



Transportation Type

by Alice Koethe

California High-Speed Rail: Surface Transportation Board Decision on Environmental Analysis

The development of a high-speed rail system in the

United States has long been a dream of train aficionados, and the dream has recently come closer to reality in California. On August 12, 2014, the Surface Transportation Board issued a decision allowing construction of the second segment of a California high-speed rail line.¹ The segment at issue stretches 114 miles from Fresno to Bakersfield (Kern County), California, and the construction allowance is subject to environmental mitigation conditions.

High-speed Rail in California

In 1996, the California legislature created the California High-Speed Rail Authority to plan, design, build, and operate a statewide high-speed rail system. The Authority's aim is to connect the metropolitan regions of the state, contribute to economic development and a cleaner environment, create jobs, and preserve agricultural and protected lands. The ultimate goal is an 800-mile rail system that extends from San Francisco in the north to Sacramento and San Diego in the east and south.

In November 2008, California voters passed a statewide ballot measure providing for bond funding for the high-speed rail project. In addition, the Federal Railroad Administration (FRA) provided the California project with \$3.49 billion in American Recovery and Reinvestment Act of 2009² grant funds. The Authority plans to initiate the operation of the high-speed rail system in several segments, starting with an "initial operating segment" from Merced in the north to the San Fernando Valley in the south.³ The Merced to San Fernando Valley initial operating segment is scheduled to begin operation in 2022.

Surface Transportation Board Background

The Surface Transportation Board is the successor agency to the Interstate Commerce Commission. The board is an economic regulatory agency with adjudicative and regulatory authority over surface transportation, including railroads. The board's current makeup includes chair David R. Elliott III, vice-chair Deb Miller, and member Ann D. Begeman. In April and June 2013, the board determined that it

had jurisdiction over the California high-speed rail system, despite the intrastate nature of the project, and granted the Authority's petition for exemption from prior approval requirements of 49 USC § 10901 for the first phase of the project.⁴ The board also received cooperating agency status in August 2013 and participated in the preparation of a Final Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA).

Summary of August 2014 Decision

I. Background

The board noted that the line at issue was the second segment of the overall high-speed rail system. The board provided an overview into the scope of the planned system and the development history of the project thus far. The proposed line would connect a Fresno station, a Kings/Tulare regional station, and a Bakersfield station. The board discussed the multiple environmental reviews conducted jointly by the Authority and the Federal Railroad Administration, including a Programmatic EIS and a Project-Level EIS.⁵ The board discussed its own participation in the NEPA process as a cooperating agency. On June 27, 2014, the FRA issued its final Record of Decision. In the decision, the FRA approved a Preferred Build Alternative that analyzed the environmental impacts of the various alternatives and explained a rationale for selection. The decision included a Mitigation Monitoring and Enforcement Plan "designed to avoid, minimize, or mitigate potential adverse environmental impacts from construction of the line."⁶

The board also summarized the environmental review conducted by its Office of Environmental Analysis. After the FRA issued its decision, the office issued an environmental memorandum recommending that the board "(1) adopt the Final EIS to comply with its NEPA obligations concerning the line, and (2) impose four additional environmental conditions."⁷ Finally, the board mentioned the public comments on the transportation merits. Several commenters filed comments in opposition of the petition for exemption, and several commenters filed comments in support of the petition.

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II. Discussion and Conclusions

A. Independent Utility

Because the board's approval was sought for a portion of a larger project, the board first addressed "whether consideration of that section in isolation would constitute an improper segmentation of board review of the transportation merits of the larger project."⁸ The board discussed Fresno and Bakersfield as logical termini for the line because, among other factors, they are two of the largest cities in the San Joaquin Valley, they are surrounded by other areas, and they are hubs within the region. The two cities are currently connected by Amtrak's passenger rail service, and the board discussed the fact that the line could provide an alternative option for those rail passengers, and the line could serve to increase capacity for Amtrak's San Joaquin operations while the remaining high-speed rail construction is under way.



The board concluded that the line between Fresno and Bakersfield had independent utility and did not constitute improper segmentation.

