



May 18, 2013

Dave Navecky
Office of Environmental Analysis
Surface Transportation Board
395 E. Street, S.W.
Washington, DC 20423-0001

Subject: Comments on the Adoption of the Final Environmental Impact Statement for the California High Speed Rail Project

Dear Mr. Navecky,

The Citizens for California High Speed Rail Accountability (CCHSRA) would like to caution the Surface Transportation Board (STB) in accepting the Final Environmental Impact Statement (MF Final EIS) issued by the California High Speed Rail Authority (Authority) and the Federal Railroad Administration (FRA) for the Merced to Fresno section of the California High Speed Rail Project. Based upon an understanding of the project and the lack of environmental review, CCHSRA requests that the STB ensure that an environmental review is done on the project and that the appropriate level of detail and attention is paid to the requirements set forth to meet the requirements of the National Environmental Policy Act (NEPA) at 49 C.F.R. Part 1105.

CCHSRA is a grassroots organization founded by approximately 30 landowners in Kings County and has grown to represent approximately 500+ landowners who are directly and indirectly impacted by the California High Speed Rail Project (HSR Project) as it traverses through Kings County. Through its involvement in the HSR Project, CCHSRA has provided a thorough review of the Fresno to Bakersfield Draft Environmental Impact Statement (FB Draft EIS). This review was conducted by landowners, environmental specialists and a legal team and resulted in an accumulation over 700+ pages of environmental comments and concerns. The comments collected and submitted by CCHSRA only represent a small fraction of the concerns by landowners, cities, agencies, special districts and counties within the Fresno to Bakersfield area, and these comments can and should be obtained by the STB for a thorough review. CCHSRA believes that many of the points of concern and lack of mitigation found in the FB Draft EIS also apply to the MF Final EIS. A selection of comments provided by community members and consultants is provided with this letter for an understanding of the issues facing both the FB Draft EIS and the MF Final EIS.

Although the comments mentioned above only pertain to the Fresno to Bakersfield section of the overall HSR Project, the permit for construction being sought by the California High Speed Rail Authority (Authority) is for 29 miles of high-speed trackway (not including tracks) that spans both the MF Final EIS and the FB Draft EIS. Please see the attached exhibit showing Construction Package 1, which is the current construction request by the Authority. Without a finalized EIS for the Fresno to Bakersfield section, it is premature for the STB to draw

conclusions and make decisions based upon the MF Final EIS . It is further important for the STB to review comments and concerns in the FB Draft EIS to insure that impacts are consistently identified and addressed.

CCHSRA would also like to call to the attention of the STB the current standards for review and adoption of environmental documents for decision making purposes. The current policies and procedures for the review of environmental documents by the STB was outlined in the FY 2011 Annual Report by the Surface Transportation Board (p. 41). Of notable mention are items such as encouraging railroad participation with local government, requirement to provide an independent analysis by the Office of Environmental Analysis, consideration of alternatives to the proposed action, and the effects on regional or local transportation systems. Of notable mention was the 2011 review of the 190 mile high-speed rail line known as the DesertXpress which runs from Victorville, California to Las Vegas, Nevada. In this case the project proponents submitted a fully developed EIS for the entire project length and the STB performed a detailed review and analysis prior to adoption. CCHSRA encourages the STB to maintain its current standard for review and analysis to ensure that the appropriate level of detail is provided prior to adoption of any environmental document for decision making reasons.

CCHSRA has provided the STB with a full set of comments, as an attachment to this letter, that were collected and submitted in response to the FB Draft EIS. This exhaustive review highlighted numerous deficiencies and issues with the project that is being proposed. CCHSRA wishes to provide the following comments based upon our review to highlight the need to provide a full review of all environmental documents prior to making and jurisdictional decisions.

Project Description

The Authority has managed to break the HSR Project into small pieces in order to manage difficult issues and segregate the project to diminish real impacts. It is not clear at this time what is being sought by the Authority in its application for a construction permit from the STB, however the reliance on the MF Final EIS would indicate that the request is to build a high-speed train system from Merced to Fresno. This conflicts with the generally accepted public definition of the HSR Project that is being advertised by the Authority which is a high-speed train system from San Francisco to Los Angeles with extensions to San Diego and Sacramento.

What the Authority is asking the STB to do is exempt a small section of track without addressing overall project impacts, when the overall objective is much greater than what is being asked in the exemption. What should be required of the Authority is to seek a permit for the entire state-wide high-speed rail system that was promised to the voters of California. With that in mind, the environmental review process should take into account "project" impacts that could be encountered, which requires a review of the project from San Francisco to Los Angeles. Without such a review, the STB runs the risk of averting the objectives and intent of NEPA and basing decisions on limited information. For example, the total amount of vehicle miles traveled (VMT) added due to the inconvenience of traveling around a grade separated track locally may be minimal, but when taken as an aggregated region or state is significant. CCHSRA performed an analysis on one farming operation in Kings County. For this singular operation, the farmer

will be adding 10,000 miles per year to his operation to reach one field. Without properly taking into account impacts for the entire project (state-wide high-speed rail implementation), the STB is

It is also important that the STB be aware that the MF Final EIS is not a continuous alignment. Due to public concern and difficulties in finding an alignment in an area known as the Chowchilla Wye, which is the area where the HSR Project intersects from an east-west alignment to a north-south alignment along Highway 99, the Authority removed this section from the MF Final EIS prior to public review. Therefore, within the project segment the described Project, which is a high-speed rail system between Merced and Fresno cannot be obtained. CCHSRA has concluded that the environmental analysis provided in the MF Final EIS cannot be accepted as valid, given that the project objectives cannot be met.

CCHSRA recommends that the STB either 1) require that the Authority provide a full environmental analysis, which should take the form of an EIS, or 2) conduct its own environmental review to ensure that the HSR Project, which is a high-speed rail system from San Francisco to Los Angeles with connections to San Diego and Sacramento is analyzed.

