NOS. 15-71780, 15-72570

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KINGS COUNTY, et al.,

Petitioners,

v.

SURFACE TRANSPORTATION BOARD; UNITED STATES OF AMERICA,

Respondents,

CALIFORNIA HIGH-SPEED RAIL AUTHORITY,

Intervenor.

DIGNITY HEALTH

Petitioner,

v.

SURFACE TRANSPORTATION BOARD; UNITED STATES OF AMERICA,

Respondents,

CALIFORNIA HIGH-SPEED RAIL AUTHORITY,

Intervenor.

ON PETITION FOR REVIEW OF FINAL ORDER
OF SURFACE TRANSPORTATION BOARD

INTERVENOR'S MOTION TO TAKE JUDICIAL NOTICE

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INTRODUCTION

Intervenor California High-Speed Rail Authority (Authority) moves for this Court to take judicial notice of certain court filings and decisions in two of the state-court lawsuits challenging the Authority's CEQA compliance for its approval of the Fresno/Bakersfield rail line project, which involve certain of the petitioners in this case. The Authority also requests that the Court take judicial notice of the final judgment in *Tos v. California High-Speed Rail Authority*.

LEGAL AUTHORITY

The Court may take judicial notice of facts that are undisputed and easily verified, and may do so at any stage of the proceedings. Fed. R. Evid. 201(b), 201(d). The Court may take judicial notice of undisputed matters of public record including documents on file in state courts. *Harris v. County of Orange*, 682 F.3d 1126, 1131-32 (9th Cir. 2012). Judicial notice of proceedings in other courts is appropriate if those proceedings have a direct relationship to matters at issue. *U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992). Judicial notice is mandatory if requested by a party and the Court is supplied with the necessary information. Fed. R. Evid. 201(c)(2).

LEGAL ARGUMENT

This Court should take judicial notice of the following exhibits A-F because they are relevant to the procedural history of this case following the Board's issuance of its Declaratory Order on December 12, 2014, and because they are relevant to the issue of the Declaratory Order's finality.

Exhibit A — Notice of Surface Transportation Board Decision filed Dec. 23, 2014, in *County of Kings, et al., v. California High-Speed Rail Authority*, Sacramento Superior Court, Case No. 34-2014-80001861-CU-WM-GDS

Exhibit B — Notice of Motion and Motion for Stay of Action etc. filed Feb. 19, 2015, in *County of Kings, et al., v. California High-Speed Rail Authority*, Sacramento Superior Court, Case No. 34-2014-80001861-CU-WM-GDS

Exhibit C — Order Granting Stay filed May 15, 2015, in *County of Kings, et al., v. California High-Speed Rail Authority*, Sacramento Superior Court, Case No. 34-2014-80001861-CU-WM-GDS

Exhibit D — Notice of Surface Transportation Board Decision filed Dec. 29, 2014, in *Dignity Health v. California High-Speed Rail Authority*, Sacramento Superior Court, Case No. 34-2014-80001865-CU-WM-GDS

Exhibit E — Notice of Motion and Motion for Stay of Action etc. filed Feb. 19, 2015, in *Dignity Health v. California High-Speed Rail Authority*, Sacramento Superior Court, Case No. 34-2014-80001865-CU-WM-GDS

Exhibit F — Order Granting Stay filed May 15, 2015, in *Dignity Health v. California High-Speed Rail Authority*, Sacramento Superior Court, Case No. 34-2014-80001865-CU-WM-GDS

This Court should take judicial notice of the following exhibit G because it is relevant to the issue of the scope of the Declaratory Order being challenged in this proceeding.

Exhibit G — Judgment Denying Petition and Complaint filed March 4, 2016, in *John Tos, et al., v. California High-Speed Rail Authority* Sacramento Superior Court, Case No. 34-2011-00113919-CU-WM-GDS

The foregoing are undisputed matters of public record in that they are true and correct copies of the foregoing document on file with the Superior Court for the County of Sacramento in each of the identified cases. *Harris*, 682 F.3d at 1131; *see also* attached Decl. of Danae J. Aitchison.

CONCLUSION

Based on the foregoing, the Authority requests that the Court take judicial notice of the court documents at Exhibits A-G.

Dated: May 6, 2016

Respectfully Submitted,

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JOHN A. SAURENMAN
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Supervising Deputy Attorney General

/s/ Danae J. Aitchison

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32469297.doc

DECLARATION OF DANAE AITCHISON IN SUPPORT OF A AUTHORITY MOTION TO TAKE JUDICIAL NOTICE

I, Danae Aitchison, declare:

1. I serve as counsel of record for the California High-Speed Rail Authority in this matter. I have personal knowledge of the facts stated herein and if called as a witness, could competently testify thereto.

2. I am co-counsel of record for the Authority in *County of Kings, et al., v. California High-Speed Rail Authority*, Sacramento Superior Court, Case No. 34-2014-80001861-CU-WM-GDS and *Dignity Health v. California High-Speed Rail Authority*, Sacramento Superior Court, Case No. 34-2014-80001865-CU-WM-GDS. I obtained true and correct copies of Exhibits A-F in this Request for Judicial Notice from this office's pleading files in these two cases.

3. I obtained a true and correct copy of Exhibit G from the Authority's counsel of record in *John Tos, et al., v. California High-Speed Rail Authority* Sacramento Superior Court, Case No. 34-2011-00113919-CU-WM-GDS.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration executed on May 6, 2016, in Sacramento, CA.

/s/ Danae J. Aitchison

DANAE J. AITCHISON
Deputy Attorney General

CERTIFICATE OF SERVICE

Case Name:	Kings County, et al. v. Surface Transportation Board	No. 15-71780
	Dignity Health v. Surface Transportation Board	No. 15-72570

I hereby certify that on May 6, 2016, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

INTERVENOR'S MOTION TO TAKE JUDICIAL NOTICE

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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 May 6, 2016, at Sacramento, California.

Danae J. Aitchison	/s/ Danae Aitchison
Declarant	Signature

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EXHIBIT A

ORIGINAL

FILED
ENDORSED

2014 DEC 23 PM 3:14

CLERK OF THE SUPERIOR COURT
BY
DEPUTY CLERK

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

COUNTY OF KINGS, CITIZENS FOR CALIFORNIA HIGH SPEED RAIL ACCOUNTABILITY, KINGS COUNTY FARM BUREAU,

Petitioners,

v.

CALIFORNIA HIGH-SPEED RAIL AUTHORITY, and DOES 1 through 20,

Respondents and Defendants.

ROES 1 TO 10,

Real Parties in Interest.

Case No. 34-2014080001861-CU-WM-GDS

NOTICE OF SURFACE TRANSPORTATION BOARD DECISION

ASSIGNED FOR ALL PURPOSES
Judge: Hon. Michael Kenny
Dept: 31
CMC Date: January 23, 2015
Trial Date: July 31, 2015
Action Filed: June 6, 2014

Respondent and Defendant, CALIFORNIA HIGH-SPEED RAIL AUTHORITY (the "Authority") provides this notice to the Court and to the Petitioners herein that the Surface Transportation Board issued a decision in a declaratory order proceeding on December 12, 2012, ("STB Order") that is pertinent to this case. The decision is attached hereto as Exhibit A. The Authority believes the decision has an impact on the Court's jurisdiction in this case and the other related cases, each of which challenges the Fresno to Bakersfield environmental impact report under the California Environmental Quality Act.

The Authority intends to bring a motion for judgment on the pleadings, in light of the STB Order, to be heard by this Court either on February 27, 2015, or March 27, 2015. (This motion would address the issues Petitioner Kings County raised in its Supplement to Case Management Statement served December 19, 2014.) The Authority currently is meeting and conferring with Petitioners in this and the other related cases regarding their availability on these dates. The Authority will provide an update on this and other issues in a supplement to its case management conference statement to be filed in January (for the January 23, 2015 CMC) in conformance with the Sacramento Superior Court Local Rules.

Dated: December 23, 2014

Respectfully Submitted,

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

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EXHIBIT A

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EB

SERVICE DATE – LATE RELEASE DECEMBER 12, 2014

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35861

CALIFORNIA HIGH-SPEED RAIL AUTHORITY—PETITION FOR DECLARATORY ORDER

Digest:[1] The Board concludes that 49 U.S.C. § 10501(b) preempts application of the California Environmental Quality Act, to the extent discussed below, to the construction of a high-speed passenger rail line between Fresno and Bakersfield, Cal.

Decided: December 12, 2014

On October 9, 2014, the California High-Speed Rail Authority (Authority) filed a petition requesting that the Board issue a declaratory order regarding the availability of injunctive remedies under the California Environmental Quality Act (CEQA) to prevent or delay construction of an approximately 114-mile high-speed passenger rail line between Fresno and Bakersfield, Cal. (the Line). The request for a declaratory order will be granted, as discussed below.

BACKGROUND

The Authority's petition concerns construction of the Line, which would be the second section of the planned statewide California High-Speed Train System (HST System). The HST System would, when completed, provide high-speed intercity passenger rail service over more than 800 miles of new rail line throughout California. The Board found in 2013 that it has jurisdiction over the HST System. Cal. High-Speed Rail Auth.—Constr. Exemption—in Merced, Madera & Fresno Cntys., Cal. (HST System Jurisdiction Decision), FD 35724, slip op. at 2 (STB served Apr. 18, 2013) (Vice Chairman Begeman concurring in part and dissenting in part); Cal. High-Speed Rail Auth.—Constr. Exemption—in Merced, Madera & Fresno Cntys., Cal. (Merced-to-Fresno), FD 35724, slip op. at 12-15 (STB served June 13, 2013) (Vice Chairman Begeman concurring in part and dissenting in part and Commissioner Mulvey concurring). The Board has granted petitions for exemption, subject to environmental and other conditions, permitting construction of the first segment of the HST System, between Merced and Fresno, Cal., and for the Line. Id. at 17-28; Cal. High-Speed Rail Auth.—Constr. Exemption—

[1] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

in Fresno, Kings, Tulare, & Kern Cntys., Cal. (Fresno-to-Bakersfield), FD 35724 (Sub-No. 1) (STB served August 12, 2014) (Vice Chairman Miller concurring and Commissioner Begeman dissenting). The Authority states that it has commenced work on the Merced to Fresno segment and is currently in the process of implementing and/or procuring construction contracts for a majority of the Line.

In its petition, the Authority requests that the Board issue an expedited declaratory order finding that CEQA injunctive remedies are not available with respect to the Line. The Authority states that seven lawsuits have been filed challenging its compliance with CEQA with respect to the Line and that the petitioners seek injunctive remedies under CEQA that would prevent or delay the Authority's ability to proceed with construction of the Line. The Authority argues that 49 U.S.C. § 10501(b) preempts such CEQA remedies because, if successful, injunctive relief would enjoin construction of a Board-authorized project. The Authority asserts that it completed the CEQA environmental review and documentation process for the Line in May 2014. Therefore, according to the Authority, the Board need not address whether CEQA is generally preempted with respect to the Line; rather the Board need only address whether injunctive remedies under CEQA that would result in a work stoppage are available as a remedy in the CEQA enforcement lawsuits that have been filed against the Authority.

The Authority notes that the Board has previously found that § 10501(b) preempts CEQA with respect to a line subject to Board jurisdiction, citing DesertXpress Enterprises, LLC—Petition for Declaratory Order, FD 34914 (STB served June 27, 2007), and North San Diego County Transit Development Board—Petition for Declaratory Order, FD 34111 (STB served August 21, 2002). The Authority argues that, while it elected to complete the CEQA process for the Line even after the Board had determined that it had jurisdiction over the HST System, it made clear during the environmental review process for the Line that it was not waiving any preemption arguments related to CEQA that might be available to the Authority, in the event of a court challenge to its CEQA compliance.[2]

The Authority further claims that Town of Atherton v. California High-Speed Rail Authority, 175 Cal. Rptr. 3d 145 (Ct. App. 2014), in which the California Court of Appeal held that the "market participant" doctrine[3] negated § 10501(b) preemption, should not affect the Board's decision in this proceeding. According to the Authority, the Atherton court affirmed a lower court decision finding that the Authority had complied with CEQA (specifically, that its programmatic environmental documentation concerning routing for the HST System was proper). As a result, the Authority states, Atherton did not decide the issue the Authority asks the Board to address here – whether a state court under CEQA can enjoin construction of a line the Board has authorized. The Authority also contends that the market participation doctrine was misapplied by the court in Atherton, as another California Court of Appeal recently found in

[2] Pet. 10 n.8.

[3] An explanation of the doctrine, and why the Board believes it does not apply here, is set forth below.

Friends of the Eel River v. North Coast Railroad Authority, 178 Cal. Rptr. 3d 752 (Ct. App. 2014), petition for review accepted by the California Supreme Court on December 10, 2014.

Rail Unions[4] and the State Building and Construction Trades Council of California support the Authority's petition. Other commenters (collectively, Opponents)[5] request that the Board deny the petition.[6] According to Opponents, the Board should not issue a decision in this proceeding because Atherton conclusively addresses the issues presented here, and the doctrines of res judicata, collateral estoppel, and waiver preclude a decision by the Board. Opponents claim, relying on Atherton, that the market participant doctrine exception to preemption applies here. Opponents also argue that § 10501(b) preemption would intrude upon the state of California's sovereignty by interfering with the internal controls and limitations the state has placed on the Authority, its own agency.

Furthermore, Opponents argue that expedited consideration of the petition is unnecessary and that the preemption issue the Authority asks the Board to address is not ripe. According to Opponents, the Authority has no immediate plans to begin construction of the Line. Therefore, Opponents assert, the injunctive relief that the Authority claims could delay the project is not imminent and likely would not occur before July 2015, the earliest that a hearing on the merits of the pending CEQA lawsuits is expected. Opponents also point out that Eel River, the California state court decision that disagreed with the Atherton court's analysis of the market participant doctrine in the context of § 10501(b) preemption, may be appealed to the California Supreme

[4] The Brotherhood of Maintenance of Way Employes Division/IBT; the Brotherhood of Railroad Signalmen; the International Association of Sheet Metal, Air and Transportation Workers Mechanical Division; the American Train Dispatchers Association; the Brotherhood of Locomotive Engineers and Trainmen/IBT; the National Conference of Firemen and Oilers District of Local 32BJ, SEIU; and the International Brotherhood of Electrical Workers (collectively, Rail Unions) filed a joint reply.

[5] Opponents include the litigants in the seven CEQA lawsuits (County of Kings, Citizens for High Speed Rail Accountability, Kings County Farm Bureau, City of Bakersfield, County of Kern, Dignity Health, First Free Will Baptist Church of Bakersfield, Coffee-Brimhall LLC, and the City of Shafter (collectively, CEQA Litigants)); Community Coalition on High-Speed Rail, Transportation Solutions Defense and Education Fund, and California Rail Foundation (collectively, Transportation Groups); United States Representatives David G. Valadao, Jeff Denham, Kevin McCarthy, and Devin G. Nunes; Senator Andy Vidak and Assemblywoman Diane L. Harkey of the California State Legislature; Friends of Rose Canyon; Madera County Farm Bureau (Farm Bureau); MEL's Farms; Roar Foundation; Jacqueline Ayer; Carol Bender; William C. Descary; Kathy Hamilton; and Alan Scott.

[6] Union Pacific Railroad Company (UP) also filed a reply. UP does not take a position regarding the preemption issues but requests that the Board not issue any decision that would compromise UP's ability to protect its freight rail network.

Court.[7] According to Opponents, the disposition of any such appeal would clarify the preemption issues raised in this proceeding. Therefore, Opponents argue that if the Board does not deny the Authority's petition, it should order additional briefing and/or wait to issue a decision.

On November 18, 2014, the Authority filed a motion for leave to reply and a reply. The Authority acknowledges that Board rules prohibit such a reply, but it argues that its filing will ensure that the Board has a complete record in this proceeding and the filing will not delay the proceeding or prejudice any party. On November 20, 2014, Transportation Groups filed an opposition to the motion for leave to reply, or, in the alternative, a motion for leave to file surreply. Transportation Groups argue that the Board should deny the Authority leave to reply because the filing would prejudice opposing parties by denying them the opportunity to respond to new arguments and would impermissibly give the Authority opportunity to reargue and expand upon previous arguments. In the alternative, Transportation Groups request that the Board grant parties 10 days to file replies to the Authority's November 18 filing.

DISCUSSION AND CONCLUSIONS

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 to issue a declaratory order to eliminate controversy or remove uncertainty. In this case, there is uncertainty as to whether, and the extent to which, the Board would find that CEQA is preempted with regard to the Line. Accordingly, we instituted a proceeding to consider the issues raised in the Authority's petition and provided an opportunity for interested persons to file replies. Following careful consideration of the Authority's petition and the opponents' arguments, we will issue this declaratory order to provide our views on the preemption issue.

Procedural issues. We will not order additional briefing in this proceeding. The procedural schedule that we adopted provided 28 days for any interested persons to file substantive replies, which we believe was enough time for parties to do so. In fact, many parties filed substantive replies in the time period we provided, and we believe the existing record provides an adequate basis for us to consider and address the issues presented here.[8]

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[7] The Friends of Eel River and Californians for Alternatives to Toxics initiated appellate review of the Eel River decision in the California Supreme Court on November 7, 2014 (Friends of Eel River v. North Coast Railroad Authority, Case No. S222472). According to the Supreme Court of California's docket, the petition for review was accepted on December 10, 2014.

[8] We will grant the petitions for leave to intervene filed by Farm Bureau, Roar Foundation, and Transportation Groups. We will accept late-filed replies of Senator Vidak; U.S. Representatives Valadao, Denham, McCarthy, and Nunes; and MEL's Farms in the interest of compiling a more complete record. Roar Foundation's request for an extension of time will be denied because Roar Foundation has already filed a substantive comment, and, as noted, we have a sufficient record to address the issues in this proceeding. Roar Foundation argues that the proceeding should be delayed to allow argument from parties that may be affected by future segments of the HST System. However, the Board's decision instituting a proceeding invited

(continued . . .)

We will deny the Authority's motion for leave to file a reply. Our rules do not permit a reply to a reply. 49 C.F.R. § 1104.13(c). Here, the parties have provided extensive arguments on the scope of federal preemption as it applies to the Line. A reply by the Authority is not necessary to provide the information we need to provide our views on preemption and address matters within the Board's expertise. Transportation Groups' opposition to motion for leave to reply or, in the alternative, motion for leave to file surreply is therefore denied as moot.

We also will not delay issuing a decision addressing the preemption issue. The issue is ripe for a decision because several CEQA lawsuits have been filed and, regardless of Opponents' suggestions to the contrary, permanent injunctive relief has already been requested and a preliminary injunction could be requested at any time in those pending lawsuits. Moreover, the Authority states that, contrary to the claims of some of the Opponents, it is in the process of implementing and/or procuring construction contracts for a majority of the Line and uncertainty regarding the preemption issue could impact its ability to proceed. Lastly, this decision will inform interested parties and the California Supreme Court of our views on federal preemption of CEQA and the market participant doctrine as they relate to this matter involving railroad transportation within the Board's jurisdiction under § 10501(b). See Atherton, 175 Cal. Rptr. 3d at 161 n.4 (noting that, as the agency authorized by Congress to administer the Interstate Commerce Act, the Board is "uniquely qualified" to address whether § 10501(b) preempts state law and that a request to the Board for a declaratory order would be the remedy for the Authority's preemption claims). Thus, we will issue this decision now to assist in the resolution of the conflict between Atherton and Eel River on federal preemption of CEQA in cases involving rail line construction.

Waiver. Transportation Groups suggest that the Authority has waived its right to assert any CEQA preemption arguments before the Board because they failed to raise the issue sooner.[9] We disagree.

Since the Board asserted jurisdiction over the HST project in April 2013, the Authority has consistently explained in its environmental documentation that it reserves the right to assert federal preemption in response to any potential legal challenge to its CEQA compliance.[10] Thus, it has expressly stated that it does not waive the right to claim preemption.

(. . . continued)

comments from all interested parties. To the extent there are additional arguments related to future segments that have not been presented here, parties may raise them in future proceedings.

[9] See Transportation Groups Reply 5-6.

[10] See Pet. 10 n.8 (quoting Fresno-Bakersfield HST Segment Final EIR/EIS 1-4: "[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"; and citing Palmdale-Burbank HST Segment Notice of Preparation, n.1, repeating that the Authority reserved its right to assert preemption).

In addition, the fact that the Authority did not previously seek a ruling on preemption in the Board's previous proceedings concerning the HST System does not amount to a waiver, as those proceedings did not squarely involve the CEQA preemption issue now presented to the Board. In decisions issued in April and June 2013, the Board held that it had jurisdiction over the HST project, HST System Jurisdiction Decision, slip op. at 2, and authorized the construction of the Merced to Fresno HST section, Merced-to-Fresno, slip op. at 12-15. In Fresno-to-Bakersfield, in a decision issued on August 12, 2014, the Board authorized construction of the Line. While the Authority possibly could have raised the CEQA preemption issue during the course of those proceedings, the preemption issue was not directly relevant to those proceedings (such that the Board would have needed to decide the issue at that time), nor would it have affected the outcome of those proceedings.[11]

Transportation Groups suggest that the Authority could have asked the state court in Atherton to refer the CEQA preemption issue to the Board. However, while the Authority could have asked for such a referral from the court, it was not required,[12] and a decision not to request such a referral does not mean the Authority's arguments before the Board are waived.[13] Also,

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[11] In deciding whether to authorize a proposed rail construction (whether under the 49 U.S.C. § 10901 formal application process or, as here, the exemption process in 49 U.S.C. § 10502), the Board considers and weighs the evidence before it on the transportation merits of the proposed construction and the adequacy of the environmental review under the National Environmental Policy Act. Those are the issues that the Board analyzed in both Fresno-to-Bakersfield and Merced-to-Fresno (where the Board also explained why the HST System was within its jurisdiction as part of the interstate rail system).

[12] See 14500 Ltd. LLC—Pet. for Declaratory Order, FD 35788, slip op. at 2 (STB served June 5, 2014) (issues involving the federal preemption provision contained in 49 U.S.C. § 10501(b) can be decided by the Board or the courts in the first instance); Jie Ao & Xin Zhou—Pet. for Declaratory Order, FD 35539, slip op. at 4, 7-8 (STB served June 6, 2012) (explaining that state court may resolve preemption issues, as long as it applies applicable Board and court precedent).

[13] The issue of whether a party has waived an argument usually (though not always) arises on appeal after a party fails to present the argument to the Board during the course of on-going Board proceedings. In such a case, a reviewing court will generally deem the argument waived and will not address it because the Board has not had the opportunity to address the issue in the first instance. See Erie-Niagara Rail Steering Comm. v. STB, 247 F.3d 437, 443-44 (2d Cir. 2001); W. Res., Inc. v. STB, 109 F.3d 782, 793-94 (D.C. Cir. 1997). See also Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 553-54 (1978) (explaining that parties need to forcefully raise issues during the course of agency's proceedings).

Here, there are no other current proceedings involving the Authority or the Line pending before the Board. The Authority has now raised the issue of potential CEQA preemption for this rail transportation project by requesting that the Board institute a declaratory order proceeding under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 to address the uncertainty that now exists regarding

(continued . . .)

the Authority's decision not to appeal the Atherton decision to the California Supreme Court (or ultimately even the United States Supreme Court)[14] does not affect whether the Authority has waived its CEQA preemption arguments before the Board. A decision not to appeal a state court judgment does not affect whether a party has timely raised arguments or issues before the Board.

Collateral estoppel and res judicata. Opponents argue that res judicata (claim preclusion) and collateral estoppel (issue preclusion) prohibit the Board from granting the Authority's petition because the Atherton court has already addressed the issue of whether CEQA is preempted with respect to the Line.[15] We believe neither issue nor claim preclusion bars the Board from issuing a declaratory order providing its views in the circumstances presented here. As discussed in more detail below, two California state appellate courts have now issued conflicting opinions addressing whether CEQA is preempted by § 10501(b). In Atherton, a California Court of Appeal held that CEQA was not preempted by § 10501(b) with respect to the Authority's programmatic environmental documentation concerning routing of the HST System. More recently, however, another California Court of Appeal found in Eel River that CEQA was preempted by § 10501(b) where, as with the Line, the case involves rail transportation within the Board's jurisdiction. Because of these conflicting opinions regarding CEQA preemption and because the Board is "uniquely qualified" to determine the preemption question,[16] the Board provides this interpretation of its statute pursuant to 5 U.S.C. § 554(e) and 49 U.S.C. § 721 in order to remove the uncertainty that exists with regard to the Board's preemption analysis.

