XAVIER BECERRA
Attorney General of California
TAMAR PACHTER
Supervising Deputy Attorney General
SHARON L. O'GRADY
Deputy Attorney General
State Bar No. 102356
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5899
Fax: (415) 703-1234
E-mail: Sharon.OGrady@doj.ca.gov
Attorneys for Defendant
California High-Speed Rail Authority

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

JOHN TOS, QUENTIN KOPP, TOWN OF ATHERTON, a municipal corporation, COUNTY OF KINGS, a subdivision of the State of California, MORRIS BROWN, PATRICIA LOUISE HOGAN-GIORNI, ANTHONY WYNNE, COMMUNITY COALITION ON HIGH-SPEED RAIL, a California nonprofit corporation, TRANSPORTATION SOLUTIONS DEFENSE AND EDUCATION FUND, a California nonprofit corporation, and CALIFORNIA RAIL FOUNDATION, a California nonprofit corporation,

Plaintiffs,

v.

CALIFORNIA HIGH SPEED RAIL AUTHORITY, a public entity, BOARD OF DIRECTORS OF THE CALIFORNIA HIGH-SPEED RAIL AUTHORITY, and DOES 1-20 inclusive,

Defendants.

Case No. 34-2016-00204740

DEFENDANT'S REQUEST FOR JUDICIAL NOTICE, SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES, AND DECLARATION OF COUNSEL

Date: April 18, 2017
Time: 9:00 a.m.
Dept: 54
Judge: Raymond M. Cadei
Trial Date: None set
Action Filed: December 13, 2017

Reservation No. 2232493

REQUEST FOR JUDICIAL NOTICE

Defendant California High-Speed Rail Authority requests that the Court take judicial notice of the following documents, pursuant to Evidence Code section 452:

1. Ruling on Submitted Matter: Remedies on Petition for Writ of Mandate in *Tos v. High-Speed Rail Authority* (Super. Ct. Sac. County, No. 34-2011-00113919) ("*Tos I*"), filed November 25, 2013, a copy of which is Exhibit 1 hereto.

2. Order Granting Respondents' Motion for Order That the Scope of Evidence at Trial Is Limited to the Administrative Record in *Tos I*, filed August 13, 2014, a copy of which is Exhibit 2 hereto.

3. Ruling on Submitted Matters: Motion to Augment Administrative Record and Motion to Compel Further Responses in *Tos I*, filed August 18, 2015, a copy of which is Exhibit 3 hereto.

4. Judgment Denying Petition and Complaint in *Tos I*, filed March 22, 2016, a copy of which is Exhibit 4 hereto.

In addition, should the Court grant plaintiffs' request for judicial notice of the letter from Michael Cohen, Director of Finance to Jeff Morales, Chief Executive Officer of the California High-Speed Rail Authority, Re Central Valley Segment Funding Plan, dated March 3, 2017, Exhibit E to Plaintiffs' Request for Judicial Notice in Opposition to Defendants' Demurrer and Motion to Strike Allegations ("Plaintiffs' RJN"), the Authority asks the Court to take judicial notice of the following document:

5. Letter from Michael Cohen, Director of Finance to Jeff Morales, Chief Executive Officer of the California High-Speed Rail Authority, Re San Francisco to San Jose Peninsula Corridor Funding Plan, dated March 3, 2017, a copy of which is Exhibit 5 hereto.

MEMORANDUM OF POINTS AND AUTHORITIES

I. THE COURT SHOULD TAKE JUDICIAL NOTICE OF EXHIBITS 1-4.

The court may take judicial notice of official acts of judicial departments of the State of California, and of the records of any court in this State. (Evid. Code, § 452, subds. (c), (d).) Exhibits 1 – 4 reflect official acts of the Superior Court of California, County of Sacramento and are court records in *Tos I.* These documents are relevant to the Authority's Demurrer because they directly rebut assertions made in Plaintiffs' Opposition to Defendants' Demurrer ("Opposition") concerning rulings made in *Tos I*, and put into context Exhibits A and B to Plaintiffs' RJN, the effect of which plaintiffs describe incorrectly in the Opposition.

II. THE COURT SHOULD TAKE JUDICIAL NOTICE OF EXHIBIT 5 IF IT TAKES JUDICIAL NOTICE OF EXHIBIT E TO PLAINTIFFS' RJN.

The court may take judicial notice of official acts of executive departments of the State of California. (Evid. Code, § 452, subd. (c).) Exhibit 5 documents an official act of the California Director of Finance pursuant to Streets and Highways Code section 2704.08, subdivision (d)(2).

Exhibit 5 is relevant to the Demurrer if the Court grants judicial notice of Exhibit E to Plaintiffs' RJN. The First Amended Complaint ("FAC") seeks an injunction relating to two Authority funding plans, the Central Valley Segment Funding Plan (the "Central Valley Funding Plan") and the San Francisco to San Jose Corridor Funding Plan (the "Peninsula Funding Plan"). ("FAC ¶¶ 47-54, 63-67, 69.) The funding plans must be approved by the Director of Finance before they can be implemented. (Sts. & Hy Code § 2704, subdivision (d)(2).) At the time plaintiffs brought this action, on December 13, 2016, neither the Central Valley Funding Plan nor the Peninsula Funding Plan had been approved by the Authority, and neither had been submitted for approval to the Director of Finance. (Complaint, ¶ 60 ["The two Funding Plans are currently only available as draft documents. The [Authority] does not plan to give final approval to either Funding Plan at its December 13th meeting. Rather, the [Authority] intends to authorize [its Chief Executive Officer to finalize both Funding Plans after January 1, 2017 . . . and submit them to the Director of Finance for his consideration and approval"].)

Plaintiffs have asked the Court to take judicial notice of the Director of Finance's March 3, 2017 approval of the Central Valley Funding Plan (Exhibit E to Plaintiffs' RJN) in support of their argument that this action was ripe when brought. (Opposition at pp. 4, 11.) The Authority has objected to judicial notice of that document because it was not in existence on December 13, 2016, the date this action was filed, and reflects an action taken by the Director of Finance months later, and therefore is not relevant to whether plaintiffs' action was premature when filed. (See Defendant's Objection to Plaintiffs' Request for Judicial Notice in Opposition to Defendant's Demurrer and Motion to Strike Allegations.)

In their Opposition to the Authority's Demurrer, plaintiffs argue that the FAC "adequately alleged that while a final approval [of the two funding plans] may not yet have been formally given, that approval is a foregone conclusion," (Opposition at p. 11), and plaintiffs cite to Exhibit E to Plaintiffs' RJN, the Director of Finance's approval of the Central Valley Funding Plan, as evidence that "events have now unfolded almost exactly as stated in the FAC" (*Id.* at p. 8 & fn 4.) Exhibit 5 to this Request for Judicial Notice documents the Director of Finance's decision to defer action on the Peninsula Funding Plan. It therefore contradicts plaintiffs' argument by showing that the Director of Finance's approval of the Authority's funding plans was not a forgone conclusion, and illustrates why this action is premature and not ripe.

If the Court decides to take judicial notice of plaintiffs' Exhibit E notwithstanding the Authority's objection, the Court also should take judicial notice of the Authority's Exhibit 5.

Dated: April 11, 2017

Respectfully Submitted,

XAVIER BECERRA
Attorney General of California
TAMAR PACHTER
Supervising Deputy Attorney General

SHARON L. O'GRADY
Deputy Attorney General
Attorneys for Defendant California High-Speed Rail Authority

DECLARATION OF COUNSEL

I, Sharon L. O'Grady, declare:

1. I am a Deputy Attorney General, and I represent defendant California High-Speed Rail Authority (the "Authority") in this action. I also served as counsel of record for the Authority in *Tos v. High-Speed Rail Authority*, Sacto. Super. Ct. No. 34-2011-00113919, ("*Tos I*"). The facts set forth herein are based on my personal knowledge, and I could competently so testify if called as a witness.

2. Attached hereto as Exhibit 1 is a true and correct copy of Ruling on Submitted Matter: Remedies on Petition for Writ of Mandate in *Tos I*, filed November 25, 2013..

3. Attached hereto as Exhibit 2 is a true and correct copy of the Order Granting Respondents' Motion for Order That the Scope of Evidence at Trial Is Limited to the Administrative Record in *Tos I*, filed August 13, 2014.

4. Attached hereto as Exhibit 3 is a true and correct copy of Ruling on Submitted Matters: Motion to Augment Administrative Record and Motion to Compel Further Responses in *Tos I*, filed August 18, 2015.