Transportation Elements

The FB Draft EIS discusses local transportation modes, including the Amtrak system through the valley, which is commonly referred to as the San Joaquins and is one of the highest ridership corridors in the nation. Given that the HSR Project is being proposed to parallel these tracks and offer a similar mode of transportation at a different level of service, NEPA requires the Authority to address the anticipated impacts to ridership, and therefore revenue to the Amtrak system. The FB Draft EIS, and the MF Final EIS are both missing any discussion of these issues nor the identification of any mitigation measures. Beyond the NEPA requirements it is critical that the STB also ensure that these issues are discovered, analyzed and addressed in the interest of the national passenger rail system.

Amtrak is also mentioned as the system which would transfer to any initial construction segments in the event that high-speed rail service cannot immediately be obtained to meet FRA requirements for "independent utility" (this is both in the FB Draft EIS and in the Authority Business Plan¹). Without any funding beyond the identified \$6 billion currently funded to the Authority the reality of Amtrak service being moved to the initial HSR Project tracks is very likely. The movement of this system will provide significant impacts including the loss of Amtrak service to the communities of Hanford, Corcoran and Wasco. These issues and impacts are missing from the Draft EIS and should be addressed per NEPA requirements.

The FB Draft EIS recognizes the proximity of the proposed HSR Project to the freight rail system in California, however fails to take any further review of potential or real impacts to the freight rail system. Freight rail in California represent a major portion of freight transportation and regularly expands its system to meet capacity and demand requirements. With the close proximity of the HSR Project, which often shares right of way lines, all environmental reviews

¹ CHSRA Revised Business Plan, Page 2-14.

are required to fully address the impacts to freight rail and offer a mitigation plan to address the limited capacity that freight rail will now be presented with. This analysis is missing in both the MF Final EIS and the FB Draft EIS.

The two state-wide freight rail systems, Union Pacific Railroad (UPR) and the Burlington Northern Santa Fe (BNSF) companies have also issued their concerns recently. In a letter dated April 16, 2013 from BNSF the following statement was provided:

"We have generally reviewed and looked over these plans, but we are at a point in our understanding of intercity passenger rail planning in the San Joaquin Valley that we are at present unable to proceed to more specific planning or review of these materials. This is in light of frankly a great deal of ambiguity and contradictions in the different materials that have been forwarded, in the public statements being made and in the absence of any kind of understanding or agreement with the public agency sponsors of these programs. It is unclear what plans are ready to be progressed on behalf of the Authority and under what terms we should consider them."²

Separately, the UPR has answered a legal complaint filed by the Authority claiming that agreements and commitments made by the Authority are not being honored as expected, therefore causing concern and requiring the UPR to reserve its right to litigation against the Authority if commitments are not met³. Again, it is also in the best interest of the STB to ensure that these concerns are addressed given that the scope of oversight provided by the STB is to ensure a viable and efficient freight rail network.

Although the HSR Project is a transportation project, it fails to ensure that its potential future operations do not have an impact on existing transportation systems, namely Amtrak and freight rail in California. Full analysis and recognition of impacts via NEPA are required to make any jurisdictional decision, however it is also important for STB to fully ensure that the impacts and mitigation measure are in place to protect existing rail systems.

Biological Review

The FB Draft EIS and the MF Final EIS fail to appropriately address the baseline biological conditions. Instead of providing the necessary surveys to determine the presence of sensitive species and endangered species, the documents propose to do surveys for these items in the future as a part of the mitigation for the project. This does not meet the standards of NEPA, which requires the Authority to begin with the adequate information and resources to make an analysis of impacts and the ability describe mitigation measures.

The FB Draft EIS also admits that they have only done surveys of 60% of the study area⁴. Visual surveys were done of properties from adjacent properties or right of ways. What CCHSRA discovered is that the Authority authorized consultants to do "dry-by assessments". These assessments were done by driving public roads and making assessments of biological

² Letter from BNSF dated April 16, 2013 is attached for reference.

³ Validation Pleading is attached for reference.

⁴ FB Draft EIS, p. 3-7.10.

impacts, however they were not able to detect rare plants, see animal signs (such as tracks or scat), investigate soil conditions or other essential functions associated with a typical biological assessment.

Example: To perform an assessment of the potential for the Fresno Kangaroo Rat, which is an endangered species, the Draft EIS attempted to recreate land use from aerial photography provided within Google Earth⁵. This method would be acceptable to identify where to perform target surveys, however not sufficient to stand as the survey itself.

A full analysis of the biological concerns lacking in the environmental review have been done by Land Protection Partners and are included with this letter. The STB is cautioned that limited biological review renders the MF Final EIS and the FB EIS insufficient to adopt as a decision making document.

Environmental Justice

The HSR Project travels through both urban and rural settings. Generally the alignments being proposed travel through low-income and minority dominated areas. The Draft EIS states:

"this project will result in disproportionately high adverse effects on minority and low-income populations"⁶

Although the Draft EIS acknowledges this impact there is no exploration of alternatives that would reduce these impacts, nor any discussion of effective mitigation measures. More evident is a direct attempt to avert any environmental justice issues which clearly violates the requirements of NEPA.

One of the major issues with the FB Draft EIS is the lack of clarity and lack of outreach that was done to reach out to low-income and minority groups. The FB Draft EIS, as organized, requires a reader to reference numerous ancillary documents that were not directly included in the text. Often these technical documents were cited numerous times on the same page of the FB Draft EIS. Given the importance of the information provided in the technical documents, NEPA requires the Authority to include the information within the FB Draft EIS such that the reader can make an informed decision as to the impacts and effectiveness of any mitigation measures.

The FB Draft EIS also clearly shows that the outreach performed prior to the FB Draft EIS publication was very sparse. Of the more than 100 meetings conducted in preparation for the Draft EIS, only 10% of the meetings were with low-income or minority communities⁷. What is also evident is that the meetings listed seem to be with those that have political power or influence rather than community members. It should also be noted that the Authority adopted an environmental justice outreach plan, only after the MF Final EIS and the FB Draft EIS were put out for public review, therefore calling into question the process that was utilized in preparation of the environmental review documents.

⁵ Draft Fresno to Bakersfield Biological Assessment ("BA"), p. 4-2.

⁶FB Draft EIS, p. 3.12-8

⁷ CIA Technical Appendix p. 4-43.

