

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34914

**REPLY OF DESERTXPRESS ENTERPRISES, LLC
TO THE COMMENTS SUBMITTED IN RESPONSE
TO ITS PETITION FOR DECLARATORY ORDER**

Linda J. Morgan
Charles H.P. Vance
Scott A. Freling
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: November 6, 2006

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34914

**REPLY OF DESERTXPRESS ENTERPRISES, LLC
TO THE COMMENTS SUBMITTED IN RESPONSE
TO ITS PETITION FOR DECLARATORY ORDER**

INTRODUCTION

Petitioner DesertXpress Enterprises, LLC (“DesertXpress”) submits this reply in support of its July 24, 2006 petition (“the Petition”) for an order declaring that the proposed DesertXpress project to construct an interstate high speed passenger rail system between Victorville, California, in San Bernardino County, and Las Vegas, Nevada (“the Project”) is not subject to state and local environmental review, land use restrictions, and other discretionary permitting requirements, including the California Environmental Quality Act (“CEQA”), Cal. Pub. Res. Code § 21000 *et seq.* (West 2006). The application of such requirements to the Project would intrude upon the Board’s exclusive jurisdiction over transportation by rail carriers, and the requirements are thus preempted by the ICC Termination Act of 1995 (“ICCTA”).

In the Petition, DesertXpress explained that the Project falls within the Board’s exclusive jurisdiction as set forth in ICCTA sections 10901 and 10501. DesertXpress further explained that a declaratory order from the Board confirming that state and local environmental review, land use restrictions, and other discretionary permitting requirements in California and

Nevada are indeed preempted is needed to remove lingering uncertainty. DesertXpress hopes that it might continue the planning and implementation process in the most efficient manner with a clear view of its compliance responsibilities. In this regard, DesertXpress appreciates the opportunity to respond to the concerns raised about the Petition in one of the comments recently filed with the Board.

BACKGROUND

In response to the Petition, the Board instituted a declaratory order proceeding on August 31, 2006, under 5 U.S.C. § 554(e) and 49 U.S.C. § 721, to determine whether the Board's jurisdiction preempts state and local environmental review, land use restrictions, and other discretionary permitting requirements that might otherwise apply to the Project.

On October 16, 2006, the International Brotherhood of Teamsters Rail Conference and its affiliated organizations submitted comments in support of the Petition because, as the Project is planned, DesertXpress will be a rail carrier under the ICCTA and therefore subject to the Board's exclusive jurisdiction.

Also on October 16, 2006, the New Jersey Department of Environmental Protection and the New Jersey Meadowlands Commission (collectively, "the N.J. Commenters") submitted comments in response to the Petition. The N.J. Commenters explained that, although they take no position concerning the Project, they are opposed to the issuance of a declaratory order in this case. See N.J. Cmts. at 2. According to the N.J. Commenters, there is no need for the Board to issue a declaratory order at this time because there is no live case or controversy. See id. at 4-7. The N.J. Commenters are concerned that, if the Board were to issue a declaratory order in this case, "there is a possibility that the Board's statements may be taken out of context

and used to obfuscate and impede the essential and legitimate oversight of environmental and public health and safety regulations by the various states.” Id. at 2.

DESERTXPRESS’S RESPONSE

The Board has the authority to issue the declaratory order DesertXpress seeks, and has issued similar declaratory orders under similar circumstances. As the Board is aware, the Administrative Procedures Act, specifically 5 U.S.C. § 554(e), provides it with the discretion to issue a declaratory order “to terminate a controversy or remove uncertainty.” Id. (emphasis added). DesertXpress is presently faced with uncertainty as to whether the Project will be required to satisfy state and/or local environmental, land use, and other discretionary permitting criteria, and the relevant state and local regulatory authorities themselves have no clear understanding of their proper roles regarding the Project.¹ Notwithstanding widespread support for the Project from state and local officials, lingering uncertainty over the scope of the Board’s exclusive jurisdiction has prompted some state and local officials to support obtaining a clarifying statement from the Board in this regard. See Attachment A (expressing “strong support for [this] private-sector initiative” and urging the Board “to issue a decision in line with [DesertXpress’s] petition” so as to “clarify jurisdictional issues...and confirm the preemptive authority of the [Board] over the proposed project”).

