

COVINGTON & BURLING LLP

1201 PENNSYLVANIA AVENUE NW
WASHINGTON, DC 20004-2401
TEL 202.662.6000
FAX 202.662.6291
WWW.COV.COM

WASHINGTON
NEW YORK
SAN FRANCISCO
LONDON
BRUSSELS



July 24, 2006

217134

VIA HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423

FILED

JUL 24 2006

SURFACE
TRANSPORTATION BOARD

Re: DesertXpress Enterprises, LLC - Petition for Declaratory Order
STB Finance Docket No. 34914

Dear Secretary Williams,

Enclosed for filing are the original and ten (10) copies of a Petition of DesertXpress Enterprises, LLC for Declaratory Order, and our check in the amount of \$1,400 for the filing fee. Expedited handling is requested for this Petition.

Please acknowledge receipt of the Petition for filing by date-stamping the enclosed extra copy and returning it via our messenger. If you have any questions or need additional information, please let me know.

Respectfully submitted,

Linda J. Morgan
Linda J. Morgan

Enclosures
FEE RECEIVED
JUL 24 2006
SURFACE
TRANSPORTATION BOARD

ENTERED
Office of Proceedings
JUL 25 2006
Part of
Public Record

217134

EXPEDITED HANDLING REQUESTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



**PETITION OF
DESERTXPRESS ENTERPRISES, LLC
FOR DECLARATORY ORDER**

ENTERED
Office of Proceedings

JUL 25 2006

Part of
Public Record

**SURFACE
TRANSPORTATION BOARD**

JUL 24 2006

FILED

FEE RECEIVED
JUL 24 2006
**SURFACE
TRANSPORTATION BOARD**

Linda J. Morgan
Charles H.P. Vance
Covington & Burling LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401
(202) 662-5214 (Phone)
(202) 778-5214 (Fax)

Counsel for DesertXpress Enterprises, LLC

Dated: July 24, 2006

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



FINANCE DOCKET NO. 34914

**PETITION OF
DESERTXPRESS ENTERPRISES, LLC
FOR DECLARATORY ORDER**

INTRODUCTION

Petitioner DesertXpress Enterprises, LLC (“DesertXpress”) hereby respectfully petitions the Surface Transportation Board (“the Board”), pursuant to its discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721, to issue an order declaring that the proposed DesertXpress project to construct an interstate high speed passenger rail system between Victorville, California and Las Vegas, Nevada (“the Project”) is not subject to state and local environmental review, land use restrictions, and other discretionary permitting requirements because the application of such requirements to the Project would intrude upon the Board’s exclusive jurisdiction over transportation by rail carriers and thus are preempted by the Interstate Commerce Commission Termination Act (“ICCTA”).

Because the Project involves substantial planning and construction complexities, DesertXpress respectfully requests that the Board act on this Petition as expeditiously as possible so as to allow the Project to advance as expeditiously and efficiently as possible. Expedited handling of the Petition would allow DesertXpress to proceed promptly in fulfilling its

compliance obligations in accordance with the Board's decision. Also, given that the Project is entirely privately financed, expedited handling would allow DesertXpress to proceed in the most cost-effective manner.

STATEMENT OF FACTS

The proposed DesertXpress project is a privately financed interstate high speed passenger rail system that, upon completion, will span an approximately 200-mile route between Victorville, California (San Bernadino County) and Las Vegas, Nevada (Clark County). The Project will include the construction of significant lengths of new track and ancillary facilities integral to the Project, including two passenger stations (one at each terminus) and a 50-acre train maintenance and storage facility and operations center near the Victorville station. The rail system will provide an alternative to automobile travel on Interstate 15 ("I-15"), and is expected to carry more passengers between southern California and Las Vegas than all of the airlines from all five southern California airports combined. DesertXpress currently anticipates that the Project will utilize European high-speed trains traveling at speeds up to 125 miles per hour, and that travel between the two locations will be accomplished in under 105 minutes.