Without the appropriate outreach to low-income and minority communities, which seem to be targeted by the Authority, the STB should insist that this remedied before relying upon the MF Final EIS or the FB Draft EIS as a decision making document.

Air Quality Impacts

CCHSRA utilized the services of Blue Sky Consulting Group to provide comments on the FB Draft EIS. The review found that:

1. The Draft EIS overstates carbon dioxide reduction due to an unrealistically low automobile fuel economy in the future; and
2. The Draft EIS has flaws present in the ridership forecasts, which in turn impact the benefits and impacts analysis.

The analysis provided by Blue Sky Consulting is attached to this letter. As the Authority has promoted the HSR Project as an air quality benefit, the NEPA analysis conducted questions this assertion and calls into the questions the ability of the this project to provide benefits, where they may be impacts.

The other important analysis provided by Blue Sky Consulting is the failure of the Authority to provide a reasonable and meaningful analysis of the ridership. As with any rail project, ridership is the key factor that governs the economics and impacts of the project. By utilizing suspect numbers for its basis of analysis, the Authority was able to inflate the ridership values to indicate a high ridership. However, based upon research including other analysis in other countries that have high-speed rail systems, it was shown that the ridership numbers used in the FB Draft EIS and the MF Final EIS are not reliable.

The STB must analyze the information provided by the Authority and the information provided with this letter to ensure that the data and approach utilized by the Authority is reasonable, and that which will yield a environmental document that is suitable for decision making.

Conclusion

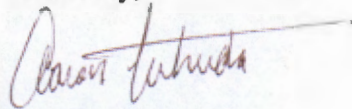
The STB is being asked to make a jurisdictional decision to authorize a permit for the construction of a high-speed rail system between Merced and Fresno. In order to carry out the issuance of such a permit the STB must adopt an EIS to which it can rely upon to ensure that the decision does not have any significant or unaddressed environmental impacts according to NEPA. The reliance upon the Final EIS for the Merced to Fresno section does not meet the test of NEPA given that the "project" being proposed is the HSR Project, which is a high speed rail system between San Francisco and Los Angeles with connections to San Diego and Sacramento, and not a high-speed rail system from Merced to Fresno. The Final EIS also has missing analysis located at the Chowchilla Wye, which creates an non-contiguous section of track.

The environmental review provided by the Authority also lacks many of the critical requirements of NEPA as indicated above and in the information included with this letter. The lack of detail and analysis provided in the environmental review renders them as unreliable as decision making tools to ensure that public and environmental concerns are identified and addressed. We

encourage the STB to provide a thorough and meaningful review of all environmental documents, including requiring the Authority to provide an analysis of the entire HSR Project, which is defined as a high-speed rail system from San Francisco to Los Angeles with connections to San Diego and Sacramento prior to any decisions.

CCHSRA greatly appreciates your acceptance and consideration of these comments. If you have any further questions or comments, you are welcome to contact the organization at cchsraorg@gmail.com.

