

Case No. S222472
IN THE SUPREME COURT OF CALIFORNIA

Friends of the Eel River and Californians for Alternatives to Toxics
Plaintiffs and Appellants,

v.

**North Coast Railroad Authority and Board of Directors of North
Coast Railroad Authority**
Defendants and Respondents.

Northwestern Pacific Railroad Company
Real Party in Interest and Respondent

**SUPREME COURT
FILED**

After a Decision by the Court of Appeal
First Appellate District, Division One
Case Nos. A139222, A139235

FEB 23 2015

Appeal from the Marin County Superior Court,
Case Nos. CIV11-3605, CIV11-03591
Honorable Roy Chernus, Judge

Frank A. McGuire Clerk

Deputy

PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE

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**MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT**

Pursuant to Rules 8.520(g) and 8.252(a) of the California Rules of Court and Sections 452(d) and 459 of the Evidence Code, Plaintiffs Friends of the Eel River and Californians for Alternatives to Toxics hereby move this Court to take judicial notice of Exhibit A, attached hereto. This document was not presented to the trial court because it relates to proceedings occurring after the trial court's judgment.

Exhibit A contains a true and correct excerpted copy of a Time Schedule Order and Petition for Review filed in *Kings County v. Surface Transportation Board* (Ninth Circuit Court of Appeals, Case Number 15-70386, filed February 9, 2015). Plaintiffs have omitted from the exhibit a copy of the Surface Transportation Board opinion in *California High-Speed Rail Authority—Petition for Declaratory Order* (December 12, 2014) S.T.B. Docket No. FD 35861 because that opinion is readily available at 2014 WL 7149612.

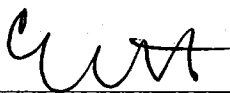
Evidence Code section 459 allows a reviewing court to take judicial notice of any matter specified in section 452. Section 452(d) allows a court to take judicial notice of “[r]ecords of . . . any court of record of the United States.” This official court record is relevant because it shows the status of litigation pending in the Ninth Circuit Court of Appeals that also addresses

the scope of preemption under the Interstate Commerce Commission

Termination Act.


For the foregoing reasons, the Plaintiffs respectfully requests that the Court grant this Motion.

DATED: February 20, 2015 SHUTE, MIHALY &
WEINBERGER LLP

By: 
ELLISON FOLK

Attorneys for Friends of the Eel River

DATED: February 20, 2015 LAW OFFICES OF
SHARON E. DUGGAN

By: 
SHARON E. DUGGAN

Attorneys for Californians For
Alternatives To Toxics

PROOF OF SERVICE

Friends of the Eel River v. North Coast Railroad Authority, et al.
Supreme Court of California
Case No. S222472

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the City and County of San Francisco, State of California. My business address is 396 Hayes Street, San Francisco, CA 94102.

On February 23, 2015, I served true copies of the following document(s) described as:

PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE

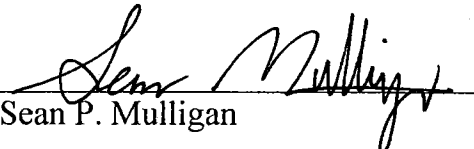
on the parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Shute, Mihaly & Weinberger LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 23, 2015, at San Francisco, California.


Sean P. Mulligan

SERVICE LIST
Friends of the Eel River v. North Coast Railroad Authority, et al.
Supreme Court of California
Case No. S222472

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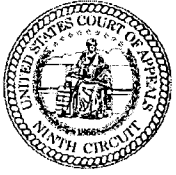
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EXHIBIT A



Office of the Clerk
United States Court of Appeals for the Ninth Circuit
Post Office Box 193939
San Francisco, California 94119-3939
415-355-8000

Molly C. Dwyer
Clerk of Court

February 09, 2015

No.: 15-70386
Short Title: Kings County, et al v. STB, et al

Dear Petitioners/Counsel

Your Petition for Review has been received in the Clerk's office of the United States Court of Appeals for the Ninth Circuit. The U.S. Court of Appeals docket number shown above has been assigned to this case. You must indicate this Court of Appeals docket number whenever you communicate with this court regarding this case.

