IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

TOWN OF ATHERTON, et al., Plaintiffs and Appellants, **v.** **CALIFORNIA HIGH-SPEED RAIL AUTHORITY,** Defendant and Respondent.	Case No. C070877

Sacramento County Superior Court
Case No. 34-2008-80000022-CUWMGDS
Case No. 34-2010-80000679-CUWMGDS
Honorable Michael P. Kenny, Judge

RESPONDENT'S ANSWER TO LETTER BRIEF OF AMICUS CURIAE PRESERVE OUR HERITAGE

KAMALA D. HARRIS
Attorney General of California
JOHN A. SAURENMAN
Senior Assistant Attorney General
DANIEL L. SIEGEL
Supervising Deputy Attorney General
DANAE J. AITCHISON, SBN 176428
JESSICA E. TUCKER-MOHL, SBN 262280
Deputy Attorneys General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 322-5522
Fax: (916) 327-2319
E-mail: Danae.Aitchison@doj.ca.gov
Attorneys for Respondent
California High-Speed Rail Authority

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INTRODUCTION

Amicus curiae Preserve Our Heritage ("POH") argues that the Interstate Commerce Commission Termination Act (the "ICCTA") does not preempt a state-law remedy under the California Environmental Quality Act ("CEQA") in this case. POH argues that the California High-Speed Rail Authority ("Authority") is a state agency subject to the State's expansive sovereign powers, and preemption would improperly interpose federal authority on the State's sovereign prerogative over its internal affairs. In POH's view, the ICCTA governs only private railroads, and Congress did not intend to govern state-owned railroads or to infringe on alleged legislative mandates that the Authority comply with CEQA.

The Authority agrees that under principles of federalism, the State of California is vested with expansive sovereign power to organize itself and choose its internal controls. Nevertheless, the ICCTA provides for uniform federal regulation of the interstate rail network and under *City of Auburn*, the ICCTA preempts application of state environmental review laws and remedies to railroads that are part of the interstate rail network. No authority supports POH's claim that the ICCTA treats privately-owned railroads differently than state-owned railroads. In fact, the U.S. Supreme Court has held that the federal scheme of interstate railroad regulation applies equally to state-owned railroads and privately-owned railroads.

Furthermore, POH argues that in Proposition 1A, the Legislature required the Authority to comply with CEQA and therefore preemption would invade state sovereignty. This argument fails because the premise is wrong. Proposition 1A does not impose any CEQA compliance requirement at the program environmental impact report ("EIR") level, which is the only issue in this case.

POH's argument related to the market participant exception to preemption misapplies the exception: just because the Authority has made a general policy decision on a train route to focus future environmental studies, informed by a CEQA document, does not mean the market participant exception applies because the basis of the current lawsuit is CEQA, not the Authority's conduct in selecting a route. Further, it is the State that must invoke the market participant exception, which it has not done here. The market participant exception simply does not fit the facts of this case.

Finally, POH suggests that federal preemption of a CEQA remedy in this case would not be sufficiently protective of the environment. This argument ignores the fact that the National Environmental Policy Act ("NEPA") will continue to apply to the high-speed train project, including NEPA mitigation requirements. The state, in its sovereign capacity, can and will continue to develop and implement the high-speed train project in a manner that protects and enhances California's environment.

ARGUMENT

I. ALTHOUGH THE STATE HAS EXPANSIVE SOVEREIGN POWERS OVER THE HIGH-SPEED TRAIN SYSTEM AND ITS DEVELOPMENT, THE ICCTA PREEMPTS A CEQA REMEDY IN THIS CASE.