Sincerely,



Aaron Fukuda
Co-Chair CCHSRA

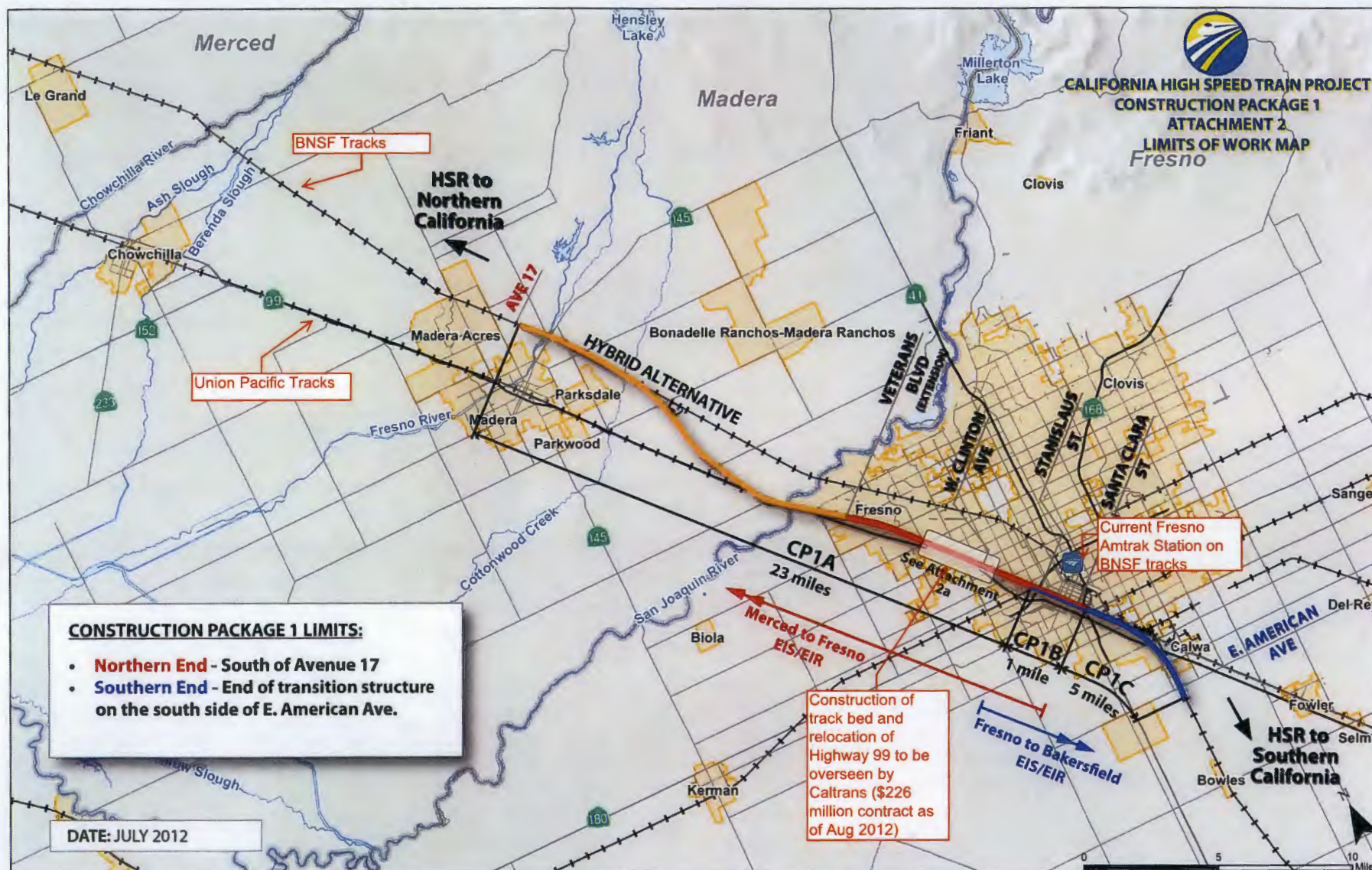
California High-Speed Train Project



**Request for Proposal
for Design-Build Services**

**RFP No.: HSR 11-16
Scope of Work**

**ATTACHMENT 2
LIMITS OF WORK MAP**



1 PILLSBURY WINTHROP SHAW PITTMAN LLP
MICHAEL R. BARR #56510
2 BLAINE I. GREEN #193028
ANDREW D. BLUTH #232387
3 Four Embarcadero Center, 22nd Floor
Post Office Box 2824
4 San Francisco, CA 94126-2824
Telephone: (415) 983-1000
5 Facsimile: (415) 983-1200

6 Attorneys for Interested Party
UNION PACIFIC RAILROAD COMPANY
7

8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 IN AND FOR THE COUNTY OF SACRAMENTO

11 HIGH-SPEED RAIL AUTHORITY and
12 HIGH-SPEED PASSENGER TRAIN
13 FINANCE COMMITTEE, for the STATE
OF CALIFORNIA,

14 Plaintiffs,

15 vs.

16 ALL PERSONS INTERESTED IN THE
17 MATTER OF THE VALIDITY OF THE
18 AUTHORIZATION AND ISSUANCE OF
19 GENERAL OBLIGATION BONDS TO BE
20 ISSUED PURSUANT TO THE SAFE,
21 RELIABLE HIGH-SPEED PASSENGER
TRAIN BOND ACT FOR THE 21ST
CENTURY AND CERTAIN
PROCEEDINGS AND MATTERS
RELATED THERETO,

22 Defendants.

No. 34-2013-00140689

RESPONSIVE PLEADING AND
ANSWER OF INTERESTED PARTY
UNION PACIFIC RAILROAD
COMPANY, IN RESPONSE TO
COMPLAINT FOR VALIDATION

(Code Civ. Proc., § 860 et seq.)

23 To protect its interests and preserve its claims and rights of action, interested party
24 UNION PACIFIC RAILROAD COMPANY ("Union Pacific" or "UP") responds to the
25 Complaint For Validation ("Validation Complaint" or "Complaint") of Plaintiffs HIGH-
26 SPEED RAIL AUTHORITY ("CHSRA") and HIGH-SPEED PASSENGER TRAIN
27 FINANCE COMMITTEE ("Committee"), for the STATE OF CALIFORNIA (collectively,
28 "Plaintiffs") as follows:

1

2

12

22

24

1 Memorandum of Understanding (as hereinafter alleged) and any related agreements
2 between UP and CHSRA that may be executed in the future.

3 3. CHSRA has yet to produce detailed routes and service plans in the areas
4 where it proposes to construct or operate HSR on, or in close proximity to, rights of way
5 used by Union Pacific freight trains. Based on information that is currently available to
6 Union Pacific, UP is unable to confirm or verify that CHSRA can achieve the trip-time
7 requirements of the Bond Act and that CHSRA can do so while, as required by the MOU,
8 avoiding disruption of UP freight operations. Therefore, it is premature for Plaintiffs to
9 request, or for this Court to adjudge, that the HSR Project is in conformity with the trip-
10 time requirements of the Bond Act, and UP objects to the extent Plaintiffs seek such an
11 overbroad validation.

12 UNION PACIFIC'S FREIGHT RAIL NETWORK

13 4. Union Pacific is a publicly traded corporation, formed and existing under the
14 laws of Delaware and qualified to do business in California. UP operates a freight rail
15 franchise, in rights of way owned by UP and others, in California and twenty-two other
16 states. The UP system is part of a national freight rail network that forms a vital link in the
17 nation's interstate and international commerce. UP's freight tracks are located throughout
18 the State of California, including in the Central Valley, in the Los Angeles Basin, and on
19 the San Francisco Peninsula.³ UP serves all of the state's major ports, including the Port of
20 Los Angeles, Port of Long Beach, and Port of Oakland. UP also facilitates international
21 trade through border crossings that connect with rail networks in Mexico and Canada.

22

23 ³ When Union Pacific's predecessor-in-interest, Southern Pacific Transportation Company,
24 sold its mainline railroad right of way between San Jose and San Francisco to the
25 Peninsula Corridor Joint Powers Board (which operates Caltrain) in 1991, it retained an
26 exclusive perpetual easement for freight rail operations on the line. Through its
27 predecessor, UP also retained sole rights to conduct intercity passenger service on the San
28 Francisco-to-San Jose line. The Revised Business Plan proposes operating HSR trains
and blended service on this right of way, but CHSRA has not acquired the rights to do so
from UP, nor made a proposal to acquire such access rights, nor submitted a plan under
which HSR trains could simultaneously use the existing rails without disrupting UP
freight operations.

1 5. Union Pacific rights of way run in close proximity to, and in some locations
2 are encroached upon by, portions of the proposed right of way for the approximately 800-
3 mile HSR Project. At various stages in the development and environmental review of the
4 Project, UP has participated and commented on the Project in order to protect UP's freight
5 rail network and avoid impacts to its operations. During review of the Project, UP has
6 raised significant operational, safety, environmental, and other concerns arising from the
7 proposed construction and/or operation of the HSR Project on or adjacent to UP rights of
8 way.

