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December 14, 2014

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

Re: **STB Finance Docket No. 35861, California High-Speed Rail Authority;
Motion for Leave to File Surreply and Surreply On Newly Raised Issues.**

Dear Ms. Brown:

Please find attached hereto for filing in the above-referenced docket my Motion for Leave to File Surreply and Surreply On Newly Raised Issues , Verification, and Certificate of Service that I hereby submit as a California resident, voter, taxpayer, and stakeholder in the California High Speed Rail Project.

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

Sincerely,



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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 35861

CALIFORNIA HIGH-SPEED RAIL AUTHORITY
PETITION FOR DECLARATORY ORDERS

MOTION FOR LEAVE TO FILE SURREPLY AND SURREPLY ON NEWLY RAISED ISSUES



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CALIFORNIA HIGH-SPEED RAIL AUTHORITY PETITION FOR DECLARATORY ORDER

MOTION FOR LEAVE TO FILE SURREPLY AND SURREPLY ON NEWLY RAISED ISSUES.

As a California resident, voter, taxpayer and stakeholder in the California High Speed Rail Project (“HSR”), I hereby respectfully file this Motion for Leave to Surreply and Surreply in response to the “Reply To Opposition Comments” (“Reply”) filed by the California High Speed Rail Authority (“CHSRA”) on November 18, 2014 in support of its Petition for Declaratory Order (“Petition”).

MOTION FOR LEAVE TO FILE SURREPLY.

CHSRA’s Reply raises numerous new issues not addressed in the Petition, at least one of which springs from a deliberate misstatement of matters I raised in the Opposition I filed on November 6, 2014 [see page 22 of CHSRA’s Reply]. For reasons already cited by other parties, CHSRA’s Reply generally prejudices all other parties to this proceeding, and particularly prejudices those parties whose positions are specifically addressed in the Reply. The Board’s acceptance of my Surreply to new issues raised by CHSRA in its Reply (below) would ensure that the Board has a complete record in this proceeding and will not delay the proceeding or prejudice any party. For these reasons, I respectfully request that the Board grant this motion for leave to file the following Surreply.

SURREPLY

This Surreply addresses CHSRA's new arguments that pertain to the purpose and effect of Proposition 1A and its attendant CEQA compliance requirements which were raised by CHSRA in its Reply pursuant to matters I addressed in my Opposition.

Proposition 1A Is A Funding Statute That Is Not Subject To ICCTA Preemption.

In its Reply, CHSRA disagrees with my argument that California voters approved Proposition 1A based on the assurance that the HSR would comply with CEQA, including the "injunctive remedy" provisions contained therein. CHSRA's Reply offers a new argument that portrays Proposition 1A's CEQA commitment as a *voluntary* state authorization that "flat out conflicts with the Board's jurisdiction" because it seeks to shield CEQA's injunctive remedies from federal preemption. [Reply Page 23]. CHSRA is quite mistaken.

The ICCTA under which CHSRA seeks preemption includes a broadly worded express preemption provision that establishes the Board's jurisdiction over transportation by rail carriers, and remedies provided with respect to the rates, classifications, rules, practices routes, services and facilities of such carriers, as well as the construction, acquisition, operation, abandonment or discontinuance of tracks or facilities. The ICCTA does not, however grant the Board jurisdiction over state funding mechanisms, and it certainly does not preempt voter-approved state funding statutes. As CHSRA acknowledges in its Reply: "Proposition 1A is a funding statute and its terms apply only to situations where its funding source will be used" [footnote 17]. Accordingly, neither Proposition 1A nor the CEQA compliance requirements imposed by Proposition 1A are subject to ICCTA preemption, and the Board has no jurisdiction over Proposition 1A implementation. And, because the CEQA lawsuits from which CHSRA seeks protection were all brought pursuant to the "Injunctive Remedies" made available by the CEQA provisions of the Proposition 1A funding statute, the ICCTA has no preemptive authority over them. Because the ICCTA does not preempt any Proposition 1A provisions, it does not imbue the Board with the powers needed to grant CHSRA's Petition.

CHSRA's petition for declaratory relief from the CEQA remedies secured by Proposition 1A is nothing less than a request that the federal government **order** California tax payers to pay for a federal railway project which explicitly avoids the very conditions under which the taxpayers supported it in the first place. 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 CHSRA's petition must be rejected.

In its Reply, CHSRA cites a number of cases to support the Petition for ICCTA preemption, including *Town of Atherton v. California High-Speed Rail Authority*, 228 Ca1.App4th 314 (2014) ("*Atherton*") as well as *Friends of the Eel River v. North Coast Railroad Authority*, 230 Cal.App-4th 85 (2014) ("*Friends*"). These cases identify 2 types of state action that are categorically preempted by the ICCTA:

Category 1 pertains to any form of preclearance that, by its nature, could be used to deny a railroad the opportunity to conduct operations. Notably, this category does not apply to Proposition 1A because the CEQA preclearance requirements imposed by Proposition 1A are not intended to deny CHSRA the opportunity to conduct operations, rather they are intended to withhold taxpayer funding from CHSRA until CEQA compliance is fully achieved. Therefore, this category of ICCTA preemption does not apply and cannot be relied upon by the Board in its consideration of CHSRA's Petition.