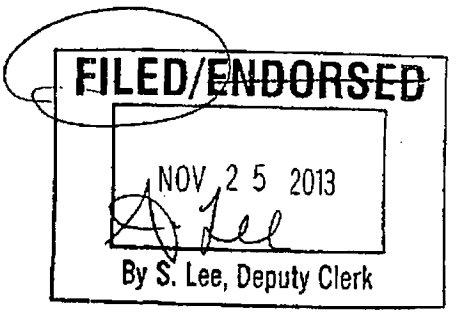
5. Attached hereto as Exhibit 4 is a true and correct copy of the Judgment Denying Petition and Complaint in *Tos I*, filed March 22, 2016.

6. Attached hereto as Exhibit 4 is a true and correct copy of the letter from Michael Cohen, Director of Finance to Jeff Morales, Chief Executive Officer of the California High-Speed Rail Authority, Re San Francisco to San Jose Peninsula Corridor Funding Plan, which I obtained from the Authority's website at https://www.hsr.ca.gov/docs/brdmeetings/2017/brdmtg_031517_Item4_ATTACHMENT_DOF_Peninsula_Corridor_Letter.pdf, on April 11, 2017.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 11, 2017 at San Francisco, California.

SHARON L. O'GRADY

EXHIBIT 1



SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

JOHN TOS, AARON FUKUDA, COUNTY OF KINGS

Plaintiffs and Petitioners,

v.

CALIFORNIA HIGH SPEED RAIL AUTHORITY, et al.,

Defendants and Respondents.

Case No. 34-2011-00113919-CU-MC-GDS

RULING ON SUBMITTED MATTER: REMEDIES ON PETITION FOR WRIT OF MANDATE

Introduction

On August 16, 2013, the Court issued a ruling in this matter finding that defendant/respondent California High Speed Rail Authority abused its discretion by approving a detailed funding plan under Streets and Highways Code section 2704.08(c) that did not comply with the requirements of subdivisions (c)(2)(D) and (K) of that statute. In that ruling, the Court directed the parties to submit further briefing on the issue of remedies.[1]

Principally, the Court directed the parties to address the issue of whether issuance of a writ of mandate directing the Authority to rescind its approval of the November 3, 2011 funding plan would be a remedy with any real and practical effect. The Court also directed the parties to address the issue of

[1] In this ruling, the Court refers to defendant/respondent California High Speed Rail Authority as "the Authority", and to plaintiffs/petitioners John Tos, et al., as "plaintiffs".

whether the writ should address subsequent actions by the Authority, such as contract approvals, as well as whether any such approvals involve the commitment or expenditure of Proposition 1A bond proceeds.

The parties have filed briefing and supporting evidence in response to the Court's ruling. On November 8, 2013, the Court held a hearing on the issue of remedies and heard oral argument by counsel for the parties. At the close of the hearing, the Court took the matter under submission.

The Court has considered the evidence submitted by the parties, as well as their oral and written arguments, and now issues its ruling on remedies.

Preliminary Procedural and Evidentiary Issues

The Authority's special application to strike or disregard argument in plaintiffs' reply brief, or for permission to file a surreply brief, is denied. Plaintiffs' reply brief did not raise entirely new arguments, but rather addressed and rebutted arguments in the Authority's opposition brief. The Authority was not precluded from addressing plaintiffs' rebuttal arguments in full at the hearing.

All requests for judicial notice filed by the parties in this phase of the proceedings are granted, and all evidentiary objections are overruled.

Issuance of a Writ of Mandate

The primary issue of concern to the Court in relation to remedies was whether issuance of a writ of mandate directing the Authority to rescind its approval of the November 3, 2011 funding plan would have any real and practical effect. Based on the briefing and evidence the parties have submitted, the Court is satisfied that issuance of the writ would have a real and practical effect in this case.

Specifically, the Court is persuaded that the preparation and approval of a detailed funding plan that complies with all of the requirements of Streets and Highways Code section 2704.08(c) is a necessary prerequisite for the preparation and approval of a second detailed funding plan under subdivision (d) of the statute, which in turn is a necessary prerequisite to the Authority's expenditure of any bond proceeds for construction or real property and equipment acquisition, other than for costs described in subdivision (g).

The conclusion that the subdivision (c) funding plan is a necessary prerequisite to the subdivision (d) funding plan is supported by the fact that only the first funding plan is required to make the critical

certification that the Authority has completed "all necessary project level environmental clearances necessary to proceed to construction". (See, Streets and Highways Code section 2704.08(c)(2)(K).) The subdivision (d) funding plan is not required to address environmental clearances. Thus, the subdivision (d) funding plan, as a precondition for proceeding to construction, depends upon the adequacy of the subdivision (c) funding plan in at least one critical respect.

In the absence of a valid subdivision (c) funding plan making the required certification of environmental clearances, the Authority could prepare and submit a subdivision (d) funding plan and proceed to commit and spend bond proceeds without ever certifying completion of the necessary environmental clearances. As plaintiffs argue, proceeding to construction without all required project-level environmental clearances could result in substantial delays in the project, or even a need to redesign or relocate portions of the project, potentially at great cost to the State and its taxpayers. Streets and Highways Code section 2704.08 is carefully designed to prevent that from happening, but that design is frustrated if obvious deficiencies in the first funding plan are essentially ignored.

Issuance of a writ of mandate directing the Authority to rescind its approval of the November 3, 2011 funding plan based on the finding that the funding plan did not comply with all of the requirements of subdivision (c) thus will have a real and practical effect: it will establish that the Authority has not satisfied the first required step in the process of moving towards the commitment and expenditure of bond proceeds.

The Court therefore grants the petition for writ of mandate, and orders that a writ of mandate shall issue pursuant to Code of Civil Procedure section 1085, directing the Authority to rescind its approval of the November 3, 2011 funding plan.

The Court also asked the parties to address the issue of whether the writ should invalidate any subsequent approvals made by the Authority in reliance on the November 3, 2011 funding plan. Plaintiffs focused on the Authority's approval of construction contracts with CalTrans and Tutor-Perini-Parsons, arguing that those contracts necessarily involve the present commitment of bond proceeds for construction-related activities that do not fall within the so-called "safe harbor" provision of Streets and

Highways Code section 2704.08(g). Much of the argument on this issue centered on the Authority's present use of federal grant money, which is not governed by Proposition 1A, and whether the manner in which such federal funds were being used and spent virtually guarantees that Proposition 1A bond proceeds eventually will have to be spent under these two contracts in order to satisfy federal matching fund requirements.

The Court has reviewed the evidence submitted by the parties and is not persuaded that approval of the two contracts at issue, or the use of federal grant money thus far, necessarily amounts to the present commitment of Proposition 1A bond funds for activities outside the scope of subdivision (g). Significantly, the Authority demonstrated that the two contracts contain termination clauses. Thus, the Authority is not necessarily committed to spending the full face amount of those contracts. Similarly, plaintiffs did not demonstrate convincingly that federal grant money that has been spent so far and that currently is projected to be spent necessarily exceeds the amount of funds available to the Authority from funds other than Proposition 1A bond proceeds, and therefore inevitably must be matched with Proposition 1A bond proceeds. It is simply unclear at this time how the pattern of spending on the project will develop.

The Court therefore concludes that the writ of mandate should not include any provision directing the Authority to rescind its approval of the CalTrans or Tutor-Perini-Parsons contracts.

Other Remedies

In their briefing and argument, plaintiffs ask the Court to order other remedies, including an injunction prohibiting the Authority from submitting a funding plan pursuant to subdivision (d) until it prepares and approves a funding plan that complies with subdivision (c); a temporary restraining order or injunction prohibiting the Authority from using federal grant money while this action is pending; and an order directing a full accounting of past and projected expenditures on the high-speed rail project.

The Court finds that none of these remedies are appropriate at this point in the proceedings.

There is no evidence before the Court that indicates that the Authority is preparing, or is ready to submit, a subdivision (d) funding plan at this point. There is thus no basis for concluding that the

Authority is threatening to violate any applicable law or order of this Court relating to the preparation and submission of such a plan, and no basis for issuing injunctive relief to halt such action.

There is also no evidence before the Court that the Authority is using, or planning to use, federal grant money in violation of any applicable law or order of this Court. Plaintiffs' argument that an injunction is necessary to prevent the commitment of Proposition 1A bond funds or the waste of federal funds while this action is pending is not persuasive. As discussed above, the Court is not persuaded that the Authority's use and projected use of federal grant money necessarily amounts to the present commitment of Proposition 1A bond proceeds. Moreover, the Authority's use of federal grant money is not regulated by Proposition 1A or its funding plan requirements.