9 CHSRA'S CHANGE TO "BLENDED SERVICE."

10 AND THE MOU BETWEEN UNION PACIFIC AND CHSRA

11 6. Ever since the Project was proposed in California in the 1990s—and
12 continuing until last year—the Project's announced plan was to construct and operate high-
13 speed rail on new tracks dedicated to HSR service. That plan changed fundamentally in
14 April 2012, when CHSRA adopted a "Revised Business Plan." Under the Revised
15 Business Plan adopted last year, CHSRA proposes for the first time to operate high-speed
16 rail on existing tracks used for freight and commuter service, rather than on new tracks
17 designated for high-speed rail only. Elsewhere, CHSRA proposes having passengers
18 transfer to existing commuter service to complete their travel into urban areas such as Los
19 Angeles, Sacramento, and San Francisco. CHSRA refers to these proposals as "blended
20 service" or "blended operations" (collectively used in this Response as "blended service").⁴
21 Significantly, blended service has the potential to disrupt or impede severely Union
22 Pacific's existing and future freight-rail operations, and it is uncertain whether blended
23

24 ⁴ The Revised 2012 Business Plan refers to *blended systems* and *blended operations*,
25 "which are the integration of high-speed trains with existing intercity and
26 regional/commuter rail systems via coordinated infrastructure (the system) and
27 scheduling, ticketing, and other means (operations)." See
28 www.cahighspeedrail.ca.gov/WorkArea/DownloadAsset.aspx?id=12242, last visited May
8, 2013. As Union Pacific understands CHSRA's proposal, the use of connections with
conventional commuter lines would decrease over a period of decades as additional
segments of the HSR system (dedicated to high-speed rail only) would be constructed.

1 service can meet the trip-time requirements of Proposition 1A (incorporated into the Bond
2 Act) for truly high-speed passenger rail.

3 7. When the Revised Business Plan was adopted, Union Pacific raised concerns
4 to CSHRA about how blended service could cause serious disruption to UP's existing and
5 future freight operations. UP subsequently engaged in negotiations with CHSRA and some
6 of the commuter railroads whose operations would be affected by blended service under the
7 Revised Business Plan, and on July 11, 2012, the parties executed a binding Memorandum
8 of Understanding and Implementation Agreement Related to High-Speed Rail Development
9 in California (the "MOU"). The MOU adopted several critical terms necessary to avoid
10 disruption of Union Pacific's freight operations and to protect Union Pacific's rights and
11 ability to continue meeting its common carrier obligations, including access to new and
12 existing customers. To further protect Union Pacific's rights in the future, as CHSRA
13 develops more specific routes and plans for HSR on particular segments that could affect
14 UP, the MOU specifically reserved UP's rights to participate in future proceedings,
15 including potential claims or litigation concerning any aspect or portion of the Project.

16 8. Since executing the MOU, Union Pacific and CHSRA have participated in
17 negotiations for the formation of additional definitive agreements that will be necessary for
18 construction of the Project to begin—including a construction and maintenance agreement,
19 an engineering agreement, and an insurance and indemnity agreement—but no such
20 agreements have yet been made. CHSRA's alignment, construction, and operational plans
21 for HSR in general—and blended service in particular—likewise have yet to be developed.
22 Because the Project's specific routes and service patterns have not been established, Union
23 Pacific is unable to verify whether CHSRA can satisfy its commitments to UP under the
24 MOU to avoid disruption of freight operations, and at the same time achieve the trip-time
25 requirements for high-speed rail under the Bond Act. Given these uncertainties, it is
26 premature for CHSRA to request a judicial determination that the proposed HSR Project is
27 consistent with the trip-time requirements of the Bond Act. To the extent CHSRA seeks
28 such a declaration through this Validation Lawsuit, Union Pacific must object to protect its

interests—and specifically to ensure that, once the Project’s specific routes and service patterns are established, CHSRA meets its commitments under the MOU so that freight operations are not disrupted.

THE BROAD SCOPE OF PLAINTIFFS’ LAWSUIT
REQUIRES UNION PACIFIC TO RESPOND TO PROTECT ITS INTERESTS
AND PRESERVE ITS CLAIMS

9. The Validation Complaint makes no allegations regarding the trip-time requirements of the Bond Act under § 2704.09. Nevertheless, the Validation Complaint invokes Proposition 1A as “codified in the Bond Act” (Compl., ¶ 7) and broadly seeks a judgment finding that the bonds have been properly issued in accordance with all Bond Act requirements. Specifically, Plaintiffs request a judgment determining that the bonds are “consistent” with the Bond Act (Compl., ¶ 1); that all conditions precedent have been satisfied (Compl., Prayer, ¶ 3(a)); that all proceedings in connection with the bonds “were, are, and will be in conformity” with the applicable provisions of “all laws and enactments” (Compl., Prayer, ¶ 3(c)); and that any challenges (including pending challenges) based on uses of proceeds of the bonds will not affect the determination of validity of the bonds (Compl., Prayer, ¶ 3(e)). The Complaint also requests a broad injunction against any future litigation, to restrain “all persons or entities” from the institution of any action challenging “any matters herein adjudicated or which could have been adjudicated.” (Compl., Prayer, ¶ 4.)

10. Plaintiffs have taken the position this Validation Lawsuit is related to *Tos v. California High Speed Rail Authority* (“*Tos*”), Sacramento Superior Court Case No. 34-2011-00113919. The plaintiffs in that case assert a claim for “Violation of Proposition 1A: 2 Hour 40 Minute Travel Time Requirement Not Met.”⁵ (Sec. Am. Complaint, at p. 8.) In the notice of related case filed with the Validation Complaint, CHSRA and the Committee

⁵ In the *Tos* case, CHSRA acknowledges “the bond act requires that the high-speed train system be designed to achieve nine specified performance characteristics,” and CHSRA contends it meets those trip-time requirements. (Opp. to Plaintiffs’ Part I Opening Brief, at 5:12-17 and at 36:5-16.)

1 explained that *Tos* and this Validation Lawsuit “are related because one challenges the
2 authorization of bonds that the other seeks to validate,” and the Court ordered the cases
3 related on that basis. Plaintiffs have since filed a motion to consolidate the Validation
4 Lawsuit with *Tos*, stating there are “overlapping issues” and “to the extent that *Tos*
5 challenges the authorization of bonds, it could have been brought as a validation action, and
6 consolidation is necessary to ensure that a single judgment resolves any questions
7 concerning the validity of the bonds.”