(. . . continued)

the issue. Neither of those statutory provisions contains a time limit for when a declaratory order must be requested.

[14] See Transportation Groups Reply 6.

[15] Transportation Groups Reply 4-11; CEQA Litigants Reply 3-4. Claim preclusion "embodies the principle 'that a party who once has had *a chance to* litigate a claim before an appropriate tribunal usually ought not to have another chance to do so.'" SBC Commc'ns v. FCC, 407 F.3d 1223, 1229 (D.C. Cir. 2005) (discussing general elements of claim preclusion under federal law); see also Brother Records, Inc. v. Jardine, 432 F.3d 939, 943 (9th Cir. 2005) (discussing the elements of claim preclusion under California law). Issue preclusion "bars relitigation of an issue by a party 'that has *actually litigated [the] issue*.'" SBC Commc'ns, 407 F.3d at 1229.

[16] Atherton, 175 Cal. Rptr. 3d at 161 n.4. See N.Y. & Atl. Ry. v. STB, 635 F.3d 66, 70 (2d Cir. 2011); Adrian & Blissfield R.R. v. Vill. of Blissfield, 550 F.3d 533, 539 (6th Cir. 2008); New Orleans & Gulf Coast Ry. v. Barrois, 533 F.3d 321, 331 (5th Cir. 2008); Emerson v. Kan. City S. Ry., 503 F.3d 1126, 1130 (10th Cir. 2007); Green Mountain v. Vermont, 404 F.3d 638, 642 (2d Cir. 2005) ("the Transportation Board is 'uniquely qualified to determine whether state law . . . should be preempted' by the Termination Act."); see also Jie Ao & Xin Zhou—Pet. for Declaratory Order, slip op. at 4, 7-8 (a state court may resolve preemption issues, as long as it applies Board and court precedent). Moreover, in this case, one of the conflicting opinions could frustrate the Board's recent approval of the construction of the Line, as discussed below.

Section 10501(b) Preemption. The Interstate Commerce Act is "among the most pervasive and comprehensive of federal regulatory schemes." Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 318 (1981). The preemption provision of the Act, as broadened by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, expressly provides that the jurisdiction of the Board over "transportation by rail carriers" is "exclusive." 49 U.S.C. § 10501(b). The statute defines "transportation" expansively to encompass any property, facility, structure or equipment "related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use." 49 U.S.C. § 10102(9). Moreover, "railroad" is defined broadly to include a switch, spur, track, terminal, terminal facility, freight depot, yard, and ground, used or necessary for transportation. 49 U.S.C. § 10102(6). Section 10501(b) expressly provides that "the remedies provided under [49 U.S.C. §§ 10101-11908] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." Section 10501(b) thus is intended to prevent a patchwork of local regulation from unreasonably interfering with interstate commerce. See Norfolk S. Ry.—Pet. for Declaratory Order, FD 35701, slip op. at 6 & n.14 (STB served Nov. 4, 2013); H.R. Rep. No. 104-311, at 95-96 (1995), reprinted in 1995 U.S.C.C.A.N. 793, 808. As the courts have stated, it is "difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations" than § 10501(b). CSX Transp., Inc. v. Ga. Pub. Serv. Comm'n, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996).

In interpreting the reach of § 10501(b) preemption, the Board and the courts have found that it prevents states or localities from intruding into matters that are directly regulated by the Board (e.g., rail carrier rates, services, construction, and abandonment). It also prevents states and localities from imposing requirements that, by their nature, could be used to deny a rail carrier's ability to conduct rail operations. Thus, state or local permitting or preclearance requirements, including environmental permitting or preclearance requirements, are categorically preempted as to any rail lines and facilities that are an integral part of rail transportation. See Green Mountain R.R., 404 F.3d at 643; City of Auburn v. United States, 154 F.3d 1025, 1027-31 (9th Cir. 1998) (if local authorities have the ability to impose environmental permitting regulations on railroads, this power will in fact amount to economic regulation if the carrier is prevented from constructing, acquiring, operating, or abandoning a line).

Other state actions may be preempted as applied – that is, only if they would have the effect of unreasonably burdening or interfering with rail transportation, which is a fact-specific determination based on the circumstances of each case. See N.Y. Susquehanna & W. Ry. v. Jackson, 500 F.3d 238, 252 (3d Cir. 2007) (federal law preempts "state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation"); Joint Pet. for Declaratory Order—Bos. & Me. Corp. & Town of Ayer (Ayer), 5 S.T.B. 500 (2001), recons. denied (STB served Oct. 5, 2001); Borough of Riverdale—Pet. for Declaratory Order—N.Y. Susquehanna & W. Ry., FD 33466, slip op. at 2 (STB served Feb. 27, 2001); Borough of Riverdale—Pet. for Declaratory Order—N.Y. Susquehanna & W. Ry., 4 S.T.B. 380, 387 (1999).

Not all state and local regulations that affect rail carriers are preempted by § 10501(b). State and local regulation is appropriate where it does not interfere with rail operations. Localities retain their reserved police powers to protect the public health and safety so long as their actions do not unreasonably burden interstate commerce. Green Mountain, 404 F.3d at 643. Thus, the Board has stated that it is reasonable for states and localities to request rail carriers to: (1) share their plans with the community when they are undertaking an activity for which another entity would require a permit; (2) use state or local best management practices when they construct railroad facilities; (3) implement appropriate precautionary measures at the railroad facility, so long as the measures are fairly applied; (4) provide representatives to meet periodically with citizen groups or local government entities to seek mutually acceptable ways to address local concerns; and (5) submit environmental monitoring or testing information to local government entities for an appropriate period of time after operations begin. Ayer, 5 S.T.B. at 511. Electrical, plumbing, and fire codes also are generally applicable. Green Mountain, 404 F.3d at 643. State and local action, however, must not have the effect of foreclosing or unduly restricting the rail carrier's ability to conduct its operations or otherwise unreasonably burden interstate commerce. CSX Transp., Inc.—Pet. for Declaratory Order, FD 34662, slip op. at 5 (STB served May 3, 2005). In short, states and towns may exercise their traditional police powers over the development of rail property to the extent that the regulations "protect public health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions." Green Mountain, 404 F.3d at 643.

Finally, the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 et seq., applies to rail constructions like the HST System that require a license under 49 U.S.C. § 10901, and the Board can adopt appropriate environmental mitigation conditions in response to concerns raised by the parties, including local entities, during the NEPA review.[17] Indeed, to reduce or mitigate potential environmental impacts of proposed constructions discovered during the NEPA review, the Board usually imposes extensive environmental mitigation conditions on rail construction approvals.[18]

Application here. As previously noted, the Authority asks us to issue a declaratory order finding only that a prohibitive injunction under CEQA is preempted, not its compliance with CEQA itself. Specifically, the Authority claims that it does not seek preemption of other injunctive

[17] The Board's decision permitting construction of the Line came after extensive environmental review had been completed, including preparation of an Environmental Impact Statement (EIS) under NEPA. The Federal Railroad Administration (FRA) was the lead agency in the EIS prepared for the Line, because it is providing some of the funding, but the Board participated in the EIS process as a cooperating agency. After carefully reviewing the EIS, the Board adopted it in its decision in Fresno-to-Bakersfield and required compliance with all of the environmental mitigation imposed by FRA. See Fresno-to-Bakersfield, slip op. at 5-7, 16-19.

[18] See, e.g., Ala. R.R.—Constr. & Operation Exemption—Rail Line Extension to Port MacKenzie, Ala., FD 35095, slip op. at 21, App. 1 (STB served Nov. 21, 2011) (imposing 100 mitigation measures on an approximately 35-mile rail line).

remedies such as a court order requiring revised environmental analyses or additional environmental mitigation under CEQA, so long as there is no work stoppage.[19] However, as a practical matter, we find it difficult to separate the prohibitive injunctive remedy available under CEQA from a California state court's ability to enforce compliance with CEQA itself. In other words, if a state court cannot compel compliance with CEQA by ordering a halt to the agency's proposed action, it is unclear how CEQA could be enforced. The primary way a state court could meaningfully enforce CEQA would be to temporarily halt the Authority's ability to proceed with construction (i.e., a prohibitive injunction) pending the completion of any further environmental analysis and development of additional environmental mitigation that the court might find to be required. Indeed, if a California court were to find that the Authority had not fully studied the impact of the Line under CEQA, and in turn that additional mitigation might be required, but the Authority had already begun construction activities or had even completed construction, the court's after-the-fact order could have already been rendered meaningless. Therefore, because we do not have a persuasive argument for separating CEQA's prohibitive remedy from its other injunctive remedies, we discuss the core issue as whether CEQA as a whole – which is usually enforced through a third-party enforcement action – is preempted with regard to the Line.

Applying the well-established preemption principles here, the Board concludes that CEQA is categorically preempted by § 10501(b) in connection with the Line. As the Board has previously found, CEQA is a state preclearance requirement that, by its very nature, could be used to deny or significantly delay an entity's right to construct a line that the Board has specifically authorized, thus impinging upon the Board's exclusive jurisdiction over rail transportation. DesertXpress Enters., LLC—Pet. for Declaratory Order, slip op. at 5 (CEQA *per se* preempted for proposed 200-mile high-speed passenger system). See also N. San Diego Cnty. Transit Dev. Bd.—Pet. for Declaratory Order, slip op. at 9 (finding state and local requirement to apply for permit and prepare environmental report before constructing track to be preempted); Eel River, 178 Cal. Rptr. 3d at 767-71 (CEQA preempted for railroad projects because, in the context of railroad operations, CEQA "is not simply a health and safety regulation imposing an incidental burden on interstate commerce"). Accord City of Auburn, 154 F.3d at 1027-31; Green Mountain, 404 F.3d at 642-45. In addition, a CEQA enforcement suit in this context attempts to regulate a project that is directly regulated by the Board. Section 10501(b) expressly preempts any state law attempts to regulate rail construction projects, as they are under the Board's exclusive jurisdiction. See CSX Transp., Inc.—Pet. for Declaratory Order, slip op. at 3.

Moreover, while the Board has recognized that voluntary agreements between rail carriers and state or local entities might not be preempted under § 10501(b),[20] we conclude that any implied agreement allegedly created by the Authority's voluntary compliance with CEQA's

[19] Pet. 10.

[20] See Ayer, 5 S.T.B. at 512 (explaining that a railroad's voluntary agreements may be an exception to § 10501(b) preemption); Twp. of Woodbridge, N.J. v. Consol. Rail Corp. (Woodbridge 2000), NOR 42053, slip op. at 4-5 (STB served Dec. 1, 2000), clarified in decision served March 23, 2001(Woodbridge 2001) (same).

procedures during the environmental review for the Line is not controlling. As the Authority explains, CEQA compliance for the HST System began prior to the Board's assertion of jurisdiction over the project. Following issuance of the HST System Jurisdiction Decision in April 2013, the Authority has consistently stated in its environmental documentation that it reserves the right to assert federal preemption in response to any potential legal challenge to its CEQA compliance.[21] Thus, to the extent any implied agreement existed, the Authority expressly modified that agreement once the Board asserted jurisdiction.

Even assuming arguendo that the Authority's previous CEQA compliance created an implied agreement, the Board concludes that any such agreement unreasonably interferes with interstate commerce and is not enforceable under § 10501(b). As the Board has explained, a railroad's agreements with state or local entities may be preempted by § 10501(b) if the agreement unreasonably interferes with interstate commerce or railroad operations. Woodbridge 2000, slip op. at 4-5; Woodbridge 2001, slip op. at 3.[22] See Blanchard Sec. Co. v. Rahway Valley R.R., 191 F. App'x 98, 100 (3d Cir. 2006) (unpublished) (following Woodbridge 2000). Here, the Board's jurisdiction extends to the Line because, as we have found, the Line would be constructed and operated as part of the interstate rail network. Merced-to-Fresno, slip op. at 11-15. Moreover, the Board specifically authorized the construction of the Line after a review of the environmental impacts under NEPA and the transportation merits of the project. Fresno-to-Bakersfield, slip op. at 12-21. The Line nevertheless is now the subject of seven CEQA enforcement suits in California state court that could block or significantly delay the Authority's right to proceed with the project. We believe that this conflict with our jurisdiction runs contrary to Congress's intent. In particular, we conclude that any implied agreement to comply with CEQA that potentially could have the effect, through the mechanism of a third-party enforcement suit, of prohibiting the construction of a rail line authorized by the Board unreasonably interferes with interstate commerce by conflicting with our exclusive jurisdiction and by preventing the Authority from exercising the authority we have granted it. See Blanchard, 191 F. App'x at 100 (finding state law claims seeking enforcement of contract with railroad preempted because they would interfere with the reactivation of a rail line). Therefore, to the extent the Authority's previous voluntary CEQA compliance created an implied contract,

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[21] See Pet. 10 n.8 (quoting Fresno-Bakersfield HST Segment Final EIR/EIS 1-4: "[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"; and citing Palmdale-Burbank HST Segment Notice of Preparation, n.1, repeating that Authority reserved its right to assert preemption).

[22] The facts here are distinguishable from Woodbridge. In Woodbridge 2000, the Board found that a voluntary agreement between a railroad and a municipality in which the railroad agreed to limit certain nighttime operations was not preempted, because the railroad "ha[d] not shown that enforcement of its commitments would unreasonably interfere with the railroad's operations." Woodbridge 2000, slip op. at 5. The Board later clarified that decision by explaining that it did not preclude the railroad from arguing in subsequent proceedings that the agreement did interfere with interstate commerce. Woodbridge 2001, slip op. at 3.

the Board concludes that any such agreement is preempted under § 10501(b) because of its impact on interstate commerce.

Opponents rely on the California Court of Appeal's decision in Atherton, which previously found that CEQA is not preempted by § 10501(b) with regard to construction of the HST System. However, to the extent our analysis above conflicts with that decision, we respectfully disagree with the court's analysis.

First, the Atherton court did not directly decide, see 175 Cal. Rptr. 3d at 161-62, whether CEQA qualified as a state permitting or preclearance requirement "that, by its nature, could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities that [the Board] has authorized." Id. at 159-60. However, to the extent Atherton can be read to suggest that CEQA is not a preclearance requirement, the court's analysis, in our view, is incorrect. Consistent with our prior decisions such as DesertXpress, we conclude here that CEQA is a state preclearance requirement because the environmental review process under CEQA can be used under state law, through an enforcement proceeding, to block a Board-authorized rail construction project. Indeed, another California Court of Appeal in Eel River, 178 Cal. Rptr. 3d at 769-70, recently explained that the environmental review process under CEQA, though it serves a laudable and important purpose, qualifies as a state preclearance requirement that "could significantly delay or even halt a project in some circumstances," and therefore is categorically preempted.

Moreover, the court in Atherton failed to acknowledge another reason why CEQA is categorically preempted by § 10501(b): that because environmental review under CEQA attempts to regulate where, how, and under what conditions the Authority may construct the Line, the application of CEQA here would constitute an attempt by a state to regulate a matter directly regulated by the Board – the construction of a new rail line as part of the interstate rail network. See CSX Transp., Inc.—Pet. for Declaratory Order, slip op. at 3 (§ 10501(b) categorically preempts any "state or local regulation of matters directly regulated by the Board – such as the construction, operation, and abandonment of rail lines"); Franks Inv. Co. v. Union Pac. R.R., 593 F.3d 404, 410-11 (5th Cir. 2010); Adrian & Blissfield R.R., 550 F.3d at 539-40.

Ultimately, the Atherton court appears to have assumed that CEQA was indeed preempted, but then held that an exception to federal preemption – the market participation doctrine – applied to block any preemption of CEQA in this particular case. See 175 Cal. Rptr. 3d at 162-68. However, we agree with the Eel River court that the market participation doctrine does not apply in the context of a CEQA enforcement suit for a railroad project under our jurisdiction and that, consequently, the Atherton court incorrectly applied it to bar federal preemption of CEQA. Eel River, 178 Cal. Rptr. 3d at 774-78.

As both the Atherton and Eel River courts explain, the market participation doctrine shields state action from federal preemption where the state's action is proprietary in nature and not regulatory – i.e., the state is acting as a participant in the marketplace and not as a regulator. See Eel River, 178 Cal Rptr. 3d at 774-76 ("[T]he market participation doctrine gives governmental entities the freedom to engage in conduct that would be allowed to private market participants. It accomplishes this end by allowing the governmental entity to avoid a charge by

aggrieved third parties that its actions are preempted by federal law.") (citations omitted); Atherton, 175 Cal. Rptr. 3d at 163-64. The Atherton court held that the market participation doctrine barred preemption under § 10501(b) because it found that the Authority's HST project, and its related CEQA compliance, was proprietary in nature and that the Authority was not acting as a regulator. See 175 Cal. Rptr. 3d at 164-68. However, as the Eel River court explained, even if a state agency's action can be 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 part of this proprietary action." 178 Cal Rptr. 3d at 776. Indeed, when a state invokes the market participation doctrine, it usually does so *"defensively"* to protect its actions from federal preemption. Id. (emphasis in original). However, when bringing a CEQA enforcement suit, "[p]etitioners 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." Id. As the Eel River court noted, "[n]one 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. Thus, we agree with the Eel River court's conclusion that "[t]he aspect of CEQA that allows a citizen's group to challenge the adequacy of an EIR when CEQA compliance is required is clearly regulatory in nature, as a lawsuit against a governmental entity cannot be viewed as part of its proprietary action, even if the lawsuit challenges that proprietary action." Id.[23]

In addition, in the context of applying the market participation doctrine, the Atherton court relied upon the alleged requirements of California's Proposition 1A (the bond measure that provides funding for the HST System) and the Authority's subsequent voluntary attempted compliance with CEQA to demonstrate that the Authority was acting as a market participant. See 175 Cal. Rptr. 3d at 165-67. While the Board will not attempt to interpret the requirements of Proposition 1A, as that is for a state court to decide, we do not believe the actions that the

[23] Opponents cite to numerous market participation doctrine cases, almost all of which are discussed in both the Atherton and Eel River decisions. None of these cases support Opponents' arguments because, as the Eel River court explained, they all involved situations where the state or municipality used the market participation doctrine defensively to shield its actions in procuring goods and services from federal preemption. See, e.g., Transportation Groups Reply 11-22, citing Bldg. & Constr. Trades Council v. Associated Builders & Contractors, 507 U.S. 218 (1993); Johnson v. Rancho Santiago Cmty. Coll., 623 F.3d 1011 (9th Cir. 2010); Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 498 F.3d 1031 (9th Cir. 2007); Tocher v. City of Santa Ana, 219 F.3d 1040 (9th Cir. 2000), abrogated in part by City of Columbus v. Ours Garage & Wrecker Serv., Inc., 536 U.S. 424 (2002); Cardinal Towing & Auto Repair, Inc. v. City of Bedford, 180 F.3d 686 (5th Cir. 1999). In this case, the relevant regulatory actions are not the procurement of goods or services for the Line, but rather the third-party enforcement suits filed against the Authority. Indeed, this case is analogous to the so-called Grupp cases discussed in Eel River, in which the courts held that when a third party "relies on a state law of general application to challenge a state proprietary action, that challenge operates as a regulation, rather than a part of the proprietary action being challenged." 178 Cal. Rptr. 3d at 776-77.

Authority has taken under Proposition 1A and CEQA are the relevant actions for purposes of determining whether the market participation exception to preemption should apply. As noted above, the relevant question under the market participation doctrine is whether a third-party enforcement action under CEQA constitutes state proprietary or regulatory action. As the Eel River court explained, such an action is a regulatory, not a proprietary action.[24]

State sovereignty. Finally, Opponents argue that any preemption of CEQA here would infringe upon California's state sovereignty by interfering with the state's right to dictate how its own agency (the Authority) must proceed when building a state project.[25] Opponents assert that Proposition 1A requires the Authority to comply with CEQA as a condition of obtaining and using Proposition 1A funding to construct the HST.[26] However, as we have noted, the relevant regulatory actions for purposes of our preemption analysis here are the third-party CEQA enforcement suits, not the state law that authorized funding for the HST System. Our analysis indicating that § 10501(b) preempts third-party attempts to enforce CEQA against a state agency does not infringe upon California's state sovereignty because the CEQA enforcement actions are not being brought by the state. Rather, the enforcement actions in state court are being brought by third parties against a state agency under the guise of state law.

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[24] Opponents, like the Atherton court, suggest that the relevant action for purposes of determining preemption here consists of the Authority's internal approvals related to the HST project and voluntary attempted compliance with CEQA. Transportation Groups Reply 11-22. Opponents suggest that preemption only applies where there is an "external" attempt to regulate a rail carrier. See, e.g., id. at 21-22 (characterizing the N. San Diego and Eel River cases as involving "external" attempts to regulate). We do not need to decide whether Opponents' internal/external distinction is controlling, however, because the relevant actions here are indeed "external" attempts to regulate a project, under the Opponents' own definition of "external." The relevant regulatory actions here are the "external" third-party CEQA enforcement suits being brought against the Authority – not any internal decisions the Authority has made. Such lawsuits can regulate rail transportation just as effectively as a state statute or regulation. See Maynard v. CSX Transp., Inc., 360 F. Supp. 2d 836, 840 (E.D. Ky. 2004) (explaining that common law suits constitute regulation); Guckenberg v. Wis. Cent. Ltd., 178 F. Supp. 2d 954, 958 (E.D. Wis. 2001) (same) (citing and quoting Cipollone v. Liggett Group, Inc., 505 U.S. 504, 521 (1992)). In addition, Opponents suggest that attempted regulation of state rail agencies like the Authority should be treated differently than local rail agencies under § 10501(b), or that only regulatory actions against private railroads are subject to preemption. See Transportation Groups Reply 21-22, 28. However, no such distinctions exist in the case law applying § 10501(b). See, e.g., Eel River, 178 Cal. Rptr. 3d at 760 (attempt to regulate activities of local rail carrier preempted); N. San Diego, slip op. at 1-2, 7 (same); Ala. R.R., slip op. at 5 (state railroad's construction of new rail line under Board's exclusive jurisdiction). See also California v. Taylor, 353 U.S. 553, 561-68 (1957) (state owned railroads generally subject to federal rail regulation in the same manner as private railroads).

[25] See Transportation Groups Reply 23-29; CEQA Litigants Reply 4.

[26] See Transportation Groups Reply 23-29.

In addition, as we have noted, we do not opine here on whether Proposition 1A requires the Authority to comply with CEQA as a condition of its funding. 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. Fresno-to-Bakersfield, slip op. at 11 ("[I]t is not our role to determine whether the Authority has complied with state or Federal funding requirements. That is an issue to be decided by the appropriate courts."); Cf. Nixon v. Mo. Mun. League, 541 U.S. 125, 134-37 (2004) (explaining that even if a federal statute were to preempt a state requirement directed at a state agency, the state legislature still has the authority to control the funding of the state agency and implicitly the state agency's actions).

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The Authority's petition for declaratory order is granted to the extent discussed above.

2. The motions to intervene are granted, and the late-filed comments of Senator Vidak; U.S. Representatives Valadao, Denham, McCarthy, and Nunes; and MEL's Farms are accepted into the record.

3. The Authority's motion for leave to file a reply is denied. Transportation Groups' opposition to motion for leave to reply or, in the alternative, motion for leave to file surreply is denied as moot.

4. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman. Commissioner Begeman dissented with a separate expression.

COMMISSIONER BEGEMAN, dissenting:

Since the Authority first came to the Board in March 2013, the majority's main focus has been on getting out of the Authority's way instead of providing much needed review and oversight (which could have occurred during the Board's construction application process) and ensuring that conflicts with stakeholders (e.g., freight carriers, Mercy Hospital) would be resolved. Although the majority's unobtrusive posture continues, today's overreaching order also clears the citizens of the State of California from the Authority's path. Just as I could not support the majority's prior oversight avoidance, I cannot support moving a significant piece of the Authority's decision-making beyond the reach of the people whose interests the Authority purportedly serves.

It is well established that the Authority and the Federal Railroad Administration (FRA) have worked together on a number of joint environmental reviews of the HST System. During these reviews, "the Authority served as the lead state agency for compliance with the California

Environmental Quality Act (CEQA), and FRA and the Authority served as co-leads for compliance with NEPA. These joint reviews have produced single environmental documents titled "environmental impact reports/environmental impact statements" (EIR/EIS) to meet the obligations of both CEQA and NEPA, respectively."[1] In approving the two segments over my objections, the Board twice adopted such joint documents, including numerous CEQA mitigation provisions.