B. Rail Transportation Analysis

As an introduction to this analysis, the board noted that its "review of the construction of new railroad lines that are to be part of the interstate rail network can take one of two forms."⁹ The two forms are as follows: a full application for authority to construct the line under 49 USC § 10901 and an application for an exemption under 49 USC § 10502(e) from the prior approval requirements. As the board described, the board should "exempt a rail construction proposal from the requirements of the full application process—even if significant in scope—so long as the application of § 10901 is not necessary to carry out the RTP [rail transportation policy of 49 USC § 10101] and there is no danger of market power abuse."¹⁰

The board discussed arguments from a number of commenters that the board should deny the Authority's petition for exemption due to ongoing legal challenges to the proposed project's financing methods. The commenters argued that the challenges to the funding mechanism create uncertainty as to the ability of the Authority to

actually build the line, which necessitates a full review under § 10901. The board cited its decision in *Alaska Survival* for the proposition that a question as to financial viability does not necessarily require full review under § 10901.¹¹ Further, the board noted that its grant of construction of authority is permissive and does not actually require that any approved line be built. The board noted that it may authorize construction, but other factors, including other court decisions, may still prevent the actual construction. The board also rejected the proposition that its licensing authority requires a different level of scrutiny to publicly financed projects. Finally, the board distinguished this case from the ICC's decision in *Ozark Mountain Railroad—Construction Exemption*, FD 32204 (ICC served Sept. 25, 1995). The board concluded that an application proceeding under § 10901 was not required in this case and proceeded to analyze the matter under § 10502.

The board proceeded to perform an analysis under § 10502 and evaluate the line in light of the rail transit policy factors enumerated in 49 USC § 10101. The board mentioned the state's determination that "California's existing passenger transportation infrastructure is at or near capacity."¹² The board further discussed the benefits of the high-speed rail system in general and the proposed Fresno to Bakersfield line in particular—they included connecting virtually all of California's major metropolitan areas; adding a mode of transportation between Fresno to Bakersfield; improving mobility to airports, mass transit, and the highway network in the San Joaquin Valley; and adding connectivity to existing Amtrak lines. The board concluded that these considerations were consistent with the rail transit policy factors 49 USC §§ 10101(4) and (5).

The board found that construction of the line would be consistent with 49 USC § 10101(14), "in that it would encourage and promote energy conservation by diverting automobile trips and commercial air flights to electrified train travel, a more energy-efficient form of transportation."¹³ It also concluded that "exempting the proposed construction would reduce the need for federal regulation" and reduce barriers to entry consistent with 49 USC §§ 10101(2) and

(7). Further, the board explained that its analysis was focused on the rail transportation policy concerns relevant to 49 USC § 10901, because that was the provision from which exemption was sought. In addition, the board addressed several other rail transportation factors and the risk of abuse of market power and concluded that the line would be consistent with the enumerated transportation factors and would not impose an abuse of market power.

The board addressed comments submitted by BNSF Railway on May 7, 2014, in response to the Final EIS. In addition to the environmental issues, BNSF “raised concerns about the line’s potential impact on BNSF’s operations, specifically the Authority’s plans to relocate portions of BNSF’s right-of-way and to acquire portions of BNSF property.”¹⁴ BNSF also identified issues with the line’s proposed crossings with existing BNSF lines. The board acknowledged that outstanding issues might be unresolved at the time of the board’s decision but stated that such ongoing discussions did not prevent the board from granting the exemption.

C. Environmental Analysis

The board’s NEPA analysis discussed the “environmental impacts associated with [the line’s] construction and operation.”¹⁵ The board considered the following options: (1) authorize a construction project as proposed, (2) deny the proposal, or (3) grant the project with conditions, including environmental mitigation measures.

The board’s Office of Environmental Assessment (OEA) reviewed the environmental documents and recommended that the board adopt the Final EIS and FRA’s mitigation and preferred alternative. The OEA received about two dozen comments from a number of entities. The board noted that most of the environmental concerns identified by commenters were previously raised in comments on the Draft EIS and a Supplemental Draft EIS. The board concluded that these comments were adequately addressed in the Final EIS, FRA’s Record of Decision, and FRA’s mitigation plan.