Finally, the Court finds no proper basis on which to order a full accounting. Plaintiffs have not demonstrated that there has been any impropriety in the expenditure of federal grant money, or of other funds subject to the funding plan requirements of Streets and Highways Code section 2704.08(c) or (d), that would require an accounting as a remedy.

The Court accordingly denies all requests for remedies other than the issuance of a writ of mandate directing the Authority to rescind its approval of the November 3, 2011 funding plan.

Plaintiffs' Remaining Writ Claims and Status of Individual Defendants

The Authority requests dismissal of plaintiffs' remaining writ of mandate claims. At the hearing on this matter, counsel for plaintiffs agreed on the record that, aside from the writ of mandate claims addressed in the Court's August 16, 2013 ruling, all other writ of mandate claims were not ripe and could be dismissed, and that plaintiffs intended to proceed on their claims under Code of Civil Procedure section 526a. The Court therefore orders all remaining writ of mandate claims dismissed.

The Authority also requests dismissal of all individual defendants named in this case. The request for dismissal is denied on the ground that some or all of the individual defendants may be proper parties in the remaining causes of action under Code of Civil Procedure section 526a, as they may have a role in the use and expenditure of Proposition 1A bond proceeds, and could be necessary parties if any injunctive relief is ordered. The writ of mandate that will be issued pursuant to the Court's August 16, 2013 ruling

shall direct only the Authority to take specified action, and shall not direct any action on the part of any of the individual defendants.

As previously agreed in an informal status and scheduling conference held with the Court on November 8, 2013, all parties are directed to appear for a continued status and scheduling conference in Department 31 at 1:30 p.m. on Friday, December 13, 2013 to address further proceedings, including trial, on plaintiffs' claims under Code of Civil Procedure section 526a.

Conclusion

The petition for writ of mandate is granted for the reasons stated in the Court's ruling issued on August 16, 2013. A writ of mandate shall issue pursuant to Code of Civil Procedure section 1085 directing the Authority to rescind its approval of the November 3, 2011 funding plan. No other relief is ordered at this time.

Counsel for plaintiffs is directed to prepare an order granting the petition and a writ of mandate in accordance with the Court's rulings in this matter; submit them to opposing counsel for approval as to form in accordance with Rule of Court 3.1312(a); and thereafter submit them to the Court for signature and issuance of the writ in accordance with Rule of Court 3.1312(b).

DATED: November 25, 2013

Judge MICHAEL P. KENNY
Superior Court of California,
County of Sacramento

CERTIFICATE OF SERVICE BY MAILING
(C.C.P. Sec. 1013a(4))

I, the undersigned deputy clerk of the Superior Court of California, County of Sacramento, do declare under penalty of perjury that I did this date place a copy of the above-entitled **RULING ON SUBMITTED MATTER** in envelopes addressed to each of the parties, or their counsel of record or by email as stated below, with sufficient postage affixed thereto and deposited the same in the United States Post Office at 720 9th Street, Sacramento, California.

MICHAEL J. BRADY
Attorney at Law
1001 Marshall Street, Suite 500
Redwood City, CA 94063-2052
Email: mbrady@rmkb.com

STUART M. FLASHMAN
Attorney at Law
5626 Ocean View Drive
Oakland, CA 94618-1533
Email: stu@stuflash.com

S. MICHELE INAN
Deputy Attorney General
455 Golden Gate Avenue, Ste 11000
San Francisco, CA 94102-7004
Email: michele.inan@doj.ca.gov

STEPHANIE F. ZOOK
Deputy Attorney General
455 Golden Gate Avenue, Ste 11000
San Francisco, CA 94102-7004
Email: Stephanie.Zook@doj.ca.gov

TAMAR PACHTER
Supervising Deputy Attorney General
455 Golden Gate Avenue, Ste 11000
San Francisco, CA 94102-7004
Email: Tamar.Pachter@doj.ca.gov

RAYMOND L. CARLSON, ESQ.
Griswold LaSalle Cobb Dowd & Gen LLP
111 E. Seventh Street
Hanford, CA 93230
Email: carlson@griswoldlasale.com

THOMAS FELLENZ
Chief Legal Counsel
770 L Street, Suite 800
Sacramento, CA 95814
Email: tfellenz@hsr.ca.gov

Dated: November 25, 2013

Superior Court of California,
County of Sacramento

By: S. LEE
Deputy Clerk

EXHIBIT 2

KAMALA D. HARRIS
Attorney General of California
TAMAR PACHTER
Supervising Deputy Attorney General
PAUL STEIN
Deputy Attorney General
State Bar No. 184956
SHARON L. O'GRADY
Deputy Attorney General
State Bar No. 102356
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5899; Fax: (415) 703-1234
E-mail: Sharon.OGrady@doj.ca.gov

Attorneys for Defendants/Respondents California High-Speed Rail Authority et al.

COOLEY LLP
STEPHEN C. NEAL (170085) (nealsc@cooley.com)
Five Palo Alto Square
3000 El Camino Real
Palo Alto, CA 94306-2155
Telephone: (650) 843-5000; Facsimile: (650) 857-0663

COOLEY LLP
MARTIN S. SCHENKER (109828) (mschenker@cooley.com)
KATHLEEN A. GOODHART (165659) (kgoodhart@cooley.com)
CANDACE A. JACKMAN (267599) (cjackman@cooley.com)
101 California Street, 5th Floor
San Francisco, CA 94111-5800
Telephone: (415) 693-2000; Facsimile: (415) 693-2222

Attorneys for Defendant/Respondent California High-Speed Rail Authority

FILED/~~ENDORSED~~
AUG 13 2014
By S. Lee, Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

JOHN TOS, AARON FUKUDA, et al.,

Plaintiffs and Petitioners,

v.

CALIFORNIA HIGH SPEED RAIL AUTHORITY, et al.,

Defendants and Respondents.

Case No. 34-2011-00113919

[~~PROPOSED~~] ORDER GRANTING 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 Honorable Michael P. Kenny
Trial Date: None Set
Action Filed: November 14, 2011

RECEIVED AUG - 8 2014 CIVIL

The motion of Respondents CALIFORNIA HIGH-SPEED RAIL AUTHORITY et al. for an order limiting the scope of evidence at trial to the administrative record came on regularly for hearing on July 25, 2014, in Department 31 of the Superior Court, the Honorable Michael P. Kenny presiding.

Petitioners JOHN TOS, AARON FUKUDA, AND COUNTY OF KINGS appeared by counsel Stuart M. Flashman, Esq. and Michael J. Brady, Esq. Respondents CALIFORNIA HIGH SPEED RAIL AUTHORITY (hereinafter, "Authority"); JEFF MORALES, CEO OF THE AUTHORITY; GOVERNOR EDMUND G. BROWN JR.; STATE TREASURER BILL LOCKYER; DIRECTOR OF FINANCE ANA MATOSANTOS; SECRETARY OF TRANSPORTATION BRIAN KELLY; and STATE CONTROLLER JOHN CHIANG; appeared by Deputy Attorney General Sharon L. O'Grady and Supervising Deputy Attorney General Tamar Pachter. Respondent Authority was also represented by Stephen C. Neal and Kathleen Goodhart of Cooley LLP and Thomas Fellenz, Chief Legal Counsel for California High-Speed Rail Authority. Amicus curiae Kings County Water District appeared by Raymond L. Carlson, Esq. of Griswold, LaSalle, Cobb, Dowd & Gin, LLP.

The Court, having considered the papers and evidence submitted by the parties, and the arguments of counsel at the hearing, and good cause appearing, rules as follows:

1. Respondents' motion is GRANTED.

2. The scope of admissible evidence at trial in this case shall include the administrative record for the Court's writ proceedings of May 31, 2013, together with the administrative record before the Authority for the 2014 Business Plan, subject to the right of the parties to file motions to augment the record.

//

//

//

//

//

IT IS SO ORDERED

DATED: 8/13/14

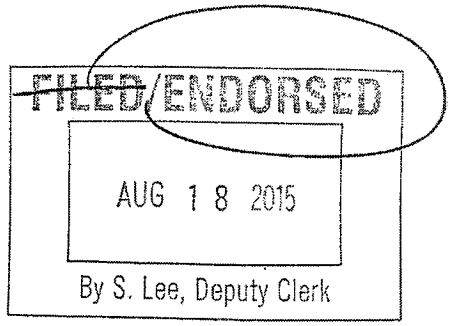
Hon. Michael P. Kenny
Judge of the Superior Court

Approved as to form:

Dated:_____

_____
Stuart M. Flashman
Counsel for Petitioners

EXHIBIT 3



SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

JOHN TOS, AARON FUKUDA, and COUNTY OF KINGS,

Plaintiffs,

v.