The proposed route is planned alongside or within the median of I-15. Specifically, from Victorville a dedicated two-track passenger rail system would be constructed, largely following the north side or median of I-15 and making maximum use of excess space within the freeway right-of-way. The majority of the track would utilize public rights-of-way on property owned by the Bureau of Land Management ("BLM"), with easements permitted for transportation use to the California Department of Transportation and the Nevada Department of

Transportation for I-15. Certain sections of the route also could use existing railroad right-of-way, private property, and undeveloped BLM land.¹

As the Board knows, DesertXpress has already initiated the Federal environmental review process. It has met with Federal Railroad Administration (“FRA”) personnel about the Project on multiple occasions, has been coordinating with the Board and the FRA in the preparation of an Environmental Impact Statement (“EIS”), and has entered into a Memorandum of Understanding with the FRA and the Board. The FRA has been designated the lead Federal agency for purposes of compliance with the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.*, and related laws, while the Board, the BLM and the Federal Highway Administration are serving as cooperating agencies in this process, and various other Federal, state, regional, and local agencies will be participating as well. In the near future, DesertXpress will seek from the Board the necessary authority to construct the new line and related facilities and to conduct rail operations over the new line.

However, a question has arisen as to whether state and/or local governmental bodies in California and Nevada can independently require that the Project comply with state and/or local environmental, land use, and other discretionary permitting requirements, such as the California Environmental Quality Act (“CEQA”), Cal. Pub. Res. Code § 21000 *et seq.* (West 2006). DesertXpress believes that CEQA and similar state and/or local requirements are preempted under ICCTA insofar as the Project is concerned, and seeks an affirmative declaration from the Board to this effect. Such a decision by the Board would remove uncertainty as to

¹ One possible alternative alignment under consideration would involve the laying of new track alongside existing rail rights-of-way covering approximately 30 miles of the corridor (the portion between the cities of Victorville and Barstow). Use of a small part of the Mojave National Preserve is also being considered.

precisely what environmental, land use, and other discretionary permitting criteria the Project will be required to satisfy, and would ensure that the Project is not unreasonably burdened with, and thereby significantly delayed by or hindered from going forward due to, additional requirements, complexity, and cost.

ARGUMENT

Section 10901(a) of ICCTA states that:

“A person may--

- (1) construct an extension to any of its railroad lines;
- (2) construct an additional railroad line;
- (3) provide transportation over, or by means of, an extended or additional railroad line; or
- (4) in the case of a person other than a rail carrier, acquire a railroad line or acquire or operate an extended or additional railroad line,

only if the Board issues a certificate authorizing such activity.”

49 U.S.C. § 10901(a). As noted above, DesertXpress will be seeking authorization from the Board in accordance with this section.

ICCTA section 10501(b) specifically provides that:

“The jurisdiction of the Board over--

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules..., practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.”

Id. § 10501(b). As the Board has explained, section 10501(b) “leave[s no] room for state and local regulation of activities related to rail transportation.” City of Creede, CO -- Petition for Declaratory Order, STB Finance Docket No. 34376 (STB served May 3, 2005) at 4.

Moreover, “rail carrier” is statutorily defined as “a person providing common carrier railroad transportation for compensation,” id. § 10102(5), while “transportation” is broadly defined to include:

“(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and

(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.”

Id. § 10102(9). Because the Project clearly anticipates “transportation” to be provided by a “rail carrier,” it presumptively falls within the Board’s exclusive jurisdiction as set forth in ICCTA sections 10901 and 10501.

With regard to the aforementioned provisions, the Board has explained that it retains exclusive jurisdiction over projects such as the one at issue here that involve the construction and operation of rail lines that are part of the interstate rail network. See King County, WA -- Petition for Declaratory Order -- Burlington N. R.R. -- Stampede Pass Line, 1 S.T.B. 731, 734-35 (1996) (Stampede Pass I). As a result, “any state or local statute that requires a railroad to obtain state or local approval before construction...of a line would appear, on its face, to conflict with the ICCTA and [therefore] is preempted.” Id. at 735. This is so because “the permitting process implies the power to deny authorization and thereby to frustrate the activity that must be sanctioned,” which in turn would constitute per se interference with the federal railroad licensing regime and an unreasonable burden on interstate commerce. Id. at 736.

