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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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Finance Docket No. 36488

**DESERTXPRESS ENTERPRISES, LLC –AUTHORITY TO CONSTRUCT AND
OPERATE– PETITION FOR EXEMPTION FROM 49 U.S.C. § 10901 – PASSENGER
RAIL LINE BETWEEN VICTOR VALLEY, CA AND RANCHO CUCAMONGA, CA**

REPLY TO COMMENTS

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Dated: June 22, 2021

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REPLY TO COMMENTS

Pursuant to 49 C.F.R. § 1104.13(a), DesertXpress Enterprises, LLC d/b/a Brightline West (“DXE”) submits this Reply to the Comments filed in the above-captioned proceeding by the San Manuel Band of Mission Indians (“SMBMI”), Morongo Band of Mission Indians (“MBMI”) and National Parks Conservation Association (“NPCA”). (SMBMI, MBMI and NPCA are referred to collectively herein as the “Commenters”).¹ For the reasons discussed below, Commenters have failed to articulate any basis for finding that DXE’s Petition for Exemption (the “DXE Petition”) does not satisfy the statutory criteria for an exemption set forth at 49 U.S.C. § 10502(a).

¹ SMBMI requested a 30-day extension to file its comments, which was granted by the Board in a decision served on May 19, 2021. Neither MBMI nor NPCA sought an extension of the May 3, 2021 due date for their comments, as required by the Board’s regulations (*see* 49 C.F.R. § 1104.7(b)), and failed even to file their comments within the extension period granted to SMBMI. For the sake of a complete record, DXE does not object to those late-filed comments and responds to them in this Reply.

As the Board has explained:

“Under Section 10502(a) [the Board] ***must*** exempt a proposed rail line construction from the detailed application procedures of § 10901 when we find that those procedures are not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101; and (2) either (a) the transaction or service is of limited scope, or (b) the full application procedures are not necessary to protect shippers from the abuse of market power.”²

Section 10901 itself requires the Board to approve a rail construction proposal unless it finds that the project is inconsistent with the public convenience and necessity:

“[I]n enacting the ICC Termination Act of 1995, Pub. L. No. 104- 88, 109 Stat. 803, ***Congress intended to facilitate rail construction*** by changing the statutory standard from requiring approval if the agency finds that a project is consistent with the public convenience and necessity (PC&N) to ***requiring approval unless the agency finds the project is inconsistent with the PC&N.***”³

None of the Commenters mention these governing statutory standards and Board pronouncements – much less demonstrate that DXE’s proposal is inconsistent with the public convenience and necessity. Indeed, NPCA states that “[w]e strongly support the development of electric high-speed rail in applications such as the XpressWest project.”⁴ Thus, the transportation merits of DXE’s proposal

² *DesertXpress Enterprises, LLC and DesertXpress HSR Corp.—Construction and Operation Exemption—In Victorville, Cal. and Las Vegas, Nev.*, Finance Docket No. 35544 (STB served Oct. 25, 2011) (the “*2011 Decision*”) at 3 (emphasis added).

³ *The Burlington Northern & Santa Fe Ry. Co. - Construction and Operation Exemption - Seadrift and Kamey, TX*, Finance Docket No. 34003 (STB served June 19, 2001) at 4 (emphasis added).

⁴ NPCA Comments at 1.

to construct and operate the Apple Valley-Rancho Cucamonga high-speed passenger rail line – and, in particular, DXE’s showing that the project satisfies the statutory criteria for exemption (*see* DXE Petition at 12-19) -- are uncontested.

