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Surface Transportation Board  
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**Re: STB Finance Docket No. FD 35861, California High-Speed Rail Authority—Petition for Declaratory Order**

Dear Ms. Brown:

Enclosed for filing in the above proceeding is the California High-Speed Rail Authority's Motion for Leave to Reply and Reply to Opposition Comments.

If you have any questions, please contact me.

Respectfully submitted,

Kevin M. Sheys  
*Attorney for California High-Speed Rail Authority*

Enclosures

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**FINANCE DOCKET NO. 35861**

**CALIFORNIA HIGH-SPEED RAIL AUTHORITY –  
PETITION FOR DECLARATORY ORDER**

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**MOTION FOR LEAVE TO REPLY  
AND REPLY TO OPPOSITION COMMENTS**

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Dated: November 18, 2014

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**CALIFORNIA HIGH-SPEED RAIL AUTHORITY –  
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**MOTION FOR LEAVE TO REPLY  
AND REPLY TO OPPOSITION COMMENTS**

Petitioner, California High-Speed Rail Authority (“Authority”) hereby respectfully files this Motion for Leave to Reply and Reply to Opposition Comments filed in response to its Petition for Declaratory Order.

**MOTION FOR LEAVE TO REPLY**

On October 9, 2014, the Authority filed a Petition for Declaratory Order (the “Petition”) with the Surface Transportation Board (“Board”) pursuant to its discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721. The Authority seeks a Board declaration on whether remedies that could block Board-authorized construction sought in lawsuits brought under the California Environmental Quality Act (“CEQA”) are available or whether such remedies are preempted by 49 U.S.C. § 10501(b) of the ICC Termination Act (“the ICCTA”). *See* Petition, 2.

In a decision served on October 17, 2014, the Board instituted a declaratory order proceeding and allowed interested persons to file substantive replies to the Authority’s petition by November 6, 2014. On or about that date, several interested parties filed replies in opposition (collectively, the “Opponents”) to the Petition, arguing that (1) the Board should not rule on the Petition because the ICCTA preemption issue raised is not

ripe, (2) the Board is powerless to address whether the ICCTA preempts CEQA Injunctive Remedies because the California Court of Appeal ruled on that precise issue in *Town of Atherton v. California High-Speed Rail Authority*, 228 Cal.App.4th 314 (2014), (3) if the Board reaches the merits of the Authority's Petition, it should conclude that the ICCTA does not preempt the CEQA Injunctive Remedies because of the market participant doctrine, and (4) ICCTA preemption of CEQA Injunctive Remedies violates state sovereignty.

The Board's rules prohibit a "reply to a reply." 49 C.F.R. § 1104.13(c). However, the Board's acceptance of the Authority's Reply (below) to the above-summarized arguments in opposition to the Petition would ensure that the Board has a complete record in this proceeding and will not delay the proceeding or prejudice any party.

*California High-Speed Rail Authority — Construction Exemption — In Fresno, Kings, Tulare, and Kerns Counties, Cal.*, STB FD 35724 (Sub-No. 1), slip op. at 8 (STB served Aug. 12, 2014); *McCloud Ry. Co. — Abandonment and Discontinuance of Service Exemption—In Siskiyou, Shasta, and Modoc Counties, CA, in the Matter of a Request to Set Terms and Conditions*, STB AB 914-X, slip op. at 3 (STB served Aug. 25, 2006). Accordingly, the Authority requests that the Board accept the following Reply.

### **REPLY TO OPPOSITION COMMENTS**

The Board should rule on the Petition because the issue of the availability of CEQA Injunctive Remedies is ripe and in any case the Board has discretion to issue declaratory judgments to eliminate controversy and remove uncertainty. The California Court of Appeal decision in *Town of Atherton v. California High-Speed Rail Authority*, 228 Cal.App.4th 314 (2014), did not address whether the ICCTA preempts CEQA Injunctive Remedies and the decision does not preclude the Board from ruling on the

Petition. The market participant doctrine discussed in that decision has no bearing on the Board's determination of whether the ICCTA preempts the CEQA Injunctive Remedies and ICCTA preemption of the CEQA Injunctive Remedies would not violate state sovereignty.

**A. The Petition is Ripe for Determination And In Any Case The Board Has Discretion To Issue Declaratory Judgments To Eliminate Controversy And Remove Uncertainty.**

As noted in the Petition, on June 5-6, 2014, seven lawsuits were filed challenging the Authority's compliance with CEQA (the "Lawsuits") with respect to the Fresno-to-Bakersfield HST Segment ("FB Section"). The Lawsuits plead for, *inter alia*, preliminary and permanent injunctive relief under CEQA (the "CEQA Injunctive Remedies") in the form of a court order precluding the Authority from proceeding with construction of the FB Section. Absent ICCTA preemption, preliminary and permanent injunctive relief under CEQA is available. *Miller v. City of Hermosa Beach*, 13 Cal. App. 4th 1118, 1143-44 (1993) (preliminary relief); Cal. Pub. Res. Code § 21168.9 (permanent relief). If granted, the CEQA Injunctive Remedies would delay or prevent STB-authorized construction of the FB Section. Thus, as explained in the Petition, the availability of CEQA Injunctive Remedies is an issue ripe for decision and in any case the Board has discretion to issue declaratory judgments to eliminate controversy and remove uncertainty, 5 U.S.C. § 554(e) and 49 U.S.C. § 721, which undeniably exists today. Petition, 5-6.

The plaintiffs in the Lawsuits (collectively referred to herein as the "Plaintiffs") jointly filed in opposition to the Petition. They indicate that they have not filed motions seeking preliminary injunctive relief in the Lawsuits and that in the absence of such motions "it is only speculation on [the Authority's] part that such relief will be sought."

See Plaintiffs Opposition to Petition for Declaratory Order (“Reply of Plaintiffs”), 5. While it is true that not one of the Plaintiffs has filed motions for injunctive relief yet, it also is true that not one of them has indicated (either in Reply of Plaintiffs or otherwise) that they intend to withdraw their request for preliminary and permanent injunctive relief.

The Community Coalition on High-Speed Rail, Transportation Solutions Defense and Education Fund and California Rail Foundations (collectively referred to herein as the “CC-HSR”), none of whom is a plaintiff in the Lawsuits, base their ripeness arguments on fundamentally incorrect facts.

First, they incorrectly claim that design-build construction contracts for the FB Section have not been signed. CC-HSR Opposition to Petition for Declaratory Order (“Reply of CC-HSR”), 3 n.1. Such a construction contract was signed in 2013 for the northernmost portion of the FB Section (known as “Construction Package 1C” or “CP1C”)<sup>1</sup>; the Authority has even issued a notice to proceed with final design to that contractor for CP1C. *See also* Petition, 6. These facts undermine statements by CC-HSR that the Authority has no “plans to start construction on the Fresno-Bakersfield Segment of the HSR Line any time soon” and that “any claim that an injunction disrupting construction is imminent must be characterized as speculation bordering on fantasy.” Reply of CC-HSR, 3-4.