In Stampede Pass I, King County sought a declaration from the Board affirming the County's authority to regulate railroad line maintenance and upgrading through a local environmental review and permitting process. Id. at 733. The Board ultimately concluded that "[a]bsent conditions imposed by the Board, requiring approval by a state or local government agency, such agencies are totally preempted from regulating the environmental consequences of the transaction" at issue. Id. at 737. "[W]here...approval of a transaction is required at the federal level with the result that the environmental effects of that approval are required to be assessed at the federal level, there is no role for state and local agencies to play other than by participation in the Federal environmental review process." Id. at 738. Indeed, ICCTA preemption doctrine is driven by a concern that requiring rail projects to comply with state or local permitting procedures could result in those rail projects either being significantly delayed or never being allowed to move forward, thereby injuring interstate commerce. See Cities of Auburn and Kent, WA -- Petition for Declaratory Order -- Burlington N. R.R. -- Stampede Pass Line, 2 S.T.B. 330, 338-39 (1997) (Stampede Pass II) ("If BN were unable to undertake the projects, or if its ability to commence [rail] projects...were substantially delayed pending resolution of a state or local permitting or environmental review process, its ability to carry rail traffic over the Stampede Pass line could be greatly inhibited, if not foreclosed."), aff'd sub nom. City of Auburn v. United States, 154 F.3d 1025 (9th Cir. 1998).²

² This broad statutory preemption applies even in cases where the Board lacks licensing and conditioning authority and therefore does not conduct its own environmental review. See Joint Petition for Declaratory Order -- Boston & Maine Corp. & Town of Ayer, MA, 5 S.T.B. 500, 506-07 (2001) (concluding that application of the town's planning board permit process, its local nuisance ordinance, and the pre-approval process of its conservation commission to the railroad's construction and operation of a new automobile unloading facility was preempted by ICCTA), pet. for reconsideration denied, 5 S.T.B. 1041 (2001), aff'd, Boston & Maine Corp. v. (continued...)

The Board further addressed the principle of ICCTA preemption in the context of local land use requirements in Borough of Riverdale -- Petition for Declaratory Order -- New York Susquehanna & Western Railway, 4 S.T.B. 380 (1999), which involved a municipality's attempt to regulate a railroad's construction and use of a truck terminal, weigh station, and corn processing plant by way of local zoning ordinances. There, the Board stated that "recent precedent has made it clear that, to the extent that they set up legal processes that could frustrate or defeat railroad operations, state or local laws that would impose a local permitting or environmental process as a prerequisite to the railroad's maintenance, use, or upgrading of its facilities are preempted because they would, of necessity, impinge upon the federal regulation of interstate commerce." Id. at 388 (footnote omitted). This means, explained the Board, that while state and local government entities retain certain limited police powers, their actions are preempted to the extent they would "have the effect of foreclosing or restricting the railroad's ability to conduct its operations or otherwise unreasonably burdening interstate commerce." Id.

The Board also specified that "[l]ocal land use restrictions, like zoning requirements, can be used to frustrate transportation-related activities and interfere with interstate commerce. To the extent that they are used in this way (such as in a situation where restrictions are placed on the location of a railroad facility), courts have found that the local regulations are preempted by the ICCTA." Id. at 387. This principle is based on the fact that congressional intent to preempt state and local "permitting process[es] for prior approval of rail activities and facilities related to interstate transportation by rail is explicit in the plain language of section 10501(b) and the statutory framework surrounding it." Id. at 388 n.16. The Board further

Town of Ayer, 206 F. Supp. 2d 128 (D. Mass. 2002), rev'd solely on attorneys' fee issue, 330 F.3d 12 (1st Cir. 2003).

explained that local entities may not even require that railroads obtain building permits prior to constructing or using railroad facilities “because of the inherent delay and interference with interstate commerce that such requirements would cause.” Id. at 388.