The due dates for filing the parties' briefs and otherwise perfecting the petition have been set by the enclosed "Time Schedule Order," pursuant to applicable FRAP rules. These dates can be extended only by court order. Failure of the petitioner to comply with the time schedule order will result in automatic dismissal of the petition. 9th Cir. R. 42-1.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
FEB 09 2015
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

KINGS COUNTY, a political subdivision of the State of California;
KERN COUNTY, a political subdivision of the State of California;
KINGS COUNTY FARM BUREAU, a California nonprofit corporation;
CALIFORNIA CITIZENS FOR HIGH-SPEED RAIL ACCOUNTABILITY, a California nonprofit corporation;
COMMUNITY COALITION ON HIGH-SPEED RAIL, a California nonprofit corporation;
CALIFORNIA RAIL FOUNDATION, a California nonprofit corporation;
TRANSPORTATION SOLUTIONS DEFENSE AND EDUCATION FUND, a California Nonprofit Corporation,

Petitioners,

v.

SURFACE TRANSPORTATION BOARD; UNITED STATES OF AMERICA; CALIFORNIA HIGH SPEED RAIL AUTHORITY, an agency of the State of California,

Respondents.

No. 15-70386

Surface Transportation Board

TIME SCHEDULE ORDER

The parties shall meet the following time schedule.

Tue., February 17, 2015 Mediation Questionnaire due. If your registration for Appellate ECF is confirmed after this date, the Mediation Questionnaire is due within one day of receiving the email from PACER confirming your registration.

Thu., April 30, 2015 Petitioners' opening brief and excerpts of record shall be served and filed pursuant to FRAP 32 and 9th Cir. R. 32-1.

Mon., June 1, 2015 Respondents' answering brief and excerpts of record shall be served and filed pursuant to FRAP 32 and 9th Cir. R. 32-1.

The optional petitioners' reply brief shall be filed and served within fourteen days of service of the respondents' brief, pursuant to FRAP 32 and 9th Cir. R. 32-1.

Failure of the petitioners to comply with the Time Schedule Order will result in automatic dismissal of the appeal. See 9th Cir. R. 42-1.

FOR THE COURT:
Molly C. Dwyer
Clerk of Court

Holly Crosby
Deputy Clerk

UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

KINGS COUNTY, a political subdivision of the State of California; KERN COUNTY, a political subdivision of the State of California; KINGS COUNTY FARM BUREAU, a California nonprofit corporation; CALIFORNIA CITIZENS FOR HIGH-SPEED RAIL ACCOUNTABILITY, a California nonprofit corporation; COMMUNITY COALITION ON HIGH-SPEED RAIL, a California nonprofit corporation; CALIFORNIA RAIL FOUNDATION, a California Nonprofit Corporation; and TRANSPORTATION SOLUTIONS DEFENSE AND EDUCATION FUND, a California Nonprofit Corporation;

Petitioners

v.

SURFACE TRANSPORTATION BOARD; UNITED STATES OF AMERICA;

Respondents

CALIFORNIA HIGH SPEED RAIL AUTHORITY, an agency of the State of California

Real Party in Interest

No.

PETITION FOR REVIEW

[28 U.S.C. §§ 2321, 2342; FRAP 15]

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1. Kings County, a subdivision of the State of California , Kern County, a subdivision of the State of California, Kings County Farm Bureau, a California nonprofit corporation (“KCFB”), California Citizens for High-Speed Rail Accountability, a California nonprofit corporation (“CCHSRA”), Community Coalition on High-Speed Rail, a California nonprofit corporation (“CC-HSR”), California Rail Foundation, a California nonprofit corporation (“CRF”), and Transportation Solutions Defense and Education Fund, a California nonprofit corporation (“TRANSDEF,” and the foregoing, collectively, “Petitioners”) hereby petition the Court for review of the Order of the Surface Transportation Board (“STB”) on the Petition for Declaratory Order (“Petition for Order”) of Real Party in Interest California High-Speed Rail Authority (“CHSRA”), an agency of the State of California (Financial Docket No. 35861) entered on December 12, 2014. (“STB Order”).
2. The Petition for Order sought a declaration from the STB that injunctive relief in any state court action brought under the California Environment Quality Act (“CEQA”) pertaining to CHSRA’s certification of a Final Environmental Impact Report (“FEIR”) for the Fresno to Bakersfield segment of its proposed high-speed rail system (the “HSR Project”) was preempted under the provisions of the Interstate Commerce Commission Termination Act (“ICCTA”).
3. On or about December 12, 2014, the STB issued its order on CHSRA’s Petition for Order. The STB Order went well beyond what was requested of it and declared that CEQA was preempted for all purposes under the ICCTA for the Fresno to Bakersfield segment. (See STB Order at p.15.) On or

¹ A copy of the STB Order is attached hereto as Exhibit “A”.

about December 29, 2014, Petitioners and others filed Petitions for Reconsideration of the STB Order. The STB has, as of this date, issued no determination on any of those petitions, which are therefore still pending before it.