Second, CC-HSR incorrectly claims that “property acquisition has not even begun on the [FB Section].” Reply of CC-HSR, 3, n.1. As of November 7, 2014, formal written offers have been made to owners of 96 parcels in CP1C out of a total of 141 required, and

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<sup>1</sup> See map at [http://www.hsr.ca.gov/docs/programs/construction/CP1\\_Map.pdf](http://www.hsr.ca.gov/docs/programs/construction/CP1_Map.pdf); see also PDF pp. 10-11 (document page 6-7, Section 3.4) and 44 (Attachment 1, Note 1) for explanation in the signed contract of CP1C work and limits and that it is covered only in the FB Section EIR/EIS.

the Authority has legal possession or possession pending for 21 parcels in CP1C. In Construction Package 2-3 (“CP 2-3”), an approximately 60-mile portion of the FB Section,<sup>2</sup> formal written offers have been made to owners of 89 parcels out of a total of 536 required. Property acquisition in the FB Section *has* begun.

Moreover, the Board has discretion to issue declaratory judgments to eliminate controversy and remove uncertainty. 5 U.S.C. § 554(e) and 49 U.S.C. § 721. Thus, if the Board is not convinced that the controversy is ripe for determination, it still can and should issue a declaratory judgment simply to remove the obvious controversy and uncertainty regarding the availability of the CEQA Injunctive Remedies. *DesertXpress Enterprises, LLC – Petition for Declaratory Order*, STB FD 34914, slip op. at 3 (STB served June 27, 2007) (“*DesertXpress*”).

Several Opponents urge the Board to not rule on the Petition until after the California Supreme Court decides whether to accept discretionary review (and if accepted, rules on this particular issue) of the Court of Appeal’s decision in *Friends of the Eel River v. North Coast Railroad Authority*, 230 Cal.App.4th 85 (2014) (“*Friends of the Eel River*”). Reply of Plaintiffs, 4; Reply of CC-HSR, 6. Nothing would be gained by waiting for the outcome of the appeal and from the prolonged controversy and uncertainty which would result. *See Norfolk S. Ry. Co. – Petition for Declaratory Order*, 2013 STB LEXIS 338, at \*1, \*5-17 (STB served Nov. 4, 2013) (where railroad sought and received a declaratory order from the Board to address ICCTA preemption issues in 18 nuisance lawsuits pending in the Circuit Court of Roanoke, County, Va.).

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<sup>2</sup> See map at [http://www.hsr.ca.gov/docs/programs/construction/CP2\\_3\\_showing\\_preferred4\\_14.pdf](http://www.hsr.ca.gov/docs/programs/construction/CP2_3_showing_preferred4_14.pdf).

**B. The Doctrine of Collateral Estoppel Does Not Prevent The Board From Considering The Merits Of The Authority's Petition.**

CC-HSR argues that the Board is powerless to address whether the ICCTA preempts CEQA Injunctive Remedies because the California Court of Appeal ruled on that precise issue in *Town of Atherton v. California High-Speed Rail Authority*, 228 Cal.App.4th 314 (2014) ("*Atherton*"), and the doctrine of issue preclusion prevents relitigation. Reply of CC-HSR, 4-11.

**1. Atherton Is Expressly Limited To The Issues Presented In That Case And The Court Acknowledged That A Declaratory Order Proceeding On Preemption Was Appropriate.**

The Board need look no further than the *Atherton* decision itself to see that CC-HSR's argument about issue preclusion is fatally flawed because the *Atherton* Court expressly limited its holding to the legal and factual issues before it in that case. "As we will explain, we need not decide the broader question of federal preemption because we find *the specific circumstances of this case* establish an exception to federal preemption under the market participant doctrine." *Atherton*, 228 Cal.App.4th at 323 (emphasis added). Further, "[t]he Authority argues 'on the limited issues before the Court in this appeal, the ICCTA preempts any CEQA remedy.' We assume based on this argument that the Authority's preemption claim is *limited to the issues in this particular case*." *Id.* at 327, n.2 (emphasis added).

Moreover, the *Atherton* Court recognized that a request to the Board is the appropriate mechanism to resolve questions regarding ICCTA preemption. "A request to the STB for a declaratory order of preemption would be the remedy for the Authority's claim of federal preemption, just as it was in *City of Auburn [v. United States]*, 154 F.3d 1025 (9th Cir. 1998) ("*City of Auburn*")." *Id.* at 332, n.4 (emphasis

added). Indeed, the Court of Appeal suggested that the lack of a declaratory order on preemption from this Board was an important factor in its decision. *See id.* (“The Authority has not informed this court of any request for a formal declaratory order from the STB that the ICCTA preempts CEQA as to the HST system.”). The *Atherton* Court has thus essentially endorsed the very step that the Authority is taking with its narrowly focused declaratory order petition. *Atherton* by its own words does not have the sweeping waiver or issue preclusion effect CC-HSR claims.<sup>3</sup>

**2. The Issue Raised In This Petition – Whether A State Court Can Enjoin Construction This Board Has Authorized – Is Not Identical To The Issue Decided In *Atherton*, So Issue Preclusion Does Not Apply.**

A second fatal flaw in CC-HSR’s issue preclusion argument is that it wrongly portrays the issue in the current declaratory order petition as identical to the one the Authority litigated and lost in *Atherton*.<sup>4</sup> Reply of CC-HSR, 6-7. Federal courts follow state law to determine whether a prior state court judgment has a preclusive effect in a later case. *Palomar Mobilehome Park Ass’n v. City of San Marcos*, 989 F.2d 362, 364 (9th Cir. 1993). Issue preclusion in California will attach only where the issue one seeks

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<sup>3</sup> CC-HSR suggests the Authority could have asked the California Court of Appeal to refer the preemption question to the Board, citing *Boston and Maine Corp. v. Town of Ayer*, 191 F. Supp.2d 257 (D.Mass. 2002) rev’d., 330 F.3d 12 (1<sup>st</sup> Cir. 2003). Reply of CC-HSR, 5-6. *Boston and Maine Corp.* involved federal district court authority to refer a question to the Board under 28 U.S.C. § 1336. CC-HSR cites no authority providing this mechanism for a state court.

<sup>4</sup> The Authority *won* on the merits in *Atherton*. *Atherton*, *supra*, 228 Cal.App.4<sup>th</sup> at 323. Appeal to the California Supreme Court on preemption, therefore was unnecessary and would have risked the CEQA merits victory. Appeal also was unnecessary as to the preemption issue, given the *Atherton* Court expressly limited its holding to the Program EIR.

to preclude from relitigation is *identical* to that decided in the prior proceeding. *Lucido v. Superior Court*, 51 Cal.3d 335, 341 (1990) (emphasis added) (“*Lucido*”).<sup>5</sup>

Issue preclusion does not prevent the Board from considering the merits of the Authority’s declaratory order petition because the issue involved in *Atherton* is fundamentally different from the issue in this proceeding. *Atherton* considered the issue of whether the ICCTA facially preempted CEQA remedies in a state court CEQA challenge to the Authority’s 2010 Bay Area to Central Valley Revised Program EIR (“Bay Area Program EIR”). *Atherton*, 228 Cal.App.4th at 161 (describing Authority’s arguments on facial preemption under *City of Auburn* case). The Bay Area Program EIR did not provide an independent basis for the Authority to seek permission from this Board to construct a rail line.<sup>6</sup>