POH's principal argument against the ICCTA's preemption of a CEQA remedy in this case is that the State has sovereign authority to establish its internal organization, the powers of its state agencies, and its own internal controls. (POH Brief, pp. 4-8; ICC Termination Act of 1995, Pub.L. No. 104-88 (Dec. 29, 1995) 109 Stat. 803, codified at 49 U.S.C. § 10101, et seq.; Pub. Resources Code, § 21000 et seq.) POH argues that

CEQA is a component of the State's sovereign "internal control," and does not represent "external regulation" of the type prohibited in the ICCTA, and that Congress did not clearly articulate an intention to preempt such internal controls. (POH Brief, pp. 4-8.) POH bases its argument on the claim that the State has required the Authority, as a state agency, to comply with CEQA in making its discretionary decisions related to the high-speed train project. (*Id.* at pp. 4-5.) POH is incorrect because although the Authority has sovereign power to plan, review, develop, and build its high-speed train system, CEQA remedies are nevertheless preempted.

A. Consistent With Principles of Federalism, the Authority Has Sovereign Power to Plan, Develop, and Build Its High-Speed Train System, but the ICCTA Prevents a CEQA Remedy Enforced by a Third Party.

At the outset, the Authority agrees that the State of California is sovereign, and possesses expansive sovereign powers to organize itself through state agencies and to establish internal priorities and controls. (*Gregory v. Ashcroft* (1991) 501 U.S. 452, 457-58 [discussing "constitutional scheme of dual sovereigns" as embodied in 10th Amendment to U.S. Constitution].) The Supremacy Clause provides that Congress may legislate even in areas "traditionally regulated by the States." (*Id.* at p. 460 [discussing Art. VI, cl.2 of U.S. Constitution].) Any such federal legislation with potential to alter the constitutional state/federal balance must be based, however, on Congressional intent that is "unmistakably clear in the language of the statute." (*Id.* citing *Atascadero State Hospital v. Scanlon* (1985) 473 U.S. 234, 242; see also *Parker v. Brown* (1943) 317 U.S. 341, 351.)

Exercising its sovereign powers, the California Legislature established the Authority in 1996 as a response to the state's growing transportation needs and the inability of existing freeways and airports to meet future transportation demand. (Pub. Util. Code, § 185000 et seq.; *id.*, §§ 185010, 185020.) The Legislature charged the Authority with developing and implementing intercity high-speed rail service across the state. (*Id.*, § 185030.) Between 2000 and 2010, the Authority complied with CEQA for its planning determinations about general high-speed train routes by first completing the Statewide Program EIR in 2005, then the Bay Area to Central Valley Final Program EIR in 2008, and the Revised Final Program EIR at issue in this case in 2010. (See SAR002598-99; SAR000150-51; SAR000003-7.)[1] The Legislature placed the Authority within state government, under the State Transportation Agency. (Gov. Code, § 13975; Pub. Util. Code, § 185020, subd. (a).) All of these actions illustrate the State's broad sovereign powers to prioritize a high-speed train system as a new form of transportation, to create a state agency to undertake planning and implementation, and to undertake programmatic environmental review.[2] The Authority will continue to exercise its sovereign powers as a state agency as it moves forward with the high-speed train.

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[1] This Answer includes citations to the administrative record as follows: the original two-disk record is cited with a leading letter followed by the page number (e.g., A000001), and the 2010 Supplemental Administrative Record is cited as "SAR" followed by the page number.

[2] POH cites *Nixon v. Missouri Municipal League* (2004) 541 U.S. 125 for the point that a federal law cannot interpose preemptive federal authority between a state and its political subdivisions, where the state has specifically directed its municipalities to take or refrain from certain actions. (POH Brief, p. 7.) The case provides no guidance on the matter at issue here: whether the ICCTA preempts a generally applicable state

(continued...)

