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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

JOHN TOS, et al., Plaintiffs and Petitioners, **v.** **CALIFORNIA HIGH SPEED RAIL AUTHORITY, et al.,** Defendants and Respondents.	Case No. 34-2011-00113919 **REPLY IN SUPPORT OF RESPONDENTS' MOTION FOR ORDER THAT THE SCOPE OF EVIDENCE AT TRIAL IS LIMITED TO THE ADMINISTRATIVE RECORD** Date: July 25, 2014 Time: 9:00 a.m. Dept: 31 Judge: The Hon. Michael P. Kenny Trial Date: None set Action Filed: November 14, 2011

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I. INTRODUCTION

The design of the high-speed rail system is by law entrusted exclusively to the discretion of the High-Speed Rail Authority. The Authority determined, in a series of public proceedings, based on an extensive administrative record, that its current plan for the design of the system—embodied in its initial funding plan and business plans—complies with the Bond Act.

Petitioners' claims attack both the current design plans for the high-speed rail system and the Authority's conclusion that these plans comply with the Bond Act. Specifically, Petitioners claim that the Authority's decision to use a "blended system" on the San Francisco Peninsula violates the Bond Act, and that the system is not "designed to achieve" certain maximum trip times and financial viability as the Bond Act requires. As shown in Respondents' opening brief, Petitioners are not entitled to litigate these design decisions in a de novo trial on the merits. Under black-letter law, Petitioners may, at most, try to show that the Authority's design decisions were arbitrary, capricious, entirely lacking in evidentiary support, or unlawfully or procedurally unfair. Under *Western States Petroleum Association v. Superior Court* (1995) 9 Cal.4th 559 (*Western States*), that review must be based solely on the thousands of pages of technical and business analysis, expert review, and public comment that comprise the administrative record. These limitations begin and end the analysis.

Petitioners do not dispute that the Authority's design decisions, as reflected in its funding and business plans, are supported by the administrative record. Instead, Petitioners pivot away from their actual claims, and purport to challenge a litany of "informal actions" that allegedly are not supported by an administrative record. These actions include grant applications, appropriations requests, and acts by the Legislature, the Governor, the Department of Finance, and others. But these actions do not change the *Western States* analysis. Petitioners challenge the system's *design*, but these newly identified actions are not design decisions. These actions did not determine whether the Authority would use a "blended system" or how fast the trains might go; they did not involve the Authority's vote on or analysis of those issues; and they did not change the design reflected in the Authority's funding and business plans—yet these are the topics on which Petitioners hope to present expert evidence. At most, these actions implement

the Authority's current design as reflected in its funding and business plans, and are therefore supported by, and reviewable against, the same administrative record. That the Authority is now implementing its design plans does not somehow erase, or allow Petitioners to escape, the administrative record.

II. THE ADMINISTRATIVE RECORD SUPPORTING THE AUTHORITY'S DESIGN DECISIONS ALSO SUPPORTS PETITIONERS' NEWLY-IDENTIFIED "INFORMAL ACTIONS."

Petitioners contend that a collection of alleged informal actions permit them to go outside the administrative record and introduce new evidence to challenge the Authority's compliance with the Bond Act. But pointing to these actions does not alter the conclusion that trial must be limited to the administrative record. First, the allegedly informal actions of the Authority are irrelevant to the merits of Petitioners' claims because they do not affect the design flaws that they actually allege. Second, these actions merely reflect implementation of the Authority's design decisions that, in turn, are supported by the administrative record. To the extent those actions are challenged because they implement an allegedly unlawful design, they may only be tested against the administrative record.

A. The putative informal actions on which Petitioners rely do not determine the design of the high-speed rail system and are therefore irrelevant to their claims.

Petitioners' claims challenge three elements of the Authority's design of the system. However, none of the informal actions which they contend permit access to evidence outside of the administrative record determine any of the design elements that they challenge.

These allegedly "informal" actions fall into the following categories:

- **Actions of the Authority implementing its own planning decisions**:
    - Submitting to the Department of Finance a request for an appropriation to fund construction of the first usable segment of rail in the Central Valley, described in the Authority's pre-appropriation first funding plan, as well as funding for "bookends" [1] (Opposition to Motion for Order Limiting Scope of

[1] Petitioners incorrectly state that the Authority also asked for an appropriation for the "bookends." (Op. at 3:15-16, 8:16-17.) The Authority's initial funding plan sought funds only

Evidence at Trial to Administrative Record (Op.) at 3:15-16);

- Applying to the federal government for grants to fund construction (Op. at 3:20, 9:13);
- Accepting those federal grant funds once awarded (Op. at 9:14);[2]
- Directing consultants to focus on a blended system in preparing the EIR for the segment of rail to be constructed on the corridor between San Francisco and San Jose (Op. at 9:9-10);
- Issuing requests for proposals for construction of the usable segment in the Central Valley (Op. at 3:23);
- Executing contracts for construction of the usable segment in the Central Valley (Op. at 4:1); and
- Unspecified testimony before the Legislature about plans for the system (Op. at 4:2-3, 9:15-16).