*Atherton* therefore did not, and had no occasion to, address the issue of whether a state court can enjoin rail line construction this Board has authorized. In contrast, this petition raises that precise issue - whether the ICCTA’s comprehensive scheme of regulation of railroads and placement of exclusive jurisdiction over rail line construction in the Board nevertheless provides jurisdiction for a state court to prevent construction

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<sup>5</sup> There are five factors that all must be met for issue preclusion: (1) the issue a person seeks to relitigate must be identical to that decided in the former proceeding; (2) it must have been actually litigated in the former proceeding; (3) it must have been necessarily decided in the former proceeding; (4) the decision must have been final and on the merits; and (5) the party against whom preclusion is sought must be the same as, or in privity with, the party in the former proceeding. *Lucido, supra*, 51 Cal.3d at 341. Because there is an equitable component to collateral estoppel, the doctrine may not apply even if all five prerequisites are met, where application of the doctrine would not be consistent with public policy. *Union Pac. R.R. Co. v. Santa Fe Pac. Pipeline, Inc.*, \_\_\_ Cal.Rptr. \_\_\_, 2014 WL 5665014 at \*28-29 (Nov. 5, 2014), citing *Direct Shopping Network, LLC v. James*, 206 Cal.App.4th 1551, 1562 (2012).

<sup>6</sup> CC-HSR tries to portray the high-speed rail system as one large project, making the *Atherton* holding on preemption apply inflexibly across the entire 800 mile system that will be constructed over time based on future, project-level environmental documents. Reply of CC-HSR, 8. As the Board has recognized, the Bay Area Program EIR was part of a lengthy programmatic planning process the Authority undertook before preparing detailed, project-level environmental documents that would form the basis – indeed, a legal prerequisite (under NEPA) for seeking the Board’s permission to construct. *California High-Speed Rail Authority – Construction Exemption – In Merced, Madera, and Fresno Counties, Cal.*, STB FD 35724, slip op. at 8, n. 49 (STB served June 13, 2013).

the Board has authorized. *Chicago and Northwestern Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 331-332 (1981) (“*Chicago and N.W. Tr. Co.*”) (holding that claims under Iowa law preempted where they would interfere with Interstate Commerce Commission exclusive authority to regulate rail line abandonment Commission authorized).

Moreover, issue preclusion “does not apply where there are changed conditions or new facts which did not exist at the time of the prior judgment, or where the previous decision was based on different substantive law.” *United States Golf Assn. v. Arroyo Software Corp.*, 69 Cal.App.4th 607, 616 (1999). The environmental document at issue in the Lawsuits, the Fresno to Bakersfield project-level EIR/EIS, is the same one this Board relied on to comply with NEPA and authorize the Authority to construct the rail line. *California High-Speed Rail Authority — Construction Exemption — In Fresno, Kings, Tulare, and Kern Counties, Cal.*, STB FD 35724 (Sub-No. 1), (STB served Aug. 11, 2014). That document includes language in Chapter 1 explaining Board jurisdiction and ICCTA preemption and reserving the Authority’s right to raise the preemption issue – a fact not present in the Bay Area Program EIR. And new appellate law in California directly conflicts with and expressly criticizes *Atherton*, holding that the market participant doctrine may not be used to avoid federal preemption by the ICCTA in a very similar case involving a publicly owned railroad line. *Friends of the Eel River, supra*, 230 Cal.App.4th 85. For these further reasons, issue preclusion does not apply here.

**3. The Issue Of Whether Proposition 1A Requires Project-Level CEQA Documents Was Not Necessarily Decided in *Atherton*, So Issue Preclusion Does Not Apply On This More Limited Issue.**

CC-HSR also argues that the market participant exception to preemption cannot be relitigated because the *Atherton* Court conclusively determined that Proposition 1A requires compliance with CEQA for the entire high-speed system in perpetuity, not just for the Bay Area Program EIR. Reply of CC-HSR, 4-6. CC-HSR is off the mark. For issue preclusion to apply, the issue must have been “necessarily decided” in *Atherton*. *Lucido, supra*, 51 Cal.3d at 341. When determination of an issue was not necessary to the prior judgment, it will not have collateral estoppel effect. *County of Santa Clara v. Deputy Sherriffs’ Ass’n*, 3 Cal.4th 873, 879, n.7 (1992) (broad comments in trial court holding not necessary to judgment cannot support collateral estoppel).

The only interpretation of Proposition 1A rendered in *Atherton* was whether it was one of the multiple grounds why the Court of Appeal concluded that the market participant doctrine applied. To reach its holding, the *Atherton* Court noted language in Proposition 1A that referred specifically to the Bay Area Program EIR to identify the project covered by that Bond Act. *Atherton, supra*, 228 Cal.App.4th at 337-338 citing Sts. & Hy. Code, §§ 2704.04(a) (legislative intent to initiate construction consistent with high-speed train system described in Authority’s program EIRs); 2704.06 (proceeds of bond sales available for costs consistent with the Authority’s certified program EIRs, as subsequently modified).<sup>7</sup> The Court also considered the Authority’s lengthy compliance with CEQA over a ten year period preparing program EIRs as a significant factor in

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<sup>7</sup> In any event, as discussed *infra* in footnote 17, Proposition 1A is a bond act that provides financing for some of the present project and, to date, no Proposition 1A funds conditioned by the purported requirement of CEQA compliance have been expended. Instead, the FB Section is currently being funded through other means.

concluding the market participant doctrine applied to eliminate preemption in this case. *Id.* at 339. While the Authority disagrees with this analysis, the Court’s interpretation that certain provisions in Proposition 1A indicated market participant activity with the Bay Area Program EIR was all that was necessary for the Court to reach its holding.

The *Atherton* Court did not “necessarily decide” that Proposition 1A required project-level CEQA documents (EIRs) for all future sections of the high-speed train system. *Id.* at 354 (citing Sts. & Hy. Code, § 2704.08 (c)(2)(K)). Likewise, the Court did not “necessarily decide” that Proposition 1A’s conditions on use of bond funds apply to the sections of the high-speed train project that may not use bond funds — as CC-HSR seems to think. *Id.* at 337-338; Reply of CC-HSR, 4-6, 8. In short, the *Atherton* Court did not interpret Proposition 1A as requiring *project-level* CEQA compliance for the entire high-speed train system, so that issue was not necessarily decided and cannot bar the Board from considering that issue here in the context of ICCTA preemption of injunctive relief remedies in CEQA cases challenging the Fresno to Bakersfield project-level EIR.

**4. The Holding in *United States v. Mendoza* Also Permits the Board To Address Whether The ICCTA Preempts Injunctive Relief Remedies Under CEQA.**

Finally, even if the issue presented and actually decided in *Atherton* were identical to the one the Authority poses in this declaratory order proceeding (and it is not), issue preclusion (collateral estoppel) would still not apply based on *United States v. Mendoza*, 464 U.S. 154 (1984) (“*Mendoza*”). In *Mendoza*, the U.S. Supreme Court held that nonmutual offensive collateral estoppel cannot be used against the

government in a manner to preclude relitigation of issues. 464 U.S. 162-163.<sup>8</sup>

Government agencies are not in the same position as private litigants for purposes of collateral estoppel. *Id.* at 160. As the high court explained:

A rule allowing nonmutual offensive collateral estoppel against the government in such cases would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue.