Instead, Commenters make a variety of claims regarding supposed deficiencies in the environmental review process conducted by the Federal Railroad Administration (“FRA”) in its reevaluation of DXE’s Las Vegas, NV-Apple Valley, CA high-speed rail line (the “Las Vegas-Apple Valley Line”) in light of DXE’s proposal to modify the alignment to utilize the I-15 median (the “Median Alignment”).⁵ SMBMI and MBMI assert that FRA’s analysis of the modified alignment failed to comply with Section 106 of the National Historic Preservation Act because it was “not conducted in a manner that included any tribal consultation.”⁶ SMBMI and MBMI further allege that FRA did not “appropriately defin[e] the area of potential effects (APE) for the project.”⁷ These (and other) complaints regarding FRA’s reevaluation of the Las Vegas-Apple Valley Line

⁵ The Board’s Office of Environmental Analysis (“OEA”) was a cooperating agency in FRA’s review of the Median Alignment. OEA concluded that “FRA’s reevaluation adequately assesses the potential environmental impacts associated with DesertXpress’ project modifications and concurs with FRA’s determination that a supplemental EIS is not necessary.” *See DesertXpress Enterprises, LLC and DesertXpress HSR Corporation – Construction and Operation Exemption – In Victorville, Cal. and Las Vegas, Nev.*, Finance Docket No. 35544 (STB served December 3, 2020) (the “*December 3 Decision*”) at 2.

⁶ SMBMI Comments, Attachment, Letter (undated) from Kenneth Ramirez to Cynthia T. Brown at 1. *See* MBMI Comments at 1 (same).

⁷ SMBMI Comments Attachment, Letter (undated) from Kenneth Ramirez to Cynthia T. Brown at 1; MBMI Comments at 1.

provide no basis for denying the DXE Petition in this proceeding, for several reasons:

First, the alignment for the Las Vegas-Apple Valley Line is not at issue in this exemption proceeding, which involves DXE's proposal to construct and operate a passenger rail line between Apple Valley and Rancho Cucamonga, CA. DXE's request for approval of the modified Median Alignment is the subject of a different STB proceeding in Finance Docket No. 35544.⁸

Second, the Board previously afforded interested parties an opportunity (in Finance Docket No. 35544) to comment on FRA's environmental review of the modified alignment for the Las Vegas-Apple Valley Line. Specifically, the Board appended to its *December 3 Decision* a 14-page memorandum prepared by OEA (the "OEA Memorandum") that summarized FRA's reevaluation process and findings, and set forth OEA's determination that FRA's reevaluation of the Median Alignment adequately assessed the environmental impacts of the project modifications. The *December 3 Decision* established a 20-day period for interested persons to submit comments regarding OEA's conclusions. No party submitted comments in response to the Board's invitation.

Third, the assertions by SMBMI and MBMI that FRA failed to engage in "any tribal consultation" or to "appropriately defin[e] the area of potential effects (APE)" are demonstrably false.⁹ FRA circulated drafts of the proposed APE to all

⁸ See *December 3 Decision* at 2-3.

⁹ See SMBMI Comments, Attachment, Letter (undated) from Kenneth Ramirez to Cynthia T. Brown at 1. See also MBMI Comments at 1.

consulting parties for review and comment no less than three times – on November 22, 2019, September 4, 2020 and June 13, 2021. As the OEA Memorandum states, FRA’s Section 106 consultation process with respect to cultural resources included “[f]ederally recognized Native American tribes with an interest in the project area.”¹⁰ FRA recently confirmed that:

“FRA received comments regarding specific historic properties of concern from the San Manuel Band of Mission Indians, and a request that the APE boundaries follow, rather than intersect, known archaeological site boundaries. In consultation with the Tribe, FRA expanded the APE to ensure inclusion of those resources.”¹¹

Attachment 1 and the OEA Memorandum refute any assertion that the Tribes have been excluded from the Section 106 process, or that FRA has failed to consider their views in defining the APE.¹²

SMBMI’s concern that “there has been no initiation of NHPA or NEPA review for the Victorville to Rancho Cucamonga line” is premature.¹³ Environmental review of the proposed Apple Valley-Rancho Cucamonga Line is in

¹⁰ *December 3 Decision*, Attachment, OEA Memorandum at 8.

¹¹ See Attachment 1, Letter dated June 15, 2021 from K. Zeringue (FRA) to A. Mack (DXE) at 1-2 (emphasis added).