- **Actions of the Legislature implementing the Authority's planning decisions,**:
  - Appropriating construction funds for high-speed rail, including funding for the "bookends" (Op. at 3:18); and
  - Enacting legislation requiring that construction funding be used only to build a blended system on the San Francisco Peninsula, unless all jurisdictions affected by that decision agreed otherwise (Op. at 9:11-12).
- **Actions of the Governor and Director of Finance implementing the Authority's planning decisions**:
  - Submitting a request for appropriation of construction funds for high-speed rail to the Legislature (Director of Finance) (Op. at 3:17-18); and
  - Signing the 2012-2013 budget (Governor) (Op. at 3:19).
- **Actions of the federal government implementing the Authority's planning decisions**:

(...continued)
for the Central Valley project. A March 30, 2012 letter to the Legislature from the Department of Finance included the Authority's funding request, as well as monies for the "bookends," and funds to improve existing rail. (Exh. D to Plaintiff's Request for Judicial Notice Part I, filed March 15, 2013.)

[2] Both the original grant agreement and an amendment that increased funding were entered into in 2010, more than a year before the Authority adopted the blended system approach in the 2012 Revised Business Plan. (AG003690, AG003747.)

- Approving grant applications for funding to build high-speed rail in the Central Valley (Op. at 9:13-14).

These acts have no bearing on Petitioners' claims because they are not design decisions of any kind. They simply carry out the Authority's previous decisions concerning blended rail, the speed of the trains, or the system's financial viability. None has any bearing on the Authority's determinations that the current system design complies with the Bond Act's performance standards. Tellingly, Petitioners do not even attempt to connect these actions to the three design flaws they allege. As Petitioners themselves must have realized, such an argument cannot be made.

Moreover, the vast majority of these actions could not, by law, be design decisions. The design of the high-speed rail system is vested in the Authority alone—not the Director of Finance, the Governor, or the federal government. (Pub. Util. Code, § 185032, subd. (a) ["The authorization and responsibility for planning, construction, and operation of high-speed passenger train service at speeds exceeding 125 miles per hour in this state is exclusively granted to the [A]uthority"].) Thus, for example, the Director of Finance's submission of an appropriation request to the Legislature, the Governor's approval of an appropriation, the actions of the federal government, testimony or statements of individual Authority representatives, and "other state government officials," and the unspecified conduct of other defendants (see Opp. at pp. 3, 8-9), are not and cannot be deemed design decisions.[3] Petitioners cannot overcome *Western States* by pointing to actions that have nothing to do with the merits of their claims.

B. The Authority's actions were not "informal" both because they implement its funding and business plans and because they were themselves authorized at public meetings.

The actions Petitioners have now identified are not "informal" in the sense that they lack a foundation in an administrative record, or in the sense that they were not subject to public comment. First, they reflect the implementation the Authority's design decisions, as mapped out

[3] Petitioners do not explain how sworn testimony before the Legislature or other public statements could in themselves constitute an agency decision, or how the Legislature passed the budget without public input. These statements are unsupported because they are unsupportable and fairly indicate the weakness of the argument as a whole.

in its funding plan and business plans, for which Petitioners concede there is an abundant administrative record. These acts are intended to bring the Authority's current design to fruition—by securing necessary funding, executing contracts, and making way for construction. The same administrative record that supports the design supports its implementation.

Second, Petitioners wrongly suggest that these actions took place in secret, or that they are not found in the administrative record. Consistent with the Authority's obligations under the Bagley-Keene Open Meeting Act, each of the actions Petitioners challenge—authorizing staff to apply for federal grants, issue RFPs, execute contracts, and the like—were in fact made at regularly-scheduled Authority meetings for which there exists a comprehensive administrative record.[4] (See O'Grady Declaration in Further Support of Motion to Limit Evidence ("O'Grady Declaration II"), ¶¶ 3-6 & Exhs. 16-29.) There is no support for Petitioners' contention that these are in any way "informal" actions for which there is no administrative record.

C. Because no exception to *Western States* applies, extra-record evidence is inadmissible.

Petitioners' attempt to avoid the limitations of *Western States* must be rejected. They do not dispute that the initial funding plan and the business plans are quasi-legislative discretionary decisions, that the Authority adopted those documents in public, and that there were ample opportunities for public comment. As discussed in Respondents' opening brief, in *Western States* the California Supreme Court foreclosed the use of extra-record evidence in these circumstances: "extra-record evidence can *never* be admitted merely to contradict the evidence the administrative agency relied on in making a quasi-legislative decision or to raise a question regarding the wisdom of that decision." (*Western States, supra,* 9 Cal.4th at p. 579, emphasis added.)