8 11. In light of the overbroad, prospective and preclusive judgment sought herein
9 by Plaintiffs (Compl., Prayer, ¶ 3), against “all persons interested in the matter of the bonds
10 . . . and other matters related thereto” (Compl., ¶ 5), and given Plaintiffs’ apparent position
11 that all claims relating to compliance with the Bond Act must be adjudicated herein
12 (Compl., Prayer, ¶ 3), Union Pacific files this responsive pleading to protect its interests in
13 ensuring that CHSRA complies with the commitments in the MOU not to disrupt UP
14 freight operations, and to preserve Union Pacific’s claims in relation to the trip-time
15 requirements of the Bond Act.

1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8

2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7

3
4
5
6
7
8
9
0
1
2
3

4
5
6
7
8
9
0
1
2
3
4
5
6

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Parties

3. Answering Paragraph 3, UP avers that Paragraph 3 contains legal argument and introductory statements which do not require a response. Further answering Paragraph 3, UP does not have sufficient knowledge to admit or deny the allegations and, on that basis, denies, specifically and generally, each and every allegation therein.

4. Answering Paragraph 4, UP avers that Paragraph 4 contains legal argument and introductory statements which do not require a response. Further answering Paragraph 4, UP does not have sufficient knowledge to admit or deny the allegations and, on that basis, denies, specifically and generally, each and every allegation therein.

5. Answering Paragraph 5, UP avers that Paragraph 5 contains legal argument and introductory statements which do not require a response. Further answering Paragraph 5, UP avers that the first sentence of Paragraph 5 is uncertain, ambiguous, and vague in that it fails to identify phases of construction of the Project that may or may not be subject to the Validation Lawsuit; and fails to specify precisely which bonds, commercial paper notes, refunding bonds, and contracts it references and/or seeks to validate, including conditions to the bond offering set forth in Proposition 1A, such as trip-time requirements. Further answering Paragraph 5, UP admits that it is an interested party in the matter of the validity of the bonds and related documents and actions that are the subject of this Validation Lawsuit, to the extent those bonds, documents and actions are deemed adequately described by the Complaint. Further answering Paragraph 5, to the extent the statements in Paragraph 5 are deemed to be factual and requiring a response, UP avers it does not have sufficient knowledge to admit or deny the remaining allegations in Paragraph 5 and, on that basis, denies, specifically and generally, the remaining allegations.

Jurisdiction and Venue

6. Answering Paragraph 6, UP avers that Paragraph 6 contains legal argument and introductory statements which do not require a response.

1

2

6

14

15

23

1 the allegations in Paragraph 10 and, on that basis, denies, specifically and generally, each
2 and every allegation therein.

3 11. Answering Paragraph 11, UP avers that Paragraph 11 contains legal
4 argument and introductory statements which do not require a response. Further answering
5 Paragraph 11, UP does not have sufficient knowledge to admit or deny the allegations and,
6 on that basis, denies, specifically and generally, each and every allegation therein.

7 12. Answering Paragraph 12, UP avers that Paragraph 12 contains legal
8 argument and introductory statements which do not require a response. Further answering
9 Paragraph 12, UP avers that Paragraph 12 is uncertain, ambiguous, and vague in that it fails
10 to identify specific portions of the bonds, notes, refunding bonds, and bond offering,
11 including attendant conditions set forth in Proposition 1A, such as trip-time requirements.
12 Further answering Paragraph 12, UP does not have sufficient knowledge to admit or deny
13 the allegations and, on that basis, denies, specifically and generally, each and every
14 allegation therein.

15 Statutory Authority for Institution of Validation Proceedings

16 13. Answering Paragraph 13, UP avers that Paragraph 13 contains legal
17 argument and introductory statements which do not require a response.

18 14. Answering Paragraph 14, UP avers that Paragraph 14 contains legal
19 argument and introductory statements which do not require a response.

20 15. Answering Paragraph 15, UP avers that Paragraph 15 contains legal
21 argument and introductory statements which do not require a response. Further answering
22 Paragraph 15, UP avers that Paragraph 15 is uncertain, ambiguous, and vague in that it fails
23 to identify phases of construction of the Project that may or may not be subject to the
24 Validation Lawsuit, and fails to specify precisely which bonds, commercial paper notes,
25 refunding bonds, and contracts it references and/or seeks to validate, including attendant
26 conditions to the bond offering set forth in Proposition 1A, such as trip-time requirements.

27 Service

28 16. Answering Paragraph 16, UP admits the allegations in Paragraph 16.

1 17. Answering Paragraph 17, UP denies the allegations of Paragraph 17.

2 18. Answering Paragraph 18, UP avers that Paragraph 18 contains legal
3 argument and introductory statements which do not require a response. Further answering
4 Paragraph 18, UP does not have sufficient knowledge to admit or deny the allegations in
5 Paragraph 18 and, on that basis, denies, specifically and generally, each and every
6 allegation therein.

7 Determination of Validity of Bonds

8 19. Answering Paragraph 19, UP avers that subsections b, c, and d of Paragraph
9 19 are uncertain, ambiguous, and vague in that they fail to identify the specific laws and
10 enactments to which they refer; fail to identify phases of construction of the Project that
11 may or may not be subject to the Validation Lawsuit; fail to specify precisely which bonds,
12 commercial paper notes, refunding bonds, and contracts they reference and/or seek to
13 validate; and fail to specify portions of the bond offering including attendant conditions to
14 the bond offering set forth in Proposition 1A, such as trip-time requirements. To the extent
15 the statements in Paragraph 19 are deemed to be factual and requiring a response, UP
16 denies, specifically and generally, each and every allegation therein.

