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VIA HAND DELIVERY

October 9, 2014

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

Re: STB Finance Docket No. 35861, California High-Speed Rail Authority – Petition for Declaratory Order

Dear Ms. Brown:

Enclosed for filing in the above-referenced docket are the original and ten copies of the Petition for Declaratory Order of California High-Speed Rail Authority. Also enclosed is a check in the amount of $1,400 for the filing fee.

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

Respectfully submitted,

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

KMS/mes
enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35861

CALIFORNIA HIGH-SPEED RAIL AUTHORITY

PETITION FOR DECLARATORY ORDER

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Dated: October 9, 2014

EXPEDITED CONSIDERATION REQUESTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35861

CALIFORNIA HIGH-SPEED RAIL AUTHORITY

PETITION FOR DECLARATORY ORDER

Petitioner, California High-Speed Rail Authority ("Authority") hereby respectfully petitions the Surface Transportation Board ("Board") for a declaratory order pursuant to its discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721. The Board has authorized construction of the Authority's 114-mile high-speed passenger rail line between Fresno and Bakersfield, CA (the "Fresno-Bakersfield HST Segment"). That construction is impending. State-law-based lawsuits pending in California state court seek a court order stopping that Board-authorized construction. Accordingly, a Board declaration is ripe now because there is an actual issue in controversy – a conflict: the lawsuits seek a court remedy stopping the impending construction the Board has authorized. The question requiring declaration is whether such a remedy is available or whether 49 U.S.C. § 10501(b) of the ICC Termination Act ("the ICCTA") preempts such a remedy.

BACKGROUND

The STB has jurisdiction over the construction and operation of the Authority's planned high-speed passenger rail system (the "Project"). On March 27, 2013, the Authority filed a Petition for Exemption under 49 U.S.C. § 10502, from the prior approval requirements of 49 U.S.C. § 10901, for the construction by the Authority of a dedicated high-speed passenger rail segment between Merced, CA and Fresno, CA. Concurrently, the Authority filed a Motion to Dismiss the Petition for lack of jurisdiction, arguing that the Project did not require STB approval. In a decision served April 18, 2013, the Board denied the Motion to Dismiss (thereby asserting jurisdiction over the entire Project) and indicated that it would set forth its reasons for denial of the Motion to Dismiss and address the petition for exemption in a subsequent decision.[1] In a decision served June 13, 2013, the Board granted the petition for exemption for construction of the Merced-Fresno HST segment and explained that it had jurisdiction over the Project because the Authority's planned high-speed passenger rail system "would have extensive interconnectivity with Amtrak, which has long provided interstate passenger rail service, and is therefore part of the interstate rail network." *California High-Speed Rail Authority—Construction Exemption—In Merced, Madera and Fresno Counties, Cal.*, STB FD No. 35724, slip op. at 12 (STB Served June 13, 2013) (citations omitted).

On September 26, 2013, the Authority filed a Petition for Exemption under 49 U.S.C. § 10502, from the prior approval requirements of 49 U.S.C. § 10901, for the

[1] *California High-Speed Rail Authority—Construction Exemption—In Merced, Madera and Fresno Counties, Cal.*, STB FD No. 35724 (STB Served April 18, 2013).

construction by the Authority of the Fresno-Bakersfield HST Segment.

On May 6-7, 2014, the Authority approved an alignment and other facilities for the Fresno-Bakersfield HST Segment, and also certified a final project environmental impact report/environmental impact statement (EIR/EIS) pursuant to the California Environmental Quality Act ("CEQA"). On June 5-6, 2014, seven lawsuits were filed against the Authority, challenging the Authority's compliance with CEQA (the "Lawsuits") with respect to the Fresno-Bakersfield HST Segment.[2] The Lawsuits plead for preliminary and permanent injunctive relief under CEQA (the "CEQA Injunctive Remedies"), in the form of court order precluding the Authority from proceeding with construction on the Fresno-Bakersfield HST Segment.[3]

