

December 29, 2014

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

ENTERED  
Office of Proceedings  
December 29, 2014  
Part of  
Public Record

**Re: STB Finance Docket No. 35861, California High-Speed Rail Authority;  
Petition for Reconsideration of Declaratory Order**

Dear Ms. Brown:

On behalf of the following listed parties, we hereby request reconsideration of the December 12, 2014 Order granting Petitioner California High-Speed Rail Authority's Petition for Declaratory Order, submitted for filing on October 9, 2014.

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December 29, 2014  
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BEFORE THE  
SURFACE TRANSPORTATION BOARD  
FINANCE DOCKET NO. 35861  
CALIFORNIA HIGH-SPEED RAIL AUTHORITY  
**PETITION FOR RECONSIDERATION OF DECLARATORY ORDER**

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BEFORE THE  
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35861

CALIFORNIA HIGH-SPEED RAIL AUTHORITY

**PETITION FOR RECONSIDERATION OF DECLARATORY ORDER**

Our clients are currently in state court litigation against the California High-Speed Rail Authority (“Authority”) based in part upon defective environmental review under California laws for which the Authority seeks preemption under the Interstate Commerce Commission Termination Act (“ICCTA”). We request reconsideration of the order granting the Petition for a Declaratory Order in this matter (“Decision”), and that you instead use your discretion to decline to issue a declaratory order.

Because the Decision introduces unnecessary confusion into a question that has already been answered by the California state court system, we request that you use your discretion under 5 U.S.C. section 554(e) and 49 U.S.C. section 721 (noted by Decision Dissent, footnote 2) to decline the petition for declaratory order. Exercising restraint in this instance would be most respectful of state sovereignty (see *Nixon v. Mo. Mun. League* (2004) 541 U.S. 125, 134-137) and create the greatest harmony between important federal, state, and local interests in the high speed rail system.

There are significant other reasons to reconsider the Decision as well. There are numerous issues both that were in our prior response to the petition and that were raised by other parties that we do not believe were sufficiently addressed. We join in the comments submitted by Stuart Flashman, Jacqueline Ayer, Jason Holder, State Senator

Vidak, and the Honorable Congressmembers McCarthy, Denham, Nunes, and Valadao.

**A. The Highest State Intermediate Court Decision on the Subject Holds the California Environmental Quality Act is Not Preempted by ICCTA.**

Federal courts, and by extension federal agencies such as Surface Transportation Board (“STB”), must follow a state’s intermediate appellate courts absent convincing evidence that the state’s highest court would rule differently. (*Cal. Pro-Life Council, Inc. v. Getman*, 328 F. 3d 1088, 1099 (9th Cir. 2003).) The only published California intermediate appellate court decision bearing upon the issue at hand, and controlling law in California, is *Town of Atherton et al. v. California High Speed Rail Authority* (2014) 228 Cal.App.4<sup>th</sup> 314 (*Town of Atherton*). The STB must follow the *Town of Atherton* decision and is precluded from reaching the opposite conclusion in the Decision.

In *Town of Atherton*, the appellate court ruled that, for the California High-Speed Rail Project (“Project”), CEQA is not preempted by the ICCTA. In support of this ruling, the *Town of Atherton* Court reasoned that the ballot measure authorizing the planned high-speed passenger rail system explicitly requires the Authority to comply with the California Environmental Quality Act (“CEQA”). In essence, the Court observed that this is a state project that must comply with state law, regardless of the effect of the ICCTA. We note that the Decision states “Whether CEQA compliance is required before the Authority is allowed to obtain or use Proposition 1A funding is a question of state law for a state court to decide.” (Order, p. 15.) The state appellate court, in *Town of Atherton*, has already decided that CEQA applies to the Project. Since the California Supreme Court denied the Attorney General’s request to depublish the *Town of Atherton* decision, it appears the Court did not disagree with its reasoning. Thus, the STB is

required to follow the *Town of Atherton* decision.