17 ADDITIONAL DEFENSES

18 For a further answer to the Complaint and by way of additional defenses, Union
19 Pacific incorporates by reference all the foregoing paragraphs of this Responsive Pleading
20 and Answer, and further alleges as follows:

21 FIRST DEFENSE

22 (Failure to State a Claim)

23 The Complaint fails to state facts sufficient to state any cause of action against
24 Union Pacific.

25 SECOND DEFENSE

26 (Uncertainty)

27 The Complaint is uncertain, ambiguous, and vague in defining the nature of the
28 actions sought to be validated and the scope of the relief requested.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

THIRD DEFENSE

(Lack of Specificity)

The Complaint lacks the specificity required by law, such as to allow this Court to provide Plaintiffs the relief they request. In particular, the Complaint fails to identify phases of construction of the HSR Project that may or may not be subject to the Validation Lawsuit; fails to specify precisely which bonds, commercial paper notes, refunding bonds, contracts and related actions it references and/or seeks to validate; fails to specify the portions of the bond offering as to which bond funds have been appropriated, and segments of the Project for which such bond proceeds will be used; fails to identify each of the specific laws and enactments to which it refers; and fails to identify the procedural, substantive and performance requirements for funding under the Bond Act, including trip-time requirements.

FOURTH DEFENSE

(Ripeness)

There is no ripe case or controversy because conditions of the bond offering mandated by Proposition 1A, which affect the validity of the bonds and bond offering, have not yet occurred. Given the breadth and scope of the Complaint, the validation action is premature.

FIFTH DEFENSE

(Estoppel)

Due to Plaintiffs' own actions and inactions, and Union Pacific's reasonable reliance thereon, Plaintiffs are estopped from maintaining the claims for relief set forth in the Complaint.

SIXTH DEFENSE

(Waiver)

By reason of Plaintiffs' actions, representations, conduct and/or omissions to act, Plaintiffs have waived each and every alleged cause of action against Union Pacific set forth in the Complaint.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SEVENTH DEFENSE

(Balancing the Equities)

The equities in this case weigh against the relief that Plaintiffs seek.

EIGHTH DEFENSE

(Reservation of Defenses)

Union Pacific reserves all other defenses that may potentially become available as a result of information developed during the case.

PRAYER FOR RELIEF

WHEREFORE, Union Pacific respectfully requests the Court enter judgment as follows:

- A. For a determination that it is premature for Plaintiffs to request, or for this Court to adjudge, that the HSR Project is in conformity with the trip-time requirements of the Bond Act, as set forth in section 2704.09 of the Streets & Highways Code;
- B. To the extent a judgment of validation is entered, Union Pacific requests that such judgment be limited to, and state, as follows:
1. This action is properly brought under Code of Civil Procedure § 860 *et seq.*, Government Code § 17700, and Street and Highways Code §§ 2704.12 and 2704.13 (“Bond Issuance Law”), of which the latter is part of the Safe, Reliable High-Speed Passenger Train Bond Act for the 21st Century, Street and Highways Code § 2704, *et seq.* (“HST Act”);
2. All proceedings by and for Plaintiffs in connection with issuance of the Bonds, Notes, and any Refunding Bonds (each as defined in the Complaint for Validation) pursuant to the Bond Issuance Law, including the adoption of Resolution IX and Resolution X for the authorization of the issuance and sale of the Bonds, Notes, and any Refunding Bonds, were, are, and will be valid and binding, and were, are, and will be in conformity with the provisions of the Bond Issuance Law;

1 3. The Bonds, Notes, and any Refunding Bonds to be issued and sold,
2 when executed and delivered, and any contracts related to the sale of the
3 Bonds, Notes, or any Refunding Bonds, will constitute valid and binding
4 obligations of the State of California under the Constitution and laws of the
5 State of California;

6 4. Challenges (including pending challenges) based on uses of proceeds
7 of the Bonds, Notes, or any Refunding Bonds, will not affect the
8 determination of validity of the Bonds, Notes, and any Refunding Bonds to
9 be issued and sold, or the validity of any contracts relating to the sale of any
10 Bonds, Notes, and any Refunding Bonds;

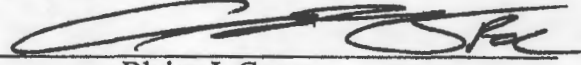
11 5. This judgment binds and permanently enjoins any and all persons
12 and entities, public or private, from the institution of any action or
13 proceeding challenging the validity of the issuance or sale of the Bonds,
14 Notes, or any Refunding Bonds, or of any contracts related to the issuance
15 and sale of the Bonds, Notes, or any Refunding Bonds as determined in
16 sections 1 through 4 inclusive of this judgment, and the payment of principal
17 and interest on the Bonds, Notes, or any Refunding Bonds;

18 6. The adjudication or determination of any challenges now or hereafter
19 based on or relating to implementation or use of proceeds of the Bonds,
20 Notes, or any Refunding Bonds; compliance of the high-speed rail project
21 with the criteria and requirements set forth in the HST Act other than the
22 Bond Issuance Law; the obligations of the High Speed Rail Authority
23 pursuant to that certain Memorandum of Understanding and Implementation
24 Agreement Related to High-Speed Rail Development in California dated
25 July 11, 2012; and other matters arising after the 60-day period in this action
26 specified in Code of Civil Procedure § 860, or any other matter not expressly
27 set forth and determined in sections 1 through 4 inclusive of this judgment,
28 are outside and beyond the scope of this judgment.

- 1 C. That Union Pacific be awarded reasonable attorneys' fees, as may be
2 allowed by statute or otherwise by law;
3 D. That Union Pacific be awarded costs of suit herein; and
4 E. That Union Pacific be awarded such other and further relief that the Court
5 may deem just and proper.

6 Dated: May 9, 2013.

7 PILLSBURY WINTHROP SHAW PITTMAN LLP
8 MICHAEL R. BARR
9 BLAINE I. GREEN
10 ANDREW D. BLUTH
11 Four Embarcadero Center, 22nd Floor
12 Post Office Box 2824
13 San Francisco, CA 94126-2824

14 By: 

15 Blaine I. Green

16 Attorneys for Interested Party
17 UNION PACIFIC RAILROAD COMPANY
18
19
20
21
22
23
24
25
26
27
28

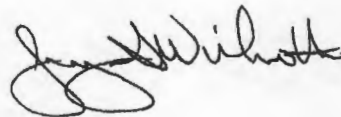
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

VERIFICATION

I, Jerry S. Wilmoth, declare that I am General Manager of Network Infrastructure for Petitioner for UNION PACIFIC RAILROAD COMPANY, an interested party in this action, and am authorized to make this verification for and on behalf of said interested party, and I make this verification for that reason.