The Authority's concurrence with POH's discussion of state sovereignty ends there. Although the Authority's sovereign powers as a state agency are both broad and essential to the success of the high-speed train project, the Authority also recognizes the STB has decided (over the Authority's argument to the contrary) that the project is part of the interstate rail network and therefore in interstate commerce. (*California High-Speed Rail Authority – Construction Exemption,* No. FD 35724, 2013 WL 3053064, at *7-10 (S.T.B. June 13, 2013).) The ICCTA applies to the high-speed train project and, pursuant to 49 U.S.C. section 10501(b), establishes exclusive remedies. The Ninth Circuit in *City of Auburn*, concluded that in the ICCTA, Congress clearly identified that state-law remedies under a state environmental review law are not available to a third party. (*City of Auburn v. United States Government* (9th Cir. 1998) 154 F.3d 1025, 1031 ["*City of Auburn*"]; *City of Encinitas v. North San Diego County Transit Development Bd.* (S.D. Cal. 2002) 2002 WL 34681621, at *4 ["*City of Encinitas*"].)[3]

(...continued)
environmental review law and remedies thereunder. The Authority is a *state* agency that is part of *state* government, and it is exercising sovereign discretion to enter the interstate rail network and have the high-speed train project be subject to the ICCTA. (Gov. Code, § 13975.) The Authority is not, as in *Nixon*, a municipal corporation seeking to use federal law to avoid a state's exercise of its sovereign power to decide whether it or its political subdivisions will enter into a form of interstate commerce. (*Nixon, supra*, 541 U.S. at p. 140; *Board of Supervisors v. Local Agency Formation Com.* (1992) 3 Cal.4th 903, 914 [state is sovereign, but cities and counties are not].)

[3] Contrary to POH's view, the Ninth Circuit had no trouble finding a clear articulation of Congressional intent in the plain language of 49 U.S.C. section 10501(b) to eliminate state regulation of railroads in interstate commerce. (*City of Auburn, supra*, 154 F.3d at p. 1031; POH Brief, p. 7.)

POH attempts to distinguish *City of Auburn* and the other cases the Authority has cited in its Supplemental Letter brief on the ground that all of them involved a *private* railroad. (POH Brief, pp. 8-9.) POH reasons that such cases involved external regulation by a public entity on a private railroad, rather than a public railroad's own internal controls where federal preemption would interfere with state sovereignty. (*Id.*, pp. 8-9.) POH's attempt to create a distinction in the ICCTA for enforcement of state environmental review laws against publicly-owned railroads has no basis in the law.

As the Authority has already explained in response to amicus curiae Citizens for California High-Speed Rail Accountability ("CCHSRA"), in the ICCTA Congress did not distinguish between publicly-owned and privately-owned railroads. (See Respondent's Answer to Letter Brief of Amicus Curiae Citizens for California High-Speed Rail Accountability, §I.C, pp. 10-13.) Nothing in the plain language of the ICCTA suggests a distinction for railroads in interstate commerce based on the nature of their ownership. (*Id.* at pp. 10-11.) The STB makes no such distinction and regulates other state-owned railroads under the ICCTA. (*Id.* at pp. 11-12.) *City of Auburn* controls in this case, and the ICCTA preempts a CEQA remedy to require further CEQA compliance for the program EIR. (*City of Auburn, supra*, 154 F.3d at pp. 1029, 1031.)

Importantly, the U.S. Supreme Court has declined to draw the distinction POH advocates between privately-owned and state-owned railroads operating in interstate commerce. (*California v. Taylor* (1957) 353 U.S. 553, 566-67 [Congress intended Railway Labor Act "to apply to any common carrier by railroad engaged in interstate transportation, whether or not owned or operated by a State."]; *Hilton v. South Carolina*

Public Railways Com'n (1991) 502 U.S. 197, 203 [in Federal Employers' Liability Act case, U.S. Supreme Court relied on *stare decisis* and declined to "throw into doubt" its prior decisions "holding that the entire federal scheme of railroad regulation applies to state-owned railroads."]; see also *Interstate Commerce Commission v. Detroit, G.H. & M. Ry. Co.* (1897) 167 U.S. 633, 642 [state-owned railroad subject to Interstate Commerce Law].) Accordingly, although the Authority acts in its sovereign capacity to develop the high-speed train system, the system will be part of the interstate rail network and the Authority is subject to the ICCTA. In this specific and narrowly defined arena of interstate commerce by a state-owned railroad, the State's sovereignty as expressed in permitting third party enforcement of its environmental review law (CEQA) yields here under the Supremacy Clause to the ICCTA. (See *California v. Taylor*, *supra*, 353 U.S. at p. 568.)