For example, the California Department of Transportation (“Caltrans”), which owns portions of the Interstate 15 (“I-15”) right-of-way that DesertXpress plans to use to

¹ As the Board is already aware, DesertXpress has initiated the federal environmental review process, has had several meetings with Federal Railroad Administration (“FRA”) personnel about the Project, has been coordinating with the Board and the FRA in the preparation of an Environmental Impact Statement, and has entered into a Memorandum of Understanding with the FRA and the Board. 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.

construct much of the new rail line, has expressed the view that, absent a clear ruling from the Board asserting its preemptive jurisdiction, completion of a California state environmental impact report (“EIR”) under CEQA would have to be prepared before DesertXpress could gain access to the right-of-way.

A California state EIR typically is prepared by a lead agency, e.g., a local city or county, in order to identify the significant environmental effects of a project. See Cal. Code Regs. tit. 14, § 15081.5; see also id. § 15002 (“If the initial study shows that the project may have a significant effect, the lead agency takes the third step and prepares an EIR.”). If Caltrans were to require preparation of a California state EIR for the Project, locating a lead agency to perform the actual review will be difficult. The City of Victorville (the proposed construction site of the California passenger station and the maintenance, storage, and operations facility) and the County of San Bernardino (which spans the entire portion of the route from Victorville to the Nevada state line) would be the most logical entities to serve as the lead agency for state EIR review. Both have indicated to DesertXpress, however, that they are unable to serve as lead agency because of the Board’s exclusive jurisdiction over the Project. Given the varying views expressed by these entities, the need for Board guidance is clear.

A statement from the Board would provide Caltrans with the necessary assurance that it could participate in the federal environmental review process and rely on that process to examine the same considerations that would otherwise be relevant to the provision of access to the right-of-way. A number of other state and local officials have likewise expressed in

discussions with DesertXpress that, with clarification from the Board as to its exclusive jurisdiction over the Project, additional state and local review will be unnecessary.²

The Board has issued declaratory orders to terminate uncertainty under similar circumstances. In The New York City Economic Development Corp. -- Petition for Declaratory Order, STB Finance Docket No. 34429 (STB served July 15, 2004), the Board examined a petition submitted by the New York City Economic Development Corporation (“NYCEDC”) seeking a statement that federal law preempted a state agency’s permitting or prior approval requirements with regard to a proposed construction project. In that case, NYCEDC and the Port Authority of New York and New Jersey proposed to construct an additional 6,744 feet of track as part of a project “to revitalize and reactivate rail operations” over certain lines. Id. at 1. Notwithstanding the fact that no litigation was pending, the Board granted NYCEDC’s request for a declaratory order of preemption, offering NYCEDC guidance to proceed with its planning for the proposed construction project. Id. at 8-9. DesertXpress faces similar uncertainty about its obligations to state and local authorities, and seeks the Board’s guidance in the hope of avoiding unnecessary and costly delay.

Moreover, the Board has a longstanding practice of issuing declaratory orders to resolve uncertainty, particularly in cases where the petitioner has requested the Board’s guidance before proceeding with a significant financial undertaking. For example, in Wisconsin Department of Transportation -- Petition for Declaratory Order, STB Finance Docket No. 34764

² DesertXpress Enterprises sought the counsel of the Governor’s Office of Planning and Research (“OPR”), the California agency charged with settling disputes among agencies regarding CEQA jurisdiction. See Cal. Pub. Res. Code § 21165. During DesertXpress’s May 23, 2006 meeting with OPR and Caltrans to discuss this issue, it was agreed that the best course of action would be for DesertXpress to seek jurisdictional clarity from the Board.