While the Decision relies extensively on the reasoning of *Friends of the Eel River v. North Coast Railroad Authority*, Consolidated Case Nos. A139222 and A139235 (Decision, p. 12-13), that case is no longer citable as authority in California. (California Rules of Court, Rule 8.1105 subsection (e) (“[A]n opinion is no longer considered published if the Supreme Court grants review or the rendering court grants rehearing”)) The Opinion acknowledges the California Supreme Court accepted review (Opinion, p. 4, fn. 7), but does not address the legal consequence of that action. Since the California Supreme Court granted a petition for review of the *Eel River* case it is no longer valid as a precedent and may not be relied upon.

Therefore, we request that you reconsider your decision in light of *Town of Atherton*, the single state appellate decision that remains binding authority in California.

**B. The Interests Of Federal-State Comity Would Best Be Promoted By Refraining From Issuing the Requested Order.**

**1. Compliance with state environmental laws complements STB jurisdiction.**

The issue of whether a California Environmental Quality Act remedy may be imposed by a state court does not interfere with or implicate your jurisdiction. In fact, it complements your jurisdiction. Because both federal and state resources are invested in the project both National Environmental Policy Act (“NEPA”) and CEQA must apply. Your opinion that state environmental review that may result in modification to a proposed project is preempted by ICCTA defeats important state interests in shaping the Project (which Project, if completed, will lie entirely within California’s borders). Both CEQA and NEPA are simply precursors to taking the major federal and state action

proposed. After their procedural requirements are observed, your expertise regarding design, construction, rates and operations of the proposed project is triggered. The exercise of your jurisdiction and expertise is triggered if and when both the Authority and Federal Railroad Administration have adequately completed their environmental review processes. In fact, the Board typically checks to ensure that these have been properly accomplished. Your Office of Environmental Analysis is designed to ensure that proper environmental review has been accomplished in order to progress to the project itself. In other words, your jurisdiction does not extend to interfering with substantive and procedural federal and state requirements in order to commence the project over which you have jurisdiction. The Decision is inconsistent with the STB's typical role of verifying other agencies' compliance with applicable environmental laws.

Additionally, the STB's own website provides a succinct overview of the STB's purposes and authority, none of which include usurping a state statutory remedy that does not interfere with your jurisdiction:

The [STB] was created in the ICC Termination Act of 1995 and is the successor agency to the Interstate Commerce Commission. The STB is an economic regulatory agency that Congress charged with resolving railroad rate and service disputes and reviewing proposed railroad mergers. The STB is decisionally independent, although it is administratively affiliated with the Department of Transportation.

The STB serves as both an adjudicatory and a regulatory body. The agency has jurisdiction over railroad rate and service issues and rail restructuring transactions (mergers, line sales, line construction, and line abandonments); certain trucking company, moving van, and non-contiguous ocean shipping company rate matters; certain intercity passenger bus company structure, financial, and operational matters; and rates and services of certain pipelines not regulated by the Federal Energy Regulatory Commission. ..." Section 10101 of the ICCTA expounds upon the rail transportation policy the Act is intended to implement. None of the policies relate to authority over the federal and state environmental prerequisites to major governmental actions.

(<http://stb.dot.gov/stb/about/overview.html>, emphasis added.)

**2. Third party enforcement of CEQA is essential to its core functions.**

The Decision refers to enforcement actions being brought by third parties “under the guise of state law.” (Decision p. 14.) However, California’s Legislature has explicitly provided for such actions because citizen, public agency, and other third party enforcement of CEQA serves important purposes promoted by the Legislature. (*Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376, 392 [“The EIR [environmental impact report] is also intended ‘to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action.’ . . . The EIR process protects not only the environment but also informed self-government.”]) The parties seeking to enforce CEQA in this case include two counties- the Counties of Kings and Kern- and one city- the City of Shafter, as well as numerous private parties. The concerns of local governments and their constituents affected by high speed rail should not be preemptorily overridden by the Board, even if at the behest of a state government that seeks to undermine its own environmental laws for the purpose of expediting its own Project.