Category 2 pertains to the state regulation of matters that are directly regulated by the Board. The Board has no jurisdiction over the manner in which California voters choose to spend the taxes they pay, therefore the Board does not enjoy regulatory control over any Proposition 1A provisions, including those pertaining to CEQA compliance. Therefore, this category of ICCTA preemption does not apply to the CEQA compliance provisions of Proposition 1A and cannot be relied upon by the Board in its consideration of CHSRA's Petition.

Both *Friends* and *Atherton* further clarify that state actions which do not fall into either Category 1 or Category 2 may still be preempted if such actions "would have the effect of preventing or unreasonably interfering with railroad transportation". This "catch-all" provision does not apply to CHSRA's Petition because the CEQA compliance provisions

from which CHSRA seeks preemption are imposed as a condition of authorizing taxpayer fund disbursements, not “railroad transportation” operations.

In *Friends*, the Appellate Court clarifies that state laws which have a “more remote or incidental effect on rail transportation” or “do not unreasonably interfere with interstate commerce” cannot be preempted by the ICCTA. As a mere “funding statute”, Proposition 1A is not remotely related to either rail transportation or interstate commerce, therefore *Friends* makes it clear that Proposition 1A (and its attendant CEQA compliance provisions) are not subject to preemption under the ICCTA.

It should be pointed out that there is *nothing* in Proposition 1A which precludes CHSRA from using only private (non-taxpayer) funds to develop the HSR project. In the unlikely event that this were to occur, federal preemption from CEQA’s “injunctive remedies” pursuant to the ICCTA could perhaps be possible. However, that is not the situation presented in CHSRA’s Petition, therefore it cannot be considered by the Board.

The fact that the ICCTA does not preempt Proposition 1A’s CEQA provisions is wholly consistent with, and not contrary to, conclusions presented in *Friends*. 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”. This holding is not relevant to CHSRA’s Petition because Proposition 1A is *not* “a state statute requiring environmental review as a condition to any railroad operation”; rather it is a state funding statute that requires environmental review as a condition of releasing taxpayer funds to *pay* for a railroad operation. Therefore, Proposition 1A does not meet the standard established by *Friends* for federal preemption under the ICCTA, and, nothing in *Friends* bars any California voter from resorting to CEQA’s Injunctive Remedies to address a perceived violation of Proposition 1A’s CEQA provisions.

Friends goes even further, however. In addressing Plaintiff’s arguments that Defendant had a contractual obligation to prepare an EIR, *Friends* concludes: “More fundamentally, even if the master agreement is viewed as a contract requiring the preparation of an EIR regarding resumed railroad operations, a claim based on a breach of that obligation may only be enforced by a party having standing” and “Because it is the contractual agreement with the state that purportedly obligates NCRA to comply with CEQA, the only way petitioners can proceed is via an action to enforce that contract”. Given *Atherton’s* conclusion that “... a

voter-approved bond measure is characterized as either ‘contractual or analogous to a contract’”, *Friends* affirms that, in the event CHSRA violates the CEQA provisions of Proposition 1A, California voters have standing to file a claim for breach of contract (at least under a third party beneficiary theory if not directly). *And all of these remedies lay outside of the ICCTA’s preemptive authority and the Board’s jurisdiction.*

CHSRA’S Assumptions Regarding CEQA’s Application To Proposition 1A Are Wrong

In its Reply, CHSRA’s new arguments in favor of federal preemption, though muddled and unclear, appear to be based partly on the presumption that Proposition 1A cannot be construed to impose even a voluntary commitment to project-level CEQA compliance [Page 23], and that Proposition 1A does not “impose a project-level CEQA compliance requirement” because “its terms apply only to situations where its funding sources will be used” [FN 17]. These assumptions reveal CHSRA’s failure to understand the California ballot initiative process in general, and Proposition 1A in particular. It also demonstrates a fundamental lack of understanding regarding how CEQA works. Here are the facts:

- Public Agencies do not *volunteer* to comply with CEQA; this is especially true for the CHSRA, which is statutorily obligated by Proposition 1A to fully comply with all aspects of CEQA before it can use taxpayer funds to construct the HSR project. With few exceptions, CEQA review attaches as a compulsory element of every project that is approved by a California public agency which may affect the environment, as evidenced by the plain and unambiguous language contained in the CEQA statute (see Division 13 commencing with Section 21000 of the Public Resources Code). The only instances in which public agencies are able to sidestep their CEQA *obligation* is when federal preemption is granted. However, federal preemption is not necessarily omnipotent. For example, state agencies considering projects that are subject to federal preemption (such as hydro dams, railways, etc.) and which require a Water Quality Certification [“WQC”] from the California Water Boards must prepare a legally sufficient EIR (which can be challenged via CEQA’s injunctive remedies) before the Water Boards can issue the WQC.
- Proposition 1A imposes numerous conditions on the HSR project that must be met before public funds are released to pay for HSR construction. These conditions include specific corridor and construction conditions as well as travel time, headway, and sustained travel speed constraints. More importantly, Proposition 1A states in clear and unambiguous language that both the California Legislature and the people of California intend that HSR construction will be consistent with the CHSRA’s Program-Level Environmental Impact Reports (“EIRs”) certified in