The *Mendoza* holding applies equally to state governments as to the federal government. *Coeur D'Alene Tribe of Idaho v. Hammond*, *supra*, 384 F.3d at 689-690; *Hercules Carriers, Inc. v. Claimant State of Fla. Dep't of Transp.*, 768 F.2d 1558, 1579 (11<sup>th</sup> Cir. 1985).

The *Mendoza* holding has been accepted in California appellate courts, meaning that even if *Atherton* addressed the same legal and factual issues identified here, it would still not be considered preclusive against the Authority if raised by any of the Opponents except CC-HSR or Transdef, the only two Opponents in the *Atherton* case. *Helene Curtis, Inc. v. Assessment Appeals Bd.*, 76 Cal.App.4th 124, 133 (1999) (citing *Mendoza* with approval); *K.G. Meredith*, 204 Cal.App.4th 164, 172, n.9 (2012) (citing *Helene Curtis, Inc.* and denying collateral estoppel because “nonmutual offensive collateral estoppel is not available against a government entity”). Even as to CC-HSR and Transdef, however, offensive use of collateral estoppel is not availing against the state on issues of law or where the public interest requires that relitigation not be foreclosed. *See City of Sacramento v. State of California*, 50 Cal.3d 51, 64 (1990); *see also California Optometric Assn. v. Lackner*, 60 Cal.App.3d 500, 505 (1976). For these

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<sup>8</sup> “‘Offensive’ collateral estoppel refers to the situation where the plaintiff seeks to foreclose defendant from relitigating an issue the defendant has previously litigated unsuccessfully in another action against the same or a different party.” *Coeur D'Alene Tribe of Idaho v. Hammond*, F.3d 674, 689 (9<sup>th</sup> Cir. 2004).

further reasons, issue preclusion does not apply and the Board should consider the merits of the Authority's petition.

**C. The Market Participant Doctrine Does Not Apply And Does Not Alter The Board's Consideration Of The ICCTA Preemption Issue In The Proceeding.**

Opponents argue that if the Board reaches the merits of the Authority's Petition, it should conclude that the ICCTA does not preempt the CEQA Injunctive Remedies because of the market participant doctrine. This conclusion would require the Board to ignore (like the Opponents did) the import of all ICCTA preemption case law except *Atherton*, which did not decide the issue before the Board (*see supra*), and in any case fundamentally misapplied the market participant doctrine. It would also require the Board to ignore the very purpose of the doctrine. Likewise, Opponents' kitchen sink arguments — that the ICCTA applies differently to state rail carriers as compared to local state-chartered rail carriers; that ICCTA preemption does not apply to public rail carriers, only private ones; that ICCTA preemption does not apply if a party claims a state agency failed to apply state laws like CEQA to itself; and that Proposition 1A controls the scope of ICCTA preemption — do not narrow the scope of ICCTA preemption. The market participant doctrine and Opponents' above arguments cannot block ICCTA preemption of the CEQA Injunctive Remedies.

**1. The Opponents Have Ignored The Meaning Of All ICCTA Preemption Case Law Except *Atherton*, Including Three Cases In The Petition Holding The ICCTA Preempts CEQA.**

The Authority has explained the Board's exclusive jurisdiction over construction of the FB Segment — that “[t]he power to authorize the construction of rail lines ... has been vested exclusively in the Board by section 10901 of the ICCTA.” And that “Congress in the ICCTA has confirmed that the jurisdiction of the Board over transportation by rail

carriers . . . is exclusive and preempts the remedies provided under federal or state law.” Petition, 6-7 (citing *King County, WA — Petition for Declaratory Order — Burlington Northern R.R. — Stampede Pass Line*, 1 S.T.B. 731, 734 (1996)). In addition to numerous railroad facility construction cases, the Authority has identified and explained three cases<sup>9</sup> holding that the ICCTA preempts CEQA, all of which apply to the Authority and two of which involve local agency rail carriers created by state law engaged in construction or operations within the exclusive jurisdiction of the Board. Petition, 7-9, 11,15-16.

With the exception of CC-HSR, the Opponents have ignored the ICCTA preemption cases in the Petition (except *Atherton*, which is discussed *infra*). CC-HSR concedes that two of the cases holding that the ICCTA preempts CEQA (*San Diego County Transit* and *Friends of the Eel River*) were properly decided. CC-HSR then attempts to distinguish these cases on two grounds.

First, CC-HSR argues that a legislatively-chartered *local* rail agency is somehow different from a legislatively-chartered *state* rail agency (like the Authority). Reply of CC-HSR, 21-22, 29. CC-HSR fails to explain, however, how this distinction makes any difference when it comes to ICCTA preemption given that CEQA applies equally to state agencies and local agencies.<sup>10</sup>

Second, CC-HSR incorrectly claims that both cases only involved one agency asserting state law environmental permitting and CEQA authority over another – the “external vs. internal application” argument that preemption cannot trump an agency’s

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<sup>9</sup> *North San Diego County Transit Dev. Bd – Petition for Declaratory Order*, STB FD 34111, 2002 WL 1924265 (STB served August 21, 2002) (“*San Diego County Transit*”); *Friends of the Eel River*, 230 Cal. App. 4th Cir. 85; and *DesertXpress*, STB FD 34914, slip op. at 3.

<sup>10</sup> See Cal. Pub. Res. Code sections 21001.1 and 21002 (stating CEQA’s purposes as to “public agencies” and 21063 (defining “public agency” to include both state agencies and local agencies such as cities and local districts).

“internal [state law based] decision-making requirements” to apply environmental state preclearance laws like CEQA to itself. Reply of CC-HSR, 12, 21-22, 28.<sup>11</sup> However, *Friends of the Eel River* was identical to the case before the Board: a third party non-governmental agency claiming in litigation that a public rail carrier failed to adequately apply CEQA to itself. *San Diego County Transit* involved the same thing, albeit in that case the third-party litigant was a governmental agency – an irrelevant difference, given the potential impact is the same, namely injunction against a rail project.<sup>12</sup>

Moreover, this external application argument misses an obvious point: Whether a third party claims administrative permitting and CEQA authority or seeks a state court injunction claiming the public rail carrier failed to properly apply CEQA to itself, the potential result is the same – a prohibition or interference with rail construction the Board has authorized and over which the Board has exclusive jurisdiction. The *Friends of the Eel River* court understood these effects, recognizing that a third-party challenge under CEQA “is clearly regulatory in nature.” *Friends of the Eel River*, 230 Cal.App.4th at 115; *Ball v. GTE Mobilnet of California*, 81 Cal.App.4th 529, 537 (2000) (citing

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<sup>11</sup> CC-HSR asserts that the “Authority is in a fundamentally different position” than the public entities seeking enforcement of laws held to be preempted by the ICCTA in the cases cited in the Petition. Reply of CC-HSR, 12. According to CC-HSR, in those cases, an “external public agency [i.e., not the project proponent] ... was attempting to regulate ... and thereby potentially reject, a rail project over which the STB has jurisdiction.” Whereas in the present case, CC-HSR says “it is [the Authority] itself that has applied to the STB for approval of *its own* project. No external permit or regulation is involved.” *Id.* CC-HSR restates this same argument elsewhere as falling under the market participant doctrine. Reply of CC-HSR, 13. That doctrine has no valid application here, as we explain *infra*.