¹² FRA’s efforts to complete the Section 106 process with respect to the Median Alignment have been obstructed by SMBMI’s and MBMI’s own actions. As MBMI acknowledges, “several Tribes objected both to the use and content of the [Section 106 Programmatic Agreement], and because of these objections, ***refused to sign as a concurring party.***” MBMI Comments at 2 (emphasis added). See also SMBMI Comments, Attachment, Letter (undated) from Kenneth Ramirez to Cynthia T. Brown at 2 (“the California Tribes have continually rejected” use of a PA).

¹³ See SMBMI Comments at 1.

the early stages. Commenters (and other interested parties) will have ample opportunity to present any issues or concerns with respect to the impact of the Victor Valley-Rancho Cucamonga Line as FRA's review of the project proceeds. In short, FRA is fulfilling its NEPA and NHPA obligations in connection with the proposed rail construction at issue in this proceeding.

Finally, SMBMI and NPCA contend that the Board should "deny the XpressWest project exemption from CEQA review."¹⁴ SMBMI observes that "it is common for many projects to go through both NEPA and CEQA."¹⁵ These assertions ignore the statutory scheme established by Congress for review and approval of railroad construction projects like DXE's proposed high-speed passenger line:

"[t]he Board has jurisdiction over 'transportation by rail carrier,' 49 U.S.C. 10501(b). . . . Here, DesertXpress intends to carry passengers by rail in interstate transportation. . . . Accordingly, ***the Board has exclusive jurisdiction over the planned new track, facilities, and operations and the Federal preemption under section 10501(b) attaches.***

This means that Federal environmental statutes, such as NEPA [footnote omitted], the Clean Air Act and the Clean Water Act, and the regulation of railroad safety under the Federal Railroad Safety Act, will apply to this proposal. [Citations omitted] However, ***state permitting and land use requirements that would apply to non-rail projects, such as the California Environmental Quality Act, will be preempted.*** [Citations omitted] But state and local agencies and concerned citizens will have

¹⁴ See NPCA Comments at 2; SMBMI Comments at 2-3.

¹⁵ SMBMI Comments at 2.

ample opportunity to participate in the ongoing EIS process under NEPA and related laws.”¹⁶

Congress has determined that rail construction projects shall be subject to the STB’s exclusive jurisdiction, and that Federal law (including Federal environmental statutes) preempt any otherwise applicable requirements under state law, ***including CEQA***. The fact that DXE has requested an exemption from Section 10901 is beside the point: the Victor Valley-Rancho Cucamonga Line would be reviewable exclusively by the STB, and environmental review under CEQA would be preempted, regardless of whether DXE proceeded via its Petition for Exemption or by filing a formal Section 10901 application.

NPCA asserts that CEQA review should be required because it “would analyze project impacts on species not afforded federal protection, such as the desert bighorn sheep.”¹⁷ SMBMI alleges that “non-federally endangered species of desert bighorn sheep were not addressed for the Victorville to Las Vegas line, despite being a California species of concern.”¹⁸ These assertions are incorrect. ***FRA did, in fact, consider potential impacts on desert bighorn sheep in both its review of DXE’s original proposal and FRA’s reevaluation of the Median Alignment.*** FRA’s September 2020 Biological Resources Technical Report explicitly acknowledged that bighorn sheep are a sensitive species and that FRA’s prior

¹⁶ *DesertXpress Enterprises, LLC – Petition for Declaratory Order*, Finance Docket No. 34914 (STB served June 27, 2007) at 4-5 (emphasis added). *See also City of Auburn v. STB*, 154 F.3d 1025, 1031-1033 (9th Cir. 1998).

¹⁷ NPCA Comments at 2.

¹⁸ SMBMI Comments at 2.

analysis of that species in Section 3.14.2.3 of the DEIS for the original Las Vegas-Victor Valley Line alignment still applied “though in a greatly reduced capacity now that the modified Project alignment would run in the median of the I-15 freeway corridor.”¹⁹ FRA (correctly) concluded that the proposed changes to the project design “substantially reduced or eliminated” the threat of direct mortalities to the species.²⁰

Status as an endangered species under Federal law is not a prerequisite to raising concerns regarding potential impacts on vulnerable species as part of a NEPA environmental review. Commenters will have an opportunity during the NEPA evaluation of the Victor Valley-Rancho Cucamonga Line to raise issues relating to desert bighorn sheep or other species of concern.