CALIFORNIA HIGH SPEED RAIL AUTHORITY *et al.*,

Defendants.

Case No. 34-2011-00113919-CU-WM-GDS

RULING ON SUBMITTED MATTERS: MOTION TO AUGMENT ADMINISTRATIVE RECORD AND MOTION TO COMPEL FURTHER RESPONSES

Factual And Procedural Background

Plaintiffs' complaint alleges "[i]n the year 2008, the voters of the state of California passed Proposition 1A...Proposition 1A authorized the construction of a high speed rail system (HSR system") in California. Proposition 1A defined HSR as an electrified system with a list of required components."[1] Plaintiffs filed this matter on November 14, 2011, claiming that the Central Valley high-speed rail project from Merced to Bakersfield is not eligible to receive funds from the Proposition 1A bond funds. Accordingly, Plaintiffs allege it would be illegal for such funds to be distributed to Defendants for the purpose of constructing the subject high speed rail system in the Central Valley.

[1] Second Amended Complaint, p. 4.

On August 13, 2014, the Court granted Defendants' motion to limit the scope of evidence at trial to the Administrative Record. Pursuant to the Court's order, the scope of evidence at trial in this case shall include the administrative record for the Court's writ proceedings of May 31, 2013, together with the administrative record before the Authority (hereinafter the "Authority") for the 2014 Business Plan. This order was subject to the right of the parties to file motions to augment the record.

Plaintiffs filed the instant motion to augment the administrative record on March 18, 2015. Plaintiffs contend they have received Defendants' index to their proposed Administrative Record and have identified "many additional relevant documents that had not been included." Defendants have filed an opposition. On April 10, 2015, the Court heard oral argument on Plaintiffs' motion. The Court ordered the parties to engage in an additional meet and confer process to narrow the scope of disputed documents, and ordered the parties to submit additional briefing providing specific arguments for each disputed document.

On June 8, 2015, Plaintiffs filed a supplemental brief in support of their motion to augment the administrative record. On July 6, 2015, Defendants filed a response to Plaintiff's supplemental brief. Plaintiffs contend the parties spent April and the first half of May engaging in meet and confer efforts. Plaintiffs provide that they "agreed to withdraw some documents from consideration, and Defendants did agree to accept a small number of documents to augment the record, [however] the range of documents has not changed appreciably from what was placed before the Court in April." (Supplemental Brief, p. 1.)

The Court's review of the "meet and confer" matrix attached as Exhibit "B" and letter attached as Exhibit "C" to the Supplemental Declaration of Stuart M. Flashman in support of Plaintiffs' motion to augment provide that the following documents have either been withdrawn, or Defendants have agreed to add them to the administrative record:

040, 041, 51, 61, 64, 81.2a, 90, 107, 108, 109, 120, 121, 136, 137, 138, 140, 141, 147, 148, 157, 162, 163, 175, 185, 188, 189, 197, 202, 203, 204[2], 206, 217, 220, 221, 226, 297, 297, 407, 419, 421, 422, 423.

On May 5, 2015, Plaintiffs filed a notice of motion and motion to compel further responses. At issue are Plaintiffs' February 13, 2013 Request for Admissions, Set One, and Form Interrogatories. The Authority served responses on March 19, 2013. These responses consisted of objections, including that civil discovery is "not permitted in this action challenging the Authority's quasi-legislative decisions."

Counsel for Plaintiffs contends that following receipt of the responses, he engaged in a meet and confer process with counsel for Plaintiffs. Counsel provides, "[a]t the end of that process, I proposed as a compromise, because a hearing was already pending on the mandamus challenge to Defendants' approval of the preliminary funding plan for the initial operating segment of Defendants' high-speed rail system, that Plaintiffs would not require any response to the discovery requests until fifteen days after the court had rendered a final decision in that proceeding. I received no response from Ms. Inan to this proposal, which I took to indicate its acceptance." (Declaration of Michael J. Brady, ¶ 4.)

Plaintiffs argue their pursuit of these discovery responses was postponed while the Court heard their writ petition, with such a "stay" continuing while further proceedings took place in the Third District Court of Appeal. On July 31, 2014, the Court of Appeal issued a decision ordering this Court to: (1) vacate its November 25, 2013 order in this action and the writ of mandate issued thereon; and (2) enter judgment on the complaint in the Validation Action. The Court issued an order so vacating and withdrawing the writ on February 3, 2015.

Plaintiffs contend they then began again pursuing the subject discovery requests, and

[2] At oral argument, Defendant asserted their belief that documents 202, 203, and 204 had been withdrawn by Plaintiffs. Plaintiffs were unable to confirm at the hearing. The parties subsequently met and agreed that the three documents had been withdrawn and were not included in the motion to augment.

again engaged in meet and confer efforts with counsel for Defendants. On April 27, 2015, Plaintiffs contend counsel for Defendants indicated that no further discovery responses would be provided. (The Declaration of Stuart M. Flashman provides that it attaches copies of meet and confer emails as exhibits A and B. The Court did not receive copies of these exhibits with the paperwork filed.) Plaintiffs argue these ongoing discussions with counsel for Defendants extended the deadline within which they were required to file a motion to compel.

On July 30, 2015, the Court issued a tentative ruling denying the motion to compel and ordering the parties to appear to discuss the motion to augment the administrative record. The parties appeared and presented oral argument concerning the motion to augment

Discussion

Motion to Augment the Administrative Record

It appears to the Court that the fundamental question that the Court will decide in this case is: Has the Authority made a decision that currently precludes compliance with Proposition 1A?

Accordingly, the record before the Court will need to consist of the documents relied upon by the Authority in making the decisions being challenged in this matter. (See *Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal.App.4th 357, 366-67.) The Court acknowledges that "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 Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 579.)

In its tentative ruling, the Court addressed the following questions to the parties concerning the motion to augment:

1. Are there documents that were properly submitted to the California High-Speed Rail Authority to be considered in making the decisions at issue in this matter that have not been included in the administrative record?

2. Are there documents that were in existence, yet not available to be placed before the California High-Speed Rail Authority despite the exercise of reasonable diligence, at the time the subject decisions were made?

During oral argument, Plaintiffs addressed three categories of documents they contended should properly be included in the administrative record pursuant to the Court's questions. These categories are:

1. Documents which were listed by URL in footnotes contained in documents submitted to the Authority.
2. Expert declarations that were submitted to counsel for the Authority in connection with this litigation.
3. The "Jones Declaration"

With regard to those documents not addressed at oral argument on this motion, the Court finds Plaintiffs have failed to carry their burden to prove that the administrative record should be augmented. The Court finds they are neither documents that were properly submitted to the Authority or were in existence, yet not available to be placed before the Authority despite the exercise of reasonable diligence at the time the subject decisions were made. (*Western States Petroleum Assn.*, 9 Cal.4th at 576-579.) To the extent Plaintiffs allege this extra-record evidence should be admitted to challenge informal decisions made by Defendants, Plaintiffs have failed to produce evidence to substantiate that any such decisions have been made. It appears the Authority is considering *options* in certain informal meetings and proceedings. Plaintiffs have presented no evidence that any *final decisions* have been made in these alleged informal proceedings such that the Court can address Proposition 1A compliance preclusion in connection with these decisions/adoptions within the context of this litigation. The Court also applies this finding to its analysis of the three document categories listed above and detailed below.

///

1. Documents which were listed by URL in footnotes contained in documents submitted to the Authority.

Plaintiffs contend, pursuant to *Consolidated Irrigation Dist. v. Superior Court* (2012) 205 Cal.App.4th 697, the administrative record should include copies of all documents that were listed by URL in the footnotes of documents, including articles, that were submitted to the Authority. In *Consolidated Irrigation*, the court held that those documents cited in a comment letter by a specific URL which will take the reader directly to the document location on the internet, were properly part of the record of proceedings under Public Resources Code section 211676.6, subdivision (e)(7). (*Id.* at 724.)