Indeed, in a case in which the Board concluded that provisions of a particular California statute were preempted, the Board stated that it has “repeatedly held that state or local laws that would impose a local permitting or environmental process as a prerequisite to the railroad’s maintenance, use, or upgrading of its facilities are preempted to the extent that they set up legal processes that could frustrate or defeat railroad operations because they would, of necessity, impinge upon the federal regulation of interstate commerce.” North San Diego County Transit Dev. Bd. -- Petition for Declaratory Order, 6 S.T.B. 331, 337 (2002) (emphasis added). Again, this is so because if cities or states were allowed to impose environmental or other permitting regulations on railroad operations, railroads could be delayed in or prevented from constructing rail track and related facilities. See id. “Such action would be tantamount to economic regulation by a [state or] local government over a rail carrier,” and “[t]he ICCTA demonstrates Congress’ intent to preempt such regulatory authority over railroad operations and to vest jurisdiction” exclusively in the Board. Id. (quoting City of Encinitas v. North San Diego County Transit Dev. Bd., No. 01-CV-1734-J, slip op. at 6 (S.D. Cal. Jan. 14, 2002) (order dismissing case for lack of subject matter jurisdiction)). As a result, the Board concluded in North San Diego County Transit that requirements of the California Coastal Act, a California state law purportedly requiring railroads to obtain city permitting approval before allowing the construction of passing track, were preempted by ICCTA section 10501(b).

Furthermore, as explained by the Board in Borough of Riverdale and City of Creede, CO, courts have likewise embraced a broad view of ICCTA’s preemption of state and

local attempts to regulate railroad construction projects and operations through application of environmental regulation, land use restrictions, and other permitting requirements. See Borough of Riverdale, 4 S.T.B. at 387-88; City of Creede, CO, at 4-5. In fact, “[e]very court that has examined the statutory language has concluded that the preemptive effect of section 10501(b) is broad and sweeping. ...[T]he courts have made it clear that state or local permitting or preclearance requirements of any kind that would affect rail operations (including building permits, zoning ordinances, and environmental and land use permitting requirements) are categorically preempted” by ICCTA. City of Creede, CO, at 4 (citing City of Auburn v. United States, 154 F.3d 1025, 1029-31 (9th Cir. 1998)).

For example, in CSX Transportation, Inc. v. Georgia Public Service Commission, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996), the court stated that:

“It is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over railroad operations....

...The most natural reading of section 10501(b)(2) is that the federal remedies provided by the ICC Termination Act are the only remedies available as to the regulation of rail transportation, and that the federal remedies are exclusive of state remedies except where the ICC Act has expressly provided otherwise. See S. Rep. No. 176, 104th Cong., 1st Sess. 14 (1995) (explaining that ICC Termination Act ‘should not be construed to authorize states to regulate railroads in areas where federal regulation has been repealed by the bill’); and H.R. Conf. Rep. No. 422, 104th Cong., 1st Sess. 167 (1995), U.S. Code Cong. & Admin. News 1995, pp. 793, 852 (stating that ‘integrated into the statement of general jurisdiction is the delineation of the exclusivity of federal remedies with respect to the regulation of rail transportation’) (emphasis added).”

Similarly, the court in Norfolk Southern Railway v. City of Austell, No. CIV A1: 97-CV-1018, 1997 WL 1113647, at *5 n.6 (N.D. Ga. Aug. 18, 1997), stated in reference to ICCTA that “a city may not...attempt to regulate land use and planning via local laws when Congress’ intent to preempt such local laws is [so] clear and manifest.” Moreover, the Ninth Circuit addressed the Board’s Stampede Pass II decision in City of Auburn v. United States, and agreed with the Board

that state and local permitting or pre-clearance requirements (including environmental regulation) are preempted by ICCTA because, by their nature, they interfere with interstate commerce by giving the state or local body the ability to delay or deny the carrier the right to construct facilities or conduct operations. 154 F.3d 1025, 1031 (9th Cir. 1998).

