson Air Force Base (North Pole) and Fort Greely (Delta Junction), AK*, STB Docket No. FD-34658, slip op. at 2 (STB served Oct. 4, 2007) (while “we will not rule out a future conditional grant in a case of some unique or compelling circumstances, in the absence of a showing of such circumstances, we believe that the better course is that we not decide the transportation merits of a construction proposal until a complete record, including the environmental record, is before us.”) (“*Alaska Railroad*”). Before *Alaska Railroad*, the Board regularly made conditional grants of construction exemption authority. See, e.g., *The Burlington N. & Santa Fe Ry. Co.—Construction and Operation Exemption—Seadrift and Kamey, TX*, STB Docket No. FD-34003 (STB served June 19, 2001) (“*BNSF-Seadrift*”).

³⁷ *BNSF-Seadrift*, slip op. at 3.

vacancy. Nevertheless, by issuing a conditional decision effective by December 31, the Board would reduce the likelihood that the Authority would pay an aggregate higher price for construction of the 29-mile segment.

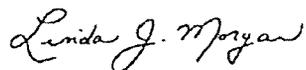
Additionally, the environmental review posture of the Fresno to Bakersfield HST Section at issue here is distinguishable from that of the proposed rail line in *Alaska Railroad*, where the Board discussed its conditional approval policy. Here, the Authority has already completed joint NEPA/CEQA Tier 1 programmatic environmental review with respect to the entire HST System (including the Fresno to Bakersfield HST Section) and has undertaken a detailed, second-tier environmental analysis of the Fresno to Bakersfield HST Section, culminating thus far in a Revised Draft EIR/Supplemental Draft EIS. In *Alaska Railroad*, the petitioner had not yet completed a Draft EIS, let alone a revision of that document. See *Alaska R.R. Corp., Petition*, STB Docket No. FD-34658 (filed July 6, 2007).

CONCLUSION

For the foregoing reasons, the Authority respectfully requests that the Board grant this Petition for Exemption and do so conditionally in the circumstances described above.

Respectfully submitted,

By.



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Dated: September 26, 2013

VERIFICATION

I, Thomas Fellenz, verify under penalty of perjury that the foregoing is true and correct.
Further, I certify that I am qualified and authorized to file this verification.

Executed on September 13, 2013

A handwritten signature in cursive script that reads "Thomas Fellenz". The signature is written in black ink and is positioned above the printed name.

Thomas Fellenz
Chief Counsel, California High-Speed Rail Authority



Figure S-1
 California HST System initial study corridors

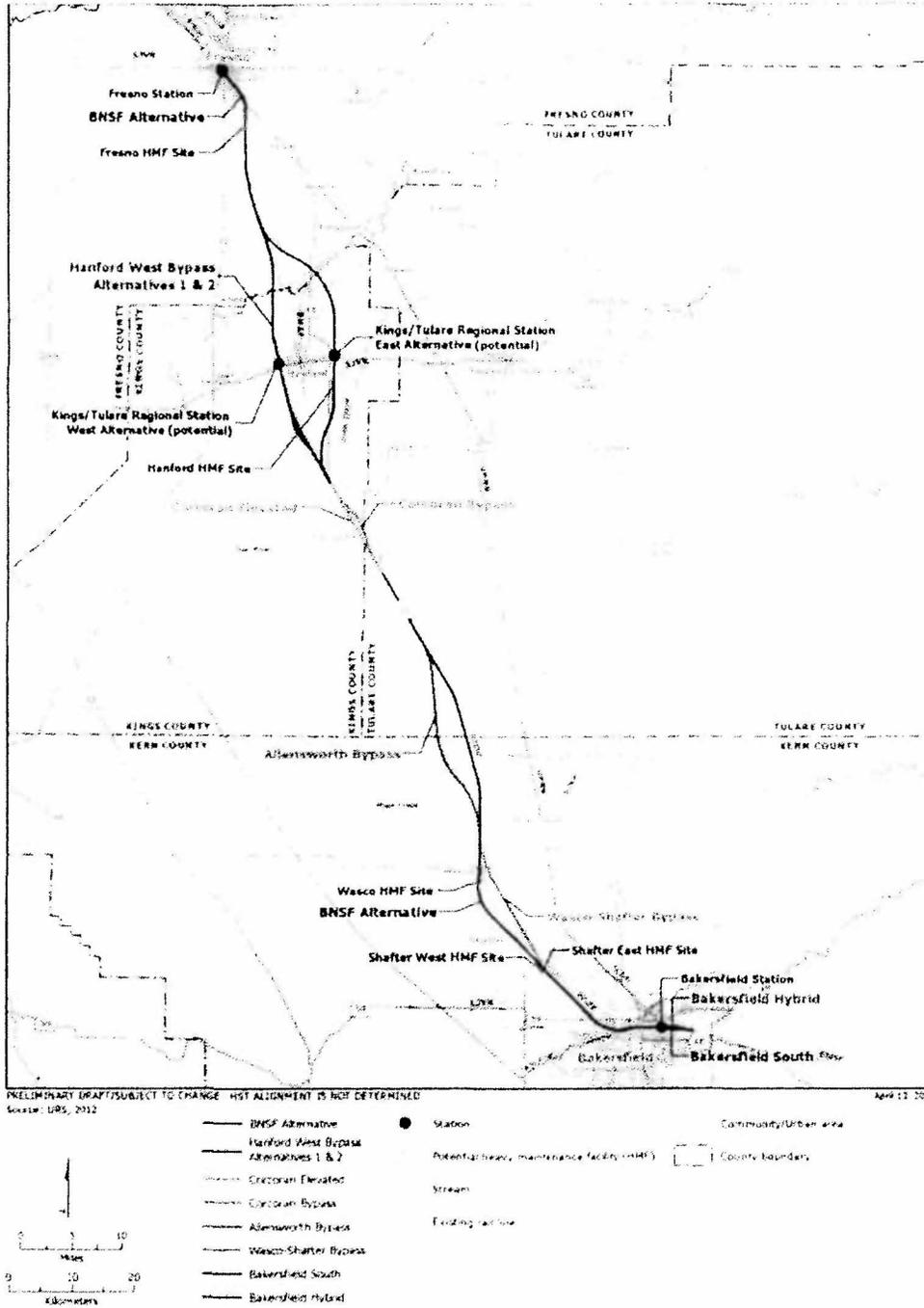


Figure S-2
 Fresno to Bakersfield Section project alternatives