The Court acknowledges that *Consolidated Irrigation* involved a CEQA challenge, something that is not at issue in this case. However, this case is unique as the high-speed rail project is an ongoing process that may take decades to complete, and the Court finds it is appropriate to apply the analysis used in *Consolidated Irrigation* to this category of documents at issue in this case. For purposes of the instant matter, the Court has limited the record to those documents that were properly before the authority as of the adoption of the 2014 Business Plan. Plaintiffs contend, and the Court agrees, that any document identified within a document submitted to the Authority as part of public comment in connection with either the 2012 or 2014 Business Plan, with a citation to its URL, is a document that should be included in the administrative record.

2. Documents that were submitted to counsel for the Authority as part of this litigation.

Plaintiffs contend that a number of expert declarations, submitted by Plaintiffs to counsel for the Authority in connection with the May 31, 2013 writ proceedings, were properly before the Authority for purposes of the 2014 Business Plan. Plaintiffs do not cite to any legal authority that documents given to an agency's counsel in connection with litigation are considered to have been presented to the agency in connection with administrative proceedings.

The Court is not persuaded. Plaintiffs admit that they had the opportunity to present the expert declarations as part of the public comment period for the 2014 Business Plan. Plaintiffs chose not to do so. Accordingly, the expert declarations were not before the Authority in connection with any decision made that is at issue in this litigation. The documents are not part of the administrative record.

3. The "Jones" Declaration

Lastly, Plaintiffs argue a declaration of Dr. Paul Jones, along with supporting maps regarding San Francisco-Los Angeles nonstop service travel time should be included in the administrative record. Plaintiffs argue this information would have been provided to the Authority prior to the adoption of the 2014 Business Plan if not for the Authority's refusal to provide the underlying data in a timely manner. Consequently, Plaintiffs contend this information falls within the exception described by *Western States Petroleum* as evidence that existed before the agency made its decision and "it was not possible in the exercise of reasonable diligence to present this evidence to the agency *before* the decision was made so that it could be considered and included in the administrative record." (*Western States Petroleum*, 9 Cal.4th at 578.)

Plaintiffs argue they requested the data underlying the "Vacca" declaration well before the 2014 Business Plan's adoption. However, Plaintiffs contend they were informed that this data was part of a proprietary program and/or otherwise could not be presented. Plaintiffs admit that they had the actual Vacca declaration and analysis, which was published in February 2013, but contend they needed additional information to allow Mr. Jones to perform his complete critique of the travel time analysis performed by Mr. Vacca. Defendants admit that the information claimed to have been proprietary was not provided until after the adoption of the 2014 Business Plan. Plaintiffs contend this amounts to agency misconduct, and the extra-record evidence should be admitted. (*Barthelemy v. Chino Basin Mun. Water Dist.* (1995) 38 Cal.App.4th 1609,

1621)("...arguably, extra-record evidence may be admissible to show 'agency misconduct.'")

It appears to the Court that Plaintiffs were timely provided access to at least some of the data necessary to perform a critique of Mr. Vacca's analysis, including the actual declaration and analysis itself. This information was published in February 2013, before the 2014 Business Plan adoption date. Consequently, Plaintiffs could have presented a critique of the Vacca analysis to the Authority as part of the public comments on the 2014 Business Plan, to the extent they had *some* information available to them at that time. They chose not to, instead waiting until the full extent of the data was provided. This decision undermines Plaintiff's contention.

Plaintiffs have failed to prove that the data contained in the Jones Declaration was in existence but unavailable to them at the time the 2014 Business Plan was adopted such that they were unable to provide any analysis in properly submitted public comments. The Court declines to augment the record with the Jones Declaration.

Motion to Compel

Neither party raised any argument concerning the motion to compel at the hearing on this matter. Accordingly, the Court affirms its tentative ruling, which is restated herein.

A motion to compel further responses to interrogatories or requests for admission must be brought within 45 days of service of the responses or objections. (See Code Civ. Proc. §§ 2030.300, subd. (c), 2033.290, subd. (c).) This deadline may be extended only by written stipulation. (*Id.*) There is no evidence before the Court that such a written stipulation exists in this matter.

Even accepting that the clock did not begin to run on the motion to compel deadline until the Court's February 3, 2015 order withdrawing the writ of mandamus, the deadline to file a motion to compel was March 20, 2015. Plaintiffs filed the instant motion to compel on May 5, 2015.

Plaintiffs argue equitable estoppel should apply to prevent Defendants from asserting the deadline for filing a motion to compel. To support this argument Plaintiffs cite to *Sears Roebuck & Co v. National union Fire Insurance Co.* (2005) 131 Cal.App.4th 1342. In *Sears Roebuck & Co*, the party responding to discovery had repeatedly provided that he was going to comply with the discovery requests, and it was because of these "evasions and false assurances" that the moving party failed to comply with the discovery motion cutoff date. (*Id.* at 1351-52.) Here, there is no evidence that Defendants promised Plaintiffs they were going to comply with the requests, thus providing false assurances that substantive responses were forthcoming.[3]

It was incumbent upon Plaintiffs to obtain a written extension of the motion to compel deadline in order to continue any meet and confer efforts they may have been pursuing. Their failure to do so renders the instant motion untimely. Consequently, the Court must deny the motion. (See *Sexton v. Superior Court* (1997) 58 Cal.App.4th 1403, 1409.)

Conclusion

The motion to augment is **GRANTED** in part and **DENIED** in part. The motion is granted as to all documents identified within a document submitted to the Authority as part of public comment in connection with any Business Plan, with a citation to its URL. The parties are to meet and confer as to the identity of these documents and include them in the administrative record. The motion to augment is denied in all other regards.

The motion to compel is **DENIED**.

In accordance with Local Rule 1.06, counsel for Plaintiffs is directed to prepare an order granting in part and denying in part the motion to augment and denying the motion to compel, incorporating this ruling as an exhibit to the order; submit them to counsel for Defendants for

[3] As provided above, the exhibits purportedly attached to the declaration of Stuart M. Flashman were not filed with the Court. Consequently the Court has been unable to determine to what extent these documents demonstrate such false assurances.

approval as to form in accordance with Rule of Court 3.1312(a); and thereafter submit them to the Court for signature and entry in accordance with Rule of Court 3.1312(b).

DATED: August 18, 2015

MICHAEL P. KENNY

Judge MICHAEL P. KENNY
Superior Court of California,
County of Sacramento

CERTIFICATE OF SERVICE BY MAILING
(C.C.P. Sec. 1013a(4))

I, the undersigned deputy clerk of the Superior Court of California, County of Sacramento, do declare under penalty of perjury that I did this date place a copy of the above-entitled **RULING ON SUBMITTED MATTER** in envelopes addressed to each of the parties, or their counsel of record as stated below, with sufficient postage affixed thereto and deposited the same in the United States Post Office at 720 9th Street, Sacramento, California.

STUART M. FLASHMAN
Attorney at Law
5626 Ocean View Drive
Oakland, CA 94618-1533

MICHAEL J. BRADY
Attorney at Law
1001 Marshall Street, Suite 500
Redwood City, CA 94063-2052

SHARON L. O'GRADY
Deputy Attorney General
455 Golden Gate Avenue, Ste 11000
San Francisco, CA 94102-7004

DOUGLAS J. WOODS
Senior Assistant Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550

RAYMOND L. CARLSON, ESQ.
Griswold LaSalle Cobb Dowd & Gen LLP
111 E. Seventh Street
Hanford, CA 93230

THOMAS FELLENZ
Chief Legal Counsel
770 L Street, Suite 800
Sacramento, CA 95814

Superior Court of California,
County of Sacramento

Dated: August 18, 2015

By: S. LEE
Deputy Clerk

EXHIBIT 4

KAMALA D. HARRIS
Attorney General of California
TAMAR PACHTER
Supervising Deputy Attorney General
SHARON L. O'GRADY
Deputy Attorney General
State Bar No. 102356
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5899
Fax: (415) 703-1234
E-mail: Sharon.OGrady@doj.ca.gov
Attorneys for Defendants Respondents California High-Speed Rail Authority, et al.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

JOHN TOS, AARON FUKUDA; AND COUNTY OF KINGS, A POLITICAL SUBDIVISION OF THE STATE OF CALIFORNIA, Petitioners, v. CALIFORNIA HIGH SPEED RAIL AUTHORITY; JEFF MORALES, CEO OF THE CHSRA; GOVERNOR JERRY BROWN; STATE TREASURER, BILL LOCKYER; DIRECTOR OF FINANCE, ANA MATASANTOS; SECRETARY (ACTING) OF BUSINESS, TRANSPORTATION AND HOUSING, BRIAN KELLY; STATE CONTROLLER, JOHN CHIANG; AND DOES I-V, INCLUSIVE, Respondents.	Case No. 34-2011-00113919 ~~[PROPOSED]~~ JUDGMENT DENYING PETITION AND COMPLAINT

FILED BY FAX

The motion of Plaintiffs and Petitioners JOHN TOS, AARON FUKUDA, and COUNTY OF KINGS for judgment on petition and complaint came on regularly for hearing on February 11, 2016, in Department 31 of the Superior Court, the Honorable Michael P. Kenny presiding.