If the Authority was interested in foregoing its CEQA commitments under the guise of federal preemption, it could have revised either of the two EIR/EISs prior to the Board's adoption of them. After all, the Board claimed jurisdiction over the project in advance of issuing a final decision (including the adoption of the joint environmental documents) to approve construction of the first section in June 2013. But the Authority took no such action on either segment. The Board adopted both of the joint environmental documents, arguably making the Authority fully accountable for both CEQA and NEPA mitigation.

The Authority has not asked the Board to shield it entirely against California's environmental laws (which may have to do with the conditioning of the November 2008 bond measure supporting the Project on CEQA compliance). The petition for declaratory order instead states that the Authority "completed the CEQA process when it completed and certified the EIR . . . for the Fresno-Bakersfield HST Segment in May of 2014" and thus "does not seek declaratory relief regarding non-injunctive remedies, such as an order requiring revised environmental analyses or additional environmental mitigation . . . ."

Yet the majority has decided to go even further than the Authority requested by finding that CEQA is "categorically preempted." In other words, there is now no means of enforcing CEQA with respect to the Project. Authority claims of CEQA compliance will be merely claims, and deviations from any of the CEQA provisions included in the Board's own-approved EIR/EISs will not be challengeable.

Ironically, today's ruling could have unintended consequences for the long-term prospects of the Project. Although the majority claims that its decision does not implicate the bonding monies, those claims certainly bind no one in the State of California. The majority's decision to remove this element of compliance oversight for the Authority may instead serve only to spur further litigation.

It is within the Board's discretion to issue a declaratory order and it should decline to do so here.[2] The Authority has come before the Board many times asserting its commitment to both CEQA and NEPA. This agency has adopted that commitment into its orders and many

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[1] See, e.g., Cal. High-Speed Rail Auth.—Constr. Exemption—in Fresno, Kings, Tulare, & Kern Cntys., Cal., FD 35724 (Sub-No. 1), slip op. at 2 n.3 (STB served Aug. 12, 2014).

[2] See 5 U.S.C. § 554(e); 49 U.S.C. § 721 (the Board has the discretion to grant or decline petitions for declaratory order).

stakeholders have relied on the Authority's representations over the years. The Authority should live up to its commitments and the Board should refrain from undermining them.

I dissent.

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***County of Kings v. California High-Speed Rail Authority***

Case No.: **34-2014080001861-CU-WM-GDS**

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; my business address is 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550.

On **December 23, 2014**, I served the attached **NOTICE OF SURFACE TRANSPORTATION BOARD DECISION** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Sacramento, California, addressed as follows:

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Attorneys for Petitioners County of Kings, Citizens for California High Speed Rail Accountability, Kings County Farm Bureau

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 **December 23, 2014**, at Sacramento, California.

RuthAnn Reshke
Declarant

Signature

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EXHIBIT B

ORIGINAL

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California High-Speed Rail Authority

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

COUNTY OF KINGS, CITIZENS FOR CALIFORNIA HIGH SPEED RAIL ACCOUNTABILITY, KINGS COUNTY FARM BUREAU,

Petitioners,

v.

CALIFORNIA HIGH-SPEED RAIL AUTHORITY, and DOES 1 through 20,

Respondents and Defendants.

ROES 1 to 10,

Real Parties in Interest.

Case No. 34-2014-80001861-CU-WM-GDS

NOTICE OF MOTION AND MOTION FOR STAY OF ACTION; MEMORANDUM OF POINTS AND AUTHORITIES; DECL. OF JESSICA TUCKER-MOHL; [PROPOSED] ORDER

ASSIGNED FOR ALL PURPOSES

Judge: Hon. Michael Kenny
Dept: 31
Date: March 27, 2015
Time: 9:00 a.m.
Action Filed: June 5, 2014

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on March 27, 2015, at 9:00 a.m. in Department 31 of the above-entitled Court, located at 720 9th Street, Sacramento, CA 95814, respondent California High-Speed Rail Authority (the "Authority") will move this Court for an order staying this action until after the California Supreme Court issues a decision in the pending case *Friends of the Eel River v. North Coast Railroad Authority* (No. S222472, Petition for Review granted Dec. 10, 2014).

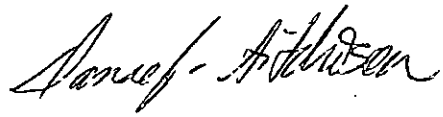
The Authority bases this motion on this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the attached Declaration of Jessica E. Tucker-Mohl, the concurrently filed Request for Judicial Notice, the pleadings and papers on file in this action, and such other and further evidence as the Court may consider at the hearing on this motion.

Pursuant to local rule 1.06, the Court will make a tentative ruling on the merits of this matter by 2:00 p.m., the court day before the hearing. To receive the tentative ruling, you can access the court's website at www.saccourt.ca.gov or arrange to obtain the tentative ruling from the clerk of Department 31. If you do not call the court and the opposing party by 4:00 p.m. the court day before the hearing, no hearing will be held.

Dated: February 19, 2015

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
DANIEL L. SIEGEL
Supervising Deputy Attorney General



DANAE J. AITCHISON
Deputy Attorney General
Attorneys for Respondents and Defendants California High-Speed Rail Authority

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INTRODUCTION

Respondent California High-Speed Rail Authority has consistently asserted that the Court lacks subject matter jurisdiction because in this case, the California Environmental Quality Act is preempted by federal law. The federal Surface Transportation Board has ruled that California's planned high-speed rail system is subject to its jurisdiction. The STB has authorized construction in the Fresno to Bakersfield section of the system, which is at issue in this lawsuit. Construction between Fresno and Bakersfield will begin in the coming months. This lawsuit seeks to prevent Fresno to Bakersfield construction from commencing, or halt it after it begins, based on CEQA. Federal law, however, expressly preempts the CEQA remedies sought in this case because they interfere with the STB's exclusive jurisdiction over rail line construction under the Interstate Commerce Commission Termination Act. The STB has issued a declaratory order that CEQA is preempted under the facts here. No exceptions to preemption apply, and ordinarily, Respondent would now move for dismissal.

On December 10, 2014, however, the California Supreme Court granted review in *Friends of the Eel River v. North Coast Railroad Authority*, which involves the intersection of CEQA, ICCTA preemption of state law, and a publicly-owned railroad, as does the lawsuit at bar here. In these circumstances, it would promote judicial economy to stay this case so that any eventual motion for judgment on the pleadings can consider and address the anticipated *Eel River* decision. Indeed, the Court queried whether the case should be in abeyance at the recent case management conference.

Nevertheless, the Authority reserves its right to assert preemption in the event that petitioners in this case or any of the related cases seek to obtain relief that could impact the project. Based on the Authority's present construction plans, it is highly likely construction in the Fresno to Bakersfield section will start well before *Eel River* is decided. If, during the pendency of the stay, a petitioner moves to lift the stay and asks for the kind of interim relief pled for in the Petitions – *i.e.*, a preliminary injunction halting construction, the Authority will oppose it on preemption grounds whether or not the Supreme Court has issued a decision in *Eel River*. Unless and until then, a stay of all proceedings is acceptable to the Authority.

STATEMENT OF FACTS/PROCEDURAL BACKGROUND

This case challenges the Authority's environmental impact report ("EIR") for the construction of approximately 114 miles of railroad track and related facilities for alleged violation of the California Environmental Quality Act ("CEQA") (Pub. Resources Code, § 21000 et seq.) In 2011, the Authority issued a draft environmental impact report/environmental impact statement ("EIR/EIS") for the Fresno to Bakersfield section of the high-speed rail system. (AR B000001; A000002.) [1] In 2012, the Authority issued a Revised Draft EIR/Supplemental Draft EIS. (AR B000001.)

While the Fresno to Bakersfield section EIR/EIS was underway, the Authority filed with the Surface Transportation Board ("STB") a petition for exemption from the prior approval requirements in 49 U.S.C. § 10901 for high-speed rail construction in the Merced to Fresno section of the system, and concurrently filed a motion to dismiss on the grounds that the STB lacked jurisdiction over the high-speed rail system as a whole. (*California High-Speed Rail Authority, Construction Exemption – in Merced, Madera, and Fresno Counties, Cal.*, No. FD 35724, 2013 WL 1701795, at * 1 (S.T.B. April 18, 2013).) The Authority argued that the high-speed rail system was not subject to STB jurisdiction because it is located within California and would not be constructed or operated as part of the interstate rail network. (*Id.* at *1.)

On April 18, 2013, the STB denied the Authority's motion to dismiss, concluding it has jurisdiction over the entire high-speed rail system, reserving its explanation on jurisdiction for the decision on the construction exemption. (*Id.* at *2.) On June 13, 2013, the STB issued a decision holding it has jurisdiction over the California high-speed rail system because its interconnectivity with Amtrak makes it part of the interstate rail network. (*California High-Speed Rail Authority, Construction Exemption – in Merced, Madera, and Fresno Counties, Cal.*, No. FD 35724, 2013 WL 3053064, at *6 (S.T.B. June 13, 2013).) [2] The decision explained that the ICCTA expanded federal regulatory jurisdiction to include wholly intrastate rail transportation

[1] This motion includes citations to portions of the administrative record ("AR") the Authority lodged on November 21, 2014. For example, AR B0000001 refers to administrative record page B0000001.

[2] The decision also authorized construction between Merced and Fresno. (*Id.* at *9-13.)

based on its relationship to the interstate rail network. (*Id.* at *7-*9.) No party appealed and the decision is final. (28 U.S.C. §§ 2321(a), 2342, 2343, 2344.)

The Authority filed a petition for exemption to obtain authority to construct the Fresno to Bakersfield section on September 26, 2013. (*California High-Speed Rail Authority, Construction Exemption – in Fresno, Kings, Tulare, and Kern Counties, Cal.*, No. FD 35724, 2014 WL 3973120, at *1 (S.T.B. August 11, 2014.).

The Authority issued the Fresno to Bakersfield Section Final EIR/EIS on April 18, 2014. (AR B000002.) On May 7, 2014, the Authority certified the Final EIR/EIS for its compliance with CEQA, approved the preferred alternative from Fresno to approximately Seventh Standard Road in Kern County, and adopted CEQA findings of fact and a statement of overriding considerations. (AR B000001-3; B000004-6.)

While this lawsuit was pending, the STB authorized construction of the Fresno to Bakersfield section of the high-speed rail system. (*California High-Speed Rail Authority, Construction Exemption – in Fresno, Kings, Tulare, and Kern Counties, Cal.*, No. FD 35724-1, 2014 WL 3973120 at *16 (S.T.B. August 11, 2014).) No party appealed the decision and it is final. (28 U.S.C. §§ 2321(a), 2342, 2343, 2344.)

On December 10, 2014, the California Supreme Court granted review of *Friends of the Eel River v. North Coast Railroad Authority*, California Supreme Court case number S222472.

On December 12, 2014, following the Authority's request for a declaratory order, the STB held that section 10501(b) preempts CEQA for the Fresno to Bakersfield rail project and that the market participant doctrine did not preclude application of normal preemption principles. (*California High-Speed Rail Authority – Petition for Declaratory Order*, No. FD 35861, 2014 WL 7149612, at *7, *10-11 (S.T.B. December 12, 2014) petitions for review filed, *Dignity Health v. Surface Transportation Board, et al.* (D.C. Cir., Feb. 10, 2015) No. 15-1030; *Kings County, et al. v. Surface Transportation Board, et al.* (9th Cir., Feb. 9, 2015) No. 15-70386.) Two petitions for reconsideration are still pending before the STB. (*Kings County, et al. Petition for Reconsideration*, No. FD 35861 (S.T.B. Dec. 29, 2014); *Jacqueline Ayer Petition for Reconsideration*, No. FD 35861 (S.T.B. Dec. 30, 2014).) Two petitions for review of the STB's

declaratory order were filed with federal appellate courts on February 9, 2015. A petition for a stay of the STB declaratory order was filed on February 19, 2015. (*Kings County et al.*, No. FD 35861 (S.T.B. Feb. 19, 2015).)

ARGUMENT

I. THIS COURT HAS CLEAR AUTHORITY TO STAY THESE PROCEEDINGS PENDING RESOLUTION OF A CALIFORNIA SUPREME COURT CASE INVOLVING RELEVANT ISSUES.

The Court has the inherent power, as well as rights recognized by statute, to control its proceedings. (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 266-267 [discussing courts inherent powers derived from Constitution and those conferred by statute]; Code Civ. Proc., § 128, subd. (a)(8).) "Trial courts generally have the inherent power to stay proceedings in the interests of justice and to promote judicial efficiency." (*Freiberg v. City of Mission Viejo* (1995) 33 Cal.App.4th 1484, 1489; see also *Rice v. Superior Court* (1982) 136 Cal.App.3d 81, 89 [inherent power of court to issue stay limited by statute conferred substantive right on aged plaintiffs to not lose rights due to passage of time].) A stay of proceedings in the trial court pending a decision by the California Supreme Court in a case before it presenting relevant legal issues is an appropriate circumstance for a stay. (See *Curran v. Mount Diablo Council of the Boy Scouts* (1998) 17 Cal.4th 670, 677 [trial court stayed action pending U.S. Supreme Court determination of case with related issues]; *Ford v. Pacific Gas and Electric Co.* (1997) 60 Cal.App.4th 696, 700 [court of appeal held briefing in abeyance pending California Supreme Court decision in case concerning related issues]; *Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 103-104 [acknowledging trial court option to stay case pending California Supreme Court decision].)

II. THE COURT SHOULD STAY THIS CASE PENDING THE CALIFORNIA SUPREME COURT'S DECISION IN *FRIENDS OF THE EEL RIVER V. NORTH COAST RAILROAD AUTHORITY*

The Court should stay the entire action pending the California Supreme Court's decision in *Eel River*. The Authority believes the law as it stands is sufficiently clear that federal law preempts the CEQA and derivative claims in this case that the Court could dismiss the claims

now. The Authority recognizes, however, that the California Supreme Court will address an issue in *Eel River* that could have relevance to the preemption analysis in this case, and at this stage, a stay of the proceedings is in the interest of judicial economy. The Authority notes however, that there are circumstances in which considerations of judicial economy would necessarily yield. If petitioners in this or one of the related cases seek to lift the stay and attempt to obtain provisional or other relief before a Supreme Court decision becomes final in *Eel River*, the issues of preemption and the jurisdiction of this Court would be squarely presented, and would have to be decided. The Authority would assert preemption and consequent lack of jurisdiction as a defense and if the stay is lifted, the Authority reserves the right to move for judgment on the pleadings then, or any time prior if other circumstances warrant.

A. The Interstate Commerce Commission Termination Act Preempts The CEQA and Derivative Claims In This Case; The Court Has No Jurisdiction To Provide The Remedies Sought.

The plain language of the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. section 10501(b), expressly preempts remedies under the CEQA and derivative claims in this case and the Court has no jurisdiction to provide a remedy. The statute provides:

> 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 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 the 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), emphasis added.) By its terms, section 10501(b) gives the STB exclusive jurisdiction over construction of rail lines, including wholly intrastate lines. (*CSX Transportation, Inc. v. Georgia Public Service Comm.* (N.D. Ga. 1996) 944 F.Supp. 1573, 1582-1584.) Section 10501(b) preempts, "state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws [of general application] having a more remote or incidental effect on rail transportation." (*People v.*

Burlington Northern Santa Fe (2012) 209 Cal.App.4th 1513, 1528 citing *New York & Susquehanna v. Jackson* (3d Cir. 2007) 500 F.3d 238, 252.)

The CEQA and derivative claims are preempted here because: (1) they seek to prevent the Authority from proceeding with STB-authorized construction; and (2) they seek to regulate rail line construction, an area directly and exclusively regulated by the STB. (*People v. Burlington Northern Santa Fe*, *supra*, 209 Cal.App.4th at p. 1528 [recognizing two types of facially preempted state laws under section 10501(b)]; see also *City of Auburn v. U.S. Government* (9th Cir. 1998) 154 F.3d 1025, 1030-1031; *Green Mountain Railroad Corporation v. State of Vermont* (2d Cir. 2005) 404 F.3d 638, 641-642.)

Town of Atherton v. California High-Speed Rail Authority does not control the preemption analysis here because that decision is expressly limited to the facts and posture of that case. (*Town of Atherton v. California High-Speed Rail Authority* (2014) 228 Cal.App.4th 314, 327, fn.2 ("*Atherton*"); *id.* at p. 323.) The legal issue at hand in *Atherton* (a broad, first-tier environmental document and general route decision) was different because that Court did not have occasion to address a conflict with the STB's exclusive jurisdiction over rail line construction, the issue presented here. (*Id.* at p. 333; *California High-Speed Rail Authority, Construction Exemption – in Fresno, Kings, Tulare, and Kern Counties, Cal.*, *supra*, 2014 WL 3973120 at *16.) The *Atherton* court noted there was no declaratory order decision by the STB relative to the CEQA lawsuits involved in that case. (*Atherton*, *supra*, 228 Cal.App. 4th at 333.) Here, however, the STB has issued a decision holding the ICCTA preempts CEQA in the context of the cases challenging Fresno to Bakersfield rail line construction the STB has authorized and no exceptions to preemption apply. (*California High-Speed Rail Authority – Petition for Declaratory Order*, *supra*, 2014 WL 7149612, at *7.) These and other distinctions the Authority would brief in full if it moves for judgment on the pleadings.

B. *Eel River* Appears To Involve Issues Relevant To This Case; It Promotes Judicial Efficiency To Stay This Case Until *Eel River* Is Decided.

Despite the ICCTA's clear preemption of the remedies sought in this case, the Authority recognizes that a case currently pending before the California Supreme Court also involves the

intersection of CEQA, the ICCTA's preemption provision, and a publicly-owned railroad. (*Friends of the Eel River v. North Coast Railroad Authority* (2014) 230 Cal.App.4th 85, review granted Dec. 10, 2014, case no. S222472.) The Supreme Court's "Case Summary" in *Eel River* poses the following question:

> (1) Does the [ICCTA] preempt the application of [CEQA] to a state agency's proprietary acts with respect to a state-owned and funded rail line or is CEQA not preempted under the market participant doctrine (see *Town of Atherton v. California High-Speed Rail Authority* (2014) 228 Cal.App.4th 314)?

(See Respondent's Request for Judicial Notice, Ex. 1, p.1.) While it is unclear whether the Supreme Court's decision in *Eel River* will be dispositive of the preemption analysis in this case, at least one of the parties will likely rely on it in future briefing on the preemption questions here.[3] In light of the fact that any decision by the trial court now about preemption will inevitably be appealed, it promotes the efficiency of the Court and the parties to stay this case in its entirety until the Supreme Court decides *Eel River*.

III. THE AUTHORITY RESERVES ITS RIGHT TO BRING A MOTION FOR JUDGMENT ON THE PLEADINGS IF PETITIONERS IN ANY OF THE RELATED CASES SEEK ANY FORM OF PROVISIONAL OR INTERIM RELIEF.

The Authority has attached with this motion a proposed order that would stay all proceedings in this case pending a decision in *Eel River*, but would preserve the ability of the parties to settle and the Court's ability to enter a stipulated judgment and dismissal if settlement occurs. The nature of the proposed stay is that it applies to all parties, and to the entire case, staying all proceedings for all causes of action. In particular, the proposed stay would cover the previously negotiated briefing schedule and hearing date for the merits of the CEQA claims in this case and in the related cases. In the event either petitioners or the Authority want to lift the stay, a motion to lift the stay will be required in conjunction with whatever other relief is sought.[4]

---

[3] The website "Docket" for *Eel River* indicates that the appellants opening briefs in the case are due on February 23, 2015. (Respondent's Request for Judicial Notice, Ex. 2, p. 2.) Full briefing in the case will not be complete for several months, and therefore it remains difficult to assess what level of factual similarity there may be between these Fresno to Bakersfield cases and the underlying facts in *Eel River*.

[4] The proposed stay does not include a stay of the Authority lodging with the Court sections H14 and H15 of the administrative record, and making it available to petitioners. The Authority has already made sections H14 and H15 available to petitioners, and will lodge these (continued...)

As explained above, the Authority anticipates commencing construction of the Fresno to Bakersfield rail line, consistent with its Surface Transportation Board authorization, and that construction will more than likely precede the Supreme Court's *Eel River* decision. The issue of this Court's subject matter jurisdiction over this case and the remedies it seeks therefore may require a decision on preemption well before the Supreme Court decides *Eel River*.

CONCLUSION

For the foregoing reasons, the Authority respectfully requests that the Court stay this entire action as indicated on the attached Proposed Order pending the final decision of the California Supreme Court in *Eel River*.

Dated: February 19, 2015

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
DANIEL L. SIEGEL
Supervising Deputy Attorney General

DANAE J. AITCHISON
Deputy Attorney General
Attorneys for Respondents and Defendants California High-Speed Rail Authority

(...continued)
sections with the Court on February 20, 2015.

DECLARATION OF JESSICA E. TUCKER-MOHL

I, Jessica E. Tucker-Mohl, declare:

1. I am an attorney at law licensed to practice before all courts of the State of California. I am a Deputy Attorney General for the State of California and am attorney of record for defendant California High-Speed Rail Authority in this this action. I have personal knowledge of the following facts. If called upon to testify as a witness, I could and would testify competently to these facts under oath.

2. Via letter dated December 23, 2014, I conferred with counsel for all parties in the six then-pending related cases challenging the Fresno to Bakersfield environmental impact report (Sacramento County Superior Court Case Nos. 34-2014-80001859; 34-2014-80001861; 34-2014-80001863; 34-2014-80001864; 34-2014-80001865; and 34-2014-80001908) regarding the Authority's planned motion for judgment on the pleadings on the grounds of preemption.

3. At the January 23, 2015, case management conference, I stated on the record that the Authority's proposed motion hearing date of March 27, 2015, and proposed filing dates of February 19th (opening motion), March 9th (oppositions) and March 20th (replies) appeared to be acceptable. On the record, all counsel present concurred.

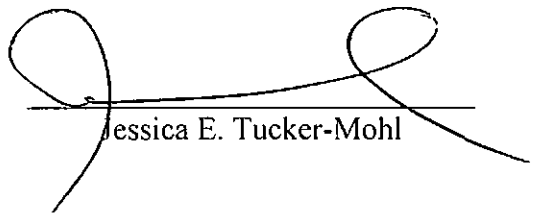
4. On February 17, 2015 at 4:15 p.m., I sent an electronic mail message to counsel for all parties in the five following related lawsuits (Sacramento County Superior Court Case Nos. 34-2014-80001861; 34-2014-80001863; 34-2014-80001864; 34-2014-80001865; and 34-2014-80001908) stating that the Authority was electing to proceed with a motion for stay instead of a motion for judgment on the pleadings, using the same hearing date and deadlines previously agreed to. I asked counsel for all parties to notify me by 4:00 p.m. on February 18, 2015, if they would agree to entry of a stay of their case pending *Friends of Eel River*.

5. On February 18, 2015, I communicated with counsel for Coffee-Brimhall LLC, petitioner in *Coffee-Brimhall LLC v. California High-Speed Rail Authority* (Case No. 34-2014-80001859), stating that the Authority was electing to proceed with a motion for stay instead of a motion for judgment on the pleadings, using the same hearing date and deadlines previously

agreed to. Because the parties have settled *Coffee-Brimhall LLC v. California High-Speed Rail Authority*, the Authority has filed a Stipulated Judgment on February 18, 2015, and the Authority anticipates Coffee-Brimhall LLC will file a Notice of Dismissal on February 19, 2015, I indicated to counsel that no motion will be filed in that case.

5. As of February 19, 2015, at 10:00 a.m., I received responses from counsel for the City of Shafter (Case No. 34-2014-80001908), indicating that petitioner Shafter would agree to entry of a stay of its case, and from counsel for Kings County, et al. (Case No. 34-2014-80001861) indicating that the Kings County, et al. petitioner group wished to review the Authority's motion for stay before making a determination as to their response. No other petitioners have responded as to whether they would agree to an entry of stay of their case.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Declaration was executed on February 19, 2015, at Sacramento, California.



Jessica E. Tucker-Mohl

[PROPOSED] ORDER

IT IS HEREBY ORDERED that:

1. All further proceedings in this case are hereby stayed until after a final decision by the California Supreme Court in *Friends of the Eel River v. North Coast Railroad Authority*, Case No. S222472, with the exception of the parties' ability to engage in settlement discussions and the Court's ability to enter a stipulated judgment and/or dismissal resulting from any settlement in this case.

2. The parties are ordered to promptly bring to this Court's attention any ruling by the California Supreme Court in *Friends of the Eel River*.