The Board’s Decision would defeat the important purposes of public involvement intended by the California Legislature when it enacted CEQA.

**3. For federal-state projects, such as the Project, CEQA and NEPA have been harmonized.**

California modeled CEQA on NEPA. (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 86, fn. 21.) The California Legislature intended then, and still intends now, that state and federal laws should work in harmony, not that NEPA review or other

federal law should displace CEQA state level review. Along these lines, the Office of the President of the United States worked with the California Governor's Office of Planning and Research to develop guidelines for joint implementation of NEPA and CEQA.

("NEPA and CEQA: Integrating State and Federal Environmental Reviews Draft for Public Review and Comment," March 2013, available at [http://www.whitehouse.gov/sites/default/files/nepa\\_and\\_ceqa\\_draft\\_handbook.pdf](http://www.whitehouse.gov/sites/default/files/nepa_and_ceqa_draft_handbook.pdf).)

CEQA plays an important role in federal-state partnerships so should not be displaced. The Decision undermines this partnership with respect to the Project.

**C. A Ruling that CEQA is Preempted by the ICCTA is not Authorized by Federal Law.**

The preemption doctrine is rooted in the Supremacy Clause of the United States Constitution, which provides that the laws of the United States "shall be the supreme Law of the Land" (U.S. Const. art. VI, cl. 2). (*People v. Burlington Northern Santa Fe R.R.* (2012) 209 Cal.App.4th 1513, 1521.) Congressional intent is the touchstone, with the presumption that Congress did not intend to preempt state laws. (*Cipollone v. Liggett Grp., Inc.* (1992) 505 U.S. 504, 516.) Congress must show in the federal statute a "clear and manifest purpose" to preempt state and local law. (*Burlington, supra*, 209 Cal.App.4th at 1522.) Based on respect for state sovereignty, Congress is presumed not to "cavalierly pre-empt state-law causes of action." (*Ibid.*, quoting *Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 485). Preemption provisions thus must be narrowly read to be "consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety." (*Medtronic, supra*, 518 U.S. at 485.) The Decision unnecessarily impinges upon state sovereignty without a clear and unmistakable

Congressional intent within the ICCTA expressly required by the Supremacy Clause (discussed at length in *Nixon v. Mo. Mun. League* (2004) 541 U.S. 125).

**D. The Legislative History of The ICCTA Shows Congress Did Not Intend to Broadly Preempt State Police Power.**

Congress' adoption of the ICCTA was the final step in a two-decade process of economic deregulation of the railroad industry and reflects Congress' concern about the impact of direct economic regulations on the competitive vitality of the industry. The ICCTA was not intended to displace the states' exercise of their traditional police or spending powers. The preemption clause must be read within this statutory framework.

Federal regulation of railroads dates back to 1887 when Congress passed the Interstate Commerce Act to protect shippers from the monopoly power of the railroad industry fraught with market manipulation and rate discrimination. (S. Rep. No. 104-176, at 2 (1995).) The statute thus created the ICC to ensure just and reasonable rates and gave it authority to address such problems. (*Ibid.*) By the 1960's, however, with the rise of other forms of transportation, Congress began to view the regulatory scheme as a threat to the survival of rail transport. (*Id.* at 3; Maureen E. Eldredge, *Who's Driving the Train? Railroad Regulation and Local Control*, 75 U. Colo. L. Rev. 549, 558 (2004).)