Plaintiffs and Petitioners JOHN TOS, AARON FUKUDA, and COUNTY OF KINGS appeared by counsel Stuart M. Flashman, Esq. and Michael J. Brady, Esq. Defendants and Respondents CALIFORNIA HIGH SPEED RAIL AUTHORITY (hereinafter, "AUTHORITY"); JEFF MORALES, CEO OF THE AUTHORITY; GOVERNOR JERRY BROWN; STATE TREASURER JOHN CHIANG; DIRECTOR OF FINANCE MICHAEL COHEN; BRIAN KELLY, SECRETARY OF THE CALIFORNIA STATE TRANSPORTATION AGENCY; and STATE CONTROLLER BETTY YEE appeared by Deputy Attorney General Sharon L. O'Grady and Supervising Deputy Attorney Tamar Pachter.

After hearing argument, the Court took the matter under submission on February 11, 2016, and on March 4, 2016 issued its Ruling on Submitted Matter: Motion for Judgment on Petition and Complaint (hereinafter "Ruling") on March 4, 2016, a copy of which is attached to this order as Exhibit A, and is incorporated fully herein by this reference.

Accordingly, **IT IS ORDERED, ADJUDGED AND DECREED** that the Petition and Complaint are **DENIED** in their entirety and judgment shall be entered in favor of all Defendants and Respondents and against all Plaintiffs and Petitioners.

DATED: 3/22/16

Honorable Michael P. Kenny
Judge of the Superior Court

Approved as to form:

Dated: March 15, 2016

Stuart M. Flashman

Michael J. Brady
Attorney for Plaintiffs and Petitioners

Dated: 3/17/2016

Raymond L. Carlson
Attorneys for Amicus Curiae Kings County Water District

SA2011103275

Exhibit A

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

JOHN TOS, AARON FUKUDA, and COUNTY OF KINGS, **Plaintiffs and Petitioners,** **v.** **CALIFORNIA HIGH SPEED RAIL AUTHORITY *et al.*,** **Defendants and Respondents.**	**Case No. 34-2011-00113919-CU-WM-GDS** **RULING ON SUBMITTED MATTER: MOTION FOR JUDGMENT ON PETITION AND COMPLAINT**

I. Factual And Procedural Background

The Legislature enacted the California High-Speed Rail Act in 1996. (Pub. Util. Code, § 185000, et seq)(hereinafter, the "Rail Act.") The Rail Act created the High-Speed Rail Authority (hereinafter, the "Authority") (Pub. Util. Code § 185012) and tasked it with developing and implementing an intercity high-speed rail service (hereinafter, the "HSR system"). (Pub. Util. Code §§ 185030, 185032.)

In 2008, Proposition 1A was placed before California voters to enact the "Safe, Reliable High-Speed Passenger Train Bond Act for the 21st Century." The Official Voter Information Guide for November 4, 2008 summarized the decision whether to enact Proposition 1A as,

> "[t]o provide Californians a safe, convenient, affordable, and reliable alternative to driving and high gas prices; to provide good-paying jobs and

> improve California's economy while reducing air pollution, global warming greenhouse gases, and our dependence on foreign oil, *shall $9.95 billion in bonds be issued* to establish a clean, efficient high-speed train service linking Southern California, the Sacramento/San Joaquin Valley, and the San Francisco Bay Area, with at least 90 percent of bond funds spent for specific projects, with private and public matching funds required, including, but not limited to, federal funds, funds from revenue bonds, and local funds, and all bond funds subject to independent audits?" (AG 000003)(emphasis added.)

The Official Voter Information Guide further indicated that a "yes" vote meant "[t]he state could sell $9.95 billion in general obligation bonds, to plan and to partially fund the construction of a high-speed train system in California, and to make capital improvements to state and local rail services." A "no" vote meant "[t]he state could not sell $9.95 billion in general obligation bonds for these purposes." (AG 000003.) The description of Proposition 1A and arguments for and against it, were followed by "an Overview of State Bond Debt." (AG 000008-9.)

California voters approved Proposition 1A (hereinafter, The "Bond Act"). (Streets and Highways Code §§ 2704, *et seq.*[1]) The Bond Act is in Division 3 of the Streets and Highways Code, which Division concerns the "Apportionment and Expenditure of Highway Funds."

The Bond Act identifies requirements the HSR system must meet prior to receipt of the funds, including that the HSR system "shall be designed to achieve the following characteristics...

> (b) Maximum nonstop service travel times for each corridor that shall not exceed the following:
>
> (1) San Francisco-Los Angeles Union Station: two hours, 40 minutes.
>
> (2) Oakland-Los Angeles Union Station: two hours, 40 minutes.
>
> (3) San Francisco-San Jose: 30 minutes...
>
> (c) Achievable operating headway (time between successive trains) shall be five minutes or less...

[1] All further statutory references are to the Streets and Highways Code, unless otherwise indicated.

> (g) In order to reduce impacts on communities and the environment, the alignment for the high-speed train system shall follow existing transportation or utility corridors to the extent feasible and shall be financially viable, as determined by the authority." (§ 2704.09.)

The Authority must prepare, publish, adopt, and submit to the Legislature, a business plan, which they must review and resubmit every two years. (Pub. Util. Code § 185033.) Before committing appropriated bond funds to construction, the Authority must approve and submit a detailed funding plan concerning the specific corridor or usable segment, to the Director of Finance, the peer review group established pursuant to section 185035 of the Public Utilities Code, and the policy committees with jurisdiction over transportation matters and the fiscal committees in both houses of the legislature. (§ 2704.08.) The funding plan must certify that the Authority has completed all necessary project level environmental clearances necessary to proceed to construction. (§ 2704.08, subd. (c)(2)(k).) The Authority cannot commit bond funds to construction until the Director of Finance concludes that "the plan is likely to be successfully implemented as proposed." (§ 2704.08, subd. (d).)

In April 2012 and April 2014, the Authority approved, published, and submitted its 2012 and 2014 Business Plans to the Legislature. (AG 001931, AG 011047.) These plans indicate that Phase I of the system is a "blended system" in which conventional and HSR trains will share tracks, stations, and other facilities. (AG 001936, 001940, 001941, 001948, 001971-001974, 011055, 011060, 011062.) In 2013, the Legislature passed SB 557 (enacting § 2704.76) which provides,

> "(b) Funds appropriated pursuant to Items 2660-104-6043, 2660-304-6043, and 2665-104-6043 of Section 2.00 of the Budget Act of 2012, to the extent those funds are allocated to projects in the San Francisco to San Jose segment, shall be used solely to implement a rail system in that segment that *primarily consists of a two-track blended system* to be used jointly by high-speed rail trains and Peninsula Joint Powers Board commuter trains (Caltrain), with the system to be contained substantially within the existing Caltrain right-of-way." (emphasis added.)

Consequently, the funds appropriated for the San Francisco to San Jose segment are for construction of a blended system.

Plaintiffs filed this matter on November 14, 2011, claiming that the high-speed rail project is not eligible to receive Bond Act funds. Accordingly, Plaintiffs allege it would be illegal to give Defendants these funds to construct the subject high-speed rail system in the Central Valley.

One of Plaintiffs' initially filed claims was previously resolved in this matter via separate trial and appeal to the Third District Court of Appeal. (*California High-Speed Rail Authority v. Superior Court* (2014) 228 Cal.App.4th 676.) The Court of Appeal directed this Court to enter judgment, "validating the authorization of the bond issuance...Further challenges by real parties in interest to the use of bond proceeds are premature." The court also ordered this Court to vacate its ruling requiring the Authority to redo the preliminary section 2704.08, subdivision (c) funding plan after the Legislature appropriated the bond funds. (*Id.* at 684.) In ruling on that matter, the Court of Appeal noted, "[j]udicial intrusion into legislative appropriations risks violating the separation of powers doctrine." (*Id.* at 714.) With regard to Proposition 1A, the court found, "the Bond Act does not curtail the exercise of the Legislature's plenary authority to appropriate."