3. This Court will hold a case management conference within thirty days after a decision is published in *Friends of the Eel River*, to discuss how to proceed with this case, including scheduling of any motions that may be appropriate.

Dated: _____

_____
Hon. Michael P. Kenny, Judge

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***County of Kings v. California High-Speed Rail Authority***

Case No.: **34-2014080001861-CU-WM-GDS**

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; my business address is 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550.

On **February 19, 2015**, I served the attached **NOTICE OF MOTION AND MOTION FOR STAY OF ACTION; MEMORANDUM OF POINTS AND AUTHORITIES; DECL. OF JESSICA TUCKER-MOHL; [PROPOSED] ORDER** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Sacramento, California, addressed as follows:

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Douglas P. Carstens
Josh Chatten-Brown
Michelle N. Black
2200 Pacific Coast Highway, Suite 318
Hermosa Beach, CA 90254

County of Kings
Colleen Carlson
Kings County Counsel
1400 W. Lacy Boulevard, Building 4
Hanford, CA 93230

Attorneys for Petitioners County of Kings, Citizens for California High Speed Rail Accountability, Kings County Farm Bureau

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 **February 19, 2015**, at Sacramento, California.

RuthAnn Reshke
Declarant

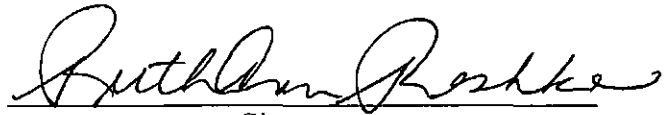
Signature

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EXHIBIT C

ORIGINAL

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Attorneys for Respondent and Defendant
California High-Speed Rail Authority

FILED/ENDORSED
MAY 15 2015
By S. Lee, Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

COUNTY OF KINGS, CITIZENS FOR CALIFORNIA HIGH SPEED RAIL ACCOUNTABILITY, KINGS COUNTY FARM BUREAU, et al.,

Petitioners,

v.

CALIFORNIA HIGH-SPEED RAIL AUTHORITY, and DOES 1 through 20,

Respondents and Defendants.

ROES 1 TO 10,

Real Parties in Interest.

Case No. 34-2014-80001861-CU-WM-GDS

~~[PROPOSED]~~ ORDER GRANTING STAY

ASSIGNED FOR ALL PURPOSES
Judge: Hon. Michael P. Kenny
Date: March 27, 2015
Dept: 31
Action Filed: June 5, 2014

On Friday, March 27, 2015 at 9:00 a.m., the Court was scheduled to hear Respondent CALIFORNIA HIGH-SPEED RAIL AUTHORITY'S Motion for Stay of Action. The Court issued a tentative ruling granting Respondent's motion and staying the action. No party requested oral argument, and the tentative ruling became final, as reflected in the minute order the Court added to the tentative ruling, a true and correct copy of which is attached to this document as Exhibit "A" and hereby incorporated by reference.

The Court HEREBY ORDERS that this matter is stayed until the California Supreme Court issues a decision in the matter of *Friends of the Eel River v. North Coast Railroad Authority*, California Supreme Court case number S222472.

Dated: May 6, 2015

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
DEBORAH M. SMITH
Supervising Deputy Attorney General

CARLOS A. MEJIA
Deputy Attorney General
Attorneys for Respondent
California High-Speed Rail Authority

Dated: May 11, 2015

Approved as to form,

CHATTEN-BROWN & CARSTENS

DOUGLAS P. CARSTENS
MICHELLE BLACK
Attorneys for Petitioners

IT IS SO ORDERED.

Dated: 5/15/15

JUDGE OF THE SUPERIOR COURT
MICHAEL P. KENNY

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EXHIBIT A

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE

MINUTE ORDER

)ATE: 03/27/2015 TIME: 09:00:00 AM DEPT: 31

UDICIAL OFFICER PRESIDING: Michael P. Kenny
:LERK: Susan Lee
:EPORTER/ERM: None
3AILIFF/COURT ATTENDANT: Larry Moorman

:ASE NO: **34-2014-80001861-CU-WM-GDS**CASE INIT.DATE: 06/05/2014
:ASE TITLE: **County of Kings vs. California High-Speed Rail Authority**
:ASE CATEGORY: Civil - Unlimited

:VENT ID/DOCUMENT ID: ,12259617
VENT TYPE: Motion - Other - Writ of Mandate
1OVING PARTY: California High-Speed Rail Authority
:AUSAL DOCUMENT/DATE FILED: Motion - Other For Stay of Action, 02/19/2015

APPEARANCES

Nature of Proceedings:

MOTION FOR STAY OF ACTION

The following shall constitute the Court's tentative ruling on the motion for stay of action, which is scheduled to be heard by the Court on Friday, March 27, 2015 at 9:00 a.m. in Department 31. The tentative ruling shall become the final ruling of the Court unless a party wishing to be heard so advises the clerk of this Department no later than 4:00 p.m. on the court day preceding the hearing, and further advises the clerk that such party has notified the other side of its intention to appear.

In the event that a hearing is requested, oral argument shall be limited to no more than 20 minutes per side.

Any party desiring an official record of this proceeding shall make arrangements for reporting services with the Clerk of the Department where the matter will be heard not later than 4:30 p.m. on the day before the hearing. The fee is $30.00 for civil proceedings lasting under one hour, and $239.00 per half day of proceedings lasting more than one hour. (Local Rule 1.12(B) and Government Code § 68086.) Payment is due at the time of the hearing.

Petitioners and Respondent have each filed a request for judicial notice in support of their response to the motion for stay of action. Respondent has filed objections to Petitioners' request. The Court has reviewed the documents and grants the requests for judicial notice as follows:

1. Respondent's request is granted in its entirety.
2. Petitioners' request is granted as to exhibits A and B. The request as to exhibits C, D, E, and F is denied.

This matter challenges Respondent's compliance with the California Environmental Quality Act in

CASE TITLE: County of Kings vs. California High-Speed Rail Authority CASE NO: 34-2014-80001861-CU-WM-GDS

connection with the construction of approximately 114 miles of railroad track and related facilities. Petitioner contends Respondent violated the California Environmental Quality Act (hereinafter, "CEQA") in failing to properly complete an Environmental Impact Report.

During the pendency of this case, the First Appellate District Court and the Third Appellate District Court decided cases concerning CEQA preemption. The First District decided *Friends of the Eel River v. North Coast Railroad Authority* (2014) 230 Cal.App.4th 85 (review granted). The First District held that the Interstate Commerce Commission Termination Act (hereinafter, "ICCTA") (49 U.S.C. § 10101 et seq.) expressly preempts CEQA. Consequently, the challenges to the subject EIR concerning a railroad company's California freight operations were properly denied by the lower court. The Third District decided *Town of Atherton v. California High Speed Rail Authority* (2014) 228 Cal.App.4th 314. The Third District held that the market participation exception applied to ICCTA preemption of CEQA with regard to the building of the California high-speed rail project. Consequently, the ICCTA did not preempt a challenge to the adequacy of the program EIR approving the high-speed train system's route.[1]

On December 10, 2014, the California Supreme Court granted review of *Friends of the Eel River v. North Coast Railroad Authority*, California Supreme Court case number S222472. The Court's website indicates that the issues the Court will consider are,

Petition for review after the Court of Appeal affirmed the judgments in actions for writ of administrative mandate. This case includes the following issues: (1) Does the Interstate Commerce Commission Termination Act [ICCTA] (49 U.S.C. § 10101 et seq.) preempt the application of the California Environmental Quality Act [CEQA] (Pub. Res. Code, § 21050 et seq.) to a state agency's proprietary acts with respect to a state-owned and funded rail line or is CEQA not preempted in such circumstances under the market participant doctrine (see *Town of Atherton v. California High Speed Rail Authority* (2014) 228 Cal.App.4th 314)? (2) Does the ICCTA preempt a state agency's voluntary commitments to comply with CEQA as a condition of receiving state funds for a state-owned rail line and/or leasing state-owned property?"[2]

In this matter, Respondent has filed a motion for a stay in light of the Supreme Court's review of *Friends of the Eel River*. Respondent argues, "...it would promote judicial economy to stay this case that that any eventual motion for judgment on the pleadings can consider and address the anticipated *Eel River* decision."[3] Respondent acknowledges that it is likely that construction will begin on the contested Fresno to Bakersfield section of the subject project before the *Eel River* decision.[4] Respondent proposes that the parties retain the ability to settle, and the Court retain the ability to enter a stipulated judgment and dismissal if settlement occurs. Respondent requests that a motion to lift the stay would be required should either party seek some sort of relief, and that the stay cover the briefing schedule and hearing date for the merits.[5]

Petitioners have filed a response to the instant motion, and non-objection to a partial stay of briefing and hearing. The response provides that the, "motion should be granted as to the briefing and hearing schedule, but denied as to administrative record finalization and any preliminary injunctive relief that becomes necessary by the Authority's efforts to acquire properties within the Section's right-of-way and construct the Section."[6] Petitioners argue that if a motion to lift the stay is necessitated, they may be prevented from effectively seeking preliminary injunctive relief, should Respondent take action which would make this matter moot by way of continuing/completing construction or property acquisition.

The Court agrees that a stay is appropriate in this matter in light of the Supreme Court's consideration of *Friends of the Eel River*. The Court agrees that continued preparation of the administrative record is unnecessary because of the potential ramifications of a Supreme Court decision in *Friends of the Eel River*. A delay in completing the record also is justified given Respondent's assertions that the record has been prepared and made available. Furthermore, the Court recognizes that Petitioners may need

CASE TITLE: County of Kings vs. California High-Speed Rail Authority | CASE NO: 34-2014-80001861-CU-WM-GDS

dditional time to proceed in the event the record is needed and must be augmented.

Vith regard to any need for injunctive belief, the Court will make itself available in a timely manner to ear a motion to lift the stay if the need arises. It is therefore not appropriate to carve out a special ircumstance in which a motion would be unnecessary.

ccordingly, this matter is hereby stayed until the California Supreme Court issues a decision in the natter of *Friends of the Eel River v. North Coast Railroad Authority*, California Supreme Court case umber S222472. Upon the issuance of said ruling, the stay shall be automatically lifted and the parties hall contact the Court for a hearing date to discuss a new briefing schedule and merits hearing date.

//

n the event that this tentative ruling becomes the final ruling of the Court, in accordance with Local Rule .06, counsel for Respondent is directed to prepare an order granting the stay, incorporating this ruling is an exhibit to the order; submit it to counsel for Petitioner for approval as to form in accordance with Rule of Court 3.1312(a); and thereafter submit it to the Court for signature and entry in accordance with Rule of Court 3.1312(b).

1] The Court recognizes that the *Atherton* decision was specific to a different component of the high speed rail system than is at issue in this case. Its applicability to this case has been raised as an issue in he briefs.
2] According to the issues statement on the Court's website as of March 16, 2015.
3] Memorandum of Points and Authorities in Support of Motion for Stay, p. 1.
4] Respondent goes on to make arguments in support of preemption and that the Court has no urisdiction in light of this preemption. These arguments are not relevant to the instant motion, and as such, the Court will not address them other than to indicate that the unresolved issues of preemption as dentified by the Supreme Court in *Friends of the Eel River* appear to be relevant to this case and support the argument that a stay promotes judicial economy.
5] Respondent indicates the proposed stay does not include a stay of Respondent's lodging with the Court sections H14 and H15 of the administrative record.
6] Response to Motion for Stay of Action, p. 2.

COURT RULING

There being no request for oral argument, the Court AFFIRMS the tentative ruling

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***County of Kings v. California High-Speed Rail Authority***

Case No.: **34-2014080001861-CU-WM-GDS**

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; my business address is 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550.

On **May 13, 2015**, I served the attached **[PROPOSED] ORDER GRANTING STAY** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Sacramento, California, addressed as follows:

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Douglas P. Carstens
Josh Chatten-Brown
Michelle N. Black
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Hermosa Beach, CA 90254

County of Kings
Colleen Carlson
Kings County Counsel
1400 W. Lacy Boulevard, Building 4
Hanford, CA 93230

Attorneys for Petitioners County of Kings, Citizens for California High Speed Rail Accountability, Kings County Farm Bureau

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 **May 13, 2015**, at Sacramento, California.

Leticia Aguirre
Declarant

Leticia Aguirre
Signature

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11601973.doc

EXHIBIT D

FILED
ENDORSED
2014 DEC 29 PM 3:06
GDSSC COURTHOUSE
SUPERIOR COURT
OF CALIFORNIA
SACRAMENTO COUNTY

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Exempt From Filing Fees Pursuant to Cal. Gov. Code § 6103

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Attorneys for Respondent
California High-Speed Rail Authority

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

DIGNITY HEALTH, a California nonprofit public benefit corporation,

Petitioner,

v.

CALIFORNIA HIGH-SPEED RAIL AUTHORITY, a public entity; and DOES 1 through 20,

Respondents.

Case No. 34-2014-80001865-CU-WM-GDS

NOTICE OF SURFACE TRANSPORTATION BOARD DECISION

ASSIGNED FOR ALL PURPOSES
Judge: Hon. Michael Kenny
Dept: 31
CMC Date: January 23, 2015
Trial Date: July 31, 2015
Action Filed: June 6, 2014

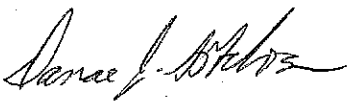
Respondent, CALIFORNIA HIGH-SPEED RAIL AUTHORITY (the "Authority"), provides this notice to the Court and to the Petitioner herein that the Surface Transportation Board issued a decision in a declaratory order proceeding on December 12, 2014, ("STB Decision") that is pertinent to this case. The STB Decision is attached hereto as Exhibit A. The Authority believes the STB Decision has an impact on the Court's jurisdiction in this case and the other related cases, each of which challenges the Fresno to Bakersfield environmental impact report under the California Environmental Quality Act.

The Authority intends to bring a motion for judgment on the pleadings, in light of the STB Decision, to be heard by this Court either on February 27, 2015, or March 27, 2015. The Authority currently is meeting and conferring with Petitioner in this case and petitioners in the other related cases regarding their availability on these dates. The Authority will provide an update on this and other issues in a supplement to its case management conference statement to be filed in January (for the January 23, 2015, CMC) in conformance with the Sacramento Superior Court Local Rules.

Dated: December 29, 2014

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
DANIEL L. SIEGEL
Supervising Deputy Attorney General



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

EXHIBIT A

44072 SERVICE DATE – LATE RELEASE DECEMBER 12, 2014
EB

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35861

CALIFORNIA HIGH-SPEED RAIL AUTHORITY—PETITION FOR DECLARATORY ORDER

Digest:[1] The Board concludes that 49 U.S.C. § 10501(b) preempts application of the California Environmental Quality Act, to the extent discussed below, to the construction of a high-speed passenger rail line between Fresno and Bakersfield, Cal.

Decided: December 12, 2014

On October 9, 2014, the California High-Speed Rail Authority (Authority) filed a petition requesting that the Board issue a declaratory order regarding the availability of injunctive remedies under the California Environmental Quality Act (CEQA) to prevent or delay construction of an approximately 114-mile high-speed passenger rail line between Fresno and Bakersfield, Cal. (the Line). The request for a declaratory order will be granted, as discussed below.

BACKGROUND

The Authority's petition concerns construction of the Line, which would be the second section of the planned statewide California High-Speed Train System (HST System). The HST System would, when completed, provide high-speed intercity passenger rail service over more than 800 miles of new rail line throughout California. The Board found in 2013 that it has jurisdiction over the HST System. Cal. High-Speed Rail Auth.—Constr. Exemption—in Merced, Madera & Fresno Cntys., Cal. (HST System Jurisdiction Decision), FD 35724, slip op. at 2 (STB served Apr. 18, 2013) (Vice Chairman Begeman concurring in part and dissenting in part); Cal. High-Speed Rail Auth.—Constr. Exemption—in Merced, Madera & Fresno Cntys., Cal. (Merced-to-Fresno), FD 35724, slip op. at 12-15 (STB served June 13, 2013) (Vice Chairman Begeman concurring in part and dissenting in part and Commissioner Mulvey concurring). The Board has granted petitions for exemption, subject to environmental and other conditions, permitting construction of the first segment of the HST System, between Merced and Fresno, Cal., and for the Line. Id. at 17-28; Cal. High-Speed Rail Auth.—Constr. Exemption—

[1] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

in Fresno, Kings, Tulare, & Kern Cntys., Cal. (Fresno-to-Bakersfield), FD 35724 (Sub-No. 1) (STB served August 12, 2014) (Vice Chairman Miller concurring and Commissioner Begeman dissenting). The Authority states that it has commenced work on the Merced to Fresno segment and is currently in the process of implementing and/or procuring construction contracts for a majority of the Line.

In its petition, the Authority requests that the Board issue an expedited declaratory order finding that CEQA injunctive remedies are not available with respect to the Line. The Authority states that seven lawsuits have been filed challenging its compliance with CEQA with respect to the Line and that the petitioners seek injunctive remedies under CEQA that would prevent or delay the Authority's ability to proceed with construction of the Line. The Authority argues that 49 U.S.C. § 10501(b) preempts such CEQA remedies because, if successful, injunctive relief would enjoin construction of a Board-authorized project. The Authority asserts that it completed the CEQA environmental review and documentation process for the Line in May 2014. Therefore, according to the Authority, the Board need not address whether CEQA is generally preempted with respect to the Line; rather the Board need only address whether injunctive remedies under CEQA that would result in a work stoppage are available as a remedy in the CEQA enforcement lawsuits that have been filed against the Authority.

The Authority notes that the Board has previously found that § 10501(b) preempts CEQA with respect to a line subject to Board jurisdiction, citing DesertXpress Enterprises, LLC—Petition for Declaratory Order, FD 34914 (STB served June 27, 2007), and North San Diego County Transit Development Board—Petition for Declaratory Order, FD 34111 (STB served August 21, 2002). The Authority argues that, while it elected to complete the CEQA process for the Line even after the Board had determined that it had jurisdiction over the HST System, it made clear during the environmental review process for the Line that it was not waiving any preemption arguments related to CEQA that might be available to the Authority, in the event of a court challenge to its CEQA compliance.[2]

The Authority further claims that Town of Atherton v. California High-Speed Rail Authority, 175 Cal. Rptr. 3d 145 (Ct. App. 2014), in which the California Court of Appeal held that the "market participant" doctrine[3] negated § 10501(b) preemption, should not affect the Board's decision in this proceeding. According to the Authority, the Atherton court affirmed a lower court decision finding that the Authority had complied with CEQA (specifically, that its programmatic environmental documentation concerning routing for the HST System was proper). As a result, the Authority states, Atherton did not decide the issue the Authority asks the Board to address here – whether a state court under CEQA can enjoin construction of a line the Board has authorized. The Authority also contends that the market participation doctrine was misapplied by the court in Atherton, as another California Court of Appeal recently found in

[2] Pet. 10 n.8.

[3] An explanation of the doctrine, and why the Board believes it does not apply here, is set forth below.

Friends of the Eel River v. North Coast Railroad Authority, 178 Cal. Rptr. 3d 752 (Ct. App. 2014), petition for review accepted by the California Supreme Court on December 10, 2014.

Rail Unions[4] and the State Building and Construction Trades Council of California support the Authority's petition. Other commenters (collectively, Opponents)[5] request that the Board deny the petition.[6] According to Opponents, the Board should not issue a decision in this proceeding because Atherton conclusively addresses the issues presented here, and the doctrines of res judicata, collateral estoppel, and waiver preclude a decision by the Board. Opponents claim, relying on Atherton, that the market participant doctrine exception to preemption applies here. Opponents also argue that § 10501(b) preemption would intrude upon the state of California's sovereignty by interfering with the internal controls and limitations the state has placed on the Authority, its own agency.

Furthermore, Opponents argue that expedited consideration of the petition is unnecessary and that the preemption issue the Authority asks the Board to address is not ripe. According to Opponents, the Authority has no immediate plans to begin construction of the Line. Therefore, Opponents assert, the injunctive relief that the Authority claims could delay the project is not imminent and likely would not occur before July 2015, the earliest that a hearing on the merits of the pending CEQA lawsuits is expected. Opponents also point out that Eel River, the California state court decision that disagreed with the Atherton court's analysis of the market participant doctrine in the context of § 10501(b) preemption, may be appealed to the California Supreme

[4] The Brotherhood of Maintenance of Way Employes Division/IBT; the Brotherhood of Railroad Signalmen; the International Association of Sheet Metal, Air and Transportation Workers Mechanical Division; the American Train Dispatchers Association; the Brotherhood of Locomotive Engineers and Trainmen/IBT; the National Conference of Firemen and Oilers District of Local 32BJ, SEIU; and the International Brotherhood of Electrical Workers (collectively, Rail Unions) filed a joint reply.

[5] Opponents include the litigants in the seven CEQA lawsuits (County of Kings, Citizens for High Speed Rail Accountability, Kings County Farm Bureau, City of Bakersfield, County of Kern, Dignity Health, First Free Will Baptist Church of Bakersfield, Coffee-Brimhall LLC, and the City of Shafter (collectively, CEQA Litigants)); Community Coalition on High-Speed Rail, Transportation Solutions Defense and Education Fund, and California Rail Foundation (collectively, Transportation Groups); United States Representatives David G. Valadao, Jeff Denham, Kevin McCarthy, and Devin G. Nunes; Senator Andy Vidak and Assemblywoman Diane L. Harkey of the California State Legislature; Friends of Rose Canyon; Madera County Farm Bureau (Farm Bureau); MEL's Farms; Roar Foundation; Jacqueline Ayer; Carol Bender; William C. Descary; Kathy Hamilton; and Alan Scott.

[6] Union Pacific Railroad Company (UP) also filed a reply. UP does not take a position regarding the preemption issues but requests that the Board not issue any decision that would compromise UP's ability to protect its freight rail network.

Court.[7] According to Opponents, the disposition of any such appeal would clarify the preemption issues raised in this proceeding. Therefore, Opponents argue that if the Board does not deny the Authority's petition, it should order additional briefing and/or wait to issue a decision.

On November 18, 2014, the Authority filed a motion for leave to reply and a reply. The Authority acknowledges that Board rules prohibit such a reply, but it argues that its filing will ensure that the Board has a complete record in this proceeding and the filing will not delay the proceeding or prejudice any party. On November 20, 2014, Transportation Groups filed an opposition to the motion for leave to reply, or, in the alternative, a motion for leave to file surreply. Transportation Groups argue that the Board should deny the Authority leave to reply because the filing would prejudice opposing parties by denying them the opportunity to respond to new arguments and would impermissibly give the Authority opportunity to reargue and expand upon previous arguments. In the alternative, Transportation Groups request that the Board grant parties 10 days to file replies to the Authority's November 18 filing.

DISCUSSION AND CONCLUSIONS

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 to issue a declaratory order to eliminate controversy or remove uncertainty. In this case, there is uncertainty as to whether, and the extent to which, the Board would find that CEQA is preempted with regard to the Line. Accordingly, we instituted a proceeding to consider the issues raised in the Authority's petition and provided an opportunity for interested persons to file replies. Following careful consideration of the Authority's petition and the opponents' arguments, we will issue this declaratory order to provide our views on the preemption issue.

Procedural issues. We will not order additional briefing in this proceeding. The procedural schedule that we adopted provided 28 days for any interested persons to file substantive replies, which we believe was enough time for parties to do so. In fact, many parties filed substantive replies in the time period we provided, and we believe the existing record provides an adequate basis for us to consider and address the issues presented here.[8]

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[7] The Friends of Eel River and Californians for Alternatives to Toxics initiated appellate review of the Eel River decision in the California Supreme Court on November 7, 2014 (Friends of Eel River v. North Coast Railroad Authority, Case No. S222472). According to the Supreme Court of California's docket, the petition for review was accepted on December 10, 2014.

[8] We will grant the petitions for leave to intervene filed by Farm Bureau, Roar Foundation, and Transportation Groups. We will accept late-filed replies of Senator Vidak; U.S. Representatives Valadao, Denham, McCarthy, and Nunes; and MEL's Farms in the interest of compiling a more complete record. Roar Foundation's request for an extension of time will be denied because Roar Foundation has already filed a substantive comment, and, as noted, we have a sufficient record to address the issues in this proceeding. Roar Foundation argues that the proceeding should be delayed to allow argument from parties that may be affected by future segments of the HST System. However, the Board's decision instituting a proceeding invited

(continued . . .)