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[4] The Opposition itself discloses that one of the so-called informal decisions, the Authority's instructions to staff concerning the San Francisco to San Jose EIR, is found in an Authority resolution, and Petitioners cite to the Authority's meeting minutes, which are part of the existing administrative record in this case. (Opposition at p. 9.)

Petitioners ask the Court to relieve them of the Western States bar, but fail to explain how acts implementing the Authority's design decisions—requests for appropriations, grant applications and acceptance of federal funds, instructions to consultants for preparation of an EIR, requests for proposal for construction, and execution of construction contracts—could justify departing from that rule. All quasi-legislative decisions by administrative agencies must be implemented through the actions of individuals, including staff, officials, and other agencies. The fact that no public hearing accompanies implementing acts does not create an exception to the Western States rule, because the same administrative record that supports the original planning or design decision also supports the actions necessary to implement the plan or design. What Petitioners are proposing would eviscerate the Western States rule: any plaintiff could avoid the limitations on review of administrative decisions simply by pointing to evidence that a state agency was implementing its decision with actions. Thus, Petitioners invite the Court to hold that if unaccompanied by a full hearing, acts like cashing checks, executing contracts, and filling out forms would subject all administrative decisions to a trial de novo. This would be absurd, and is precisely the kind of meddling that the Western States sought to prevent: second-guessing of quasi-legislative discretionary decisions in violation of the separation of powers and the deference due agency expertise, and interference with the finality of those decisions. This Court should decline that invitation.

Petitioners' argument finds no support in the law. They do not even try to distinguish *Carrancho v. California Air Resources Board* (2003) 111 Cal.App.4th 1255, 1269-1271, which held that decisions made in public planning meetings, like those conducted by the Authority, are not "informal," and judicial review of such planning decisions must be based on the administrative record. Instead, they rely on two inapposite First District Court of Appeal cases, *California Oak Foundation v. Regents of University of California* (2010) 188 Cal.App.4th 277, and *City of Oakland v. Oakland Police and Fire Retirement System* (2014) 224 Cal.App.4th 210. In *California Oak Foundation, supra*, the court of appeal held that the trial court had discretion to consider expert testimony on petitioners' claim that a project violated the Alquist-Priolo

Earthquake Fault Zoning Act. (188 Cal.App.4th at p. 255-256.) In that case, however, the Regents' determination that the project would not violate the act was an informal decision that did not involve any public hearings. (*Ibid.*) *City of Oakland v. Oakland Police and Fire Retirement System*, *supra*, 224 Cal.App.4th at p. 238, also involved an informal agency action for which there had been no hearing.5

Nor do Petitioners explain why they failed to submit their evidence to the Authority while it was in the process of making its decisions, including its current business plan, which it approved in April 2014. An informal decision is one in which the public lacked an opportunity to weigh in, and there is little or no record to support the agency's decision. In such cases, reviewing courts are unable to meaningfully determine the validity of an agency's quasi-legislative decision, and extrinsic evidence may therefore be allowed. But these considerations do not apply where parties, like the Petitioners here, are afforded the opportunity to participate in public agency decision-making but instead choose to challenge the decision after the fact. (See *Western States, supra,* 9 Cal.4th at pp. 578.) To allow Petitioners to rely now on evidence they could have presented to the agency, but did not, would violate *Western States.*

III. THE AUTHORITY IS REQUIRED BY LAW TO PURSUE A BLENDED HIGH-SPEED RAIL SYSTEM ON THE PENINSULA.

In their opening brief, Respondents showed that discretion to proceed with a blended high-speed rail system has been taken out of the Authority's hands by the enactment of Senate Bill 557, effectively mooting any challenge to the Authority's exercise of discretion in this

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[5] It is worth noting that, notwithstanding that the trial courts in *California Oak Foundation* and *City of Oakland* allowed limited extrinsic evidence, both were mandamus cases in which the agency's decisions were reviewed under the deferential substantial evidence standard. (See *California Oak Foundation, supra,* 118 Cal.App.4th at pp. 247, 254 [holding the court's "inquiry is limited to whether the [agency] decision was arbitrary, capricious or utterly lacking in evidentiary support"]; *City of Oakland, supra,* 224 Cal.App.4th at p. 226, fn. 7 [noting that any error by the trial court in failing to apply an appropriately deferential standard of review to the agency's decision will be resolved in the court of appeal's de novo review of legal issues].) Neither case supports Petitioners' argument that they are entitled to introduce evidence outside the administrative record, or that the appropriate standard of review is anything other than deferential.

regard. (Opening Brief at p. 9; see Sts. & Hy. Code, §§ 2704.76, subd. (b), 2704.77.) In their Opposition, Petitioners do not disagree or even address this argument.