<sup>12</sup> The *San Diego County Transit* case involved *both* a claim that an external agency, the City of Encinitas, had permitting and CEQA authority over a public rail project *and* a claim the rail agency violated CEQA by not applying CEQA to itself. The STB Declaratory Order states: “In addition to the claimed permit violation, the City argued that [the public rail agency] had violated the California Environmental Quality Act (CEQA) (Public Resources Code § 21000 et seq.), the State CEQA Guidelines (Cal. Code of Regs., § 15000 et seq.), and...” *San Diego County Transit*, 2002 WL 1924265, at \*2 n. 7. The federal district court decision states: “Plaintiff seeks declaratory and injunctive relief preventing [the public rail agency] from taking action in furtherance of the passing track until [the public rail agency] complies with CEQA...” *City of Encinitas v. North San Diego County Transit Dev. Bd.* 2002 WL 34681621, at \*1 (S.D. Cal. Jan. 14, 2002). This is contrary to CC-HSR’s wrong statement that the case involved only external assertion of regulatory jurisdiction. Reply of CC-HSR, 21.

*Chicago & North West Transportation Co.*, *supra*, 450 U.S. at 326 for position that state court adjudication is a form of state regulation).

In addition, this “external/internal application” dichotomy argument was argued in *San Diego County Transit* using almost identical wording as CC-HSR uses in its Reply. Subsequent to the federal district court’s reported decision (*supra* 2002 WL 34681621), the City of Encinitas appealed and moved for an injunction pending appeal. The injunction motion stated: “NCTD is not an ordinary private rail carrier, but a public entity created and controlled by the State of California itself ... there is no reason to believe Congress intended to interfere in the internal process by which state transportation agencies make decisions to undertake such improvements.”<sup>13</sup> This is the *exact* argument CC-HSR makes. Reply of CC-HSR, 12, 21-22. The Court discussed *City of Auburn* in detail and, after giving thorough consideration to the arguments presented, denied the stay motion because the City of Encinitas had not distinguished its case from *City of Auburn*. *Order Denying Motion for Injunction Pending Appeal* (No. 01-1734), at 4-6 (S.D. Cal Nov. 1, 2002).<sup>14</sup> This suggests that Court understood that any attempted distinctions of public vs. private (*City of Auburn* involved a private rail carrier)<sup>15</sup> or internal vs. external (*City of Auburn* involved a local agency asserting permitting jurisdiction over railroad) miss the forest for the trees – *i.e.*, regardless of the state-law vehicle and procedure being used to stop a rail project over which the Board has jurisdiction, if the potential outcome is the same (stopping the project), it is preempted.

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<sup>13</sup> *City of Encinitas’ Memo of P&As in Support of Motion for Injunction Pending Appeal*, (No. 01-1734) 2002 WL 32970270 at \*7-8 (S.D. Cal. Oct. 7, 2002).

<sup>14</sup> This decision is available in Westlaw, but only through download of the docket; and it has no Westlaw citation, so we attach it here as Exhibit A.

<sup>15</sup> CC-HSR attempts this same distinction, relying on *City of Auburn* and three other cases. Reply of CC-HSR, 12, 28 n. 17.

Lastly, the United States Supreme court has rejected this type of self-application argument, in the context of the federal Railway Labor Act. *California v. Taylor*, 353 U.S. 553 (1957). There, the State of California there sought to apply its own civil service laws to the employees of its own railroad – apply its own law to itself. *Id.* at 556. The Supreme Court recognized that the scheme of federal regulation of railroads applies to publicly owned or operated railroads. *Id.* at 562-563. The Railway Labor Act preempted the state civil service laws, because the state law directly conflicted with the federal law. *Id.* at 561, 566-567. A state court CEQA injunction preventing the same rail construction that this Board has authorized, based on a state statute that would otherwise be preempted if the rail carrier were privately owned, presents the same type of inherent conflict between the state law and the federal law. *Id.* at 567; *Chicago & N.W. Tr. Co.*, *supra*, 450 U.S. at 318.

**2. If The Board Does Consider *Atherton*, It Should Conclude That *Atherton* Fundamentally Misapplied The Market Participant Doctrine.**

As noted *supra*, *Atherton* did not decide the issue before the Board in this case and thus the Board need not delve into whether *Atherton* was wrongly decided. Petition, 12-13. However, if the Board does consider *Atherton*, it should conclude that *Atherton* fundamentally misapplied the market participant doctrine. *See* Petition, 15. The market participant doctrine cannot block ICCTA preemption of the CEQA Injunctive Remedies and in any case cannot be invoked by the Plaintiffs in the Lawsuits.

*Atherton* fundamentally misapplied the market participant doctrine. First, the Authority has explained that the market participant doctrine allows states acting in a proprietary capacity to have the *same* freedom to pursue their interests as would private entities in the same situation. Petition, 13-14. The *Atherton* court did not explain how

the doctrine would help the Authority be on an equal footing with a private entity in the same situation, such as *DesertXpress*. In fact, the market participant doctrine would put the Authority on a lesser footing when compared to *DesertXpress*, the construction and operation of which is not subject to CEQA. See *DesertXpress*, STB FD 34914, slip op. at 3. Despite a full recitation of the market participant doctrine case law (more than 35 pages in just the Reply of CC-HSR and the Reply of Plaintiffs) none of the Opponents explain how the doctrine would help the Authority be on an equal footing with a similarly situated private entity. The likely reason none of the Opponents address this point (even though it is right out of the very cases relied upon in the Reply filings<sup>16</sup>) is that it exposes *Atherton* as an anomaly — it is (to the Authority’s knowledge) the only time a Court has ever applied the doctrine to tilt the playing field against a state agency.

Second, the Authority has explained that the market participant doctrine is a presumption about Congressional intent and does not apply if the relevant federal statute contains “any express or implied indication by Congress’ that the presumption embodied by the market participant doctrine should not apply.” Petition, 14 (citing *Engine Mfrs. Ass’n v. So. Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031, 1042 (9<sup>th</sup> Cir. 2007) (“*Engine Manufacturers*”) (quoting *Building & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 226–27 (1993) (“*Boston Harbor*”)). *Boston Harbor* holds that the Court will not “infer” preemption of proprietary action unless Congress “indicat[es] ... that a State may not manage its own property when it pursues its purely proprietary interests.” *Boston Harbor*, 507 U.S. at 231; *Atherton*, *supra*, 228 Cal. App. 4th at 335-336. ICCTA preemption is not, however, merely

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<sup>16</sup> *Building & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 226–27 (1993); *Reeves, Inc. v. Stake*, 447 U.S. 429, 439 (1980).

express preemption. The ICCTA says that the Board has “exclusive” jurisdiction over the construction of tracks and that “the remedies provided under [the ICCTA] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” 49 U.S.C. 10501(b)(2).

For the issue before the Board, no clearer indication of Congressional intent is possible than to say *remedies are exclusive*. See *CSX Transp., Inc. v. Georgia Public Service Comm'n*, 944 F.Supp. 1573, 1581 (N.D.Ga.1996) (“It is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations.”). The *Atherton* Court relied upon the same case law, noting that the market participant doctrine could override express preemption provisions, but did not explain how the language in section 10501(b)(2) could reasonably be construed to not overcome the presumption. CC-HSR cites to *Engine Manufacturers*, but not *Boston Harbor*, which involved fleet rules in a state implementation plan which were more stringent than required the Clean Air Act (“CAA”). See Reply of CC-HSR, 20. The *Engine Manufacturers* Court held that the market participant doctrine blocked CAA preemption of the state requirement on a state-owned fleet. *Engine Manufacturers*, 498 F.3d at 1044. The CAA provision in issue (42 U.S.C. 7586) was related to fleet choice and not exclusive remedies. Contrary to CC-HSR’s assertion *Engine Manufacturers* and 42 U.S.C. 7586 have no parallel to ICCTA preemption.