November 2005 and July 2008. Both of these EIRs assert without reservation or qualification that the HSR project is subject to CEQA review, which necessarily includes the preparation of project-level EIRs for each project segment. To ensure full CEQA compliance (and, by extension, Proposition 1A compliance), these EIR's must withstand any legal challenge authorized by the CEQA statute.

- Explicit and specific language that imposes project compliance with CEQA is not actually required in any state-wide ballot initiative because CEQA already attaches as a compulsory element to all state projects that may have a significant effect on the environment. This is a basic tenet of statutory development in California's ballot initiative process, as evidenced by all the state-wide ballot initiatives on which Californians have recently voted. In fact, a survey of all the state ballot initiatives considered over the last 5 years reveals that the *only time* CEQA is specifically mentioned is when the project described in the initiative includes elements that are identified as being **exempt** from CEQA. For example, the recently approved Proposition 48 (which addressed a tribal-state gaming compact) states categorically that CEQA does *not* apply to specific elements of Proposition 48 such as the tribal-state compacts/ agreements and gaming project activities which occur on tribal lands. The historical record of California's state-wide ballot initiative process clearly demonstrates that compulsory CEQA compliance is an implicit requirement in *all* ballot initiatives *including Proposition 1A*; CEQA compliance is *never* voluntary.
- In deciding *Atherton*, the Appellate Court specifically affirmed that CEQA compliance is a central element of the Proposition 1A statute. The court held that CHSRA's power is "circumscribed by the provision 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**" [emphasis added].

These facts demonstrate the error in CHSRA's fundamental premise that Proposition 1A does not impose a project-level CEQA compliance requirement. Moreover, this premise is entirely controverted by the very petition that CHSRA has filed with the Board. In other words, CHSRA's request for federal preemption from the project-level CEQA provisions of Proposition 1A is an implicit concession that Proposition 1A does indeed impose project-level CEQA compliance. CHSRA's arguments regarding CEQA's application to Proposition 1A are flat-out wrong, and must be accorded no weight by the Board.

Injunctive Remedies Are The Only Means Of Ensuring CEQA Compliance.

Though it has already been shown that the ICCTA has no preemptive authority over any Proposition 1A funding provisions, it is worthwhile to consider why a Board decision to

preempt CEQA's "Injunctive Remedies" should never be taken lightly. CEQA's "Injunctive Remedies" provide the backstop provisions which ultimately ensure the legal sufficiency of an EIR, and without these remedies, CEQA is rendered utterly meaningless. This is because the *only* enforcement provisions contained within the CEQA statutes are the very same "Injunctive Remedies" which CHSRA now seeks to avoid. A Lead Agency that is exempted from CEQA's "Injunctive Remedies" can simply ignore CEQA's substantial mitigation requirements (which are more demanding than NEPA's) and certify a clearly deficient EIR as being CEQA-compliant *with impunity*. Absent CEQA's "Injunctive Remedies", CHSRA can declare even the most basic, low-cost mitigation measures to be "not cost-effective" without justification and in clear violation CEQA's mitigation provisions. In fact, CHSRA has already done just that (as I indicated in Attachment 1 of my Opposition). The bottom line is that, if CHSRA had bothered to prepare an adequate EIR in the first place, it would not need to seek relief from CEQA's injunctive remedies at all; the Petition itself essentially and implicitly affirms the legal insufficiencies of CHSRA's EIR.

Conclusion

For all the reasons provided above, I respectfully request that the Board reject CHSRA's Petition because it seeks ICCTA preemption from provisions of a voter-approved state funding statute over which the Board has no jurisdiction.

Respectfully submitted,



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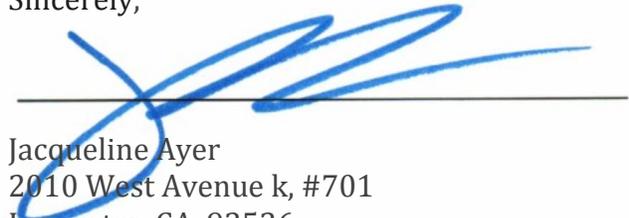
VERIFICATION

I declare under penalty of perjury that the factual statements made in the foregoing “Motion for Leave to Surreply and Surreply On Newly Raised Issues” are true and correct.

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

Executed On: December 14, 2014

Sincerely,



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing "Motion for Leave to Surreply and Surreply On Newly Raised Issues" was served on the 14th of December, 2014 by electronic mail or first class mail, postage prepaid, on the following parties:

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