CEQA in particular should fall squarely within the general ambit of state or local environmental, land use, and other discretionary permitting measures that the Board and the courts have held are preempted by ICCTA. CEQA is, in short, “California’s state version of NEPA.” Laub v. United States Dep’t of the Interior, 342 F.3d 1080, 1083 n.2 (9th Cir. 2003). Its specific goals include, among others, the requirement that California’s state and local agencies identify and avoid (or mitigate) the significant environmental effects of any project requiring their approval. See CEQA, Cal. Pub. Res. Code § 21000 et seq. CEQA purportedly applies to any “activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is...(c) [a]n activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.” Id. § 21065. The statute’s implementing regulations specify that projects found to have significant environmental effects can be rejected or conditioned upon the implementation of mitigation measures. See Cal. Code Regs. tit. 14, §§ 15091-97. CEQA and like measures therefore fall into the category of state regulation that both the Board and the federal courts have concluded is subject to ICCTA preemption.

As a result, DesertXpress respectfully requests that the Board exercise its discretion and issue a declaratory order to this effect. The Board typically issues such orders to terminate a controversy or remove uncertainty, and in doing so considers a number of factors, including “the significance to the industry and the ripeness of the controversy.” City of Creede,

CO -- Petition for Declaratory Order, STB Finance Docket No. 34376 (STB served June 22, 2004) at 2. In the past, the Board has exercised its discretion and issued declaratory orders in a variety of cases raising analogous issues. See, e.g., Stampede Pass I (exercising discretion to issue a declaratory order clarifying the role of state and local government entities and the Board in regulating the environmental effects of the reactivation of a rail line); Borough of Riverdale (exercising discretion to institute declaratory order proceedings to clarify the role of state and local regulation, including land use or zoning laws or regulations and environmental laws or regulations, of railroad facilities); Town of Ayer, MA (exercising discretion to issue a declaratory order regarding local permitting regulation of an automobile unloading facility); North San Diego County Transit (exercising discretion to issue a declaratory order clarifying the role of state and local permitting regulation of new rail line construction). As noted above, uncertainty exists as to precisely what environmental, land use, and other discretionary permitting criteria the Project will be asked to satisfy. Moreover, conclusively establishing that state and local environmental and land use statutes and regulations do not apply to projects involving the construction of new rail line such as at issue in this matter would be significant not only for the Project but for the industry as a whole. As such, the entry of a declaratory order is both appropriate and desirable.

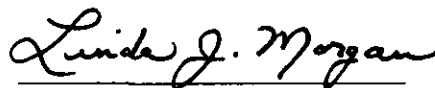
CONCLUSION

DesertXpress's filing of this Petition should in no way be interpreted as an effort to prevent state and local agencies in California and Nevada from participating in the Federal process. It has long been recognized that such "agencies can play a significant role under many federal environmental statutes." Borough of Riverdale, 4 S.T.B. at 386. Indeed, DesertXpress welcomes and encourages the input of state and local agencies in California and Nevada in the

ongoing preparation of the EIS and the engineering design process. Rather, through the filing of this Petition DesertXpress simply asks the Board to remove lingering uncertainty about the extent of the Board's jurisdiction over the Project, and to specifically address whether its jurisdiction preempts state and local environmental review, land use restrictions, and other discretionary permitting requirements that might otherwise apply. DesertXpress files this Petition in the hope that it might continue the planning process in the most efficient manner with a clear view of its compliance responsibilities.

For the foregoing reasons, DesertXpress respectfully requests that the Board issue an order declaring that the Project is not subject to state and local environmental review, land use restrictions, and other discretionary permitting requirements in California and Nevada, including CEQA, because such requirements, as applied to the Project, are preempted by ICCTA sections 10501 and 10901. Furthermore, DesertXpress respectfully requests that such determination be made as expeditiously as possible so that the Project may advance as expeditiously as possible.

Respectfully submitted,



Linda J. Morgan
Charles H.P. Vance
Covington & Burling LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401
(202) 662-5214 (Phone)
(202) 778-5214 (Fax)

Counsel for DesertXpress Enterprises, LLC

Dated: July 24, 2006