In a decision effective on August 27, 2014, the STB exempted construction of the Fresno-Bakersfield HST Segment from the prior approval requirements of 49 U.S.C § 10901, subject to certain environmental and historic preservation conditions.[4]

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[2] *Coffee-Brimhall LLC v. California High-Speed Rail Authority* (Case No. 34-2014-80001859); *County of Kings, et al. v. California High-Speed Rail Authority* (Case No. 34-2014-80001861) (makes no distinction between preliminary or permanent injunctive relief); *County of Kern v. California High-Speed Rail Authority* (Case No. 34-2014-80001863); *First Free Will Baptist Church of Bakersfield v. California High-Speed Rail Authority* (Case No. 34-2014-80001864); *Dignity Health v. California High-Speed Rail Authority* (Case No. 34-2014-80001865); *City of Bakersfield v. California High-Speed Rail Authority* (Case No. 34-2014-80001866); *City of Shafter v. California High-Speed Rail Authority* (Case No. 34-2014-80001908). Each of the lawsuits is currently in the Superior Court for the State of California, Sacramento County. No environmental organization filed any of these lawsuits. No environmental organization personally appeared at the Authority's May 6-7, 2014 final public meeting claiming the EIR/EIS document was inadequate or faulty. Subsequently, the Federal Railroad Administration ("FRA") and the Board approved the EIR/EIS document under the National Environmental Policy Act ("NEPA") as having taken the requisite "hard look" at the potential environmental impacts of the project and recommended environmental impact avoidance, minimization and mitigation measures.

[3] Coffee-Brimhall Petition, Prayer, ¶ 5; County of Kings, et al., Petition, Prayer, ¶ 2; County of Kern Petition, ¶¶ 173-178 and Prayer, ¶¶ 5-6; First Free Will Baptist Church of Bakersfield Petition, ¶¶ 33-34 and Prayer, ¶ 5; Dignity Health Petition, ¶¶ 32-33 and Prayer, ¶ 5; City of Bakersfield Petition, ¶¶ 32-33 and Prayer, ¶ 5; City of Shafter Petition, Prayer, ¶ 1(e).

[4] *California High-Speed Rail Authority—Construction Exemption—In Fresno, Kings, Tulare, and Kerns Counties, Cal.*, STB FD No. 35724 (Sub-No. 1) (STB Served August 12, 2014) ("*Fresno-Bakersfield Decision*").

With $3.48 billion in federal funding ($2.55 billion of which is time-limited stimulus funding[5]), matched with state funds, and STB construction authorizations, the Authority has commenced work on the first portion of the high-speed rail system in the Central Valley.

DECLARATORY RELIEF IS APPROPRIATE

The Board has discretion to issue declaratory judgments to eliminate controversy and remove uncertainty. 5 U.S.C. § 554(e); 49 U.S.C. § 721. The Board has used its discretion to issue declaratory judgments in cases where there is a question regarding the scope of ICCTA preemption. *Grafton & Upton Railroad Company—Petition for Declaratory Order*, STB Finance Docket No. 35779, slip op. at 4 (STB Served Jan. 27, 2014); *DesertXpress Enterprises, LLC—Petition for Declaratory Order*, STB Finance Docket No. 34914, slip op. at 3 (STB Served June 27, 2007) ("*DesertXpress*"); *Cities of Auburn and Kent, WA – Petition for Declaratory Order – Burlington Northern Railroad Company – Stampede Pass Line*, 2 S.T.B. 330 (1997), *aff'd sub nom. City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998). Petitioners in the Lawsuits have the right to file a motion for a preliminary injunction at any time, including in connection with or related to a case management conference scheduled for November 21, 2014. A preliminary injunction would delay or prevent the construction the STB has authorized. A controversy therefore exists. A Board declaration is appropriate here to eliminate this controversy and remove uncertainty regarding the availability of the

[5] This funding was authorized by the American Recovery and Reinvestment Act of 2009 ("ARRA"); the funding must be expended by September of 2017 or else is lost. 31 U.S.C. § 1552(a).