Following the board’s independent review of the environmental record, the board concluded that the Final EIS “has taken the requisite ‘hard look’ at the potential environmental impacts associated with the line as required by NEPA and complies with both the CEQ NEPA regulations and [the board’s] environmental rules at 49 CFR § 1105.”¹⁶ The board determined that “[t]he Final EIS adequately identifies and assesses the environmental impacts discovered during the course of the environmental review, carefully compares a reasonable range of alternatives (including a No-Action Alternative), and includes extensive mitigation to avoid or minimize potential environmental effects.”¹⁷ Accordingly, the board adopted the Final EIS and the OEA’s Environmental Memorandum.

Under § 106 of the National Historic Preservation Act, the board was required to consider the effect of its decisions on lands listed or eligible for listing in the National Register of Historic Places and afford the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment.¹⁸ In this case, the board, the Authority, the FRA, the U.S. Army Corps of Engineers, the State Historic Preservation Officer, and the ACHP executed an Memorandum of Agreement on May 14, 2014, that “outlines

additional surveys, historic property treatment, mitigation measures, and other efforts that will take place.”¹⁹ Such an agreement is permitted by § 106, when the effects of an undertaking upon properties eligible for listing in the National Register of Historic Places cannot yet be determined.

D. Conclusion

After evaluating the transportation and environmental concerns, the board granted the petition for exemption and allowed the Authority to construct the FRA-designed environmentally preferred alternative identified in the FRA’s Record of Decision. The board imposed minor additional conditions on the construction.

E. Begeman Dissent

Board member Ann D. Begeman dissented, noting her concerns about the effects of the project on the freight rail network. In Begeman’s opinion, the “board should have required the Authority to resolve its issues with BNSF before granting its approval.”²⁰ ☉

Endnotes

¹Cal. High-Speed Rail Auth.—Constr. Exemption—in Fresno, Kings, Tulare, and Kern Cntys., Cal., FD 35724 (Sub-No. 1) (Served Aug. 12, 2014) [hereinafter *Fresno to Kern*].

²Pub. L. No. 111-15, 123 Stat. 115.

³See CONNECTING CAL.: CAL. HIGH-SPEED RAIL AUTH. 2014 BUS. PLAN (Apr. 30, 2014), available at www.hsr.ca.gov/.

⁴See Cal. High-Speed Rail Auth.—Constr. Exemption—in Merced, Madera, and Fresno Cntys., Cal., FD 35724 (Apr. 18, 2013) (determining that the STB had jurisdiction over the matter); Cal. High-Speed Rail Auth.—Constr. Exemption—in Merced, Madera and Fresno Cntys., Cal., FD 35724 (June 13, 2013) [hereinafter *Merced to Fresno*] (authorizing the construction of a 65-mile line between Merced and Fresno, Cal., subject to environmental mitigation; and elaborating on the rationale for its Apr. 2013 finding of jurisdiction).

⁵The Nat’l Env’tl. Policy Act (NEPA) (42 U.S.C. § 4321 et seq.) and implementing regulations (Council on Env’tl. Quality (CEQ)), 40 C.F.R. §§ 1500 -1508) direct agencies to evaluate the prospective environmental impacts of proposed actions.

⁶*Fresno to Kern* 7.

⁷*Id.*

⁸*Id.* at 8; citing *Merced to Fresno* 15-16.

⁹*Fresno to Kern* 9.

¹⁰*Id.* at 10 (citing *Alaska Survival v. STB*, 705 F.3d 1073, 1082-83 (9th Cir. 2013) and *Vill. of Palestine v. ICC*, 936 F.2d 1335,1337 (D.C. Cir. 1991)).

¹¹*Fresno to Kern* 10 (citing *Alaska Survival* 1082).

¹²*Fresno to Kern* 12.

¹³*Id.* at 13 (citing the Final EIS at 3.5-73 to 3.6-76).

¹⁴*Fresno to Kern* 15.

¹⁵*Id.* at 16.

¹⁶*Id.* at 18.

¹⁷*Id.*

¹⁸Pub. L. No. 89-665; 16 U.S.C. 470 et seq.

¹⁹*Fresno to Kern* 20.

²⁰*Id.* at 23 (Begeman dissenting).