After a series of railroad bankruptcies in the 1970's, Congress passed the Staggers Rail Act of 1980, extensively reforming the ICC's authority, allowing increased competition in the rail industry, and deregulating mergers and the abandonment of service lines and operations. (S. Rep. No. 104-176, at 3 (1995); Staggers Rail Act of 1980, Pub. L. 96-448, 94 Stat. 1895.) It also displaced state jurisdiction over economic regulation of rate increases and fuel surcharges and limited state powers over intrastate

rate, classification, rule, or practice. (Carter H. Strickland, Jr., *Revitalizing the Presumption against Preemption to Prevent Regulatory Gaps: Railroad Deregulation and Waste Transfer Stations*, 34 *Ecology L.Q.* 1147, 1160 (2007).)

In 1995, Congress enacted the ICCTA, which abolished the ICC and transferred its remaining powers to the newly created STB. ( ICC Termination Act of 1995, Pub. L. 104-88, 109 Stat. 803.) The Act repealed the historic economic regulatory functions, including tariff filing, rail fare regulation, financial assistance program, and minimum rate regulation. (H.R. Rep. No. 104-311, at 82-83 (1995).)

Most relevant to this petition, the ICCTA reformed the role of the states over economic regulation. Even under the Staggers Act, the states had still engaged, with ICC approval, in some economic regulation of “intrastate rail rates, classifications, rules, and practices.” (Pub. L. 96-448, §216.) The House Report explained that this scheme of ICC approval of state economic regulation was replaced by the ICCTA’s express preemption provision under the proposal: “State certification: Requires that States may only regulate intrastate rail transportation if certified by the ICC. Replaced by direct preemption of State economic regulation of rail transportation.” (H.R. Rep. No. 104-311, at 83, 95-96; Carter H. Strickland, Jr., *supra*, at 1161.)

As enacted, the ICCTA’s sole focus is on the economic regulation of rail carriers, regulating the setting of rates, classifications, rules, and practices by rail carriers (49 U.S.C. §§10701-10747), rail carrier service, use, reporting, and accounting (*id.* §§11101-11164), and consolidation, mergers, and acquisition of control (*id.* §§11321-11328).

Meanwhile, the STB’s role in overseeing rail carrier activity is tightly circumscribed, in contrast to the original role of the ICC. Upon application, the STB has

authority to issue licenses authorizing the construction of new railroad lines, the extension of railroad lines, and the acquisition of a rail line by a non-rail carrier. (49 U.S.C. §10901; *see generally Alaska Survival v. STB* (9th Cir. 2013) 705 F.3d. 1073, 1078.) And the STB may exempt a rail carrier from even these minimal licensing procedures if it finds that compliance is (1) not necessary to satisfy the economic policy objectives of the ICCTA, (2) the proposal is of limited scope, or (3) the licensing process is not necessary to protect shippers. (*Ibid.*)

Other activities, including the upgrading and rehabilitation of rail lines and related facilities, do not fall under the STB’s regulatory authority. (*City of Auburn v. U.S. Gov’t* (9th Cir. 1998) 154 F.3d. 1025, 1033 (*Auburn*)). As Congress explained, “only regulations are retained that are necessary to maintain a ‘safety net’ or ‘backstop’ of remedies to address problems of rates, access to facilities, and industry restructuring.” (H.R. Rep. No. 104-311, at 93.)

These backstop remedies, at 49 U.S.C. sections 11701-11707 and 11901-11908, address STB enforcement authority for statutory violations, spell out the rights and remedies for failure to comply with the ICCTA’s economic regulations (*e.g.*, damage awards for violation of ICCTA regulations or STB orders), and set forth applicable civil and criminal penalties. (*Id.*)

Finally, to ensure the integrity of this regulatory scheme, the statute preempts any conflicting or duplicative state law remedies against rail carriers:

The jurisdiction of the Board over—

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part 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).) Thus, the remedies provided in Part A of the ICCTA (§§10101-11908) are exclusive and preempt all other remedies “with respect to rates, classifications, rules, practices, routes, services, and facilities” for the “regulation of rail transportation.” (49 U.S.C. §10501(b).)