POH also suggests *City of Encinitas* is distinguishable, despite being a public railroad, because the case involved a publicly-owned railroad seeking relief from third-party CEQA enforcement rather than relief from its own internal CEQA obligations. (POH Brief, p. 9.) This reading of *City of Encinitas* is wholly inaccurate because, as here, that case involved a third-party CEQA enforcement claim and a preemption defense. (*City of Encinitas*, *supra*, 2002 WL 34681621, at *1-4.) The City of Encinitas filed an action against the North San Diego County Transit Development Board ("Transit Board") in state court alleging violations of CEQA, the California Coastal Act, and public utilities code provisions related to a regional transportation plan. (*Id.* at *1.) After removing the case to federal court, the Transit Board contended, in response to the City of Encinitas' motion to remand, that the ICCTA preempted the state law claims, including the CEQA claim. (*Id.* at *1-2.) The district court agreed, and dismissed the

case. (*Id.* at *4.) *City of Encinitas* is therefore identical to this case because it involved an attempt by a third party to enforce a CEQA remedy on a publicly-owned railroad in interstate commerce. This is the very type of "external regulation" that POH impliedly concedes the ICCTA preempts. (POH Brief, p. 9.)

B. Proposition 1A Does Not Require Further Programmatic CEQA Compliance and Therefore Does Not Represent a Sovereign Internal Control That Provides a CEQA Remedy in This Case.

An additional basis to reject POH's argument regarding sovereignty is that it is premised on a faulty representation of Proposition 1A [the "Bond Act"] and its relationship to the current case about the Revised Final Program EIR. (Sts. & Hy. Code, § 2704, et seq.) POH argues that California's Legislature has required the Authority to comply with state environmental laws such as CEQA, citing Streets and Highways Code section 2704.08, subdivision (c)(2)(K), a provision in the Bond Act. (POH Brief, pp. 4-5, 7.) POH depicts this requirement not as regulation, but as a purely internal control on the Authority's behavior. (*Id.* at p. 9.) The problem with POH's argument is that section 2704.08, subdivision (c)(2)(K), does not mandate any further CEQA compliance for the program-level EIR at issue in this case.

As explained in the Authority's answer brief to CCHSRA, section 2704.08, subdivision (c)(2)(K), requires the Authority to include, identify, or certify, in a funding plan it must submit to the Governor and the Legislature before seeking an appropriation, the following:

> The authority has completed all necessary *project level* environmental clearances necessary to proceed to construction.

(Sts. & Hy. Code, § 2704.08, subd. (c)(2)(K); emphasis added.) This provision is plainly focused on *project-level* environmental review. It has no relevance to this case, involving a CEQA challenge to the Revised Final *Program* EIR. (See *In re Bay-Delta, etc.* (2008) 43 Cal.4th 1143, 1169-70; see also Respondent's Opposition to Amicus Curiae Preserve Our Heritage's Request for Judicial Notice, pp. 1-3 [opposing judicial notice of alleged legislative history of SB 1029 as not relevant to determination of plain meaning of previously enacted Streets and Highways Code section 2704.08, subdivision (c)(2)(K)].) Section 2704.08, subdivision (c)(2)(K), therefore cannot be interpreted as "an internal control, compelled by the state legislature" to require the Authority to revise and recirculate the *program* EIR. (POH Brief, p. 9.)[4]