¹⁹ See FRA Biological Resources Technical Report (September 2020), Appendix H at 12 (available at https://railroads.dot.gov/sites/fra.dot.gov/files/2020-11/10_XW_Attachment%20H_Bio_pdfa.pdf).

²⁰ *Id.*

CONCLUSION

For the foregoing reasons, DXE respectfully requests that the Board grant its Petition for Exemption from the requirements of 49 U.S.C. § 10901 to construct and operate the proposed Victor Valley-Rancho Cucamonga Line.

Respectfully submitted,



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Dated: June 22, 2021

ATTACHMENT 1



U.S. Department
of Transportation

1200 New Jersey Avenue, SE
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**Federal Railroad
Administration**

June 15, 2021

Andrew Mack
SVP, Development Strategy & Permitting
Brightline West
6700 Via Austi Pkwy, Suite B
Las Vegas, NV 89119

**RE: XpressWest High-Speed Passenger Train Project
San Bernardino County, California, and Clark County, Nevada
Continuing Consultation – Finalization of Area of Potential Effects Delineation Values**

Dear Mr. Mack,

The Federal Railroad Administration (FRA) appreciates your continued participation in the ongoing consultation for the XpressWest High-Speed Passenger Train Project pursuant to Section 106 of the National Historic Preservation Act (NHPA) (54 U.S.C. § 306108)). Thank you for reviewing FRA's revised Area of Potential Effects (APE) package submitted to you on September 4, 2020. In accordance with 36 CFR Part 800.4, FRA sought your review and comment on the revised APE, revised the APE further as described below, and provided responses to all comments received in the attached comment matrix (*see* Attachment 2).

In consideration of comments received from Consulting Parties and Tribes, FRA has further revised the APE in the following ways:

One APE: FRA combined the Archeological APE and the Above-Ground APE into one APE that is inclusive of direct, indirect, and cumulative effects from the Undertaking. There is now just one APE and within it, FRA characterizes an area of direct impact and an area of indirect impact. The extent of the APE is designated by a black line in Attachment 1. The area of direct impact (also referred to as the Limits of Disturbance or LOD) is depicted by the blue and yellow shaded areas on the APE Map (Attachment 1). This represents the project's construction footprint including all anticipated ground disturbing activities such as construction easements, access routes, staging and construction areas, substations, emergency crossovers, etc. In all previous consultation materials, this area was formerly referred to as the Archeological APE. The area of indirect impact represents the area where visual, atmospheric, and/or vibratory effects may occur, and is depicted without shading within the black line on the APE Map (Attachment 1). In all previous consultation materials, this area was formerly referred to as the Above-Ground APE. It is acknowledged that visual, atmospheric and/or vibratory effects may also occur within the area of direct impact.

APE Changes: FRA received comments regarding specific historic properties of concern from the San Manuel Band of Mission Indians, and a request that the APE boundaries follow, rather than intersect,

known archaeological site boundaries. In consultation with the Tribe, FRA expanded the APE to ensure inclusion of those resources.

Due to the advancement of engineering to a 30% design phase since September 2020, the APE has also been updated to reflect the most up-to-date project changes. In some areas, the APE has expanded and in other areas that APE has reduced in size compared against the September 2020 APE. For ease of comparison, Attachment 1 depicts changes utilizing color coding: yellow and red represent expansions and pink and green represent reductions. Additional engineering changes may occur at the 60%, 90% and final design phases, and through on-going Section 106 consultation. Due to the potential for future project refinements, FRA intends to include a process in the Programmatic Agreement (PA) that allows for refinement of the APE based on project modifications or on-going consultation regarding specific historic properties of concern, including those that have religious or cultural significance to Tribes.