The Conference Report for the ICCTA explained that revised section 10501 retained “the exclusivity of Federal remedies with respect to the regulation of rail transportation” previously adopted in the Staggers Act to assure uniform administration, “while clarifying that *the exclusivity is related to remedies with respect to rail regulation – not State and Federal law generally.*” (H.R. Conf. Rep. 104-422, at 167 (1995), emphasis added.)

In other words, Congress modified the preemption provision already existing in the Staggers Act (accommodating concurrent state jurisdiction over some economic matters, *see* Pub. L. 96-448, § 214) to conform it to the ICCTA’s elimination of the states’ authority over direct economic regulation of rail carriers and to ensure uniform remedies for violations of provisions within the STB’s exclusive jurisdiction over railroad rates, routes, classifications, services, and the like. It did not expand the section’s preemptive effect to the exercise of traditional state and local police powers unrelated to the economic regulation of rail.

The Decision is inconsistent with the purposes of the ICCTA’s preemption clause.

**E. The Decision Would Set a Precedent That Could Lead to the Decline of State Sponsored Railways.**

The Board's Decision must be viewed not just within the context of the California High Speed Rail Authority's project, but also for its precedential effect on other state-proposed rail systems. It is our understanding that a number of states may be considering using their own funds to build, or work in partnership with the federal government and private entities to build, state-sponsored railways. High speed rail projects involving state funding have been proposed in the Midwest, New England, Florida, Texas, Pennsylvania, the Pacific Northwest, Colorado/ New Mexico, and the Southwestern United States. While federal preemption of state law may be desirable in the context of privately proposed and funded rail lines, if preemption by ICCTA is applied further to state-proposed rail lines, states would be unable to control by state laws and regulations the rail lines that they are funding. Soon, states would no longer sponsor or participate in constructing rail lines. Therefore, considering the adverse precedent this Decision would create, causing the demise or decline of state-sponsored railways, we urge you to reconsider it.

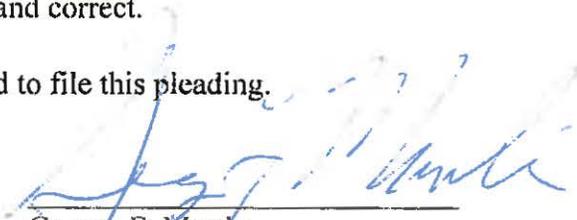
By using its discretion to refrain from issuing an advisory opinion, the Board would best promote comity between local, state, and federal governments. Failing to do so would have the opposite effect. We respectfully request that you reconsider your decision and refrain from issuing such an order.

VERIFICATION

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

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

Executed on 12-30-14



George F. Martin  
Borton Petrini, LLP  
*Attorneys for Petitioner.*  
*Dignity Health*

VERIFICATION

I declare under penalty of perjury that the factual statements made in the foregoing  
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Further, I certify that I am qualified and authorized to file this pleading.

Sincerely,

Executed on Dec. 29, 2014



Douglas P. Carstens

Michelle Black

*Attorneys for County of Kings, Citizens  
for High Speed Rail Accountability, and  
Kings County Farm Bureau*

**VERIFICATION**

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

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

Executed on 10.29.14

A handwritten signature in blue ink, appearing to be "James Arnone", written over a horizontal line.

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**VERIFICATION**

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

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

Executed on December 26, 2014



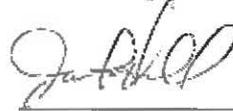
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**VERIFICATION**

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

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

Executed on December 24, 2014



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*Attorney for Community Coalition on High-Speed Rail ("CC-HSR"), Transportation Solutions Defense and Education Fund ("TRANSDEF"), and California Rail Foundation ("CRF")*

I hereby certify that I have served all parties of record in this proceeding with this document by United States mail to the addresses as follows:

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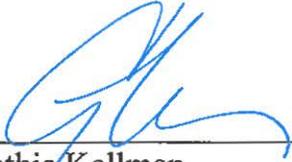
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