We will deny the Authority's motion for leave to file a reply. Our rules do not permit a reply to a reply. 49 C.F.R. § 1104.13(c). Here, the parties have provided extensive arguments on the scope of federal preemption as it applies to the Line. A reply by the Authority is not necessary to provide the information we need to provide our views on preemption and address matters within the Board's expertise. Transportation Groups' opposition to motion for leave to reply or, in the alternative, motion for leave to file surreply is therefore denied as moot.

We also will not delay issuing a decision addressing the preemption issue. The issue is ripe for a decision because several CEQA lawsuits have been filed and, regardless of Opponents' suggestions to the contrary, permanent injunctive relief has already been requested and a preliminary injunction could be requested at any time in those pending lawsuits. Moreover, the Authority states that, contrary to the claims of some of the Opponents, it is in the process of implementing and/or procuring construction contracts for a majority of the Line and uncertainty regarding the preemption issue could impact its ability to proceed. Lastly, this decision will inform interested parties and the California Supreme Court of our views on federal preemption of CEQA and the market participant doctrine as they relate to this matter involving railroad transportation within the Board's jurisdiction under § 10501(b). See Atherton, 175 Cal. Rptr. 3d at 161 n.4 (noting that, as the agency authorized by Congress to administer the Interstate Commerce Act, the Board is "uniquely qualified" to address whether § 10501(b) preempts state law and that a request to the Board for a declaratory order would be the remedy for the Authority's preemption claims). Thus, we will issue this decision now to assist in the resolution of the conflict between Atherton and Eel River on federal preemption of CEQA in cases involving rail line construction.

Waiver. Transportation Groups suggest that the Authority has waived its right to assert any CEQA preemption arguments before the Board because they failed to raise the issue sooner.[9] We disagree.

Since the Board asserted jurisdiction over the HST project in April 2013, the Authority has consistently explained in its environmental documentation that it reserves the right to assert federal preemption in response to any potential legal challenge to its CEQA compliance.[10] Thus, it has expressly stated that it does not waive the right to claim preemption.

(. . . continued)

comments from all interested parties. To the extent there are additional arguments related to future segments that have not been presented here, parties may raise them in future proceedings.

[9] See Transportation Groups Reply 5-6.

[10] See Pet. 10 n.8 (quoting Fresno-Bakersfield HST Segment Final EIR/EIS 1-4: "[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"; and citing Palmdale-Burbank HST Segment Notice of Preparation, n.1, repeating that the Authority reserved its right to assert preemption).

In addition, the fact that the Authority did not previously seek a ruling on preemption in the Board's previous proceedings concerning the HST System does not amount to a waiver, as those proceedings did not squarely involve the CEQA preemption issue now presented to the Board. In decisions issued in April and June 2013, the Board held that it had jurisdiction over the HST project, HST System Jurisdiction Decision, slip op. at 2, and authorized the construction of the Merced to Fresno HST section, Merced-to-Fresno, slip op. at 12-15. In Fresno-to-Bakersfield, in a decision issued on August 12, 2014, the Board authorized construction of the Line. While the Authority possibly could have raised the CEQA preemption issue during the course of those proceedings, the preemption issue was not directly relevant to those proceedings (such that the Board would have needed to decide the issue at that time), nor would it have affected the outcome of those proceedings.[11]

Transportation Groups suggest that the Authority could have asked the state court in Atherton to refer the CEQA preemption issue to the Board. However, while the Authority could have asked for such a referral from the court, it was not required,[12] and a decision not to request such a referral does not mean the Authority's arguments before the Board are waived.[13] Also,

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[11] In deciding whether to authorize a proposed rail construction (whether under the 49 U.S.C. § 10901 formal application process or, as here, the exemption process in 49 U.S.C. § 10502), the Board considers and weighs the evidence before it on the transportation merits of the proposed construction and the adequacy of the environmental review under the National Environmental Policy Act. Those are the issues that the Board analyzed in both Fresno-to-Bakersfield and Merced-to-Fresno (where the Board also explained why the HST System was within its jurisdiction as part of the interstate rail system).

[12] See 14500 Ltd. LLC—Pet. for Declaratory Order, FD 35788, slip op. at 2 (STB served June 5, 2014) (issues involving the federal preemption provision contained in 49 U.S.C. § 10501(b) can be decided by the Board or the courts in the first instance); Jie Ao & Xin Zhou—Pet. for Declaratory Order, FD 35539, slip op. at 4, 7-8 (STB served June 6, 2012) (explaining that state court may resolve preemption issues, as long as it applies applicable Board and court precedent).

[13] The issue of whether a party has waived an argument usually (though not always) arises on appeal after a party fails to present the argument to the Board during the course of on-going Board proceedings. In such a case, a reviewing court will generally deem the argument waived and will not address it because the Board has not had the opportunity to address the issue in the first instance. See Erie-Niagara Rail Steering Comm. v. STB, 247 F.3d 437, 443-44 (2d Cir. 2001); W. Res., Inc. v. STB, 109 F.3d 782, 793-94 (D.C. Cir. 1997). See also Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 553-54 (1978) (explaining that parties need to forcefully raise issues during the course of agency's proceedings).

Here, there are no other current proceedings involving the Authority or the Line pending before the Board. The Authority has now raised the issue of potential CEQA preemption for this rail transportation project by requesting that the Board institute a declaratory order proceeding under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 to address the uncertainty that now exists regarding

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the Authority's decision not to appeal the Atherton decision to the California Supreme Court (or ultimately even the United States Supreme Court)[14] does not affect whether the Authority has waived its CEQA preemption arguments before the Board. A decision not to appeal a state court judgment does not affect whether a party has timely raised arguments or issues before the Board.

Collateral estoppel and res judicata. Opponents argue that res judicata (claim preclusion) and collateral estoppel (issue preclusion) prohibit the Board from granting the Authority's petition because the Atherton court has already addressed the issue of whether CEQA is preempted with respect to the Line.[15] We believe neither issue nor claim preclusion bars the Board from issuing a declaratory order providing its views in the circumstances presented here. As discussed in more detail below, two California state appellate courts have now issued conflicting opinions addressing whether CEQA is preempted by § 10501(b). In Atherton, a California Court of Appeal held that CEQA was not preempted by § 10501(b) with respect to the Authority's programmatic environmental documentation concerning routing of the HST System. More recently, however, another California Court of Appeal found in Eel River that CEQA was preempted by § 10501(b) where, as with the Line, the case involves rail transportation within the Board's jurisdiction. Because of these conflicting opinions regarding CEQA preemption and because the Board is "uniquely qualified" to determine the preemption question,[16] the Board provides this interpretation of its statute pursuant to 5 U.S.C. § 554(e) and 49 U.S.C. § 721 in order to remove the uncertainty that exists with regard to the Board's preemption analysis.

(. . . continued)

the issue. Neither of those statutory provisions contains a time limit for when a declaratory order must be requested.

[14] See Transportation Groups Reply 6.

[15] Transportation Groups Reply 4-11; CEQA Litigants Reply 3-4. Claim preclusion "embodies the principle 'that a party who once has had *a chance to* litigate a claim before an appropriate tribunal usually ought not to have another chance to do so.'" SBC Commc'ns v. FCC, 407 F.3d 1223, 1229 (D.C. Cir. 2005) (discussing general elements of claim preclusion under federal law); see also Brother Records, Inc. v. Jardine, 432 F.3d 939, 943 (9th Cir. 2005) (discussing the elements of claim preclusion under California law). Issue preclusion "bars relitigation of an issue by a party 'that has *actually litigated [the] issue*.'" SBC Commc'ns, 407 F.3d at 1229.

[16] Atherton, 175 Cal. Rptr. 3d at 161 n.4. See N.Y. & Atl. Ry. v. STB, 635 F.3d 66, 70 (2d Cir. 2011); Adrian & Blissfield R.R. v. Vill. of Blissfield, 550 F.3d 533, 539 (6th Cir. 2008); New Orleans & Gulf Coast Ry. v. Barrois, 533 F.3d 321, 331 (5th Cir. 2008); Emerson v. Kan. City S. Ry., 503 F.3d 1126, 1130 (10th Cir. 2007); Green Mountain v. Vermont, 404 F.3d 638, 642 (2d Cir. 2005) ("the Transportation Board is 'uniquely qualified to determine whether state law . . . should be preempted' by the Termination Act."); see also Jie Ao & Xin Zhou—Pet. for Declaratory Order, slip op. at 4, 7-8 (a state court may resolve preemption issues, as long as it applies Board and court precedent). Moreover, in this case, one of the conflicting opinions could frustrate the Board's recent approval of the construction of the Line, as discussed below.

Section 10501(b) Preemption. The Interstate Commerce Act is "among the most pervasive and comprehensive of federal regulatory schemes." Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 318 (1981). The preemption provision of the Act, as broadened by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, expressly provides that the jurisdiction of the Board over "transportation by rail carriers" is "exclusive." 49 U.S.C. § 10501(b). The statute defines "transportation" expansively to encompass any property, facility, structure or equipment "related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use." 49 U.S.C. § 10102(9). Moreover, "railroad" is defined broadly to include a switch, spur, track, terminal, terminal facility, freight depot, yard, and ground, used or necessary for transportation. 49 U.S.C. § 10102(6). Section 10501(b) expressly provides that "the remedies provided under [49 U.S.C. §§ 10101-11908] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." Section 10501(b) thus is intended to prevent a patchwork of local regulation from unreasonably interfering with interstate commerce. See Norfolk S. Ry.—Pet. for Declaratory Order, FD 35701, slip op. at 6 & n.14 (STB served Nov. 4, 2013); H.R. Rep. No. 104-311, at 95-96 (1995), reprinted in 1995 U.S.C.C.A.N. 793, 808. As the courts have stated, it is "difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations" than § 10501(b). CSX Transp., Inc. v. Ga. Pub. Serv. Comm'n, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996).

In interpreting the reach of § 10501(b) preemption, the Board and the courts have found that it prevents states or localities from intruding into matters that are directly regulated by the Board (e.g., rail carrier rates, services, construction, and abandonment). It also prevents states and localities from imposing requirements that, by their nature, could be used to deny a rail carrier's ability to conduct rail operations. Thus, state or local permitting or preclearance requirements, including environmental permitting or preclearance requirements, are categorically preempted as to any rail lines and facilities that are an integral part of rail transportation. See Green Mountain R.R., 404 F.3d at 643; City of Auburn v. United States, 154 F.3d 1025, 1027-31 (9th Cir. 1998) (if local authorities have the ability to impose environmental permitting regulations on railroads, this power will in fact amount to economic regulation if the carrier is prevented from constructing, acquiring, operating, or abandoning a line).

Other state actions may be preempted as applied – that is, only if they would have the effect of unreasonably burdening or interfering with rail transportation, which is a fact-specific determination based on the circumstances of each case. See N.Y. Susquehanna & W. Ry. v. Jackson, 500 F.3d 238, 252 (3d Cir. 2007) (federal law preempts "state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation"); Joint Pet. for Declaratory Order—Bos. & Me. Corp. & Town of Ayer (Ayer), 5 S.T.B. 500 (2001), recons. denied (STB served Oct. 5, 2001); Borough of Riverdale—Pet. for Declaratory Order—N.Y. Susquehanna & W. Ry., FD 33466, slip op. at 2 (STB served Feb. 27, 2001); Borough of Riverdale—Pet. for Declaratory Order—N.Y. Susquehanna & W. Ry., 4 S.T.B. 380, 387 (1999).

Not all state and local regulations that affect rail carriers are preempted by § 10501(b). State and local regulation is appropriate where it does not interfere with rail operations. Localities retain their reserved police powers to protect the public health and safety so long as their actions do not unreasonably burden interstate commerce. Green Mountain, 404 F.3d at 643. Thus, the Board has stated that it is reasonable for states and localities to request rail carriers to: (1) share their plans with the community when they are undertaking an activity for which another entity would require a permit; (2) use state or local best management practices when they construct railroad facilities; (3) implement appropriate precautionary measures at the railroad facility, so long as the measures are fairly applied; (4) provide representatives to meet periodically with citizen groups or local government entities to seek mutually acceptable ways to address local concerns; and (5) submit environmental monitoring or testing information to local government entities for an appropriate period of time after operations begin. Ayer, 5 S.T.B. at 511. Electrical, plumbing, and fire codes also are generally applicable. Green Mountain, 404 F.3d at 643. State and local action, however, must not have the effect of foreclosing or unduly restricting the rail carrier's ability to conduct its operations or otherwise unreasonably burden interstate commerce. CSX Transp., Inc.—Pet. for Declaratory Order, FD 34662, slip op. at 5 (STB served May 3, 2005). In short, states and towns may exercise their traditional police powers over the development of rail property to the extent that the regulations "protect public health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions." Green Mountain, 404 F.3d at 643.

Finally, the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 et seq., applies to rail constructions like the HST System that require a license under 49 U.S.C. § 10901, and the Board can adopt appropriate environmental mitigation conditions in response to concerns raised by the parties, including local entities, during the NEPA review.[17] Indeed, to reduce or mitigate potential environmental impacts of proposed constructions discovered during the NEPA review, the Board usually imposes extensive environmental mitigation conditions on rail construction approvals.[18]

Application here. As previously noted, the Authority asks us to issue a declaratory order finding only that a prohibitive injunction under CEQA is preempted, not its compliance with CEQA itself. Specifically, the Authority claims that it does not seek preemption of other injunctive

[17] The Board's decision permitting construction of the Line came after extensive environmental review had been completed, including preparation of an Environmental Impact Statement (EIS) under NEPA. The Federal Railroad Administration (FRA) was the lead agency in the EIS prepared for the Line, because it is providing some of the funding, but the Board participated in the EIS process as a cooperating agency. After carefully reviewing the EIS, the Board adopted it in its decision in Fresno-to-Bakersfield and required compliance with all of the environmental mitigation imposed by FRA. See Fresno-to-Bakersfield, slip op. at 5-7, 16-19.

[18] See, e.g., Ala. R.R.—Constr. & Operation Exemption—Rail Line Extension to Port MacKenzie, Ala., FD 35095, slip op. at 21, App. 1 (STB served Nov. 21, 2011) (imposing 100 mitigation measures on an approximately 35-mile rail line).

remedies such as a court order requiring revised environmental analyses or additional environmental mitigation under CEQA, so long as there is no work stoppage.[19] However, as a practical matter, we find it difficult to separate the prohibitive injunctive remedy available under CEQA from a California state court's ability to enforce compliance with CEQA itself. In other words, if a state court cannot compel compliance with CEQA by ordering a halt to the agency's proposed action, it is unclear how CEQA could be enforced. The primary way a state court could meaningfully enforce CEQA would be to temporarily halt the Authority's ability to proceed with construction (i.e., a prohibitive injunction) pending the completion of any further environmental analysis and development of additional environmental mitigation that the court might find to be required. Indeed, if a California court were to find that the Authority had not fully studied the impact of the Line under CEQA, and in turn that additional mitigation might be required, but the Authority had already begun construction activities or had even completed construction, the court's after-the-fact order could have already been rendered meaningless. Therefore, because we do not have a persuasive argument for separating CEQA's prohibitive remedy from its other injunctive remedies, we discuss the core issue as whether CEQA as a whole – which is usually enforced through a third-party enforcement action – is preempted with regard to the Line.

Applying the well-established preemption principles here, the Board concludes that CEQA is categorically preempted by § 10501(b) in connection with the Line. As the Board has previously found, CEQA is a state preclearance requirement that, by its very nature, could be used to deny or significantly delay an entity's right to construct a line that the Board has specifically authorized, thus impinging upon the Board's exclusive jurisdiction over rail transportation. DesertXpress Enters., LLC—Pet. for Declaratory Order, slip op. at 5 (CEQA *per se* preempted for proposed 200-mile high-speed passenger system). See also N. San Diego Cnty. Transit Dev. Bd.—Pet. for Declaratory Order, slip op. at 9 (finding state and local requirement to apply for permit and prepare environmental report before constructing track to be preempted); Eel River, 178 Cal. Rptr. 3d at 767-71 (CEQA preempted for railroad projects because, in the context of railroad operations, CEQA "is not simply a health and safety regulation imposing an incidental burden on interstate commerce"). Accord City of Auburn, 154 F.3d at 1027-31; Green Mountain, 404 F.3d at 642-45. In addition, a CEQA enforcement suit in this context attempts to regulate a project that is directly regulated by the Board. Section 10501(b) expressly preempts any state law attempts to regulate rail construction projects, as they are under the Board's exclusive jurisdiction. See CSX Transp., Inc.—Pet. for Declaratory Order, slip op. at 3.

Moreover, while the Board has recognized that voluntary agreements between rail carriers and state or local entities might not be preempted under § 10501(b),[20] we conclude that any implied agreement allegedly created by the Authority's voluntary compliance with CEQA's

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[19] Pet. 10.

[20] See Ayer, 5 S.T.B. at 512 (explaining that a railroad's voluntary agreements may be an exception to § 10501(b) preemption); Twp. of Woodbridge, N.J. v. Consol. Rail Corp. (Woodbridge 2000), NOR 42053, slip op. at 4-5 (STB served Dec. 1, 2000), clarified in decision served March 23, 2001(Woodbridge 2001) (same).

procedures during the environmental review for the Line is not controlling. As the Authority explains, CEQA compliance for the HST System began prior to the Board's assertion of jurisdiction over the project. Following issuance of the HST System Jurisdiction Decision in April 2013, the Authority has consistently stated in its environmental documentation that it reserves the right to assert federal preemption in response to any potential legal challenge to its CEQA compliance.[21] Thus, to the extent any implied agreement existed, the Authority expressly modified that agreement once the Board asserted jurisdiction.

Even assuming arguendo that the Authority's previous CEQA compliance created an implied agreement, the Board concludes that any such agreement unreasonably interferes with interstate commerce and is not enforceable under § 10501(b). As the Board has explained, a railroad's agreements with state or local entities may be preempted by § 10501(b) if the agreement unreasonably interferes with interstate commerce or railroad operations. Woodbridge 2000, slip op. at 4-5; Woodbridge 2001, slip op. at 3.[22] See Blanchard Sec. Co. v. Rahway Valley R.R., 191 F. App'x 98, 100 (3d Cir. 2006) (unpublished) (following Woodbridge 2000). Here, the Board's jurisdiction extends to the Line because, as we have found, the Line would be constructed and operated as part of the interstate rail network. Merced-to-Fresno, slip op. at 11-15. Moreover, the Board specifically authorized the construction of the Line after a review of the environmental impacts under NEPA and the transportation merits of the project. Fresno-to-Bakersfield, slip op. at 12-21. The Line nevertheless is now the subject of seven CEQA enforcement suits in California state court that could block or significantly delay the Authority's right to proceed with the project. We believe that this conflict with our jurisdiction runs contrary to Congress's intent. In particular, we conclude that any implied agreement to comply with CEQA that potentially could have the effect, through the mechanism of a third-party enforcement suit, of prohibiting the construction of a rail line authorized by the Board unreasonably interferes with interstate commerce by conflicting with our exclusive jurisdiction and by preventing the Authority from exercising the authority we have granted it. See Blanchard, 191 F. App'x at 100 (finding state law claims seeking enforcement of contract with railroad preempted because they would interfere with the reactivation of a rail line). Therefore, to the extent the Authority's previous voluntary CEQA compliance created an implied contract,

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[21] See Pet. 10 n.8 (quoting Fresno-Bakersfield HST Segment Final EIR/EIS 1-4: "[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"; and citing Palmdale-Burbank HST Segment Notice of Preparation, n.1, repeating that Authority reserved its right to assert preemption).

[22] The facts here are distinguishable from Woodbridge. In Woodbridge 2000, the Board found that a voluntary agreement between a railroad and a municipality in which the railroad agreed to limit certain nighttime operations was not preempted, because the railroad "ha[d] not shown that enforcement of its commitments would unreasonably interfere with the railroad's operations." Woodbridge 2000, slip op. at 5. The Board later clarified that decision by explaining that it did not preclude the railroad from arguing in subsequent proceedings that the agreement did interfere with interstate commerce. Woodbridge 2001, slip op. at 3.

the Board concludes that any such agreement is preempted under § 10501(b) because of its impact on interstate commerce.

Opponents rely on the California Court of Appeal's decision in Atherton, which previously found that CEQA is not preempted by § 10501(b) with regard to construction of the HST System. However, to the extent our analysis above conflicts with that decision, we respectfully disagree with the court's analysis.

First, the Atherton court did not directly decide, see 175 Cal. Rptr. 3d at 161-62, whether CEQA qualified as a state permitting or preclearance requirement "that, by its nature, could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities that [the Board] has authorized." Id. at 159-60. However, to the extent Atherton can be read to suggest that CEQA is not a preclearance requirement, the court's analysis, in our view, is incorrect. Consistent with our prior decisions such as DesertXpress, we conclude here that CEQA is a state preclearance requirement because the environmental review process under CEQA can be used under state law, through an enforcement proceeding, to block a Board-authorized rail construction project. Indeed, another California Court of Appeal in Eel River, 178 Cal. Rptr. 3d at 769-70, recently explained that the environmental review process under CEQA, though it serves a laudable and important purpose, qualifies as a state preclearance requirement that "could significantly delay or even halt a project in some circumstances," and therefore is categorically preempted.

Moreover, the court in Atherton failed to acknowledge another reason why CEQA is categorically preempted by § 10501(b): that because environmental review under CEQA attempts to regulate where, how, and under what conditions the Authority may construct the Line, the application of CEQA here would constitute an attempt by a state to regulate a matter directly regulated by the Board – the construction of a new rail line as part of the interstate rail network. See CSX Transp., Inc.—Pet. for Declaratory Order, slip op. at 3 (§ 10501(b) categorically preempts any "state or local regulation of matters directly regulated by the Board – such as the construction, operation, and abandonment of rail lines"); Franks Inv. Co. v. Union Pac. R.R., 593 F.3d 404, 410-11 (5th Cir. 2010); Adrian & Blissfield R.R., 550 F.3d at 539-40.

Ultimately, the Atherton court appears to have assumed that CEQA was indeed preempted, but then held that an exception to federal preemption – the market participation doctrine – applied to block any preemption of CEQA in this particular case. See 175 Cal. Rptr. 3d at 162-68. However, we agree with the Eel River court that the market participation doctrine does not apply in the context of a CEQA enforcement suit for a railroad project under our jurisdiction and that, consequently, the Atherton court incorrectly applied it to bar federal preemption of CEQA. Eel River, 178 Cal. Rptr. 3d at 774-78.

As both the Atherton and Eel River courts explain, the market participation doctrine shields state action from federal preemption where the state's action is proprietary in nature and not regulatory – i.e., the state is acting as a participant in the marketplace and not as a regulator. See Eel River, 178 Cal Rptr. 3d at 774-76 ("[T]he market participation doctrine gives governmental entities the freedom to engage in conduct that would be allowed to private market participants. It accomplishes this end by allowing the governmental entity to avoid a charge by

aggrieved third parties that its actions are preempted by federal law.") (citations omitted); Atherton, 175 Cal. Rptr. 3d at 163-64. The Atherton court held that the market participation doctrine barred preemption under § 10501(b) because it found that the Authority's HST project, and its related CEQA compliance, was proprietary in nature and that the Authority was not acting as a regulator. See 175 Cal. Rptr. 3d at 164-68. However, as the Eel River court explained, even if a state agency's action can be 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 part of this proprietary action." 178 Cal Rptr. 3d at 776. Indeed, when a state invokes the market participation doctrine, it usually does so *"defensively"* to protect its actions from federal preemption. Id. (emphasis in original). However, when bringing a CEQA enforcement suit, "[p]etitioners 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." Id. As the Eel River court noted, "[n]one 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. Thus, we agree with the Eel River court's conclusion that "[t]he aspect of CEQA that allows a citizen's group to challenge the adequacy of an EIR when CEQA compliance is required is clearly regulatory in nature, as a lawsuit against a governmental entity cannot be viewed as part of its proprietary action, even if the lawsuit challenges that proprietary action." Id.[23]

In addition, in the context of applying the market participation doctrine, the Atherton court relied upon the alleged requirements of California's Proposition 1A (the bond measure that provides funding for the HST System) and the Authority's subsequent voluntary attempted compliance with CEQA to demonstrate that the Authority was acting as a market participant. See 175 Cal. Rptr. 3d at 165-67. While the Board will not attempt to interpret the requirements of Proposition 1A, as that is for a state court to decide, we do not believe the actions that the

[23] Opponents cite to numerous market participation doctrine cases, almost all of which are discussed in both the Atherton and Eel River decisions. None of these cases support Opponents' arguments because, as the Eel River court explained, they all involved situations where the state or municipality used the market participation doctrine defensively to shield its actions in procuring goods and services from federal preemption. See, e.g., Transportation Groups Reply 11-22, citing Bldg. & Constr. Trades Council v. Associated Builders & Contractors, 507 U.S. 218 (1993); Johnson v. Rancho Santiago Cmty. Coll., 623 F.3d 1011 (9th Cir. 2010); Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 498 F.3d 1031 (9th Cir. 2007); Tocher v. City of Santa Ana, 219 F.3d 1040 (9th Cir. 2000), abrogated in part by City of Columbus v. Ours Garage & Wrecker Serv., Inc., 536 U.S. 424 (2002); Cardinal Towing & Auto Repair, Inc. v. City of Bedford, 180 F.3d 686 (5th Cir. 1999). In this case, the relevant regulatory actions are not the procurement of goods or services for the Line, but rather the third-party enforcement suits filed against the Authority. Indeed, this case is analogous to the so-called Grupp cases discussed in Eel River, in which the courts held that when a third party "relies on a state law of general application to challenge a state proprietary action, that challenge operates as a regulation, rather than a part of the proprietary action being challenged." 178 Cal. Rptr. 3d at 776-77.