(STB served Feb. 6, 2006), the Board granted the request of the Wisconsin Department of Transportation (“WisDOT”) for a declaratory order asserting the Board’s lack of jurisdiction over a track purchase that WisDOT intended to make. Likewise, in Georgia Department of Transportation -- Petition for Declaratory Order, STB Finance Docket No. 34665 (STB served Apr. 14, 2005), the Board granted the Georgia agency’s request for a declaratory order, including a finding of whether, upon consummation of a planned transaction, a particular entity would be the sole common carrier on a line.³ In each such instance, the Board has offered guidance to petitioners so as to remove uncertainty surrounding an anticipated undertaking. In the same vein, DesertXpress faces uncertainty as to whether the Project will be required to satisfy state and/or local prior approval and discretionary permitting requirements. A declaratory order providing guidance on this issue would be consistent with longstanding Board practice.

The unique nature of the Project is further reason for the Board to issue a declaratory order. The Project calls for the construction of a fully grade-separated, dedicated double-track passenger railroad along an approximately 200-mile corridor. The sheer magnitude of the rail construction component makes the Project unique. In addition to the track itself, the Project includes the construction of ancillary facilities, including two passenger stations (one at each terminus) and a 50-acre train maintenance, storage, and operations facility near the Victorville station.

³ See also Wis. Dep’t of Transp. -- Petition for Declaratory Order, STB Finance Docket No. 34623 (STB served Dec. 23, 2004) (issuing declaratory order that WisDOT would not become common carrier by virtue of planned purchase of 37-mile line of railroad); Wis. Dep’t of Transp. -- Petition for Declaratory Order, STB Finance Docket No. 34181 (STB served Aug. 1, 2002) (issuing declaratory order that WisDOT would not become rail carrier and subject to the Board’s jurisdiction if it exercised option to purchase certain rail assets).

Naturally, DesertXpress's plan to create an interstate high speed passenger rail system, with approximately 200 miles of new rail line, virtually from scratch, requires a significant amount of planning and carries a large degree of potential uncertainty.

DesertXpress's obligations to move the Project forward within the federal regulatory structure are clear, and DesertXpress has begun the process of satisfying the applicable requirements. The extent of DesertXpress's obligations to state and local authorities, however, remains unclear.

Although DesertXpress firmly believes that the Board's exclusive jurisdiction preempts CEQA and similar state and/or local requirements insofar as the Project is concerned, DesertXpress would benefit greatly from Board guidance on this issue. A decision by the Board would remove uncertainty as to whether the Project will be required to satisfy state and/or local environmental, land use, and other discretionary permitting criteria, 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.

This uncertainty is compounded by the reality that the Project will be financed entirely through private investment, with no financial assistance from any public authority. The preliminary total cost of the Project is estimated at approximately \$3 billion, including design, construction, trains, systems, testing, and commissioning. DesertXpress's ability to attract and maintain commitments from private investors depends to a significant degree on the Project's certainty. Capital accumulation for a venture of this magnitude takes time. Board guidance would assist DesertXpress with its efforts to secure the private investment necessary to move the Project forward and mitigate future project development risks.

Issuance of a declaratory order in this case also would help to further a variety of interstate rail transportation goals. A declaratory order explaining the proper role of state and

local officials would help to clarify, and therefore reduce, the “regulatory barriers to entry” surrounding the Project. See 49 U.S.C. § 10101(7). Ultimately, the Project is designed to ease longstanding traffic congestion on I-15 by diverting passengers to a more efficient and environmentally-friendly mode of transportation. A declaratory order providing DesertXpress with the guidance required to continue its planning will certainly help “to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes” and “to encourage and promote energy conservation.” Id. §§ 10101(5), (14).

As a final point, DesertXpress does not seek departure from Board precedent on the issue of preemption. DesertXpress acknowledges the limitations on the doctrine that have been recognized by the Board, such as the principle that state and local requirements which do not interfere with interstate rail operations generally are not preempted. See, e.g., Fletcher Granite Co. -- Petition for Declaratory Order, STB Finance Docket No. 34020 (STB served June 29, 2001) at 5. Many of the concerns raised by the N.J. Commenters can be addressed by the Board through a simple statement to this effect.

CONCLUSION

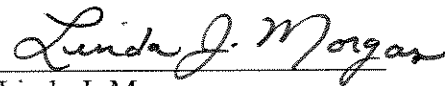
DesertXpress submits that the Board has the authority to issue a declaratory order in this case and the exercise of this authority is indeed warranted. The Project at issue is unique in both scale and design. Given the genuine uncertainty that DesertXpress faces and the Board’s prior willingness to issue declaratory orders under similar circumstances, DesertXpress respectfully requests the Board’s guidance.