[4] Although not necessary for the resolution of this case about a program-level EIR, section 2704.08, subdivision (c)(2)(K), on its face does not mandate CEQA compliance for project-level environmental review. This provision refers to "necessary" environmental clearance, indicating that the Bond Act requires whatever environmental clearance is "necessary" under the law. (Sts. & Hy. Code, § 2704.08, subd. (c)(2)(K).) POH has requested judicial notice of alleged legislative history that POH claims shows legislative intent that section 2704.08, subdivision (c)(2)(K), requires CEQA compliance. As the Authority has explained in its opposition to POH's judicial notice request, the item it asks the Court to judicially notice, the "Leno Letter," is not legislative history of section 2704.08, subdivision (c)(2)(K). The Leno Letter addresses the Legislature's funding contained in SB 1029, which post-dates the passage of section 2704.08, subdivision (c)(2)(K), by nearly four years. Even if the Leno Letter could somehow be interpreted as addressing section 2704.08, subdivision (c)(2)(K), which it does not, the Leno Letter could still only be characterized as post-hoc explanation. (See Respondent's Opposition To Amicus Curiae Preserve Our Heritage's Request for Judicial Notice, pp. 2-3.)

II. THE MARKET PARTICIPANT EXCEPTION DOES NOT APPLY BECAUSE THE STATE HAS NOT INVOKED IT, AND BECAUSE THE BASIS OF THIS LAWSUIT IS CEQA, NOT MARKETPLACE ACTIVITY.

POH argues, relying on the CCHSRA Letter Brief, that the effect of federal preemption in this case is limited because of the market participant exception. (POH Brief, pp. 11-13.) The market participant exception allows states to develop rules or standards for the state's proprietary interactions with the marketplace that might otherwise be preempted by a federal statutory regime if achieved through state law or regulation. (See *Bldg. & Const. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.* (1993) 507 U.S. 218, 231-32 ["*Boston Harbor*"].) The market participant exception is for the state to invoke; it is not for use by third parties. (See, e.g., *Cardinal Towing & Auto Repair, Inc. v. City of Bedford, Tex.* (5th Cir. 1999) 180 F.3d 686, 690-91.) The market participation exception is a red herring: this factual situation is unlike that of the cases in which a market participant exception has been identified. This issue has been addressed extensively in the Authority's Answer to the amicus curiae brief filed by CCHSRA, which is incorporated herein by reference. (See Respondent's Answer to Letter Brief of Amicus Curiae CCHSRA, §II, pp. 16-24.)

POH argues that the Authority's position presents a paradox, in that were federal preemption to apply, it would apply across the board to all aspects of the Authority's decision-making with respect to the high-speed train project and "complete[ly] federal[ize]" the project. (POH Brief, p. 12.) This argument has no traction here; this case concerns the Authority's preparation of a Program EIR and defense of that Program EIR under CEQA. The Authority has simply argued that here, the market participant

exception cannot be used to force the Authority to take actions that, in its discretion, it has opted not to pursue. But the Authority has a broad range of proprietary powers and, going forward, remains free to assert the market participant exception to federal preemption in exercising its proprietary judgment and discretion.

III. THE AUTHORITY IS COMMITTED TO IMPLEMENTING THE HIGH-SPEED TRAIN PROJECT IN A MANNER THAT PROTECTS AND ENHANCES CALIFORNIA'S ENVIRONMENT.

POH argues that without CEQA, there will be less environmental protection applicable to the high-speed train project because NEPA has different requirements for mitigation than CEQA. (POH Brief, pp. 10-11.)[5] Although a CEQA remedy is preempted with respect to the Program EIR in this case, the high-speed train project has been, and will continue to be subject to NEPA and NEPA's requirement for preparation of an environmental impact statement ("EIS"). (See 42 U.S.C. § 4321, et seq.; *id.* at § 4332 [NEPA required as part of any "major federal action"]; 40 C.F.R. §§ 1500.1 et seq. [NEPA regulations]; C021384-035294 [2005 Statewide High-Speed Train Program EIR/EIS]; B003835-008240 [2008 Bay Area to Central Valley High-Speed Train Program EIR/EIS]; *California High-Speed Rail Authority – Construction Exemption*, *supra*, 2013 WL 3053064, at *14, 17-18 [discussing extensive EIS process for high-speed train project, and NEPA requirements going forward]; 49 C.F.R. §§ 1105.1 et seq. [STB regulations for application of NEPA].) The