Authority has taken under Proposition 1A and CEQA are the relevant actions for purposes of determining whether the market participation exception to preemption should apply. As noted above, the relevant question under the market participation doctrine is whether a third-party enforcement action under CEQA constitutes state proprietary or regulatory action. As the Eel River court explained, such an action is a regulatory, not a proprietary action.[24]

State sovereignty. Finally, Opponents argue that any preemption of CEQA here would infringe upon California's state sovereignty by interfering with the state's right to dictate how its own agency (the Authority) must proceed when building a state project.[25] Opponents assert that Proposition 1A requires the Authority to comply with CEQA as a condition of obtaining and using Proposition 1A funding to construct the HST.[26] However, as we have noted, the relevant regulatory actions for purposes of our preemption analysis here are the third-party CEQA enforcement suits, not the state law that authorized funding for the HST System. Our analysis indicating that § 10501(b) preempts third-party attempts to enforce CEQA against a state agency does not infringe upon California's state sovereignty because the CEQA enforcement actions are not being brought by the state. Rather, the enforcement actions in state court are being brought by third parties against a state agency under the guise of state law.

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[24] Opponents, like the Atherton court, suggest that the relevant action for purposes of determining preemption here consists of the Authority's internal approvals related to the HST project and voluntary attempted compliance with CEQA. Transportation Groups Reply 11-22. Opponents suggest that preemption only applies where there is an "external" attempt to regulate a rail carrier. See, e.g., id. at 21-22 (characterizing the N. San Diego and Eel River cases as involving "external" attempts to regulate). We do not need to decide whether Opponents' internal/external distinction is controlling, however, because the relevant actions here are indeed "external" attempts to regulate a project, under the Opponents' own definition of "external." The relevant regulatory actions here are the "external" third-party CEQA enforcement suits being brought against the Authority – not any internal decisions the Authority has made. Such lawsuits can regulate rail transportation just as effectively as a state statute or regulation. See Maynard v. CSX Transp., Inc., 360 F. Supp. 2d 836, 840 (E.D. Ky. 2004) (explaining that common law suits constitute regulation); Guckenberg v. Wis. Cent. Ltd., 178 F. Supp. 2d 954, 958 (E.D. Wis. 2001) (same) (citing and quoting Cipollone v. Liggett Group, Inc., 505 U.S. 504, 521 (1992)). In addition, Opponents suggest that attempted regulation of state rail agencies like the Authority should be treated differently than local rail agencies under § 10501(b), or that only regulatory actions against private railroads are subject to preemption. See Transportation Groups Reply 21-22, 28. However, no such distinctions exist in the case law applying § 10501(b). See, e.g., Eel River, 178 Cal. Rptr. 3d at 760 (attempt to regulate activities of local rail carrier preempted); N. San Diego, slip op. at 1-2, 7 (same); Ala. R.R., slip op. at 5 (state railroad's construction of new rail line under Board's exclusive jurisdiction). See also California v. Taylor, 353 U.S. 553, 561-68 (1957) (state owned railroads generally subject to federal rail regulation in the same manner as private railroads).

[25] See Transportation Groups Reply 23-29; CEQA Litigants Reply 4.

[26] See Transportation Groups Reply 23-29.

In addition, as we have noted, we do not opine here on whether Proposition 1A requires the Authority to comply with CEQA as a condition of its funding. 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. Fresno-to-Bakersfield, slip op. at 11 ("[I]t is not our role to determine whether the Authority has complied with state or Federal funding requirements. That is an issue to be decided by the appropriate courts."); Cf. Nixon v. Mo. Mun. League, 541 U.S. 125, 134-37 (2004) (explaining that even if a federal statute were to preempt a state requirement directed at a state agency, the state legislature still has the authority to control the funding of the state agency and implicitly the state agency's actions).

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The Authority's petition for declaratory order is granted to the extent discussed above.

2. The motions to intervene are granted, and the late-filed comments of Senator Vidak; U.S. Representatives Valadao, Denham, McCarthy, and Nunes; and MEL's Farms are accepted into the record.

3. The Authority's motion for leave to file a reply is denied. Transportation Groups' opposition to motion for leave to reply or, in the alternative, motion for leave to file surreply is denied as moot.

4. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman. Commissioner Begeman dissented with a separate expression.

COMMISSIONER BEGEMAN, dissenting:

Since the Authority first came to the Board in March 2013, the majority's main focus has been on getting out of the Authority's way instead of providing much needed review and oversight (which could have occurred during the Board's construction application process) and ensuring that conflicts with stakeholders (e.g., freight carriers, Mercy Hospital) would be resolved. Although the majority's unobtrusive posture continues, today's overreaching order also clears the citizens of the State of California from the Authority's path. Just as I could not support the majority's prior oversight avoidance, I cannot support moving a significant piece of the Authority's decision-making beyond the reach of the people whose interests the Authority purportedly serves.

It is well established that the Authority and the Federal Railroad Administration (FRA) have worked together on a number of joint environmental reviews of the HST System. During these reviews, "the Authority served as the lead state agency for compliance with the California

Environmental Quality Act (CEQA), and FRA and the Authority served as co-leads for compliance with NEPA. These joint reviews have produced single environmental documents titled "environmental impact reports/environmental impact statements" (EIR/EIS) to meet the obligations of both CEQA and NEPA, respectively."[1] In approving the two segments over my objections, the Board twice adopted such joint documents, including numerous CEQA mitigation provisions.

If the Authority was interested in foregoing its CEQA commitments under the guise of federal preemption, it could have revised either of the two EIR/EISs prior to the Board's adoption of them. After all, the Board claimed jurisdiction over the project in advance of issuing a final decision (including the adoption of the joint environmental documents) to approve construction of the first section in June 2013. But the Authority took no such action on either segment. The Board adopted both of the joint environmental documents, arguably making the Authority fully accountable for both CEQA and NEPA mitigation.

The Authority has not asked the Board to shield it entirely against California's environmental laws (which may have to do with the conditioning of the November 2008 bond measure supporting the Project on CEQA compliance). The petition for declaratory order instead states that the Authority "completed the CEQA process when it completed and certified the EIR . . . for the Fresno-Bakersfield HST Segment in May of 2014" and thus "does not seek declaratory relief regarding non-injunctive remedies, such as an order requiring revised environmental analyses or additional environmental mitigation . . . ."

Yet the majority has decided to go even further than the Authority requested by finding that CEQA is "categorically preempted." In other words, there is now no means of enforcing CEQA with respect to the Project. Authority claims of CEQA compliance will be merely claims, and deviations from any of the CEQA provisions included in the Board's own-approved EIR/EISs will not be challengeable.

Ironically, today's ruling could have unintended consequences for the long-term prospects of the Project. Although the majority claims that its decision does not implicate the bonding monies, those claims certainly bind no one in the State of California. The majority's decision to remove this element of compliance oversight for the Authority may instead serve only to spur further litigation.

It is within the Board's discretion to issue a declaratory order and it should decline to do so here.[2] The Authority has come before the Board many times asserting its commitment to both CEQA and NEPA. This agency has adopted that commitment into its orders and many

---

[1] See, e.g., Cal. High-Speed Rail Auth.—Constr. Exemption—in Fresno, Kings, Tulare, & Kern Cntys., Cal., FD 35724 (Sub-No. 1), slip op. at 2 n.3 (STB served Aug. 12, 2014).

[2] See 5 U.S.C. § 554(e); 49 U.S.C. § 721 (the Board has the discretion to grant or decline petitions for declaratory order).

stakeholders have relied on the Authority's representations over the years. The Authority should live up to its commitments and the Board should refrain from undermining them.

I dissent.

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***Dignity Health v. California High-Speed Rail Authority***

Case No.: **34-2014-80001865-CU-WM-GDS**

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; my business address is 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550.

On **December 29, 2014**, I served the attached **NOTICE OF SURFACE TRANSPORTATION BOARD DECISION** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Sacramento, California, addressed as follows:

George F. Martin
Borton Petrini, LLP
5060 California Avenue, 7th Floor
Bakersfield, CA 93309

Attorneys for Petitioner
Dignity Health

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 **December 29, 2014**, at Sacramento, California.

RuthAnn Reshke
Declarant


Signature

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EXHIBIT E

ORIGINAL

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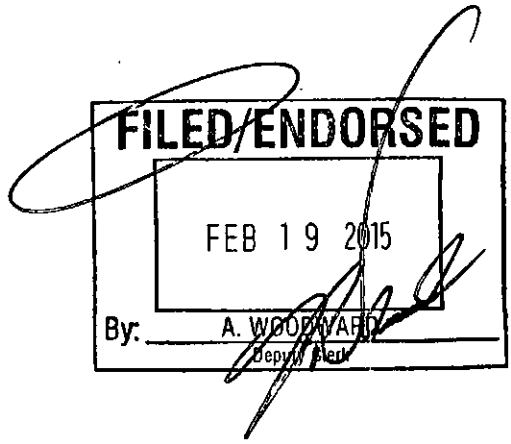


SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

DIGNITY HEALTH, a California nonprofit public benefit corporation,

Petitioners,

v.

CALIFORNIA HIGH-SPEED RAIL AUTHORITY, and DOES 1 through 20,

Respondents and Defendants.

ROES 1 to 10,

Real Parties in Interest.

Case No. 34-2014-80001865-CU-WM-GDS

NOTICE OF MOTION AND MOTION FOR STAY OF ACTION; MEMORANDUM OF POINTS AND AUTHORITIES; DECL. OF JESSICA TUCKER-MOHL; [PROPOSED] ORDER

ASSIGNED FOR ALL PURPOSES

Judge: Hon. Michael Kenny
Dept: 31
Date: March 27, 2015
Time: 9:00 a.m.
Action Filed: June 5, 2014

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on March 27, 2015, at 9:00 a.m. in Department 31 of the above-entitled Court, located at 720 9th Street, Sacramento, CA 95814, respondent California High-Speed Rail Authority (the "Authority") will move this Court for an order staying this action until after the California Supreme Court issues a decision in the pending case *Friends of the Eel River v. North Coast Railroad Authority* (No. S222472, Petition for Review granted Dec. 10, 2014).

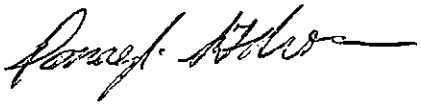
The Authority bases this motion on this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the attached Declaration of Jessica E. Tucker-Mohl, the concurrently filed Request for Judicial Notice, the pleadings and papers on file in this action, and such other and further evidence as the Court may consider at the hearing on this motion.

Pursuant to local rule 1.06, the Court will make a tentative ruling on the merits of this matter by 2:00 p.m., the court day before the hearing. To receive the tentative ruling, you can access the court's website at www.saccourt.ca.gov or arrange to obtain the tentative ruling from the clerk of Department 31. If you do not call the court and the opposing party by 4:00 p.m. the court day before the hearing, no hearing will be held.

Dated: February 19, 2015

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
DANIEL L. SIEGEL
Supervising Deputy Attorney General



DANAE J. AITCHISON
Deputy Attorney General
Attorneys for Respondents and Defendants California High-Speed Rail Authority

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INTRODUCTION

Respondent California High-Speed Rail Authority has consistently asserted that the Court lacks subject matter jurisdiction because in this case, the California Environmental Quality Act is preempted by federal law. The federal Surface Transportation Board has ruled that California's planned high-speed rail system is subject to its jurisdiction. The STB has authorized construction in the Fresno to Bakersfield section of the system, which is at issue in this lawsuit. Construction between Fresno and Bakersfield will begin in the coming months. This lawsuit seeks to prevent Fresno to Bakersfield construction from commencing, or halt it after it begins, based on CEQA. Federal law, however, expressly preempts the CEQA remedies sought in this case because they interfere with the STB's exclusive jurisdiction over rail line construction under the Interstate Commerce Commission Termination Act. The STB has issued a declaratory order that CEQA is preempted under the facts here. No exceptions to preemption apply, and ordinarily, Respondent would now move for dismissal.

On December 10, 2014, however, the California Supreme Court granted review in *Friends of the Eel River v. North Coast Railroad Authority*, which involves the intersection of CEQA, ICCTA preemption of state law, and a publicly-owned railroad, as does the lawsuit at bar here. In these circumstances, it would promote judicial economy to stay this case so that any eventual motion for judgment on the pleadings can consider and address the anticipated *Eel River* decision. Indeed, the Court queried whether the case should be in abeyance at the recent case management conference.

Nevertheless, the Authority reserves its right to assert preemption in the event that petitioners in this case or any of the related cases seek to obtain relief that could impact the project. Based on the Authority's present construction plans, it is highly likely construction in the Fresno to Bakersfield section will start well before *Eel River* is decided. If, during the pendency of the stay, a petitioner moves to lift the stay and asks for the kind of interim relief pled for in the Petitions – *i.e.*, a preliminary injunction halting construction, the Authority will oppose it on preemption grounds whether or not the Supreme Court has issued a decision in *Eel River*. Unless and until then, a stay of all proceedings is acceptable to the Authority.

STATEMENT OF FACTS/PROCEDURAL BACKGROUND

This case challenges the Authority's environmental impact report ("EIR") for the construction of approximately 114 miles of railroad track and related facilities for alleged violation of the California Environmental Quality Act ("CEQA") (Pub. Resources Code, § 21000 et seq.) In 2011, the Authority issued a draft environmental impact report/environmental impact statement ("EIR/EIS") for the Fresno to Bakersfield section of the high-speed rail system. (AR B000001; A000002.) [1] In 2012, the Authority issued a Revised Draft EIR/Supplemental Draft EIS. (AR B000001.)

While the Fresno to Bakersfield section EIR/EIS was underway, the Authority filed with the Surface Transportation Board ("STB") a petition for exemption from the prior approval requirements in 49 U.S.C. § 10901 for high-speed rail construction in the Merced to Fresno section of the system, and concurrently filed a motion to dismiss on the grounds that the STB lacked jurisdiction over the high-speed rail system as a whole. (*California High-Speed Rail Authority, Construction Exemption – in Merced, Madera, and Fresno Counties, Cal.*, No. FD 35724, 2013 WL 1701795, at * 1 (S.T.B. April 18, 2013).) The Authority argued that the high-speed rail system was not subject to STB jurisdiction because it is located within California and would not be constructed or operated as part of the interstate rail network. (*Id.* at *1.)

On April 18, 2013, the STB denied the Authority's motion to dismiss, concluding it has jurisdiction over the entire high-speed rail system, reserving its explanation on jurisdiction for the decision on the construction exemption. (*Id.* at *2.) On June 13, 2013, the STB issued a decision holding it has jurisdiction over the California high-speed rail system because its interconnectivity with Amtrak makes it part of the interstate rail network. (*California High-Speed Rail Authority, Construction Exemption – in Merced, Madera, and Fresno Counties, Cal.*, No. FD 35724, 2013 WL 3053064, at *6 (S.T.B. June 13, 2013).) [2] The decision explained that the ICCTA expanded federal regulatory jurisdiction to include wholly intrastate rail transportation

[1] This motion includes citations to portions of the administrative record ("AR") the Authority lodged on November 21, 2014. For example, AR B0000001 refers to administrative record page B0000001.

[2] The decision also authorized construction between Merced and Fresno. (*Id.* at *9-13.)

based on its relationship to the interstate rail network. (*Id.* at *7-*9.) No party appealed and the decision is final. (28 U.S.C. §§ 2321(a), 2342, 2343, 2344.)

The Authority filed a petition for exemption to obtain authority to construct the Fresno to Bakersfield section on September 26, 2013. (*California High-Speed Rail Authority, Construction Exemption – in Fresno, Kings, Tulare, and Kern Counties, Cal.*, No. FD 35724, 2014 WL 3973120, at *1 (S.T.B. August 11, 2014.).

The Authority issued the Fresno to Bakersfield Section Final EIR/EIS on April 18, 2014. (AR B000002.) On May 7, 2014, the Authority certified the Final EIR/EIS for its compliance with CEQA, approved the preferred alternative from Fresno to approximately Seventh Standard Road in Kern County, and adopted CEQA findings of fact and a statement of overriding considerations. (AR B000001-3; B000004-6.)

While this lawsuit was pending, the STB authorized construction of the Fresno to Bakersfield section of the high-speed rail system. (*California High-Speed Rail Authority, Construction Exemption – in Fresno, Kings, Tulare, and Kern Counties, Cal.*, No. FD 35724-1, 2014 WL 3973120 at *16 (S.T.B. August 11, 2014).) No party appealed the decision and it is final. (28 U.S.C. §§ 2321(a), 2342, 2343, 2344.)

On December 10, 2014, the California Supreme Court granted review of *Friends of the Eel River v. North Coast Railroad Authority*, California Supreme Court case number S222472.

On December 12, 2014, following the Authority's request for a declaratory order, the STB held that section 10501(b) preempts CEQA for the Fresno to Bakersfield rail project and that the market participant doctrine did not preclude application of normal preemption principles. (*California High-Speed Rail Authority – Petition for Declaratory Order*, No. FD 35861, 2014 WL 7149612, at *7, *10-11 (S.T.B. December 12, 2014) petitions for review filed, *Dignity Health v. Surface Transportation Board, et al.* (D.C. Cir., Feb. 10, 2015) No. 15-1030; *Kings County, et al. v. Surface Transportation Board, et al.* (9th Cir., Feb. 9, 2015) No. 15-70386.) Two petitions for reconsideration are still pending before the STB. (*Kings County, et al. Petition for Reconsideration*, No. FD 35861 (S.T.B. Dec. 29, 2014); *Jacqueline Ayer Petition for Reconsideration*, No. FD 35861 (S.T.B. Dec. 30, 2014).) Two petitions for review of the STB's

declaratory order were filed with federal appellate courts on February 9, 2015. A petition for a stay of the STB declaratory order was filed on February 19, 2015. (*Kings County et al.*, No. FD 35861 (S.T.B. Feb. 19, 2015).)

ARGUMENT

I. THIS COURT HAS CLEAR AUTHORITY TO STAY THESE PROCEEDINGS PENDING RESOLUTION OF A CALIFORNIA SUPREME COURT CASE INVOLVING RELEVANT ISSUES.

The Court has the inherent power, as well as rights recognized by statute, to control its proceedings. (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 266-267 [discussing courts inherent powers derived from Constitution and those conferred by statute]; Code Civ. Proc., § 128, subd. (a)(8).) "Trial courts generally have the inherent power to stay proceedings in the interests of justice and to promote judicial efficiency." (*Freiberg v. City of Mission Viejo* (1995) 33 Cal.App.4th 1484, 1489; see also *Rice v. Superior Court* (1982) 136 Cal.App.3d 81, 89 [inherent power of court to issue stay limited by statute conferred substantive right on aged plaintiffs to not lose rights due to passage of time].) A stay of proceedings in the trial court pending a decision by the California Supreme Court in a case before it presenting relevant legal issues is an appropriate circumstance for a stay. (See *Curran v. Mount Diablo Council of the Boy Scouts* (1998) 17 Cal.4th 670, 677 [trial court stayed action pending U.S. Supreme Court determination of case with related issues]; *Ford v. Pacific Gas and Electric Co.* (1997) 60 Cal.App.4th 696, 700 [court of appeal held briefing in abeyance pending California Supreme Court decision in case concerning related issues]; *Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 103-104 [acknowledging trial court option to stay case pending California Supreme Court decision].)

II. THE COURT SHOULD STAY THIS CASE PENDING THE CALIFORNIA SUPREME COURT'S DECISION IN *FRIENDS OF THE EEL RIVER V. NORTH COAST RAILROAD AUTHORITY*

The Court should stay the entire action pending the California Supreme Court's decision in *Eel River*. The Authority believes the law as it stands is sufficiently clear that federal law preempts the CEQA and derivative claims in this case that the Court could dismiss the claims

now. The Authority recognizes, however, that the California Supreme Court will address an issue in *Eel River* that could have relevance to the preemption analysis in this case, and at this stage, a stay of the proceedings is in the interest of judicial economy. The Authority notes however, that there are circumstances in which considerations of judicial economy would necessarily yield. If petitioners in this or one of the related cases seek to lift the stay and attempt to obtain provisional or other relief before a Supreme Court decision becomes final in *Eel River*, the issues of preemption and the jurisdiction of this Court would be squarely presented, and would have to be decided. The Authority would assert preemption and consequent lack of jurisdiction as a defense and if the stay is lifted, the Authority reserves the right to move for judgment on the pleadings then, or any time prior if other circumstances warrant.

A. The Interstate Commerce Commission Termination Act Preempts The CEQA and Derivative Claims In This Case; The Court Has No Jurisdiction To Provide The Remedies Sought.

The plain language of the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. section 10501(b), expressly preempts remedies under the CEQA and derivative claims in this case and the Court has no jurisdiction to provide a remedy. The statute provides:

> 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 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 the 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), emphasis added.) By its terms, section 10501(b) gives the STB exclusive jurisdiction over construction of rail lines, including wholly intrastate lines. (*CSX Transportation, Inc. v. Georgia Public Service Comm.* (N.D. Ga. 1996) 944 F.Supp. 1573, 1582-1584.) Section 10501(b) preempts, "state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws [of general application] having a more remote or incidental effect on rail transportation." (*People v.*

Burlington Northern Santa Fe (2012) 209 Cal.App.4th 1513, 1528 citing *New York & Susquehanna v. Jackson* (3d Cir. 2007) 500 F.3d 238, 252.)

The CEQA and derivative claims are preempted here because: (1) they seek to prevent the Authority from proceeding with STB-authorized construction; and (2) they seek to regulate rail line construction, an area directly and exclusively regulated by the STB. (*People v. Burlington Northern Santa Fe*, *supra*, 209 Cal.App.4th at p. 1528 [recognizing two types of facially preempted state laws under section 10501(b)]; see also *City of Auburn v. U.S. Government* (9th Cir. 1998) 154 F.3d 1025, 1030-1031; *Green Mountain Railroad Corporation v. State of Vermont* (2d Cir. 2005) 404 F.3d 638, 641-642.)

Town of Atherton v. California High-Speed Rail Authority does not control the preemption analysis here because that decision is expressly limited to the facts and posture of that case. (*Town of Atherton v. California High-Speed Rail Authority* (2014) 228 Cal.App.4th 314, 327, fn.2 ("*Atherton*"); *id.* at p. 323.) The legal issue at hand in *Atherton* (a broad, first-tier environmental document and general route decision) was different because that Court did not have occasion to address a conflict with the STB's exclusive jurisdiction over rail line construction, the issue presented here. (*Id.* at p. 333; *California High-Speed Rail Authority, Construction Exemption – in Fresno, Kings, Tulare, and Kern Counties, Cal.*, *supra*, 2014 WL 3973120 at *16.) The *Atherton* court noted there was no declaratory order decision by the STB relative to the CEQA lawsuits involved in that case. (*Atherton*, *supra*, 228 Cal.App. 4th at 333.) Here, however, the STB has issued a decision holding the ICCTA preempts CEQA in the context of the cases challenging Fresno to Bakersfield rail line construction the STB has authorized and no exceptions to preemption apply. (*California High-Speed Rail Authority – Petition for Declaratory Order*, *supra*, 2014 WL 7149612, at *7.) These and other distinctions the Authority would brief in full if it moves for judgment on the pleadings.

B. *Eel River* Appears To Involve Issues Relevant To This Case; It Promotes Judicial Efficiency To Stay This Case Until *Eel River* Is Decided.