4. Because all of the Petitioners herein reside in the State of California, under 28 U.S.C. §2343, jurisdiction is proper in the Ninth Circuit Court of Appeal.

5. Relief is sought on the basis that the STB's order was in error in that:

- a. It ignores the fact that CEQA is not a regulatory statute, but an informational statute intended to assure that the decision makers, and the public, are properly informed of the significant environmental consequences of a pending decision and ways in which those consequences could feasibly be mitigated or avoided, and that as such, and parallel to the STB's allowance for application of the National Environmental Policy Act ("NEPA"), CEQA's provisions likewise should be allowed to apply and are not preempted;
- b. It ignores the fact that the project applicant herein is not a typical private rail line owner but an agency of the State of California, and consequently, under *Nixon v. Missouri Municipal League* (2004) 541 U.S. 125, preemption should not apply because the ICCTA does not clearly express an intent to interfere with a sovereign power of a state to oversee its own subordinate governmental entities; and
- c. Under the market participant exception to federal preemption under the Commerce Clause, a state's actions to control the behavior of its own component entities, as would a private

party, are not preempted. In this instance, the California Legislature created CHSRA as a component agency within the state's government and intended CEQA to apply to this agency as a state-run enterprise.

- d. It violates Petitioners' constitutional right to seek redress of grievances in violation of the federal Constitution (First Amendment) and the California Constitution (Art. I, §3).
- e. It violates the separation of powers doctrine under both the federal and California Constitutions.
- f. It violates the Tenth Amendment to the federal Constitution by interfering with the sovereign powers of the State of California.

6. CHSRA had also sought a determination in the California Court of Appeal for the Third Appellate District that application of CEQA to its high-speed rail projects was preempted by the ICCTA. That request was made in the context of an appeal that included Petitioners TRANSDEF, CRF, and CC-HSR from the judgment of the Sacramento County Superior Court granting in part a petition for writ of mandate under CEQA regarding a Program-level Environmental Impact Report ("PEIR")² for the San Francisco to Merced segment of CHSRA's high-speed rail project. The Court of Appeal, after full briefing of the issue, issued a published decision, *Town of Atherton et al. v. California High Speed Rail Authority* (2014) 228 Cal.App.4th 314, which concluded that application of CEQA to the HSR Project was not preempted by the ICCTA, based on the market participant exception to preemption under the commerce clause. CHSRA did not seek review of that decision by the California Supreme Court.

² The document was issued as a Program EIR/Program EIS. However, the state court challenge pertained solely to the EIR.

7. CHSRA, and others, asked the California Supreme Court to depublish the *Town of Atherton* decision. On October 29, 2014, the California Supreme Court denied the request for depublication. That decision is therefore final.

8. On September 29, 2014, in a case not involving the HSR Project, the California First District Court of Appeal issued a published decision in the case *Friends of Eel River et al. v. North Coast Rail Authority et al.* (2014) 230 Cal.App.4th 85. That decision broadly concluded that application of CEQA to public rail projects was preempted under the ICCTA. On December 10, 2014, the California Supreme Court granted review of the Court of Appeal's decision, effectively depublishing the *Friends of Eel River* case, and review of that case is currently pending before the California Supreme Court. The California Supreme Court's decision on review is expected to resolve the conflict between the *Friends of Eel River* and *Town of Atherton* decisions.

9. For the above reasons, Petitioners seek the following:

- a. An order reversing the order issued by the STB and remanding the matter with direction that the STB enter an order recognizing that, for the reasons presented above, application of CEQA to the CHSRA for both the present Fresno to Bakersfield segment and other portions of the high-speed rail system authorized by the Legislature are not preempted by the ICCTA.
- b. A stay of any effect of the STB Order pending this Court's final determination on the merits.

Dated: February 6, 2015

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