CEQA Injunctive Remedies with respect to construction of the Fresno-Bakersfield HST Segment.

ARGUMENT

Declaratory Relief Regarding The Availability Of The CEQA Injunctive Remedies With Respect To Construction Of The Fresno-Bakersfield HST Segment Is Appropriate

The Authority is in the process of implementing and/or procuring construction contracts for a majority of the Fresno-Bakersfield HST Segment. A contract for a portion of that Segment has already been awarded. The CEQA Injunctive Remedies sought in the Lawsuits, if granted by the state court, would delay or prevent that construction.

A. The Board Has Exclusive Jurisdiction Over Construction Of Rail Lines Such As The Fresno-Bakersfield HST Segment

The jurisdiction of the Board over—

> (1) transportation by rail carriers, and the remedies provided in this part with respect to... 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). "The power to authorize the construction of rail lines and the power to authorize railroads to operate over them has been vested exclusively in the Board by section 10901 of the ICCTA." *King County, WA—Petition for Declaratory Order—Burlington Northern R.R.—Stampede Pass Line*, 1 S.T.B. 731, 734 (1996). "Indeed,

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." *Id.* at 736. Moreover, in the parallel context of railroad abandonments under Interstate Commerce Act, the high court has interpreted the ICC's exclusive and plenary authority to rule on line abandonments to be so comprehensive that allowing state-law claims over abandonments the STB has authorized would be at odds with the uniformity Congress sought with the Act, and was therefore preempted. *Chicago and North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 320 (1981).

B. The STB Has Held That The ICCTA Preempts CEQA, Including Injunctive Remedies

The STB has previously held that the ICCTA preempts CEQA[6] with respect to the construction of a rail line subject to STB jurisdiction. Recently, in *DesertXpress,* the petitioner asked the Board for a declaratory judgment regarding whether construction of a passenger rail line that would be subject to STB jurisdiction was subject to CEQA. *DesertXpress*, slip op. at 2. In the resulting Declaratory Order, the Board found that it had exclusive jurisdiction over "the planned new track, facilities and operations" and that CEQA was per se preempted. *Id.* at 4.[7]

Previously, in *North San Diego County Transit Dev. Bd – Petition for*

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[6] CEQA was modeled on the federal National Environmental Policy Act ("NEPA"), *No Oil, Inc. v. City of Los Angeles*, 13 Cal. 3d 68, 86 n.21 (1974), with which the Board is familiar. Generally speaking, the goals of and process involved in NEPA and CEQA are very similar. *Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 247, 260-261 (1972).

[7] More broadly, courts and the STB have held that state laws that could be used to deny a railroad the ability to proceed with activities that the Board has authorized are categorically preempted regardless of the context. *Adrian and Blissfield R.R. Co. v. Blissfield*, 550 F.3d 533, 540 (6th Cir. 2008) (internal citations omitted).

Declaratory Order, STB FD No. 34111, 2002 WL 1924265 (STB served August 21, 2002) ("*San Diego County Transit*"), the STB addressed whether the ICCTA preempted CEQA injunctive remedies. The case involved the North San Diego County Transit Development Board d/b/a North County Transit District ("NCTD"), a public entity created by the California Legislature and charged with responsibility for providing public transit services. *Id.* at *1.

NCTD was a rail carrier subject to STB jurisdiction because it owned a line of railroad. *Id.* The NCTD line was used for freight rail operations, Amtrak intercity passenger rail service and NCTD's commuter rail service. *Id.* The dispute arose when NCTD proposed to construct a 1.7 mile passing track within the city limits of Encinitas to improve passenger and freight operations. NCTD applied to the City of Encinitas for a coastal development permit pursuant to the California Coastal Act, but the City determined an EIR under CEQA was required prior to issuing the permit and allowing construction. Initially, NCTD appealed the city's determination, but it later abandoned the appeal and built the passing track without the permit. *Id.* at *2.