Despite the ICCTA's clear preemption of the remedies sought in this case, the Authority recognizes that a case currently pending before the California Supreme Court also involves the

intersection of CEQA, the ICCTA's preemption provision, and a publicly-owned railroad. (*Friends of the Eel River v. North Coast Railroad Authority* (2014) 230 Cal.App.4th 85, review granted Dec. 10, 2014, case no. S222472.) The Supreme Court's "Case Summary" in *Eel River* poses the following question:

> (1) Does the [ICCTA] preempt the application of [CEQA] to a state agency's proprietary acts with respect to a state-owned and funded rail line or is CEQA not preempted under the market participant doctrine (see *Town of Atherton v. California High-Speed Rail Authority* (2014) 228 Cal.App.4th 314)?

(See Respondent's Request for Judicial Notice, Ex. 1, p.1.) While it is unclear whether the Supreme Court's decision in *Eel River* will be dispositive of the preemption analysis in this case, at least one of the parties will likely rely on it in future briefing on the preemption questions here.[3] In light of the fact that any decision by the trial court now about preemption will inevitably be appealed, it promotes the efficiency of the Court and the parties to stay this case in its entirety until the Supreme Court decides *Eel River*.

III. THE AUTHORITY RESERVES ITS RIGHT TO BRING A MOTION FOR JUDGMENT ON THE PLEADINGS IF PETITIONERS IN ANY OF THE RELATED CASES SEEK ANY FORM OF PROVISIONAL OR INTERIM RELIEF.

The Authority has attached with this motion a proposed order that would stay all proceedings in this case pending a decision in *Eel River*, but would preserve the ability of the parties to settle and the Court's ability to enter a stipulated judgment and dismissal if settlement occurs. The nature of the proposed stay is that it applies to all parties, and to the entire case, staying all proceedings for all causes of action. In particular, the proposed stay would cover the previously negotiated briefing schedule and hearing date for the merits of the CEQA claims in this case and in the related cases. In the event either petitioners or the Authority want to lift the stay, a motion to lift the stay will be required in conjunction with whatever other relief is sought.[4]

---

[3] The website "Docket" for *Eel River* indicates that the appellants opening briefs in the case are due on February 23, 2015. (Respondent's Request for Judicial Notice, Ex. 2, p. 2.) Full briefing in the case will not be complete for several months, and therefore it remains difficult to assess what level of factual similarity there may be between these Fresno to Bakersfield cases and the underlying facts in *Eel River*.

[4] The proposed stay does not include a stay of the Authority lodging with the Court sections H14 and H15 of the administrative record, and making it available to petitioners. The Authority has already made sections H14 and H15 available to petitioners, and will lodge these (continued...)

As explained above, the Authority anticipates commencing construction of the Fresno to Bakersfield rail line, consistent with its Surface Transportation Board authorization, and that construction will more than likely precede the Supreme Court's *Eel River* decision. The issue of this Court's subject matter jurisdiction over this case and the remedies it seeks therefore may require a decision on preemption well before the Supreme Court decides *Eel River*.

CONCLUSION

For the foregoing reasons, the Authority respectfully requests that the Court stay this entire action as indicated on the attached Proposed Order pending the final decision of the California Supreme Court in *Eel River*.

Dated: February 19, 2015

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
DANIEL L. SIEGEL
Supervising Deputy Attorney General

DANAE J. AITCHISON
Deputy Attorney General
Attorneys for Respondents and Defendants California High-Speed Rail Authority

(...continued)
sections with the Court on February 20, 2015.

DECLARATION OF JESSICA E. TUCKER-MOHL

I, Jessica E. Tucker-Mohl, declare:

1. I am an attorney at law licensed to practice before all courts of the State of California. I am a Deputy Attorney General for the State of California and am attorney of record for defendant California High-Speed Rail Authority in this this action. I have personal knowledge of the following facts. If called upon to testify as a witness, I could and would testify competently to these facts under oath.

2. Via letter dated December 23, 2014, I conferred with counsel for all parties in the six then-pending related cases challenging the Fresno to Bakersfield environmental impact report (Sacramento County Superior Court Case Nos. 34-2014-80001859; 34-2014-80001861; 34-2014-80001863; 34-2014-80001864; 34-2014-80001865; and 34-2014-80001908) regarding the Authority's planned motion for judgment on the pleadings on the grounds of preemption.

3. At the January 23, 2015, case management conference, I stated on the record that the Authority's proposed motion hearing date of March 27, 2015, and proposed filing dates of February 19th (opening motion), March 9th (oppositions) and March 20th (replies) appeared to be acceptable. On the record, all counsel present concurred.

4. On February 17, 2015 at 4:15 p.m., I sent an electronic mail message to counsel for all parties in the five following related lawsuits (Sacramento County Superior Court Case Nos. 34-2014-80001861; 34-2014-80001863; 34-2014-80001864; 34-2014-80001865; and 34-2014-80001908) stating that the Authority was electing to proceed with a motion for stay instead of a motion for judgment on the pleadings, using the same hearing date and deadlines previously agreed to. I asked counsel for all parties to notify me by 4:00 p.m. on February 18, 2015, if they would agree to entry of a stay of their case pending *Friends of Eel River*.

5. On February 18, 2015, I communicated with counsel for Coffee-Brimhall LLC, petitioner in *Coffee-Brimhall LLC v. California High-Speed Rail Authority* (Case No. 34-2014-80001859), stating that the Authority was electing to proceed with a motion for stay instead of a motion for judgment on the pleadings, using the same hearing date and deadlines previously

agreed to. Because the parties have settled *Coffee-Brimhall LLC v. California High-Speed Rail Authority*, the Authority has filed a Stipulated Judgment on February 18, 2015, and the Authority anticipates Coffee-Brimhall LLC will file a Notice of Dismissal on February 19, 2015, I indicated to counsel that no motion will be filed in that case.

5. As of February 19, 2015, at 10:00 a.m., I received responses from counsel for the City of Shafter (Case No. 34-2014-80001908), indicating that petitioner Shafter would agree to entry of a stay of its case, and from counsel for Kings County, et al. (Case No. 34-2014-80001861) indicating that the Kings County, et al. petitioner group wished to review the Authority's motion for stay before making a determination as to their response. No other petitioners have responded as to whether they would agree to an entry of stay of their case.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Declaration was executed on February 19, 2015, at Sacramento, California.

Jessica E. Tucker-Mohl

[PROPOSED] ORDER

IT IS HEREBY ORDERED that:

1. All further proceedings in this case are hereby stayed until after a final decision by the California Supreme Court in *Friends of the Eel River v. North Coast Railroad Authority*, Case No. S222472, with the exception of the parties' ability to engage in settlement discussions and the Court's ability to enter a stipulated judgment and/or dismissal resulting from any settlement in this case.

2. The parties are ordered to promptly bring to this Court's attention any ruling by the California Supreme Court in *Friends of the Eel River*.

3. This Court will hold a case management conference within thirty days after a decision is published in *Friends of the Eel River*, to discuss how to proceed with this case, including scheduling of any motions that may be appropriate.

Dated: _____

_____
Hon. Michael P. Kenny, Judge

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***Dignity Health v. California High-Speed Rail Authority***

Case No.: **34-2014-80001865-CU-WM-GDS**

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; my business address is 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550.

On **January 19, 2015**, I served the attached **NOTICE OF MOTION AND MOTION FOR STAY OF ACTION; MEMORANDUM OF POINTS AND AUTHORITIES; DECL. OF JESSICA TUCKER-MOHL; [PROPOSED] ORDER** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Sacramento, California, addressed as follows:

George F. Martin
Borton Petrini, LLP
5060 California Avenue, 7th Floor
Bakersfield, CA 93309

Attorneys for Petitioner
Dignity Health

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 **January 19, 2015**, at Sacramento, California.

Corey Bakarich
Declarant

Signature

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11747788doc

EXHIBIT F

ORIGINAL

KAMALA D. HARRIS
Attorney General of California
DEBORAH M. SMITH
Supervising Deputy Attorney General
DANAE J. AITCHISON (SBN 176428)
JESSICA E. TUCKER-MOHL (SBN 262280)
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REMY MOOSE MANLEY, LLP (SBN 246064)
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Telephone: (916) 443-2745
Fax: (916) 443-9017
E-mail: jmoose@rmmenvirolaw.com
steller@rmmenvirolaw.com
lharris@rmmenvirolaw.com

Attorneys for Respondent
California High-Speed Rail Authority

FILED/~~ENDORSED~~
MAY 15 2015
By S. Lee, Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

DIGNITY HEALTH, a California nonprofit public benefit corporation,

Petitioner,

v.

CALIFORNIA HIGH-SPEED RAIL AUTHORITY, a public entity; and DOES 1 through 20,

Respondents.

Case No. 34-2014-80001865-CU-WM-GDS

~~[PROPOSED]~~ ORDER GRANTING STAY

ASSIGNED FOR ALL PURPOSES
Judge: Hon. Michael Kenny
Date: March 27, 2015
Dept: 31
Action Filed: June 6, 2014

On Friday, March 27, 2015 at 9:00 a.m., the Court was scheduled to hear Respondent CALIFORNIA HIGH-SPEED RAIL AUTHORITY'S Motion for Stay of Action. The Court issued a tentative ruling granting Respondent's motion and staying the action. No party requested oral argument, and the tentative ruling became final, as reflected in the minute order the Court added to the tentative ruling, a true and correct copy of which is attached to this document as Exhibit "A" and hereby incorporated by reference.

The Court HEREBY ORDERS that this matter is stayed until the California Supreme Court issues a decision in the matter of *Friends of the Eel River v. North Coast Railroad Authority*, California Supreme Court case number S222472.

Dated: May 6, 2015

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
DEBORAH M. SMITH
Supervising Deputy Attorney General

CARLOS A. MEJIA
Deputy Attorney General
Attorneys for Respondent and Defendant California High-Speed Rail Authority

Dated: May 8, 2015

Approved as to form,

BORTON PETRINI, LLP

GEORGE F. MARTIN
Attorneys for Petitioner and Plaintiff, Dignity Health

IT IS SO ORDERED.

Dated: 5/15/15

JUDGE OF THE SUPERIOR COURT
MICHAEL P. KENNY

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EXHIBIT A

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE

MINUTE ORDER

DATE: 03/27/2015 TIME: 09:00:00 AM DEPT: 31

JUDICIAL OFFICER PRESIDING: Michael P. Kenny
CLERK: Susan Lee
REPORTER/ERM: None
BAILIFF/COURT ATTENDANT: Larry Moorman

CASE NO: **34-2014-80001865-CU-WM-GDS** CASE INIT.DATE: 06/06/2014
CASE TITLE: **Dignity Health vs. California High-Speed Rail Authority**
CASE CATEGORY: Civil - Unlimited

EVENT ID/DOCUMENT ID: ,12259832
EVENT TYPE: Motion - Other - Writ of Mandate
MOVING PARTY: California High-Speed Rail Authority
CAUSAL DOCUMENT/DATE FILED: Motion - Other for Stay of Action, 02/19/2015

APPEARANCES

NATURE OF PROCEEDINGS: MOTION FOR STAY OF ACTION

TENTATIVE RULING

The following shall constitute the Court's tentative ruling on the motion for stay of action, which is scheduled to be heard by the Court on Friday, March 27, 2015 at 9:00 a.m. in Department 31. The tentative ruling shall become the final ruling of the Court unless a party wishing to be heard so advises the clerk of this Department no later than 4:00 p.m. on the court day preceding the hearing, and further advises the clerk that such party has notified the other side of its intention to appear.

In the event that a hearing is requested, oral argument shall be limited to no more than 20 minutes per side.

Any party desiring an official record of this proceeding shall make arrangements for reporting services with the Clerk of the Department where the matter will be heard not later than 4:30 p.m. on the day before the hearing. The fee is $30.00 for civil proceedings lasting under one hour, and $239.00 per half day of proceedings lasting more than one hour. (Local Rule 1.12(B) and Government Code § 68086.) Payment is due at the time of the hearing.

Respondents have filed a request for judicial notice. Petitioner has not filed any objections. The Court has reviewed the documents and grants the request for judicial notice.

Respondents have filed a request for judicial notice. Petitioner has not filed any objections. The Court has reviewed the documents and grants the request for judicial notice.

This matter challenges Respondent's compliance with the California Environmental Quality Act in connection with the construction of approximately 114 miles of railroad track and related facilities. Petitioner contends Respondent violated the California Environmental Quality Act (hereinafter, "CEQA") in failing to properly complete an Environmental Impact Report.

During the pendency of this case, the First Appellate District Court and the Third Appellate District Court decided cases concerning CEQA preemption. The First District decided *Friends of the Eel River v. North Coast Railroad Authority* (2014) 230 Cal.App.4th 85 (review granted). The First District held that the Interstate Commerce Commission Termination Act (hereinafter, "ICCTA") (49 U.S.C. § 10101 et seq.) expressly preempts CEQA. Consequently, the challenges to the subject EIR concerning a railroad company's California freight operations were properly denied by the lower court. The Third District decided *Town of Atherton v. California High Speed Rail Authority* (2014) 228 Cal.App.4th 314. The Third District held that the market participation exception applied to ICCTA preemption of CEQA with regard to the building of the California high-speed rail project. Consequently, the ICCTA did not preempt a challenge to the adequacy of the program EIR approving the high-speed train system's route.[1]

On December 10, 2014, the California Supreme Court granted review of *Friends of the Eel River v. North Coast Railroad Authority*, California Supreme Court case number S222472. The Court's website indicates that the issues the Court will consider are,

"Petition for review after the Court of Appeal affirmed the judgments in actions for writ of administrative mandate. This case includes the following issues: (1) Does the Interstate Commerce Commission Termination Act [ICCTA] (49 U.S.C. § 10101 et seq.) preempt the application of the California Environmental Quality Act [CEQA] (Pub. Res. Code, § 21050 et seq.) to a state agency's proprietary acts with respect to a state-owned and funded rail line or is CEQA not preempted in such circumstances under the market participant doctrine (see *Town of Atherton v. California High Speed Rail Authority* (2014) 228 Cal.App.4th 314)? (2) Does the ICCTA preempt a state agency's voluntary commitments to comply with CEQA as a condition of receiving state funds for a state-owned rail line and/or leasing state-owned property?"[2]

In this matter, Respondent has filed a motion for a stay in light of the Supreme Court's review of *Friends of the Eel River*. Respondent argues, "...it would promote judicial economy to stay this case that that any eventual motion for judgment on the pleadings can consider and address the anticipated *Eel River* decision."[3] Respondent acknowledges that it is likely that construction will begin on the contested Fresno to Bakersfield section of the subject project before the *Eel River* decision.[4] Respondent proposes that the parties retain the ability to settle, and the Court retain the ability to enter a stipulated judgment and dismissal if settlement occurs. Respondent requests that a motion to lift the stay would be required should either party seek some sort of relief, and that the stay cover the briefing schedule and hearing date for the merits.[5]

Petitioner has not filed any response or objection to the instant motion.

The Court agrees that a stay is appropriate in this matter in light of the Supreme Court's consideration of *Friends of the Eel River*. The Court agrees that continued preparation of the administrative record is unnecessary because of the potential ramifications of a Supreme Court decision in *Friends of the Eel River*. A delay in completing the record also is justified given Respondent's assertions that the record has been prepared and made available. Furthermore, the Court recognizes that Petitioners may need additional time to proceed in the event the record is needed and must be augmented.

With regard to any need for injunctive relief, the Court will make itself available in a timely manner to hear a motion to lift the stay if the need arises. It is therefore not appropriate to carve out a special circumstance in which a motion would be unnecessary.

Accordingly, this matter is hereby stayed until the California Supreme Court issues a decision in the matter of *Friends of the Eel River v. North Coast Railroad Authority*, California Supreme Court case number S222472. Upon the issuance of said ruling, the stay shall be automatically lifted and the parties shall contact the Court for a hearing date to discuss a new briefing schedule and merits hearing date.

//

In the event that this tentative ruling becomes the final ruling of the Court, in accordance with Local Rule 1.06, counsel for Respondent is directed to prepare an order granting the stay, incorporating this ruling as an exhibit to the order; submit it to counsel for Petitioner for approval as to form in accordance with Rule of Court 3.1312(a); and thereafter submit it to the Court for signature and entry in accordance with Rule of Court 3.1312(b).

---

[1] The Court recognizes that the *Atherton* decision was specific to a different component of the high speed rail system than is at issue in this case. Its applicability to this case has been raised as an issue in the briefs.
[2] According to the Issues statement on the Court's website as of March 16, 2015.
[3] Memorandum of Points and Authorities in Support of Motion for Stay, p. 1.
[4] Respondent goes on to make arguments in support of preemption and that the Court has no jurisdiction in light of this preemption. These arguments are not relevant to the instant motion, and as such, the Court will not address them other than to indicate that the unresolved issues of preemption as identified by the Supreme Court in *Friends of the Eel River* appear to be relevant to this case and support the argument that a stay promotes judicial economy.
[5] Respondent indicates the proposed stay does not include a stay of Respondent's lodging with the Court sections H14 and H15 of the administrative record.

COURT RULING

There being no request for oral argument, the Court AFFIRMS the tentative ruling.

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***Dignity Health v. California High-Speed Rail Authority***

Case No.: **34-2014-80001865-CU-WM-GDS**

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; my business address is 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550.

On **May 13, 2015**, I served the attached **[PROPOSED] ORDER GRANTING STAY** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Sacramento, California, addressed as follows:

George F. Martin
Borton Petrini, LLP
5060 California Avenue, 7th Floor
Bakersfield, CA 93309

Attorneys for Petitioner
Dignity Health

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 **May 13, 2015**, at Sacramento, California.

Leticia Aguirre
Declarant

Leticia Aguirre
Signature

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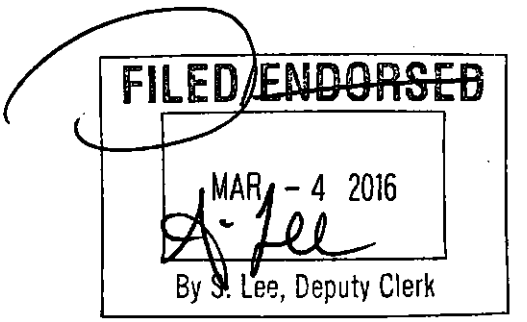
EXHIBIT G



SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

JOHN TOS, AARON FUKUDA, and COUNTY OF KINGS,

Plaintiffs and Petitioners,

v.

CALIFORNIA HIGH SPEED RAIL AUTHORITY *et al.*,

Defendants and Respondents.

Case No. 34-2011-00113919-CU-WM-GDS

RULING ON SUBMITTED MATTER: MOTION FOR JUDGMENT ON PETITION AND COMPLAINT

I. Factual And Procedural Background

The Legislature enacted the California High-Speed Rail Act in 1996. (Pub. Util. Code, § 185000, et seq)(hereinafter, the "Rail Act.") The Rail Act created the High-Speed Rail Authority (hereinafter, the "Authority") (Pub. Util. Code § 185012) and tasked it with developing and implementing an intercity high-speed rail service (hereinafter, the "HSR system"). (Pub. Util. Code §§ 185030, 185032.)

In 2008, Proposition 1A was placed before California voters to enact the "Safe, Reliable High-Speed Passenger Train Bond Act for the 21st Century." The Official Voter Information Guide for November 4, 2008 summarized the decision whether to enact Proposition 1A as,

> "[t]o provide Californians a safe, convenient, affordable, and reliable alternative to driving and high gas prices; to provide good-paying jobs and

> improve California's economy while reducing air pollution, global warming greenhouse gases, and our dependence on foreign oil, *shall $9.95 billion in bonds be issued* to establish a clean, efficient high-speed train service linking Southern California, the Sacramento/San Joaquin Valley, and the San Francisco Bay Area, with at least 90 percent of bond funds spent for specific projects, with private and public matching funds required, including, but not limited to, federal funds, funds from revenue bonds, and local funds, and all bond funds subject to independent audits?" (AG 000003)(emphasis added.)

The Official Voter Information Guide further indicated that a "yes" vote meant "[t]he state could sell $9.95 billion in general obligation bonds, to plan and to partially fund the construction of a high-speed train system in California, and to make capital improvements to state and local rail services." A "no" vote meant "[t]he state could not sell $9.95 billion in general obligation bonds for these purposes." (AG 000003.) The description of Proposition 1A and arguments for and against it, were followed by "an Overview of State Bond Debt." (AG 000008-9.)

California voters approved Proposition 1A (hereinafter, The "Bond Act"). (Streets and Highways Code §§ 2704, *et seq.*[1]) The Bond Act is in Division 3 of the Streets and Highways Code, which Division concerns the "Apportionment and Expenditure of Highway Funds."

The Bond Act identifies requirements the HSR system must meet prior to receipt of the funds, including that the HSR system "shall be designed to achieve the following characteristics…

> (b) Maximum nonstop service travel times for each corridor that shall not exceed the following:
>
> (1) San Francisco-Los Angeles Union Station: two hours, 40 minutes.
>
> (2) Oakland-Los Angeles Union Station: two hours, 40 minutes.
>
> (3) San Francisco-San Jose: 30 minutes…
>
> (c) Achievable operating headway (time between successive trains) shall be five minutes or less…

[1] All further statutory references are to the Streets and Highways Code, unless otherwise indicated.

> (g) In order to reduce impacts on communities and the environment, the alignment for the high-speed train system shall follow existing transportation or utility corridors to the extent feasible and shall be financially viable, as determined by the authority." (§ 2704.09.)

The Authority must prepare, publish, adopt, and submit to the Legislature, a business plan, which they must review and resubmit every two years. (Pub. Util. Code § 185033.) Before committing appropriated bond funds to construction, the Authority must approve and submit a detailed funding plan concerning the specific corridor or usable segment, to the Director of Finance, the peer review group established pursuant to section 185035 of the Public Utilities Code, and the policy committees with jurisdiction over transportation matters and the fiscal committees in both houses of the legislature. (§ 2704.08.) The funding plan must certify that the Authority has completed all necessary project level environmental clearances necessary to proceed to construction. (§ 2704.08, subd. (c)(2)(k).) The Authority cannot commit bond funds to construction until the Director of Finance concludes that "the plan is likely to be successfully implemented as proposed." (§ 2704.08, subd. (d).)

In April 2012 and April 2014, the Authority approved, published, and submitted its 2012 and 2014 Business Plans to the Legislature. (AG 001931, AG 011047.) These plans indicate that Phase I of the system is a "blended system" in which conventional and HSR trains will share tracks, stations, and other facilities. (AG 001936, 001940, 001941, 001948, 001971-001974, 011055, 011060, 011062.) In 2013, the Legislature passed SB 557 (enacting § 2704.76) which provides,

> "(b) Funds appropriated pursuant to Items 2660-104-6043, 2660-304-6043, and 2665-104-6043 of Section 2.00 of the Budget Act of 2012, to the extent those funds are allocated to projects in the San Francisco to San Jose segment, shall be used solely to implement a rail system in that segment that *primarily consists of a two-track blended system* to be used jointly by high-speed rail trains and Peninsula Joint Powers Board commuter trains (Caltrain), with the system to be contained substantially within the existing Caltrain right-of-way." (emphasis added.)

Consequently, the funds appropriated for the San Francisco to San Jose segment are for construction of a blended system.

Plaintiffs filed this matter on November 14, 2011, claiming that the high-speed rail project is not eligible to receive Bond Act funds. Accordingly, Plaintiffs allege it would be illegal to give Defendants these funds to construct the subject high-speed rail system in the Central Valley.

One of Plaintiffs' initially filed claims was previously resolved in this matter via separate trial and appeal to the Third District Court of Appeal. (*California High-Speed Rail Authority v. Superior Court* (2014) 228 Cal.App.4th 676.) The Court of Appeal directed this Court to enter judgment, "validating the authorization of the bond issuance…Further challenges by real parties in interest to the use of bond proceeds are premature." The court also ordered this Court to vacate its ruling requiring the Authority to redo the preliminary section 2704.08, subdivision (c) funding plan after the Legislature appropriated the bond funds. (*Id.* at 684.) In ruling on that matter, the Court of Appeal noted, "[j]udicial intrusion into legislative appropriations risks violating the separation of powers doctrine." (*Id.* at 714.) With regard to Proposition 1A, the court found, "the Bond Act does not curtail the exercise of the Legislature's plenary authority to appropriate."