[5] POH further argues that the ICCTA's preemption provisions undermine "specific environmental preconditions" of the Bond Act. (POH Brief, pp. 10-11.) As discussed above in section I.B, the Bond Act does not require further program-level CEQA compliance.

high-speed train project will also be subject to other federal environmental laws. (See *DesertXpress Enterprises, LLC – Petition for Declaratory Order*, No. FD 34914, 2007 WL 1833521, at *3 (S.T.B. June 25, 2007) [federal environmental statutes such as NEPA, the Clean Air Act, and Clean Water Act apply where CEQA is preempted].)

POH is incorrect to suggest that NEPA is toothless and that following federal preemption of CEQA, mitigation of environmental impacts will be lacking. (POH Brief, pp. 10-11.) NEPA's mitigation requirements, as well as state and federal permitting requirements, have applied and will continue to apply to the high-speed train project. (40 C.F.R. § 1502.16(h) [requirements to discuss mitigation in EIS; *California High-Speed Rail Authority – Construction Exemption, supra*, 2013 WL 3053064, at *17-18].) Here, for example, in adopting the 2008 Bay Area to Central Valley Program EIS/EIR, the Federal Railroad Administration (FRA) as NEPA lead agency fully adopted each of the mitigation measures that the Authority adopted under CEQA. (SAR007085-007308, 007086 [FRA Record of Decision]; SAR007153-7170 [Appendix A, Mitigation Monitoring and Reporting Program]; B003869 [FRA is lead agency].) NEPA provides for judicial review and remedies, including substantive review of whether the mitigation measures contained in an EIS "ensure that environmental consequences have been fairly evaluated". (*Alaska Survival v. Surface Transp. Bd.* (9th Cir. 2013) 705 F.3d 1073, 1088 citing *City of Carmel-By-The-Sea v. U.S. Dep't of Transp.* (9th Cir. 1997) 123 F.3d 1142, 1154; see also *Cities of Auburn and Kent, WA – Petition for a Declaratory Order- Burlington Northern Railroad Company – Stampede Pass Line,* No. FD 33200, 1997 WL 362017 at *3, 6 (S.T.B. June 25, 2007) [discussing NEPA review and availability of judicial review for parties dissatisfied with

outcome of NEPA process].) Furthermore, the NEPA process also includes significant opportunities for public participation. (See *DesertXpress*, 2007 WL 1833521, at *3.)

As POH indicates, the STB in its June 13, 2013 decision on the Merced to Fresno section of the high-speed train project discussed the current CEQA/NEPA process. (POH Brief, p. 7.) Nothing about the STB's discussion precludes the application of federal preemption here. In the future, the Authority may, in its sovereign capacity, voluntarily choose to engage in further environmental review related to the high-speed train project, including the adoption of mitigation measures. (See *supra*, § I.) The Authority is committed to implementing the high-speed train project in a manner that protects and enhances California's environment, notwithstanding that CEQA remedies are preempted here. (*City of Auburn, supra*, 154 F.3d at pp. 1029, 1031.)

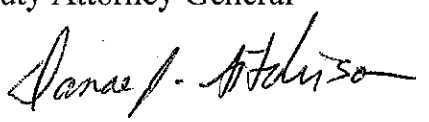
CONCLUSION

POH's arguments that the ICCTA does not preempt a CEQA remedy in this case largely duplicate those of fellow amicus curiae CCHSRA. As discussed above and also in response to CCHSRA, the ICCTA does not distinguish between state- and privately-owned railroads as part of the interstate rail network. The Authority has broad sovereign powers as a state agency, and can undertake marketplace activity as it sees fit. But in this case, the uniform regulation of the ICCTA, with which the Authority must now comply, preempts a CEQA remedy for the Program EIR.