Third, the Authority has pointed out that a different California appellate court held that environmental review under CEQA as a condition to restoration of railroad operations subject to the jurisdiction of the STB was preempted by the ICCTA and that the market participant doctrine could not be invoked by third parties to avoid ICCTA preemption. In *Friends of the Eel River* the Court cited and specifically disagreed with

the application of the market participant doctrine in *Atherton*. 230 Cal.App.4th at 112-18. The Court explained that the market participant doctrine allows government agencies acting in their capacity as the owners of property or purchasers of goods and services (and not in their capacity as regulators) the same freedom to protect their interests as do private individuals and entities; that in certain circumstances state action designed to protect the environment could be proprietary in nature; and that the market participant doctrine could protect proprietary state action from federal preemption. *Id.* at 113-14. However, the Court also explained that a third party challenge to the adequacy of environmental review under CEQA was not part of the government's proprietary action:

NCRA, a political subdivision of the state, undertook a project to reopen the Russian River Division of the line. As part of that project, it prepared an EIR, which is now challenged by petitioners as inadequate. Even if the project to reopen the line is viewed as "proprietary" and the initial decision to prepare the EIR a component of this proprietary action, a writ proceeding by a private citizen's group challenging the adequacy of the review under CEQA is not a part of this proprietary action.

*Id.* at 115. The market participant doctrine allows a governmental entity to avoid a charge by aggrieved third parties that its actions are preempted by federal law, what the court called using the doctrine "*defensively*," but not the opposite:

Petitioners seek to stand the market participation doctrine on its head and use it to avoid the preemptive effect of a federal statute the state entity is seeking to invoke. None of the cases involving market participation use the doctrine in this context, and such a use would be antithetical to the purpose underlying the doctrine.

*Id.* at 115. To the contrary, a third party challenge under CEQA "is clearly regulatory in nature" and "cannot be viewed as a part of its proprietary action, even if the lawsuit challenges that proprietary action." *Id.* Thus, the Court held the market participant

doctrine could not be used by third party challengers to avoid the ICCTA preemption of CEQA. *Id.*

The *Friends of the Eel River* Court went on to explain why it disagreed with the *Atherton* Court's market participant doctrine analysis. Although *Atherton* was factually and procedurally similar, the *Friends of the Eel River* Court said the *Atherton* Court overlooked the purpose of the market participant doctrine, did not adequately explain how a third party's challenge under CEQA could be part of the government's proprietary activity and, perhaps most importantly, did not explain how its analysis could be squared with its (the *Atherton* Court's) recognition that ICCTA preemption case law holds that state law preclearance requirements on railroads are "*per se* unreasonable interference with interstate commerce." *Id.* at 117 (quoting *Adrian and Blissfield R.R. Co. v. Village of Blissfield*, 550 F.3d 533, 540 (6<sup>th</sup> Cir. 2008) (internal citations omitted).

None of the Opponents make any effort to respond to the above-summarized *Friends of the Eel River* Court's discussion of *Atherton* decision.

*Friends of the Eel River* lends strong additional support to the proposition that in the case before the Board, the market participant doctrine does not apply and thus does not change the Board's consideration of the ICCTA preemption issue in this proceeding.

### **3. The Language In Proposition 1A Does Not Govern The Preemption Analysis.**

Opponents argue that the ICCTA cannot preempt CEQA Injunctive Remedies because both Proposition 1A and CEQA represent the State's voluntary commitment to apply CEQA to itself, not prohibited state regulation being imposed by an external agency. Reply of CC-HSR, 11-12, 20-22; Jacqueline Ayer Opposition To Petition For Declaratory Order, 4-7. The *Atherton* Court, in dicta, also suggested that Proposition 1A

was analogous to a non-preempted voluntary agreement. *Atherton, supra*, 228 Cal.App.4th at 339 (citing *Joint Petition for Declaratory Order — Boston and Maine Corporation and Town of Ayer, MA.*, 2001 STB Lexis 435, at \*18–\*19 (STB served Apr. 30, 2001) (“*Boston and Maine*”). These arguments and the *Atherton* dicta incorrectly focus the preemption analysis on the state statute, rather than on the language and intent of the ICCTA. *See City of Auburn*, 154 F.3d at 1031.

While this Board has recognized that a railroad’s voluntary agreements will not be considered to interfere with interstate commerce, this line of decisions is not without limits. A railroad’s voluntary choice to undertake an “activity or restriction” will generally not be preempted. *Joint Petition for Declaratory Order — Boston and Maine*, 2001 WL 458685, at \*5, \*7, n. 38. When a railroad enters into a contractual settlement agreement to resolve litigation, the railroad cannot shield itself from the contractual bargain it struck by resorting to preemption. *Township of Woodbridge, NJ, et al., v. Consolidated Rail Corp.*, No. 42053, 2000 WL 1771044, at \*3, \*5 (STB served Dec. 1, 2000). The voluntary agreement decisions, however, cannot be read to authorize state regulation that flat out conflicts with the Board’s jurisdiction. *See* *Petition*, 11. Accordingly, *even if* Proposition 1A can be interpreted as a voluntary commitment for the Authority to prepare project-level EIRs, Proposition 1A cannot be interpreted as a voluntary agreement to submit to CEQA Injunctive Remedies that is shielded from preemption.<sup>17</sup> Since CEQA Injunctive Remedies present an inherent conflict with the

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<sup>17</sup> The Authority does not read Proposition 1A to impose a future, project-level CEQA compliance requirement. Proposition 1A is a funding statute and its terms apply only to situations where its funding source will be used. Further, it does not say the Authority must prepare project-level EIRs. Instead, it refers to “environmental studies” and “necessary project level environmental clearances necessary to proceed to construction.” Sts. & Hy. Code, §§ 2704.08(b), 2704.08 (g), 2704.08(c)(2)(K). The Board need not resolve this question of state-law interpretation, however, because as discussed above, Proposition 1A includes no voluntary agreement to be subject to CEQA Injunctive Remedies.

ICCTA's placement of exclusive jurisdiction over construction in the Board, it is analogous to the preempted state-law claims in *Chicago & N.W. Tr. Co.*, not the contractual agreement in *Township of Woodbridge*.

**D. ICCTA Preemption of CEQA Injunctive Remedies Does Not Violate State Sovereignty.**

Opponents argue that ICCTA preemption of CEQA Injunctive Remedies would violate state sovereignty. In particular, CC-HSR argues that applying preemption to CEQA Injunctive Remedies would violate state sovereignty because the ICCTA lacks “unmistakably clear” Congressional intent to do so. Reply of CC-HSR, 23-30.<sup>18</sup> CC-HSR rests its argument on *Nixon v. Missouri Municipal League*, 541 U.S. 125, 140-141 (2004), a case involving the Telecommunications Act and the powers of the Federal Communications Commission. For reasons unknown, CC-HSR ignores the cases addressing state sovereignty in the context of state-owned railroads and *railroad* laws – cases the Authority cited in its Petition – that squarely reject this argument. Petition, 9, 15-16.