I declare that I have read the foregoing RESPONSIVE PLEADING AND ANSWER OF INTERESTED PARTY UNION PACIFIC RAILROAD COMPANY, IN RESPONSE TO COMPLAINT FOR VALIDATION and know its contents. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 9th day of May, 2013.



RECEIVED
MAY 13 2013
GRISWOLD, La SALLE
COBB, DONALDSON



DJ Mitchell II
Assistant Vice President
Passenger Operations

BNSF Railway Company
P.O. Box 961034
2600 Lou Menk Drive
Fort Worth, Texas
76161-0034
(817) 352-1230
(817) 234-7454
dj.mitchell@bnsf.com

April 16, 2013

Mr. Joseph J. Metzler
Manager- Operations and Maintenance
Project Management Team for CAHSRA
On the behalf of the NCRPWG
Parsons Brinckerhoff
303 Second Street
Suite 700 North
San Francisco, CA 94107

RE: PB-BNSF-3146--California High Speed Rail Authority-Rail Service Concepts for 2018-2025 BNSF Network Capacity Models

Dear Mr. Metzler:

This is in reference to your letter and the request you forwarded in February on behalf of the California High Speed Rail Authority for modeling and review of various proposed passenger rail blended service plans

We have generally reviewed and looked over these plans, but we are at a point in our understanding of intercity passenger rail planning in the San Joaquin Valley that we are at present unable to proceed to more specific planning or review of these materials. This is in light of frankly a great deal of ambiguity and contradictions in the different materials that have been forwarded, in the public statements being made and in the absence of any kind of understanding or agreement with the public agency sponsors of these programs. It is unclear what plans are ready to be progressed on behalf of the Authority and under what terms we should consider them.

In that regard, six intercity rail service options have been forwarded which may be internally inconsistent with respect to the extent to which they would involve BNSF right of way, trackage, or the construction of new railroad sometimes adjacent to and sometimes over BNSF right of way. It is also unclear the extent to which these options would use conventional FRA compliant rolling stock at speeds below 90 MPH or other alternatives.

With respect to truly high speed passenger rail service, elements of the options under consideration appear to be inconsistent with materials or plans that the Authority has submitted in descriptions to the Surface Transportation Board for exemption, and what the Authority has submitted for environmental review. Thus, there appears to be too much ambiguity at this time for a productive review of these plans.

In order to progress this effectively, we ask that the Authority provide us with a draft engineering agreement that contains a scope of work and budget that can be reviewed and for the Authority to specify the corridor alignment that is the realistic plan they might be advancing. As we have emphasized since our first discussions with prior officers of the Authority, it will also be essential



to address the safety implications, risk mitigation strategy and liability associated with any construction near or adjacent to our track as well as for future operations. We would then be in a better position to have meaningful discussions on how this could progress. BNSF has not agreed to or acquiesced in any proposed or potential alignment or change in service in the San Joaquin Valley involving our railroad, whether on, near, or adjacent to, our current right-of-way, or which could affect current or future rail service on our line, or could affect access to our line by present or future freight customers. In order for BNSF to progress any particular segment we will need to understand how these issues are addressed as to the entire proposed line through the San Joaquin Valley.

By the same token, we are not clear with whom we are actually negotiating or what agency would be the responsible entity progressing these plans, whether they are for truly high speed service or for what is being called Blended Service. For that reason I am copying Frank Vacca of CAHSRA and Bill Bronte of Caltrans to help us understand how all of this is to progress, and please feel free to forward this letter to the various parties copied on your initial letter to us as appropriate. With respect to the Authority's two Blended Service options and Caltrans' three service options A, B, and C, we believe it is necessary for the appropriate public agency intercity passenger rail sponsors to make some key decisions:

- Determine which one of the five conventional train speed options should be used as the foundation for any additional service agreement negotiations;
- Confirm that the service option selected consists of Amtrak service as part of its existing network and normal operations, whether operating on BNSF track or facilities constructed by the Authority;
- Identify a lead agency with which BNSF would negotiate;
- Provide BNSF with a projected timeline for the implementation of the proposed additional service; and,
- Confirm, as discussed in recent meetings, that Design-Build will not be used as a project delivery method where CHSRA construction will impact BNSF property or customers.

The different options and scenarios of your various alternative plans, some of which are very aggressive levels of passenger train service, could require significantly different capital infrastructure requirements to permit service and analysis of impacts on future freight service capacity and even access to our own line as a result of potential parallel structures along the right-of-way. In a similar vein, if the agencies envision something along the lines of the Amtrak metrics and standards to apply to this service for measurement of on-time performance, that will also involve significantly increased infrastructure and capital investment to ensure future intercity passenger rail service compatible with the preservation of freight capacity and mobility.

While we appreciate the work Parsons Brinckerhoff has been doing on this project, it is now essential that we have direct contact with whatever authority we would be negotiating definitive agreements if these projects are to be progressed. Therefore, as indicated earlier, we are copying Messrs. Vacca and Bronte for their determination of which agency we should be working with



on which agreement for which service. When we are advised with whom at the appropriate agency we should discuss how best to progress this, we can plan a follow-up call or meeting to include myself and Rick Weicher as we coordinate these efforts for BNSF, consistent with our previous direct meetings with prior representatives for and officers of the California High Speed Rail Authority.

Sincerely,

A handwritten signature in black ink, appearing to read "DJ Mitchell II", written over a horizontal line.

DJ Mitchell II
Passenger Operations

cc: Frank Vacca, Chief Program Manager, California High-Speed Rail Authority
Bill Bronte, Division Chief, Division of Rail, Caltrans
Karen Greene Ross, Assistant Chief Counsel, California High-Speed Rail Authority
Gil Mallery, Parsons Brinkerhoff
Rick Weicher, BNSF Railway
Walt Smith, BNSF Railway