Dated: November 8, 2013

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
JOHN A. SAURENMAN
Senior Assistant Attorney General
DANIEL L. SIEGEL
Supervising Deputy Attorney General
JESSICA E. TUCKER-MOHL
Deputy Attorney General



DANAE J. AITCHISON
Deputy Attorney General
Attorneys for Respondent
California High-Speed Rail Authority

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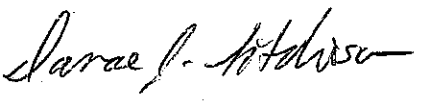
CERTIFICATE OF COMPLIANCE

I certify that the attached Respondent's Answer to Letter Brief of Amicus Curiae Preserve Our Heritage uses a 13 point Times New Roman font and contains 3,709 words based on the word count function in Microsoft Word, exclusive of caption page, tables, and this certification.

Dated: November 8, 2013

KAMALA D. HARRIS
Attorney General of California



DANAE J. AITCHISON
Deputy Attorney General
Attorneys for Respondent
California High-Speed Rail Authority

DECLARATION OF SERVICE

Case Name: ***Town of Atherton et al. v. California High-Speed Rail Authority***

Case No.: **Court of Appeal, Third Appellate District Case No. C070877**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **November 8, 2013**, I served the attached **RESPONDENT'S ANSWER TO LETTER BRIEF OF AMICUS CURIAE PRESERVE OUR HERITAGE** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows,
(and also submitted electronically to Stu@stuflash.com; California Supreme Court):

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on
November 8, 2013, at Sacramento, California.

Michelle Fowler
Declarant

Signature

SA2012105991
31813217

SERVICE LIST

Stuart M. Flashman
Law Offices of Stuart M. Flashman
5626 Ocean View Drive
Oakland, CA 94618-1533
AND Served Via E-Mail to: Stu@stuflash.com
Counsel for Town of Atherton, et al., Plaintiff and Appellant

Raymond L. Carlson
Griswold LaSalle Cobb Dowd & Gin, LLP
111 E. Seventh Street
Hanford, CA 93230
Counsel for Citizens for California High Speed Rail Authority Accountability, Amicus Curiae for Appellant

Colleen J. Carlson
Kings County Counsel's Office
1400 W. Lacey Boulevard, Building 4
Hanford, CA 93230
Counsel for County of Kings, Amicus Curiae for Appellant

Andrew Michael Heglund
Office of the City Attorney
1600 Truxton Avenue, 14th Floor
Bakersfield, CA 93301
Counsel for Bakersfield, a Charter City and Political Subdivision of the State of California, Amicus Curiae for Appellant

Oliver W. Wanger
Wanger Jones Helsley PC
265 E. River Park Circle, Suite 310
Fresno, CA 93720
Counsel for Preserve Our Heritage, Amicus Curiae for Appellant

Douglas P. Carstens
Chatten-Brown & Carstens
2200 Pacific Coast Highway, Suite 318
Hermosa Beach, CA 90254
Counsel for John Van De Kamp, et al., Amicus Curiae for Appellant;

Kevin M. Fong
Pillsbury Winthrop Shaw Pittman
P.O. Box 2824
Four Embarcadero Center, 22nd Floor
San Francisco, CA 94126-2824
Counsel for Union Pacific Railroad Company, Amicus Curiae for Appellant

Douglas P. Carstens
Chatten-Brown & Carstens
2200 Pacific Coast Highway, Suite 318
Hermosa Beach, CA 90254
Counsel for Friends of Eel River, et al., Amicus Curiae for Appellant

Honorable Michael Kenny
c/o Clerk of Court, Dept. 31
Sacramento County Superior Court
720 Ninth Street
Sacramento, CA 95814

California Supreme Court
350 McAllister Street, Room 1295
San Francisco, CA 94102
(Electronically)