*Friends of the Eel River* addressed the same state sovereignty argument CC-HSR makes here in a case involving a public rail carrier created by the California legislature and the ICCTA. *Friends of the Eel River*, 203 Cal.App.4th 85. The petitioners in that case, like CC-HSR, asserted that *Nixon* was controlling and the ICCTA did not make it “unmistakably clear” that Congress intended to regulate state-owned railroads in the same manner as private railroads. *Id.* at 118-19. The California Court of Appeal disagreed, distinguishing the express preemption provision in the ICCTA from the language in the Telecommunications Act. *Id.* at 119. “If Congress has the authority

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<sup>18</sup> See also Reply of Plaintiffs, 4.

under the Commerce Clause to act, that action does not invade ‘the province of state sovereignty reserved by the Tenth Amendment.’” *Id.* (citing *New York v. United States*, 505 U.S. 144, 155-156 (1992)). The Court held that the ICCTA’s preemption of CEQA did not impinge on state sovereignty. *Id.* at 119.

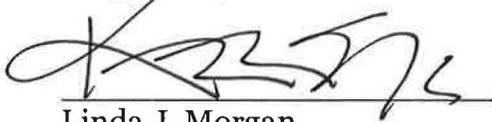
The result in *Friends of the Eel River* is consistent with *California v. Taylor*, a case involving the state-owned State Belt Railroad and the Railway Labor Act. 353 U.S. at 568. The State of California argued that a federal statute was presumed not to restrict a sovereign state unless it expressly so provided, and the Railway Labor Act was not sufficiently express. *Id.* at 563. The Supreme Court disagreed, affirmed the sovereign right of the State of California to engage in interstate commerce by owning and operating a railroad as a common carrier, but explained that a state does so within the rubric and limitations of Congress’ power to regulate interstate commerce. *Id.* at 562, 568. Publicly-owned rail carriers are treated the same as privately-owned rail carriers in the panoply of federal railroad laws that comprise the comprehensive scheme of federal regulation and results in no improper invasion of state sovereignty. *Id.* at 562-563.

## CONCLUSION

The California Court of Appeal decision in *Town of Atherton v. California High-Speed Rail Authority*, 228 Cal.App.4th 314 (2014), did not address whether the ICCTA preempts CEQA Injunctive Remedies of Board authorized construction, and the decision does not preclude the Board from ruling on the Petition. The market participant doctrine has no bearing on the Board’s determination of whether the ICCTA preempts the CEQA Injunctive Remedies ICCTA preemption of the CEQA Injunctive would not violate state sovereignty. The Board should rule on the Petition now because

the issue of availability of CEQA Injunctive Remedies is ripe and (in any case) the Board has discretion to issue declaratory judgments to eliminate controversy and remove uncertainty. The Authority respectfully requests that the Board issue an order regarding the availability of the CEQA Injunctive Remedies with respect to the FB Section.

Respectfully submitted,



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November 18, 2014



**EXHIBIT A**



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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

CITY OF ENCINITAS

Plaintiff,

v.

NORTH SAN DIEGO COUNTY  
TRANSIT DEVELOPMENT BOARD,  
ET AL.

Defendants.

Civil No. 01CV1734-J (AJB)

**ORDER DENYING MOTION FOR  
INJUNCTION PENDING APPEAL**

Before the court is a motion for preliminary injunction pending appeal, filed by the City of Encinitas which seeks an order enjoining defendant from "(a) awarding any construction bid for the Encinitas Passing Track Project, or otherwise incurring any contractual liability for construction of said project; and (b) commencing any grading, construction or other activity affecting the existing physical environment in connection with the proposed Encinitas Passing Track project." Plaintiff submitted its points and authorities, supporting declaration and request for judicial notice; Defendant filed its opposition brief and two declarations in support thereof; and plaintiff filed its reply brief. Defendant also filed a request that the court take judicial notice of the Public Utilities Commission's November 7, 2002 opinion dismissing plaintiff's complaint

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1 before it. After reviewing the parties' submissions, the court determined that the matter was  
2 appropriate for decision without oral argument and vacated the hearing date. *See* Civ. L. R.  
3 7.1.d.1. For the reasons set forth below, the motion is **DENIED**.

#### 4 ***Background***

##### 5 **I. Federal court proceedings**

6 The City of Encinitas' ("the City") petition for writ of mandate, originally filed in state  
7 court and removed by defendants to this court, challenged the North San Diego County Transit  
8 Development Board's ("Transit Development Board") approval of plans to double track a  
9 portion of railroad line without completion of environmental review as a violation of the  
10 California Environmental Quality Act, the Regional Transportation Plan, and the California  
11 Coastal Act. "Double tracking" in this project entails a 1.7 mile augmentation of an existing  
12 single-line railroad track so that trains may pass each other. The City specifically challenged the  
13 Transit Development Board's failure to prepare an environmental impact report or apply for and  
14 obtain a Coastal Development Permit. It sought declaratory and injunctive relief.

15 Transit Development Board applied to the City for a Coastal Development Permit in  
16 1996, but later withdrew its application. The City contends that the withdrawal was a response to  
17 a City staff report concluding that the project raised environmental and planning concerns that  
18 needed to be addressed through CEQA and the Coastal Development Permit review process.  
19 Four years passed before the Transit Development Board moved forward on the project without  
20 doing the studies or obtaining the permits that the City believed were needed.

21 The City filed a motion to remand and the Transit Development Board filed a motion to  
22 stay judicial proceedings. The court determined that the City's claims were preempted by the  
23 Interstate Commerce Commission Termination Act ("ICCTA"), which gave exclusive  
24 jurisdiction over "transportation rail carriers" and [t]he construction, acquisition, operation,  
25 abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities,  
26 even if the tracks are located, or intended to be located, entirely in one State" to the Surface  
27 Transportation Board within the Department of Transportation ("STB"), thereby preempting  
28 "remedies provided under Federal and State law." *See* 49 U.S.C. § 10501(b) The court

1 accordingly dismissed the case with prejudice and denied the motions for stay and to remand as  
2 moot. *See* "Order Dismissing Case for Lack of Subject Matter Jurisdiction," filed 1/14/02 [Doc.  
3 No. 23]. The clerk's judgment was entered the following day, terminating the case.

4 On February 13, 2002, the City filed its notice of appeal in the Ninth Circuit. The City  
5 learned on September 26, 2002 that the Transit Development Board is sending the project out for  
6 construction bids, the contract to be awarded on November 22, 2002 and construction completed  
7 nine months later. The City now seeks a motion for injunction pending appeal pursuant to Rule  
8 60(c) of the Federal Rules of Civil Procedure.

## 9 **II. Administrative proceedings**

10 On December 5, 2001, the Transit Development Board initiated proceedings for a  
11 declaratory order from the Surface Transportation Board. The California Coastal Commission  
12 intervened in the STB proceedings in opposition to the Transit Development Board's position  
13 that it was exempt from State coastal regulations. On August 21, 2002, the STB issued a  
14 decision in favor of the Transit Development Board, relying heavily on this court's opinion that  
15 state and local environmental laws were preempted. The City appealed the STB's decision to the  
16 District of Columbia Circuit.