The City of Encinitas filed a lawsuit in state court seeking, among other things, injunctive relief to prevent NCTD from building the passing track until it completed permitting requirements and an EIR under CEQA. NCTD filed a declaratory order petition with the Board and subsequently removed the state court lawsuit to federal court. *Id.* The District Court held the state-law claims were preempted by the ICCTA. *Id.* at *4. The Board concurred, emphasizing that Congress intended to place regulatory authority over railroad construction (whether or not the construction required separate STB authorization) exclusively in the Board and that state or local laws that set up

processes that could defeat railroad operations would impinge on federal regulation of interstate commerce. *Id.* at *5.

As noted above, NCTD is a public entity created by the California Legislature. It is important to point out that in deciding that CEQA was preempted, the STB relied on numerous cases involving private entities and rejected the city's argument that ICCTA preemption was any different when addressing a public entity. *Id.* at *3, n.12. In the context of other federal laws regulating railroads, the U.S. Supreme Court has declined to draw any distinction between privately-owned and publicly-owned railroads operating in interstate commerce. *California v. Taylor*, 353 U.S. 553, 566-67 (1957) (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 Commission*, 502 U.S. 197, 203 (1991) (in Federal Employer's Liability Act case, Court declined to "throw into doubt" prior U.S. Supreme Court decisions "holding that the entire federal scheme of railroad regulation applies to state-owned railroads."). These authorities suggest no basis under the ICCTA to distinguish between publicly owned and privately owned railroads and that the Board's prior declaratory orders are applicable irrespective of the type of railroad ownership.

C. The Availability Of The CEQA Injunctive Remedies Regarding The Fresno-Bakersfield HST Segment Presents A Controversy Ripe For A Declaration

The Authority completed the CEQA process when it completed and certified the EIR (jointly with a federal EIS under NEPA) for the Fresno-Bakersfield HST Segment in May of 2014. This means the STB need not rule generally on whether CEQA in its entirety is preempted by the ICCTA with respect to construction of the Fresno-

Bakersfield HST Segment because the CEQA process is complete.[8] Similarly, the Authority does not seek declaratory relief regarding non-injunctive remedies, such as an order requiring revised environmental analyses or additional environmental mitigation but no work stoppage.

The only controversy regarding which the Authority seeks a declaratory order is the availability or not of the CEQA Injunctive Remedies with respect to the Fresno-Bakersfield HST Segment. 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)[9]. If granted, the CEQA Injunctive Remedies would delay or prevent STB-authorized construction of the Fresno-Bakersfield HST Segment, so there is a controversy ripe for decision. Regarding remedies generally, including injunctive remedies, the ICCTA states: "remedies provided under this part...preempt the remedies

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[8] As the Authority explained in the Final EIR/EIS, it elected to complete the CEQA process even after the Board determined that it had jurisdiction over the Project. However, the Authority clearly articulated that "[c]ompleting the state environmental review process does not waive any preemption argument that may be available to the Authority in the event of a legal challenge." (Fresno-Bakersfield HST Segment, Final EIR/EIS, p. 1-4.) Similarly in July 2014, the Authority, as lead Agency under CEQA, issued an EIR Notice of Preparation (NOP) for the Palmdale to Burbank Segment, which is similar in purpose to an EIS notice of intent under NEPA. Again the Authority stated it prepared the NOP voluntarily and was not waiving any preemptive effect on CEQA's application. (Palmdale-Burbank HST Segment, NOP, footnote 1). Even if the Authority had not done so, the Board would still need to consider whether the CEQA Injunctive Remedies were preempted, because a rail carrier's agreement on undertakings that would interfere with interstate commerce would not curtail ICCTA preemption. *Township of Woodbridge*, NJ v. Consolidated Rail Corp., STB NOR No. 42053 (STB Served Dec. 1, 2000)("*Township of Woodbridge*") clarified in decision served March 23, 2001.