The remaining claims in this matter are, per letter stipulation dated January 8, 2014:

1. "The currently proposed high-speed rail system does not comply with the requirements of Streets and Highways Code § 2704.09 in that it cannot meet the statutory requirement that the high-speed train system to [sic] be constructed so that the maximum nonstop service travel time for San Francisco – Los Angeles Union Station shall not exceed 2 hours and 40 minutes;
2. The currently proposed high-speed rail system does not comply with the requirements of Streets and Highways Code § 2704.09 in that it will not be financially viable as determined by the Authority and the requirement under § 2704.08(c)(2)(J) that the planned passenger service by the Authority in the corridors or usable segments thereof will not require a local, state, or federal operating subsidy;
3. The currently proposed "blended rail" system is substantially different from

the system whose required characteristics were described in Proposition 1A, and the legislative appropriation towards constructing this system is therefore an attempt to modify the terms of that ballot measure in violation of article XVI, section 1 of the California Constitution and therefore must be declared invalid;

4. If Plaintiffs are successful in any of the above three claims, Proposition 1A bond funds will be unavailable to construct any portion of the Authority's currently-proposed high-speed rail system. Under those circumstances, the $3.3 billion of federal grant funds will not allow construction of a useful project. Therefore, under those circumstances the Authority's expenditure of any portion of the $3.3 billion of federal grant funds towards the construction of the currently-proposed system would be a wasteful use of public funds and would therefore be subject to being enjoined under Code of Civil Procedure § 526a."

The parties briefed these issues and then presented oral argument on February 11, 2015. At the close of the hearing, the Court took the matter under submission.

II. Standard of Review

This case involves numerous claims concerning the compliance of the HSR system as currently proposed with the requirements of the Bond Act.

The interpretation of statutes in such a case is an issue of law on which the court exercises its independent judgment. (See, *Sacks v. City of Oakland* (2010) 190 Cal.App.4th 1070, 1082.) In exercising its independent judgment, the Court is guided by certain established principles of statutory construction, which may be summarized as follows.

The primary task of the court in interpreting a statute is to ascertain and effectuate the intent of the Legislature. (See, *Hsu v. Abbara* (1995) 9 Cal.4th 863, 871.) As this matter involves the interpretation of statutes approved by the voters, "ascertaining the will of the electorate is paramount." (*Cal. High-Speed Rail Authority*, 228 Cal.App.4th at 708.) "Statutes adopted by the voters must be construed liberally in favor of the people's right to exercise their reserved powers, and it is the duty of the courts to jealously guard the right of the people by resolving doubts in favor of the use of those reserved powers." (*Id.*)

However, whether a statute is enacted by the voters or passed by the Legislature, the same

basic rules of statutory construction apply. (*Id.*) The starting point for the task of interpretation is the wording of the statute itself, because these words generally provide the most reliable indicator of legislative, or elector, intent. (See, *Murphy v. Kenneth Cole Productions* (2007) 40 Cal.4th 1094, 1103.) The language used in a statute is to be interpreted in accordance with its usual, ordinary meaning, and if there is no ambiguity in the statute, the plain meaning prevails. (See, *People v. Snook* (1997) 16 Cal.4th 1210, 1215.) The court should give meaning to every word of a statute if possible, avoiding constructions that render any words surplus or a nullity. (See, *Reno v. Baird* (1998) 18 Cal.4th 640, 658.) Statutes should be interpreted so as to give each word some operative effect. (See, *Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 390.)

Beyond that, the Court must consider particular statutory language in the context of the entire statutory scheme in which it appears, construing words in context, keeping in mind the nature and obvious purpose of the statute where the language appears, and harmonizing the various parts of the statutory enactment by considering particular clauses or sections in the context of the whole. (See, *People v. Whaley* (2008) 160 Cal.App.4th 779, 793.)

To the extent this matter requires review of administrative actions taken by the Authority, the Court must determine whether those actions constitute an abuse of discretion, namely whether the action was arbitrary, capricious, entirely lacking in evidentiary support, unlawful, or procedurally unfair. (See *Khan v. Los Angeles City Employees' Retirement System* (2010) 187 Cal.App.4th 98, 105-06.)

III. Discussion

A. Requests for Judicial Notice

Plaintiffs have filed a request for judicial notice concerning five documents. Defendants have filed objections to items 1 and 5.

Item 1 requests the Court take judicial notice of the fact that, "beginning in 2011,

Congressional appropriations have provided no funding for the California High-Speed Rail Authority or its project, or any other high-speed rail project, and in fact have rescinded prior funding for high-speed rail projects." Defendants object on the basis that this is irrelevant to any material issue in this matter, contains evidence that was not before the Authority when it made its decision (pursuant to *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559), and that the proffered fact is not the proper subject of judicial notice. The Court agrees, based on its analysis herein, that this fact is not relevant to any material issue currently ripe for review in this matter.

Item 5 requests judicial notice of mapping by the California Department of Transportation of California urban areas, which mapping has been integrated into a set of online databases accessible through Google Earth. Defendants object on the basis that the maps are irrelevant to any material issue, the evidence was not properly before the Authority, the evidence is proffered to contradict the Authority's experts, Plaintiffs failed to comply with Rule of Court 3.1306, subdivision (c), and Plaintiffs improperly seek judicial notice of the accuracy of the maps. The Court agrees, based on its analysis herein, that this information is not relevant to any issue that is currently ripe for review.

The request for judicial notice is **GRANTED** as to items 2, 3, and 4, and **DENIED** as to items 1 and 5.

B. The Purpose of the Bond Act

Central to this matter is the answer to the following question: Does the Bond Act simply provide bond financing, conditional upon the satisfaction of certain design criteria, or does it reach further, providing the sole authority by which a high-speed rail system may be constructed by the Authority (regardless of the source of funding)? Plaintiffs urge this Court to read section 2704.04, subdivision (a) as a declaration of the Legislature's intent that any HSR system built in

California must comply with the Bond Act's pre-requisites. Defendants argue, instead, that the Bond Act only prohibits the use of Bond Act funds until the Authority has proven compliance with the system described therein. Consequently, Defendants contend, to the extent the Authority is moving forward with an HSR system utilizing non-Bond Act funds, there is no statutory prohibition to these actions.

In analyzing the meaning of the Bond Act, the Court looks first to the plain language of the relevant statutes. Section 2704.04, subdivision (a) provides,

> "It is the intent of the Legislature by enacting this chapter and of the people of California by approving the bond measure pursuant to this chapter to initiate the construction of a high-speed train system that connects the San Francisco Transbay Terminal to Los Angeles Union Station and Anaheim, and links the state's major population centers, including Sacramento, the San Francisco Bay Area, the Central Valley, Los Angeles, the Inland Empire, Orange County, and San Diego consistent with the authority's certified environmental impact reports of November 2005 and July 9, 2008."

Section 2704.04 is located within Streets and Highways Code Division 3, "Apportionment and Expenditure of Highway Funds," Chapter 20, "Safe, Reliable High-Speed Passenger Train Bond Act for the 21st Century," Article 2, "High-Speed Passenger Train Financing Program." Section 2704.04 is titled, "Legislative intent; Use of net proceeds from sale of bonds." All of these titles indicate that the Bond Act, including section 2704.04, addresses the *use of funds* to construct a HSR system.

Such an interpretation is supported by the information provided to the voters to assist in determining whether to vote "yes" or "no" on Proposition 1A. The summary in the voter information guide indicated that the voters needed to decide, "*...shall $9.95 billion in bonds be issued* to establish a clean, efficient high-speed train service linking Southern California, the Sacramento/San Joaquin Valley, and the San Francisco Bay Area..." (AG 000003)(emphasis added.) The descriptions of what a "yes" or "no" vote would mean indicate that the result of the vote would determine whether the state could sell $9.95 billion in general obligation bonds in

order to construct an HSR system. (*Id.*) There is no discussion that a "yes" vote on Proposition 1A prohibits the Legislature from utilizing its appropriation powers to construct an HSR system using funds other than the $9.95 billion in general obligation bonds.

As the Court of Appeal held in the prior trial on this matter, "[j]udicial intrusion into legislative appropriations risks violating the separation of powers doctrine." (*Cal. High-Speed Rail Authority*, 228 Cal.App.4th at 714.) "If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action." (*Id.*) The Court of Appeal further noted, "the only judicial standard commensurate with the separation of powers doctrine is one of strict construction to ensure that restrictions on the Legislature are in fact imposed by the people rather than by the courts in the guise of interpretation." (*Id.*)(citing *Schabarum v. California Legislature* (1998) 60 Cal.App.4th 1205, 1218.) With regard to Proposition 1A, the court read the plain language of the statute and found, "the Bond Act does not curtail the exercise of the Legislature's plenary authority to appropriate."[2]

There is nothing in the Bond Act or in the voter information guide that dictates the Legislature cannot use non-Bond Act funds to construct or plan an HSR system absent a showing that the system complies with the Bond Act requirements. The Bond Act did not establish the Authority, the Rail Act did. The Bond Act is, consequently, not the source of the Authority's responsibilities or "powers," which are described in the Rail Act, via Public Utilities Code section 185034. The Bond Act is simply that: a Bond Act. The Authority may not spend any of the $9.95 billion in general obligation bonds absent a showing of compliance with the numerous requirements described in the Bond Act. Additionally, all parties agree that Bond Act proceeds have not been used in the challenged segments and are not currently at issue, as the Authority has

[2] While this ruling concerned whether the Legislature was prohibited from appropriating funds in the absence of a preliminary funding plan, the absence of a clear directive to abdicate appropriation power with regard to non-bond sources leads to the same conclusion here.

not prepared the required funding plans pursuant to section 2704.08. (Opening Brief, p. 3.)

The Court finds that the Bond Act describes criteria that must be met in order to finance an HSR system with Bond Act funds. The Bond Act does not set "restrictions on what type of system [the Authority] could construct regardless of its funding source." (Opening Brief, p. 1.)

It is with this determination in mind that the Court now turns to Plaintiffs' challenges to the HSR system as currently proposed.

C. The Blended System

i. *2005 and 2008 EIRs*

Plaintiffs argue the proposed "blended system" is not consistent with the Bond Act because it fails to comply with the Authority's certified Environmental Impact Reports of November 2005 and July 9, 2008, as required by section 2704.04, subdivision (a).[3] Because the Legislature has mandated the blended system via SB 557 (enacting § 2704.76), neither party argues that this issue is not ripe for review. Accordingly, the Court considers whether the statutorily mandated blended system violates the Bond Act as approved by the voters.

Section 2704.04, subdivision (a) provides,

> "It is the intent of the Legislature by enacting this chapter and of the people of California by approving the bond measure pursuant to this chapter to initiate the construction of a high-speed train system that connects the San Francisco Transbay Terminal to Los Angeles Union Station and Anaheim, and links the state's major population centers, including Sacramento, the San Francisco Bay Area, the Central Valley, Los Angeles, the Inland Empire, Orange County, and San Diego *consistent with the authority's certified environmental impact reports of November 2005 and July 9, 2008.*" (emphasis added.)

This section, Plaintiffs argue, evidences the Legislature and voters' intent and expectations that the HSR system will be consistent with the 2005 and 2008 EIRs. The 2005 EIR includes cross-sections for the "Caltrain Shared-Use Alignment" showing four tracks throughout

[3] Defendants maintain Plaintiffs may not argue that the blended system fails to comply because this claim is not squarely within the January 8, 2014 stipulated issues. The Court disagrees and finds that number 3 may be interpreted broadly to allow for Plaintiffs' arguments that the blended system cannot comply with the Bond Act.

the San Francisco to San Jose segment. (H7.011060-H7.011074.) The 2008 EIR includes a set of typical cross sections for the San Francisco to San Jose segment, again showing four tracks. (H7.013158 – H7.013175.) The 2008 EIR further provides that "[t]he Draft Program EIR.EIS analyzes one alignment option between San Francisco and San Jose along the San Francisco Peninsula that would utilize the Caltrain rail right-of-way, and share tracks with express Caltrain commuter rail services…The alignment between San Francisco and San Jose *is assumed to have 4-tracks*, with the two middle tracks being shared by Caltrain and HST and the outer tracks used by Caltrain…" (H7.014212)(emphasis added.)

However, in 2012, the Authority modified the 2005 and 2008 EIRs via the 2012 Bay Area to Central Valley Partially Revised Final Program EIR. An initial blended system (two-tracks shared by Caltrain and HSR trains) in the San Francisco Peninsula is discussed at length in this 2012 EIR. (H7.018234-35, H7.018239-40.) The issue before the Court is whether section 2704.04, subdivision (a) requires the four-track alignment discussed in the 2005 and 2008 EIRs, or whether section 2704.04 must be read in conjunction with section 2704.06 to allow for project modification via subsequently modified environmental studies.

Section 2704.06 is titled, "Availability of proceeds for planning and capital costs," and provides,

> "The net proceeds received from the sale of nine billion dollars ($9,000,000,000) principal amount of bonds authorized pursuant to this chapter, upon appropriation by the Legislature in the annual Budget Act, shall be available, and subject to those conditions and criteria that the Legislature may provide by statute, for (a) planning the high-speed train system and (b) capital costs set forth in subdivision (c) of Section 2704.04, consistent with the authority's certified environmental impact reports of November 2005 and July 9, 2008, *as subsequently modified pursuant to environmental studies conducted by the authority.*" (emphasis added.)

Defendants argue section 2704.04, subdivision (a) must be read in conjunction with 2704.06 in order to give meaning to the words "*as subsequently modified pursuant to environmental studies conducted by the authority.*" To hold that the HSR system can only qualify

for Bond Act funds if it meets the design proposed by the 2005 and 2008 EIRS would read the modification language out of section 2704.06. Defendants also contend the Legislature has statutory and Constitutional authority to amend the Bond Act to require a blended system.

When considering a statutory scheme, the Court should not construe individual statutes in isolation, but instead should view the Act as a whole. (See, *People v. Whaley* (2008) 160 Cal.App.4th 779, 793.) The court should give meaning to every word of a statute if possible, avoiding constructions that render any words surplus or a nullity. (See, *Reno v. Baird* (1998) 18 Cal.4th 640, 658.) Statutes should be interpreted so as to give each word some operative effect. (See, *Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 390.)

Plaintiffs argued at length during oral argument that section 2704.06 refers only to the receipt of bond funds, while section 2704.04 provides the general legislative intent that the HSR system comply with the 2005 and 2008 EIRs. Because the schematics included in the 2005 and 2008 EIRs refer only to four-track systems, Plaintiffs argue, a two-track blended system violates the general Legislative intent limiting any HSR system the Authority completes. This argument is contrary to the Court's finding above that the Bond Act concerns itself solely with the use of Bond Act funds. As sections 2704.04 and 2704.06 must be read in the context of the use of Bond Act funds, they must be read together, giving meaning to every word.

Section 2704.06 allows expenditure of Bond Act funds on a system that is "consistent with the authority's certified environmental impact reports of November 2005 and July 9, 2008, *as subsequently modified pursuant to environmental studies conducted by the authority.*" To read section 2704.04 as urged by Plaintiffs means that Bond Act funds *cannot* be expended on a system that complies with a modified EIR if it is not consistent with the 2005 and 2008 EIRs. Essentially, Plaintiffs ask this Court to read the words "as subsequently modified pursuant to environmental studies conducted by the authority" out of the Bond Act. Such a reading is

contrary to the direction that the Court should avoid constructions that render any words surplus or a nullity.

Reading section 2704.04 and 2704.06 together, the Court finds that the Authority may use Bond Act funds to construct an HSR system that is compliant with the 2005 and 2008 EIRs, as subsequently modified. As the 2012 Bay Area to Central Valley Partially Revised Final Program EIR modified the subject EIRs to provide for a two-track blended system, in conformance with the provision of section 2704.06, the requirement of a blended system via SB 557 does not violate the Bond Act.

ii. *Minimum headway requirement and trip-time between San Francisco and San Jose*

Defendants argue Plaintiffs' claims concerning the blended system headway and trip-time requirements are not ripe. The Court will consider both claims together.

Plaintiffs contend the blended system violates the Bond Act because it cannot meet the system requirements for operating headways. Section 2704.09, subdivision (c) provides, that the "[t]he high-speed train system to be constructed pursuant to this chapter shall be designed to achieve the following characteristics… Achievable operating headway (time between successive trains) shall be five minutes or less." Plaintiffs argue the blended system can only accommodate a maximum of ten trains per hour, four of which would be HSR trains. (AG 013028, 013074.) Accordingly, there is a fifteen-minute delay between HSR trains on the blended system, in violation of section 2704.09, subdivision (c).

Defendants argue that this, and the remainder of Plaintiffs' arguments are not yet ripe, as the system design Plaintiffs challenge, "today is not final, but continues to evolve and change" making the claims not reviewable. (Opposition, p. 13.) Defendants further contend, "[w]hen the Authority commits bond funds to a specific plan pursuant to section 2704.08, subdivision (d), the

validity of those expenditures will be reviewable." (*Id.*) Defendants argue, "[t]he only final design decisions the Authority has made involve the Merced-Fresno and Fresno-Bakersfield segments of the system, which Plaintiffs do not challenge." (*Id.* at p. 15, FN 11.)

The evidence before the Court indicates that the blended HSR system, as currently proposed, can accommodate ten trains in an hour. This allows for one train approximately every six minutes, with a delay between HSR trains of approximately fifteen minutes. (AG 013028, 013074.) Plaintiffs argue this demonstrates that the Authority cannot currently prove the blended HSR system complies with Section 2704.09, subdivision (c)'s headway requirement. Defendants contend that these claims are premature, and, that if they are ripe, the definition of "train" includes non-HSR trains, and with imminent technology, the system will be able to improve its six-minute headway to the required five-minute headway. Consequently, Defendants argue the system is "designed to achieve" five minute or less operating headway between trains, even though these trains are not all HSR trains.

With regard to operating time between San Francisco and San Jose, section 2704.09, subdivision (b)(3) requires the system to be designed to achieve maximum nonstop service travel time that shall not exceed thirty minutes. In January 2013, the Authority's consultants performed a simulation analysis to determine whether the blended system could currently comply with this requirement. (AG 022899.) Using a travel speed of 110 mph, the memorandum concluded the nonstop travel time would be 32 minutes. Using a speed of 125 mph, the travel time could be reduced to 30 minutes. Via a revised February 7, 2013 memorandum, the Authority's consultants concluded that, using a travel time of 110 mph the nonstop travel time would be 30 minutes. (AG 022912.) There is no clear explanation for this change in conclusions, other than an email exchange requesting that the consultants disregard the 125 mph proposal. (AG 022909.)

On February 11, 2013, this 30-minute travel time at 110 mph was presented to the

Authority via a memorandum. The memorandum indicated that "[f]urther improvements may be achievable through improved train performance, use of tilt technology, more aggressive alignments and higher maximum speeds." (AG 017435.)

Most troubling about this study is the fact that the Authority relied on a 4th and King Caltrain Station as the location in San Francisco from which the travel time should be calculated. (AG 013030, AG 022903, AG 013038.) The Authority acknowledged this fact during oral argument on this matter, and argued that section 2704.09, subdivisions (b)(1) and (3) do not require a specific San Francisco terminal, only requiring that the calculations be between "San Francisco" and the indicated destination. Plaintiffs argue the Bond Act requires the trip to start at the San Francisco Transbay Terminal, a location that is 1.3 miles further north, thus extending the time it will take a train to complete the required distance.

Section 2704.04, subdivision (b)(2) provides that "Phase 1 of the high-speed train project is the corridor of the high-speed train system between San Francisco Transbay Terminal and Los Angeles Union Station and Anaheim." Subdivision (b)(3) identifies specific high-speed train corridors, and lists, "(B) San Francisco Transbay Terminal to San Jose to Fresno." Subdivision (a) identifies that the purpose behind the Bond Act is "construction of a high-speed train system that connects the San Francisco Transbay Terminal to Los Angeles Union Station and Anaheim…" Consequently, it appears that the intent of the Bond Act was for the system to extend, in San Francisco, to the Transbay Terminal, not stop 1.3 miles short at a 4th and King Caltrain Station. This specific language and indication of intent does not conflict with a general referral to "San Francisco" in section 2704.09 subdivision (b)(1) and (3). It is reasonable to interpret this reference to "San Francisco" as indicating the Transbay Terminal identified as the intended San Francisco location in section 2704.04.

It appears, at this time, that the Authority does not have sufficient evidence to prove the

blended system can currently comply with all of the Bond Act requirements, as they have not provided analysis of trip time to the San Francisco Transbay Terminal, and cannot yet achieve five-minute headways (even allowing for the definition of "train" to include non-HSR trains). However, as Plaintiffs acknowledged during oral argument, the Authority *may be able* to accomplish these objectives at some point in the future. This project is an ongoing, dynamic, changing project. As the Court of Appeal noted, "[b]ecause there is no final funding plan and the design of the system remains in flux…we simply cannot determine whether the project will comply with the specific requirements of the Bond Act…" (*California High-Speed Rail Authority*, 228 Cal.App.4th at 703.)

There is no evidence currently before the Court that the blended system *will not* comply with the Bond Act system requirements. Although Plaintiffs have raised compelling questions about potential future compliance, the Authority has not yet submitted a funding plan pursuant to section 2704.08, subdivisions (c) and (d), seeking to expend Bond Act funds. Thus, the issue of the project's compliance with the Bond Act is not ripe for review. Currently, all that is before the Court is conjecture as to what system the Authority will present in its request for Bond Act funds. This is insufficient for the requested relief.

D. Plaintiffs' remaining claims

Plaintiffs' remaining claims include:

1. The Authority has not proven that, pursuant to section 2704.09, subdivision (g), the HSR system will be financially viable.
2. The HSR system as proposed cannot meet the San Francisco-Los Angeles travel time required by the Bond Act.

For the reasons discussed above, the Court finds these claims are also not ripe for review. As the Court determined first in this ruling, the Bond Act is just that: a bond act providing for bond financing of an HSR system. Until the Authority attempts to utilize Bond Act funds, pursuant to the prerequisites identified in section 2704.08, the financial viability and San

Francisco-Los Angeles corridor designs remain in flux. The record provides, for example, that the Authority continues to focus on system trip time and that the analysis will change as the project changes. (AG 017554, AG 017556.)

As this Court has previously indicated, the key question at this time is whether the Authority has taken any action that precludes compliance with the Bond Act. Plaintiffs have failed to provide evidence at this time that the Authority has taken such an action. This is because, as of today, there are still too many unknown variables, and in absence of a funding plan, too many assumptions that must be made as to what the Authority's final decisions will be. While Plaintiffs have produced evidence that raises substantial concerns about the currently proposed system's ability to ultimately comply with the Bond Act, the Authority has yet to produce the funding plan that makes those issues ripe for review. Thus, Plaintiffs' claims must be denied.

IV. Conclusion

Via Proposition 1A, the voters enacted the "Safe, Reliable High-Speed Passenger Train Bond Act for the 21st Century." This Bond Act provided for financing of a high-speed rail system, to be designed and constructed by the High-Speed Rail Authority (established by the 1996 Rail Act). In order to qualify for financing, the Authority must be able to prove the system it proposes can attain certain standards, including performance times, and financial viability. While the blended system does not appear to have been initially considered by the 2005 and 2008 EIRs, section 2704.06 allows for a system that complies with the EIRs, *as modified*. The blended system complies with the 2012 modification, thus complying with the Bond Act requirements.

As of the date of this ruling, the Authority has not submitted a section 2704.08 funding plan, and consequently has not sought to utilize any Bond Act funds on the challenged system. To the extent non-Bond Act funds are being expended, Plaintiffs have not identified any basis upon which this Court should enjoin the use of said funds. The HSR system is not final, but instead

continues to evolve and change. As such, the issue of whether the HSR system complies with the Bond Act is not ripe for review.

The Petition and Complaint are **DENIED**.

In accordance with Local Rule 1.06, counsel for Defendants is directed to prepare an order denying the petition and complaint, incorporating this ruling as an exhibit to the order, and a separate judgment; submit them to counsel for Plaintiffs for approval as to form in accordance with Rule of Court 3.1312(a); and thereafter submit them to the Court for signature and entry in accordance with Rule of Court 3.1312(b).

DATED: March 4, 2016

Judge MICHAEL P. KENNY
Superior Court of California,
County of Sacramento

CERTIFICATE OF SERVICE BY MAILING
(C.C.P. Sec. 1013a(4))

I, the undersigned deputy clerk of the Superior Court of California, County of Sacramento, do declare under penalty of perjury that I did this date place a copy of the above-entitled **RULING ON SUBMITTED MATTER** in envelopes addressed to each of the parties, or their counsel of record as stated below, with sufficient postage affixed thereto and deposited the same in the United States Post Office at 720 9th Street, Sacramento, California.

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