17 On November 7, 2001, the Public Utilities Commission dismissed the City's complaint  
18 for lack of jurisdiction. (Req. Judicial Not. Ex. 4).

## 19 *Discussion*

### 20 **I. Legal standard**

21 Once a notice of appeal is filed, the district court is divested of jurisdiction over all  
22 matters being appealed. *Natural Resources Defense Council, Inc. v. Southwest Marine Inc.*, 242  
23 F.3d 1163, 1166 (9th Cir. 2001). The exception to this rule is Rule 62(c) of the Federal Rules of  
24 Civil Procedure, which enables the district court to "grant an injunction during the pendency of  
25 the appeal upon such terms as to bond or otherwise as it considers proper for the security of the  
26 rights of the adverse party." *See* Fed. R. Civ. P. 62(c); *see also* *Mayweathers v. Newland*, 258  
27 F.3d 930, 935 (9th Cir. 2001)(quoting *Natural Resources Defense Council, Inc. v. Southwest*  
28 *Marine, Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001)). Because the purpose of Rule 62(c) is only to

1 enable the court to exercise that power it always inherently possessed to maintain the status quo  
2 during the pendency on appeal, the court may not adjudicate the merits anew, or to take any  
3 action that materially alters the status of the case on appeal. *See id.*; *see also McClatchy*  
4 *Newspapers v. Central Valley Typographical Union No. 46, et al.*, 686 F.2d 731, 734 (9th Cir.  
5 1982 (en banc)).

6 The court may grant an injunction pending appeal if the moving party can show either (1)  
7 a combination of probable success and the possibility of irreparable harm; or (2) the party raises  
8 serious questions and the balance of hardship tips in its favor. *See Big Country Foods, Inc. v.*  
9 *Board of Education*, 868 F.2d 1085, 1088 (9th Cir. 1989) (internal citations omitted); *see also*  
10 *Mount Graham Coalition v. Thomas*, 89 F.3d 554, 555 (9th Cir. 1996). These two ways of  
11 obtaining preliminary injunctive relief are not different tests “but represent two points on a  
12 sliding scale in which the degree of irreparable harm increases as the probability of success on  
13 the merits decreases.” *Big Country Foods, Inc.*, 868 F.2d at 1088.

14 The reference to serious questions in the second formulation “refers to questions which  
15 cannot be resolved one way or the other at the hearing on the injunction and as to which the  
16 court perceives a need to preserve the status quo lest one side prevent resolution of the questions  
17 or execution of any judgment by altering the status quo.” *Gilder v. PGA Tour, Inc.*, 936 F.2d  
18 417, 422 (9th Cir. 1991) (quoting *Republic of Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th  
19 Cir. 1988)(en banc)). Furthermore, “serious questions” are substantial, difficult, and doubtful, as  
20 to make them a fair ground for litigation and thus for more deliberate investigation.” *Id.* If the  
21 court concludes that movant has failed to raise a serious question on the merits, it may deny the  
22 motion on that ground alone and decline to address the balance of hardships factor. *Mount*  
23 *Graham Coalition v. Thomas*, 89 F.3d at 555, 558.

24 The City argues that the issue to be addressed on appeal--whether, by enacting the  
25 ICTTA, Congress has preempted *all* state and local regulation of *state-funded* and *state-created*  
26 transit agencies--is one of first impression. It contends that the NCTD and this court have relied  
27 entirely on law involving the assertion of local or state police power authority over *private* rail  
28 carriers. The City further argues that STB’s exclusive jurisdiction is limited to construction and

1 operation of the track and does not extend to the decisionmaking process by which the rail  
2 carrier determines whether, or upon what terms, to undertake a rail improvement project.

3 The Transit Development Board argues that the distinction between private and public  
4 rail carriers is immaterial because the real issue is whether the NCTD is a rail carrier subject to  
5 STB jurisdiction. As a rail carrier--regardless of whether public or private--the NCTD is subject  
6 to federal law, which preempts all state and local regulation. The Transit Development Board  
7 does not dispute that the matter is one of first impression, but instead relies on the previous  
8 conclusions of this court, the STB and the PUC that state and local regulatory laws are  
9 preempted. This court's order dismissing the case relied heavily on *City of Auburn v. United*  
10 *States*, 154 F.3d 1025 (9th Cir. 1998).

11 In *City of Auburn*, a presumably private company called Burlington sought approval from  
12 the STB to reacquire a 151-mile portion of a rail line it had previously sold with a proposal that  
13 it would repair and improve the line by making several significant modifications. The county  
14 requested an informal opinion from the STB whether the Interstate Commerce Commission  
15 Termination Act, 49 U.S.C. § 701 et seq., preempted its ability to review the environmental  
16 impact of the proposed project. The STB issued an informal opinion that the rail line was not  
17 subject to state and local permit requirements. Upon request for a formal declaratory order, the  
18 STB issued its opinion that state and local environmental laws were preempted by federal law.

19 Meanwhile, the project moved forward. The STB prepared an Environmental  
20 Assessment, required by the National Environmental Policy Act, and concluded that the proposal  
21 would have no significant environmental impact if certain mitigation measures were  
22 implemented. The City of Auburn appealed the STB's formal declaratory order to the Ninth  
23 Circuit after the STB approved the project.

24 On appeal, the City of Auburn argued that (1) Congress intended the ICCTA to preempt  
25 only economic regulation of rail transportation, not the traditional state police power of  
26 environmental review; and (2) the ICCTA contains no provision expressly preempting state and  
27 local land use and environmental regulations. The Ninth Circuit rejected both arguments. It  
28 found that the statute's plain language "explicitly grant[s] the STB exclusive authority over

1 railway projects” like that proposed by Burlington. Addressing the City of Auburn’s arguments,  
2 the Ninth Circuit stated that there was no evidence that Congress intended the ICCTA to allow  
3 states to take an active role in the regulation of railroads, and that environmental and economic  
4 regulations were not mutually exclusive so that the Court could say that the ICCTA applied to  
5 only one or the other. *Id.* at 1031.

6 The City of Encinitas has not distinguished its case from *City of Auburn*, which this court  
7 believes will preclude relief on review. This court agrees, given the holding in *City of Auburn*  
8 and the conclusions of this court, the STB and the PUC that state and local environmental laws  
9 are preempted, that the City has not presented a serious question on the merits. The court need  
10 not address in whose favor the balance of hardships tips. *See Mount Graham Coalition v.*  
11 *Thomas*, 89 F.3d at 555, 558.

12 **Conclusion**

13 After reviewing the papers submitted and giving thorough consideration to the arguments  
14 presented therein, the court concludes that the City has not carried its burden in connection with  
15 its request for an injunction pending appeal. Accordingly, the City’s motion is **DENIED**.

16 **IT IS SO ORDERED.**

17 Dated: October 31, 2002

18   
19 NAPOLEON A. JONES, JR.  
United States District Judge

20 cc: Magistrate Judge Battaglia  
21 All Counsel of Record

## CERTIFICATE OF SERVICE

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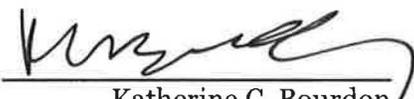
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