FRA carefully considered all comments and determined that the September 2020 APE delineation values utilized to determine the extent of the APE, still reflect the best compromise achieved over the past year and a half of consultation with the Consulting Parties. Having expanded the APE delineation values twice since September 2019 in response to comments and visual simulation studies, it was determined that the APE delineation values need not be further refined. The Final APE delineation values are summarized below in Table 1, and the APE maps, reflective of these values, are included in Attachment 1. These APE Delineation Values will be applied if and when any additional Project changes occur, or additional historic properties of concern are identified through consultation.

Table 1. Final APE Delineation Values

Project Component		APE Delineation
Urban Alignment (CA, NV)	Trenched and At-Grade	450 ft (60.96 meters) from centerline
	Elevated At-Grade	750 ft (228.60 meters) from centerline
	Elevated Guideway/Elevated Roadway (emergency crossovers equate to elevated roadway)	1000 ft (304.80 meters) from centerline
Rural/Desert Alignment (CA, NV)	Trenched and At-Grade	1000 ft (304.80 meters) from centerline
	Elevated At-Grade	1500 ft (457.20 meters) from centerline
	Elevated Guideway/Elevated Roadway (emergency crossovers equate to elevated roadway)	1500 ft (457.20 meters) from centerline
Utility corridors (CA only)		200 ft (60.96 meters) on either side of footprint (400 ft or 121.92 meters total)
Station areas (CA, NV)		1000 ft (304.80 meters) from edge of footprint
Ancillary facilities (substations, auto-transformers, temporary construction easements) (CA, NV)		100 ft (30.48 meters) from edge of footprint
Access roads (CA, NV)		100 ft (30.48 meters) from centerline (200 ft or 60.96 meters total)
Historic Properties, including those of Religious or Cultural Significance to Tribes		Variable - Distance delineated in consultation with Consulting Parties

	including Tribes; PA will provide for a process to refine the APE further in consideration of new information provided by a Consulting Party to FRA
Vertical height of Project components (CA, NV)	Up to 65 ft (19.81 meters) above current grade; 86 feet in Barstow, CA only
Limits of Disturbance (alignment, highway improvements only, interchange modifications) (CA, NV)	Variable - Project footprint
Vertical depth of Project components (CA, NV)	Down to 120 ft (36.58 meters) from current grade

In response to other thematic comments received, FRA has made its National Environmental Policy Act (NEPA) documentation available to the Consulting Parties on FRA's website. This includes the Final Environmental Impact Statement (EIS) and Record of Decision (ROD) issued for the Project in 2011 as well as FRA's 2020 final reevaluation memo. These documents include the Noise and Vibration Technical Report. The documents are available at: <https://railroads.dot.gov/environment/environmental-reviews/desertxpress-las-vegas-victorville>.

FRA intends to proceed to the next steps of the Section 106 process utilizing the Final APE Delineation Values. If FRA determines the APE should be refined, due to project changes or through further consultation, FRA will notify the Consulting Parties and ensure any changes are considered in subsequent Section 106 steps. If you have additional concerns regarding specific historic properties or cultural resources, based on the refinements to the APE, please contact FRA by July 15, 2021.

If you would like to discuss FRA's responses to your comments, please contact either Amanda Ciampolillo, Environmental Protection Specialist, at 617.494.2173 or amanda.ciampolillo@dot.gov or myself, at 202-578-4115 or katherine.zeringue@dot.gov.

Thank you for your continued participation in this process. We look forward to continuing to work with you on this project.

Sincerely,



Katherine Zeringue
Federal Preservation Officer
USDOT Federal Railroad Administration

Attachments:

- 1: APE Maps
- 2: Consulting Party Comment Response Matrix
- 3: Halloran Springs - Additional Visual Simulation
- 4: kmz Files

cc: Amanda Ciampolillo, FRA
Kimberly Demuth, HNTB

Certificate of Service

I certify that on June 22, 2021, I served a copy of the DXE Rancho Extension Petition to the parties of record, listed below, by U.S. Mail, first class.

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