[9] CEQA permanent remedies are governed by California Public Resources Code, section 21168.9. That section gives courts broad discretion, including discretion to directly order work stoppage, discretion to order rescission of a project approval (in whole or in part) that has the practical effect of a work stoppage and/or discretion to order revision of analyses but allowing a project (in whole or in part) to continue. The title of the order generally is irrelevant, and often will not be titled "injunction". The key is whether the order has the practical effect of slowing, suspending or stopping the project that amounts to an injunction. It is that type of permanent remedy (in addition to preliminary injunctive remedies) that would conflict with what the Board has authorized and is what is in controversy in this Petition, and so requires a Declaratory Order.

provided under...State law." 49 U.S.C. § 10501(b)(2).

In *Township of Woodbridge*, the STB found that Conrail's voluntarily agreements to adhere to a locomotive idling curfew, which were incorporated into court orders, made it unnecessary for the Board to "consider preemption issues that would have been involved ... had a court attempted to impose sanctions for violations of the agreements that are so onerous as to *unreasonably interfere* with railroad operations." *Township of Woodbridge*, STB NOR No. 42053 (STB Served Dec. 1, 2000), at 4-5. (emphasis added.) The court did not impose sanctions for violation of the idling curfew that would have unreasonably interfered with railroad operations. If it had, the STB would have needed to consider whether the sanctions were preempted by the ICCTA.

The present case raises the scenario the STB did not reach in *Township of Woodbridge*, but instead of onerous court sanctions the issue is whether the CEQA Injunctive Remedies are preempted.[10] In *San Diego County Transit*, the STB held that the ICCTA preempted CEQA injunctive remedies with respect to the construction of a rail line subject to STB jurisdiction. *San Diego County Transit*, at *5. The Board said Congress intended to place regulatory authority over railroad construction exclusively in the Board and state or local laws that set up processes that could defeat railroad operations would impinge on federal regulation of interstate commerce. *Id.* at *5-6. More recently, in *DesertXpress*, the Board found that it had exclusive jurisdiction over "the planned new track, facilities and operations" and that CEQA was per se preempted. *Id.* at 4.

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[10] *See Blanchard Securities v. Rahway Valley R.R. Co.*, 2004 U.S. Dist. LEXIS 25647, at *18 (D.N.J. Dec. 22, 2004), aff'd, 191 Fed. Appx. 98 (3rd Cir. 2006)(in dispute about an easement, an injunction to prevent the reactivation of a rail line would unquestionably interfere with interstate rail operations and thus be in contravention of the *Township of Woodbridge* exception).

The decision of the California Court of Appeal in *Town of Atherton, et al. v. California High-Speed Rail Authority*, 228 Cal. App. 4th 314 (2014) ("*Atherton*") does not require a different result here than in *San Diego County Transit* and *DesertXpress*. As will be discussed shortly, a more recent California Court of Appeal opinion disagreed with the reasoning of the *Atherton* decision and specifically held that ICCTA could preempt third party lawsuits challenging railroad projects under CEQA. Moreover, the *Atherton* case is distinguishable.

At issue in *Atherton* was the validity of a programmatic environmental document for a large portion of the HST system (*id.* at 326-27), which by its high-level nature was not the stand-alone basis for any construction to be authorized or enjoined. The court assumed without deciding[11] that the ICCTA would preempt CEQA and then held that the market participant exception (discussed below) applied to negate preemption. *Id.* at 333-34. On the merits, the court affirmed the lower court's decision that the Authority's environmental document complied with CEQA. *Id.* at 359.

As a result, the court in *Atherton* did not have to address (so it did not address) the question the Authority presents to the Board in this Petition – namely, whether a state court under CEQA can enjoin construction of the thing the Board has authorized. The court prefaced its entire preemption analysis on the "assum[ption]...that the Authority's preemption claim is limited to the issues presented in this particular case."[12]

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[11] The *Atherton* court noted that the Board had not been asked to determine preemption in that case, noting the Board has been called uniquely qualified on that issue. *Atherton, supra*, 228 Cal. App. 4th at 332, n.4 (citing and quoting *CSX Transp., Inc. v. Georgia Public Service Comm'n*, 944 F.Supp. 1573, 1584 (N.D.Ga.1996). The *Atherton* court continued: "A request to the STB for a declaratory order of preemption would be the remedy for the Authority's claim of federal preemption.... 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. In the *STB June Decision* [2013] the STB made no such determination; it did not even mention preemption. As we discussed *ante*, it merely found it had jurisdiction." *Id.*

[12] *Atherton, supra*, 228 Cal. App. 4th at 327, n.2.