As discussed in the Petition, DesertXpress of course does not wish to prevent state and local agencies in California and Nevada from participating in the federal process. State and

local “agencies can play a significant role under many federal environmental statutes.” Borough of Riverdale -- Petition for Declaratory Order -- N.Y. Susquehanna & W. Ry., 4 S.T.B. 380, 386 (1999). Indeed, DesertXpress welcomes and encourages the input and participation of these agencies in the ongoing preparation of the federal Environmental Impact Statement and the engineering design process.⁴

For the reasons discussed herein and those set forth in its Petition, 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.

Respectfully submitted,



Linda J. Morgan
Charles H.P. Vance
Scott A. Freling
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: November 6, 2006

⁴ DesertXpress has taken several steps to facilitate state and local participation in the federal process, including issuance of a Notice of Preparation through California’s State Clearinghouse, advising the public that a federal Environmental Impact Statement would be prepared for the Project. DesertXpress continues to consult with many state and local entities, including Caltrans, the California Transportation Commission, the Nevada Department of Transportation, the California Department of Fish and Game, the County of San Bernardino, and the City of Victorville.

ATTACHMENT A

.....

September 29, 2006

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

Re: STB Finance Docket No. 34914

Dear Secretary Williams:

We are writing in connection with the aforementioned proceeding to comment specifically on the pending Petition for Declaratory Order filed by DesertXpress Enterprises.

We, the undersigned Federal and local elected officials of San Bernardino County and the City of Victorville, as well as members of the Southern California Logistics Airport Authority and the Victor Valley Economic Development Agency, hereby express our strong support for the private-sector initiative to build the DesertXpress high speed train connecting Victorville, California and Las Vegas, Nevada. The project will serve a critical infrastructure need to mitigate the current and growing traffic congestion on the I-15 corridor. Locally, we believe that this project, with its terminal station, and the operations and maintenance facility planned to be located in Victorville, CA, will be of great strategic and economic value to the State of California, San Bernardino County, the City of Victorville, the Victorville Redevelopment Agency, the Southern California Logistics Airport and the Southern California Logistics Rail Authority.

We understand that the petition before you asks the Board to clarify jurisdictional issues with respect to the DesertXpress project and confirm the preemptive authority of the agency over the proposed project. We urge the agency to issue a decision in line with the petition to ensure that the project can be developed in an expeditious and cost-effective manner. We also

The Honorable Vernon A. Williams
September 29, 2006
Page 2

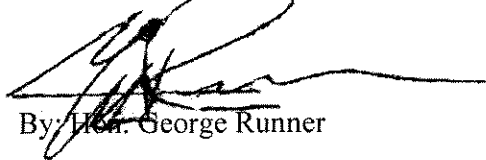
encourage all of the federal agencies involved -- the Surface Transportation Board, the Federal Railroad Administration, the Bureau of Land Management and the Federal Highway Administration -- to take all actions within their power and jurisdiction to ensure that this important and creative initiative becomes a reality as quickly and efficiently as possible.

Respectfully submitted,

25TH CONGRESSIONAL DISTRICT OF CALIFORNIA



17TH SENATE DISTRICT OF CALIFORNIA


By: Hon. George Runner

36TH ASSEMBLY DISTRICT OF CALIFORNIA



By: Hon. Sharon Runner

1ST DISTRICT OF SAN BERNARDINO COUNTY



By: Supervisor Bill Postmus

CITY OF VICTORVILLE, CALIFORNIA



By: Mayor Mike Rothschild

The Honorable Vernon A. Williams
September 29, 2006
Page 3

THE REDEVELOPMENT AGENCY OF
THE CITY OF VICTORVILLE

Mike Rothschild

By: Chairman Mike Rothschild

SOUTHERN CALIFORNIA LOGISTICS
AIRPORT AUTHORITY

Terry E. Caldwell

By: Chairman of the Governing Board Terry Caldwell