The remaining claims in this matter are, per letter stipulation dated January 8, 2014:

1. "The currently proposed high-speed rail system does not comply with the requirements of Streets and Highways Code § 2704.09 in that it cannot meet the statutory requirement that the high-speed train system to [sic] be constructed so that the maximum nonstop service travel time for San Francisco – Los Angeles Union Station shall not exceed 2 hours and 40 minutes;
2. The currently proposed high-speed rail system does not comply with the requirements of Streets and Highways Code § 2704.09 in that it will not be financially viable as determined by the Authority and the requirement under § 2704.08(c)(2)(J) that the planned passenger service by the Authority in the corridors or usable segments thereof will not require a local, state, or federal operating subsidy;
3. The currently proposed "blended rail" system is substantially different from

the system whose required characteristics were described in Proposition 1A, and the legislative appropriation towards constructing this system is therefore an attempt to modify the terms of that ballot measure in violation of article XVI, section 1 of the California Constitution and therefore must be declared invalid;

4. If Plaintiffs are successful in any of the above three claims, Proposition 1A bond funds will be unavailable to construct any portion of the Authority's currently-proposed high-speed rail system. Under those circumstances, the $3.3 billion of federal grant funds will not allow construction of a useful project. Therefore, under those circumstances the Authority's expenditure of any portion of the $3.3 billion of federal grant funds towards the construction of the currently-proposed system would be a wasteful use of public funds and would therefore be subject to being enjoined under Code of Civil Procedure § 526a."

The parties briefed these issues and then presented oral argument on February 11, 2015. At the close of the hearing, the Court took the matter under submission.

II. Standard of Review

This case involves numerous claims concerning the compliance of the HSR system as currently proposed with the requirements of the Bond Act.

The interpretation of statutes in such a case is an issue of law on which the court exercises its independent judgment. (See, *Sacks v. City of Oakland* (2010) 190 Cal.App.4th 1070, 1082.) In exercising its independent judgment, the Court is guided by certain established principles of statutory construction, which may be summarized as follows.

The primary task of the court in interpreting a statute is to ascertain and effectuate the intent of the Legislature. (See, *Hsu v. Abbara* (1995) 9 Cal.4th 863, 871.) As this matter involves the interpretation of statutes approved by the voters, "ascertaining the will of the electorate is paramount." (*Cal. High-Speed Rail Authority*, 228 Cal.App.4th at 708.) "Statutes adopted by the voters must be construed liberally in favor of the people's right to exercise their reserved powers, and it is the duty of the courts to jealously guard the right of the people by resolving doubts in favor of the use of those reserved powers." (*Id.*)

However, whether a statute is enacted by the voters or passed by the Legislature, the same

basic rules of statutory construction apply. (*Id.*) The starting point for the task of interpretation is the wording of the statute itself, because these words generally provide the most reliable indicator of legislative, or elector, intent. (See, *Murphy v. Kenneth Cole Productions* (2007) 40 Cal.4th 1094, 1103.) The language used in a statute is to be interpreted in accordance with its usual, ordinary meaning, and if there is no ambiguity in the statute, the plain meaning prevails. (See, *People v. Snook* (1997) 16 Cal.4th 1210, 1215.) The court should give meaning to every word of a statute if possible, avoiding constructions that render any words surplus or a nullity. (See, *Reno v. Baird* (1998) 18 Cal.4th 640, 658.) Statutes should be interpreted so as to give each word some operative effect. (See, *Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 390.)

Beyond that, the Court must consider particular statutory language in the context of the entire statutory scheme in which it appears, construing words in context, keeping in mind the nature and obvious purpose of the statute where the language appears, and harmonizing the various parts of the statutory enactment by considering particular clauses or sections in the context of the whole. (See, *People v. Whaley* (2008) 160 Cal.App.4th 779, 793.)

To the extent this matter requires review of administrative actions taken by the Authority, the Court must determine whether those actions constitute an abuse of discretion, namely whether the action was arbitrary, capricious, entirely lacking in evidentiary support, unlawful, or procedurally unfair. (See *Khan v. Los Angeles City Employees' Retirement System* (2010) 187 Cal.App.4th 98, 105-06.)

III. Discussion

A. Requests for Judicial Notice

Plaintiffs have filed a request for judicial notice concerning five documents. Defendants have filed objections to items 1 and 5.

Item 1 requests the Court take judicial notice of the fact that, "beginning in 2011,

Congressional appropriations have provided no funding for the California High-Speed Rail Authority or its project, or any other high-speed rail project, and in fact have rescinded prior funding for high-speed rail projects." Defendants object on the basis that this is irrelevant to any material issue in this matter, contains evidence that was not before the Authority when it made its decision (pursuant to *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559), and that the proffered fact is not the proper subject of judicial notice. The Court agrees, based on its analysis herein, that this fact is not relevant to any material issue currently ripe for review in this matter.

Item 5 requests judicial notice of mapping by the California Department of Transportation of California urban areas, which mapping has been integrated into a set of online databases accessible through Google Earth. Defendants object on the basis that the maps are irrelevant to any material issue, the evidence was not properly before the Authority, the evidence is proffered to contradict the Authority's experts, Plaintiffs failed to comply with Rule of Court 3.1306, subdivision (c), and Plaintiffs improperly seek judicial notice of the accuracy of the maps. The Court agrees, based on its analysis herein, that this information is not relevant to any issue that is currently ripe for review.

The request for judicial notice is **GRANTED** as to items 2, 3, and 4, and **DENIED** as to items 1 and 5.

B. The Purpose of the Bond Act

Central to this matter is the answer to the following question: Does the Bond Act simply provide bond financing, conditional upon the satisfaction of certain design criteria, or does it reach further, providing the sole authority by which a high-speed rail system may be constructed by the Authority (regardless of the source of funding)? Plaintiffs urge this Court to read section 2704.04, subdivision (a) as a declaration of the Legislature's intent that any HSR system built in

California must comply with the Bond Act's pre-requisites. Defendants argue, instead, that the Bond Act only prohibits the use of Bond Act funds until the Authority has proven compliance with the system described therein. Consequently, Defendants contend, to the extent the Authority is moving forward with an HSR system utilizing non-Bond Act funds, there is no statutory prohibition to these actions.

In analyzing the meaning of the Bond Act, the Court looks first to the plain language of the relevant statutes. Section 2704.04, subdivision (a) provides,

> "It is the intent of the Legislature by enacting this chapter and of the people of California by approving the bond measure pursuant to this chapter to initiate the construction of a high-speed train system that connects the San Francisco Transbay Terminal to Los Angeles Union Station and Anaheim, and links the state's major population centers, including Sacramento, the San Francisco Bay Area, the Central Valley, Los Angeles, the Inland Empire, Orange County, and San Diego consistent with the authority's certified environmental impact reports of November 2005 and July 9, 2008."

Section 2704.04 is located within Streets and Highways Code Division 3, "Apportionment and Expenditure of Highway Funds," Chapter 20, "Safe, Reliable High-Speed Passenger Train Bond Act for the 21st Century," Article 2, "High-Speed Passenger Train Financing Program." Section 2704.04 is titled, "Legislative intent; Use of net proceeds from sale of bonds." All of these titles indicate that the Bond Act, including section 2704.04, addresses the *use of funds* to construct a HSR system.

Such an interpretation is supported by the information provided to the voters to assist in determining whether to vote "yes" or "no" on Proposition 1A. The summary in the voter information guide indicated that the voters needed to decide, "*...shall $9.95 billion in bonds be issued* to establish a clean, efficient high-speed train service linking Southern California, the Sacramento/San Joaquin Valley, and the San Francisco Bay Area..." (AG 000003)(emphasis added.) The descriptions of what a "yes" or "no" vote would mean indicate that the result of the vote would determine whether the state could sell $9.95 billion in general obligation bonds in

order to construct an HSR system. (*Id.*) There is no discussion that a "yes" vote on Proposition 1A prohibits the Legislature from utilizing its appropriation powers to construct an HSR system using funds other than the $9.95 billion in general obligation bonds.