Atherton therefore does not control the outcome here in this different factual and legal context, where there is now a particular STB-approved rail construction that could be halted by a conflicting injunction issued in a CEQA action challenging project-level compliance.[13]

Even if *Atherton* could be considered relevant here, it based its entire holding on a fundamentally inapplicable doctrine – the market participant doctrine. *Id.* at 333-334. Another California Court of Appeal decision (discussed below) subsequently agreed that *Atherton* erred on this very point. In any event, there are two reasons why the market participant doctrine does not apply to allow a CEQA injunction to delay or prevent STB-authorized construction.

First, the market participant doctrine only allows states acting in a proprietary capacity to have the *same* freedom to pursue their interests as would private entities in the same situation without having their actions labeled "state regulation" that would be preempted. *Building & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 226–27 (1993) ("*Boston Harbor*"); *Reeves, Inc. v. Stake*, 447 U.S. 429, 439 (1980). It exists to put public entities operating in a proprietary capacity on equal competitive footing (and not less) than private entities.[14] *See Boston Harbor, supra*, at

[13] Moreover, one of the principal bases for the *Atherton* ruling – "years of the Authority's compliance with CEQA" (*id.* at 334, 339) – is inapplicable to the injunction issue in this Petition. The Authority has never consented or acquiesced to a project stoppage injunction under CEQA, and in fact vigorously opposed an attempt at one in November 2012 regarding the Merced-Fresno HST segment. In addition, when the Authority in May 2014 certified the EIR at issue in this Petition, the Authority expressly reserved the right to invoke preemption. Authority Resolution #HSRA 14-10.

[14] *Atherton* can be viewed as turning the market participant doctrine on its head: *Atherton's* use of the doctrine results in the state (the Authority) being put on unequal footing (by having to comply with CEQA) than a private entity (DesertXpress, preempted from CEQA) doing the exact same type of project.

226-27. Therefore, the premise for application of the doctrine was and still is absent.[15]

Second, the *Atherton* court's application of the market participant doctrine against the Authority was contrary to the rule that it cannot 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." *Engine Mfrs. Ass'n v. So. Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031, 1042 (9th Cir. 2007) (quoting *Boston Harbor, supra*, 507 U.S. at 231.) (emphasis added). For rail construction within the jurisdiction of the STB, the ICCTA is that express "indication by Congress." 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). Regulation of rail transportation includes the construction of tracks, *City of Auburn v. United States, supra*, 154 F.3d at 1030, and the Board has authorized construction of tracks between Fresno and Bakersfield. No clearer expression of Congressional intent is possible.[16] The ICCTA's very terms are an express "indication by Congress" that bars application of the market participation exception to federal preemption in the manner in which that doctrine was invoked by the *Atherton*

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[15] Even aside from the propriety of invoking the market participant doctrine as a threshold matter, the court's reasons for finding that it applied were incorrect. For instance, a principal basis for the *Atherton* decision (*id.* at 337-39) – namely, the content of the 2008 voter initiative (Proposition 1A) that approved some funding for the Authority's project – is wrong. Proposition 1A is a condition only on funding from that bond act and contemplates merely that the Authority will complete whatever "environmental clearances" that may be "necessary." Cal. Sts. & High. Code § 2704.08(c)(2)(K). Proposition 1A did not address federal preemption or injunctive remedies. Silence is no basis for concluding that Proposition 1A was intended to defeat preemption or permit an injunctive remedy stopping what the voters authorized funding for.

[16] *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.").

opinion. *Boston Harbor, supra*, at 226-227.[17] Accordingly, the market participant doctrine could not apply to block the ICCTA preemption and allow the CEQA Injunctive Remedies to delay or prevent STB-authorized construction of Fresno-Bakersfield HST Segment.