Section 2704.77 requires the Authority to follow the blended system approach identified in its 2012 Business Plan, unless the government entities that lobbied for the blended system agree otherwise. Thus, whether a blended system approach violates the Bond Act is now a matter of statutory interpretation, not a challenge to the exercise of discretion. Petitioners may challenge the statute, but are not entitled to an evidentiary trial of that legislative decision. (*Schabarum v. California Legislature* (1998) 60 Cal.App.4th 1205, 1219-1220.)

IV. PETITIONERS CANNOT AVOID THE *WESTERN STATES* BAR BY ARGUING THAT THE AUTHORITY'S FUNDING AND BUSINESS PLANS DO NOT REFLECT FINAL DESIGN DECISIONS.

Petitioners have been trying to avoid the *Western States* bar since the outset of this case, raising a series of arguments, most of which have now been discarded.[6] In the latest of these attempts, Petitioners devote much of their Opposition to arguing that the Authority's initial funding plan and its 2012 and 2014 business plans do not finally "commit" the Authority to any particular design of the high-speed rail system. (Opp. at pp. 5-8.) They say that the proof of this lies in the fact that the Legislature only intended those plans to be informational documents, and that there has been no environmental review of those decisions. (Op. at pp. 6-7.) Consequently, they argue, it is the implementing acts that are at issue, not the antecedent planning documents. And, because there is no administrative record for the implementing acts, the Court should admit evidence outside the administrative record. (Op. at pp. 6-9.) This argument fails for two reasons.

[6] Petitioners have apparently abandoned their argument that by alleging "taxpayer" claims for "waste" pursuant to Code of Civil Procedure section 526a, they can avoid the limitations of *Western States* and other cases limiting such challenges to the administrative record.

First, in the context of this motion to limit the scope of evidence at trial to the administrative record, the finality of the Authority's "commitment" to its design decisions is irrelevant.[7] To the extent the Authority has designed the system, those decisions are reflected in its funding plan and business plans, and are supported by the administrative record. Second, Petitioners' argument that the final act committing a public agency to a course of action is CEQA or NEPA approval of project-level environmental review works against them. Petitioners point to the absence of such environmental approvals as proof that the Authority's funding and business plans are not final commitments. They then contend that because they are instead challenging the final implementing acts, for which there is no administrative record, the Court must admit extrinsic evidence. (Opp. at pp. 7-8.) But, similarly, none of those "informal" acts has received environmental clearance. By Petitioner's logic these acts are thus no more or less "commitments" than the Authority's funding and business plans. Accordingly, there is no reason to treat these actions differently, and certainly there is no reason to treat them as anything but part and parcel of the funding and business plans and the administrative record from which they spring.

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[7] As a threshold matter, Respondents agree and have consistently argued that because these planning documents do not represent final decisions committing the Authority to any particular design, Petitioners' challenges are not ripe for review. (See *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 169.) The ripeness of Petitioners' claims, however, is not at issue on this motion, and neither is the Authority's level of commitment. Here, the issue is whether there is an administrative record adequate to support the design decisions the Authority has made, to the extent it has made them, as well as its conclusion that the current design complies with the terms of the Bond Act. Respondents continue to urge the Court to recognize that Petitioners' claims are not ripe for judicial review. But if review is to occur at this juncture, *Western States* and its progeny squarely dictate that it must be limited to the administrative record.

V. CONCLUSION

For the foregoing reasons, and those set forth in Respondents' opening brief, the Court should grant Respondents' motion for an order that the scope of evidence at trial is limited to the administrative record.

Dated: July 18, 2014

Respectfully Submitted,

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DECLARATION OF SERVICE BY E-MAIL and OVERNIGHT COURIER

Case Name: **Tos, et al. v. California High Speed Rail Authority, et al.**

No.: **34-2011-00113919**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for overnight mail with the **Golden State Overnight (GSO)** In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the overnight courier that same day in the ordinary course of business.

On July 18, 2014, I served the attached

REPLY IN SUPPORT OF RESPONDENTS' MOTION FOR ORDER THAT THE SCOPE OF EVIDENCE AT TRIAL IS LIMITED TO THE ADMINISTRATIVE RECORD

DECLARATION OF SHARON O'GRADY IN FURTHER SUPPORT OF RESPONDENTS' MOTION FOR ORDER THAT THE SCOPE OF EVIDENCE AT TRIAL IS LIMITED TO THE ADMINISTRATIVE RECORD

by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, for overnight delivery, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 18, 2014, at San Francisco, California.

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Declarant

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