A different California appellate district subsequently confirmed that *Atherton* fundamentally misapplied the market participant doctrine. In *Friends of the Eel River v. North Coast Railroad Authority*, ____ Cal.App.4th ____, 2014 Cal. App. LEXIS 877 (Sept. 29, 2014), the Court held that the market participant doctrine could not be used to avoid ICCTA preemption in a case involving CEQA analysis of the resumption of rail operations, citing and specifically disagreeing with *Atherton*. *Friends of the Eel River v. North Coast Railroad Authority*, 2014 Cal. App. LEXIS 877, at *49.[18] As with *Atherton*, *Friends of the Eel River* involved a railroad line owned by a public entity created by the California legislature. The *Friends of the Eel River* decision recited the two concerns discussed above: (a) the market participant doctrine was developed so that public agencies could be treated the same as private actors, rather than differently, and (b) that its application must considered in light of Congressional intent regarding preemption in

[17] *See also, A Fisherman's Best v. City of Charleston* 310 F.3d 155, 178-179 (4th. Cir. 2002) (rejecting market participant doctrine for Magnuson Fisheries Act where doctrine does not fit with Congressional intent behind federal preemption scheme).

[18] "Although *Atherton* presents a situation factually and procedurally similar to the one before us, we respectfully disagree with the court's analysis, which overlooks the genesis and purpose of the market participation doctrine and does not adequately answer the question of how a third party's challenge to an EIR under CEQA can reasonably be viewed as part of the government's proprietary activities ... Additionally, characterizing a government agency's preparation of CEQA documents as 'voluntary' does not answer the question of whether and when a third party has standing to enforce CEQA compliance." Id. at 51-52.

a particular area. *Friends of the Eel River v. North Coast Railroad Authority*, 2014 Cal. App. LEXIS 877, at *26-32. At a minimum, California law is conflicting on this point.[19]

In any event, *Atherton* does not control the question requiring issuance of a declaratory order in this case because it did not involve a direct conflict between a threatened CEQA injunction and an STB-approved project, as explained in more detail above. Accordingly, the Board does not need to delve into whether *Atherton* was wrongly decided. It only needs to declare whether an STB-approved rail construction can be halted by a conflicting injunction issued in a CEQA action challenging project-level compliance.

REQUEST FOR EXPEDITED CONSIDERATION

The Authority respectfully requests that the STB issue an order regarding the availability of the CEQA Injunctive Remedies with respect to the Fresno-Bakersfield HST Segment, issued by November 20, 2014 and effective shortly thereafter.[20] As noted above, the Lawsuits' first case management conference and appearance before the trial court judge is scheduled for November 21, 2014. An STB order regarding the availability of the CEQA Injunctive Remedies with respect to the Fresno-Bakersfield HST Segment issued by November 20, 2014 and effective shortly thereafter would eliminate controversy and remove uncertainty in advance of this first appearance and case management conference.

To facilitate expedited consideration, the Authority has served a copy of this Petition for Declaratory Order on all counsel of record of the Petitioners in the Lawsuits.

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[19] Proceedings are pending with the California Supreme Court to order that *Atherton* not be published as legal precedent in California courts. Depublication Proceedings, No. S221362

[20] The Authority will apprise the Board should there be any need for an earlier decision date on the requested order.

CONCLUSION

For the foregoing reasons, the Authority respectfully requests the Board issue an order regarding the availability of the CEQA Injunctive Remedies with respect to the Fresno-Bakersfield HST Segment.

Respectfully submitted,

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Counsel for California High-Speed Rail Authority

October 9, 2014

VERIFICATION

I, Thomas Fellenz, verify under penalty of perjury that the factual statements made in the foregoing Petition For Declaratory Order are true and correct, to the best of my knowledge, information and belief.

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

Executed on October 9, 2014.

Thomas Fellenz
Chief Counsel
California High-Speed Rail Authority

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Petition for Declaratory Order was served on the 9th day of October 2014, by first class mail, postage prepaid on the following parties:

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