As the Court of Appeal held in the prior trial on this matter, "[j]udicial intrusion into legislative appropriations risks violating the separation of powers doctrine." (*Cal. High-Speed Rail Authority*, 228 Cal.App.4th at 714.) "If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action." (*Id.*) The Court of Appeal further noted, "the only judicial standard commensurate with the separation of powers doctrine is one of strict construction to ensure that restrictions on the Legislature are in fact imposed by the people rather than by the courts in the guise of interpretation." (*Id.*)(citing *Schabarum v. California Legislature* (1998) 60 Cal.App.4th 1205, 1218.) With regard to Proposition 1A, the court read the plain language of the statute and found, "the Bond Act does not curtail the exercise of the Legislature's plenary authority to appropriate."[2]

There is nothing in the Bond Act or in the voter information guide that dictates the Legislature cannot use non-Bond Act funds to construct or plan an HSR system absent a showing that the system complies with the Bond Act requirements. The Bond Act did not establish the Authority, the Rail Act did. The Bond Act is, consequently, not the source of the Authority's responsibilities or "powers," which are described in the Rail Act, via Public Utilities Code section 185034. The Bond Act is simply that: a Bond Act. The Authority may not spend any of the $9.95 billion in general obligation bonds absent a showing of compliance with the numerous requirements described in the Bond Act. Additionally, all parties agree that Bond Act proceeds have not been used in the challenged segments and are not currently at issue, as the Authority has

[2] While this ruling concerned whether the Legislature was prohibited from appropriating funds in the absence of a preliminary funding plan, the absence of a clear directive to abdicate appropriation power with regard to non-bond sources leads to the same conclusion here.

not prepared the required funding plans pursuant to section 2704.08. (Opening Brief, p. 3.)

The Court finds that the Bond Act describes criteria that must be met in order to finance an HSR system with Bond Act funds. The Bond Act does not set "restrictions on what type of system [the Authority] could construct regardless of its funding source." (Opening Brief, p. 1.)

It is with this determination in mind that the Court now turns to Plaintiffs' challenges to the HSR system as currently proposed.

C. The Blended System

i. *2005 and 2008 EIRs*

Plaintiffs argue the proposed "blended system" is not consistent with the Bond Act because it fails to comply with the Authority's certified Environmental Impact Reports of November 2005 and July 9, 2008, as required by section 2704.04, subdivision (a).[3] Because the Legislature has mandated the blended system via SB 557 (enacting § 2704.76), neither party argues that this issue is not ripe for review. Accordingly, the Court considers whether the statutorily mandated blended system violates the Bond Act as approved by the voters.

Section 2704.04, subdivision (a) provides,

> "It is the intent of the Legislature by enacting this chapter and of the people of California by approving the bond measure pursuant to this chapter to initiate the construction of a high-speed train system that connects the San Francisco Transbay Terminal to Los Angeles Union Station and Anaheim, and links the state's major population centers, including Sacramento, the San Francisco Bay Area, the Central Valley, Los Angeles, the Inland Empire, Orange County, and San Diego *consistent with the authority's certified environmental impact reports of November 2005 and July 9, 2008.*" (emphasis added.)

This section, Plaintiffs argue, evidences the Legislature and voters' intent and expectations that the HSR system will be consistent with the 2005 and 2008 EIRs. The 2005 EIR includes cross-sections for the "Caltrain Shared-Use Alignment" showing four tracks throughout

[3] Defendants maintain Plaintiffs may not argue that the blended system fails to comply because this claim is not squarely within the January 8, 2014 stipulated issues. The Court disagrees and finds that number 3 may be interpreted broadly to allow for Plaintiffs' arguments that the blended system cannot comply with the Bond Act.

the San Francisco to San Jose segment. (H7.011060-H7.011074.) The 2008 EIR includes a set of typical cross sections for the San Francisco to San Jose segment, again showing four tracks. (H7.013158 – H7.013175.) The 2008 EIR further provides that "[t]he Draft Program EIR/EIS analyzes one alignment option between San Francisco and San Jose along the San Francisco Peninsula that would utilize the Caltrain rail right-of-way, and share tracks with express Caltrain commuter rail services...The alignment between San Francisco and San Jose *is assumed to have 4-tracks*, with the two middle tracks being shared by Caltrain and HST and the outer tracks used by Caltrain..." (H7.014212)(emphasis added.)

However, in 2012, the Authority modified the 2005 and 2008 EIRs via the 2012 Bay Area to Central Valley Partially Revised Final Program EIR. An initial blended system (two-tracks shared by Caltrain and HSR trains) in the San Francisco Peninsula is discussed at length in this 2012 EIR. (H7.018234-35, H7.018239-40.) The issue before the Court is whether section 2704.04, subdivision (a) requires the four-track alignment discussed in the 2005 and 2008 EIRs; or whether section 2704.04 must be read in conjunction with section 2704.06 to allow for project modification via subsequently modified environmental studies.

Section 2704.06 is titled, "Availability of proceeds for planning and capital costs," and provides,

> "The net proceeds received from the sale of nine billion dollars ($9,000,000,000) principal amount of bonds authorized pursuant to this chapter, upon appropriation by the Legislature in the annual Budget Act, shall be available, and subject to those conditions and criteria that the Legislature may provide by statute, for (a) planning the high-speed train system and (b) capital costs set forth in subdivision (c) of Section 2704.04, consistent with the authority's certified environmental impact reports of November 2005 and July 9, 2008, *as subsequently modified pursuant to environmental studies conducted by the authority.*" (emphasis added.)

Defendants argue section 2704.04, subdivision (a) must be read in conjunction with 2704.06 in order to give meaning to the words "*as subsequently modified pursuant to environmental studies conducted by the authority.*" To hold that the HSR system can only qualify

for Bond Act funds if it meets the design proposed by the 2005 and 2008 EIRS would read the modification language out of section 2704.06. Defendants also contend the Legislature has statutory and Constitutional authority to amend the Bond Act to require a blended system.

When considering a statutory scheme, the Court should not construe individual statutes in isolation, but instead should view the Act as a whole. (See, *People v. Whaley* (2008) 160 Cal.App.4th 779, 793.) The court should give meaning to every word of a statute if possible, avoiding constructions that render any words surplus or a nullity. (See, *Reno v. Baird* (1998) 18 Cal.4th 640, 658.) Statutes should be interpreted so as to give each word some operative effect. (See, *Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 390.)

Plaintiffs argued at length during oral argument that section 2704.06 refers only to the receipt of bond funds, while section 2704.04 provides the general legislative intent that the HSR system comply with the 2005 and 2008 EIRs. Because the schematics included in the 2005 and 2008 EIRs refer only to four-track systems, Plaintiffs argue, a two-track blended system violates the general Legislative intent limiting any HSR system the Authority completes. This argument is contrary to the Court's finding above that the Bond Act concerns itself solely with the use of Bond Act funds. As sections 2704.04 and 2704.06 must be read in the context of the use of Bond Act funds, they must be read together, giving meaning to every word.

Section 2704.06 allows expenditure of Bond Act funds on a system that is "consistent with the authority's certified environmental impact reports of November 2005 and July 9, 2008, *as subsequently modified pursuant to environmental studies conducted by the authority.*" To read section 2704.04 as urged by Plaintiffs means that Bond Act funds *cannot* be expended on a system that complies with a modified EIR if it is not consistent with the 2005 and 2008 EIRs. Essentially, Plaintiffs ask this Court to read the words "as subsequently modified pursuant to environmental studies conducted by the authority" out of the Bond Act. Such a reading is

contrary to the direction that the Court should avoid constructions that render any words surplus or a nullity.

Reading section 2704.04 and 2704.06 together, the Court finds that the Authority may use Bond Act funds to construct an HSR system that is compliant with the 2005 and 2008 EIRs, as subsequently modified. As the 2012 Bay Area to Central Valley Partially Revised Final Program EIR modified the subject EIRs to provide for a two-track blended system, in conformance with the provision of section 2704.06, the requirement of a blended system via SB 557 does not violate the Bond Act.

ii. *Minimum headway requirement and trip-time between San Francisco and San Jose*

Defendants argue Plaintiffs' claims concerning the blended system headway and trip-time requirements are not ripe. The Court will consider both claims together.

Plaintiffs contend the blended system violates the Bond Act because it cannot meet the system requirements for operating headways. Section 2704.09, subdivision (c) provides, that the "[t]he high-speed train system to be constructed pursuant to this chapter shall be designed to achieve the following characteristics... Achievable operating headway (time between successive trains) shall be five minutes or less." Plaintiffs argue the blended system can only accommodate a maximum of ten trains per hour, four of which would be HSR trains. (AG 013028, 013074.) Accordingly, there is a fifteen-minute delay between HSR trains on the blended system, in violation of section 2704.09, subdivision (c).

Defendants argue that this, and the remainder of Plaintiffs' arguments are not yet ripe, as the system design Plaintiffs challenge, "today is not final, but continues to evolve and change" making the claims not reviewable. (Opposition, p. 13.) Defendants further contend, "[w]hen the Authority commits bond funds to a specific plan pursuant to section 2704.08, subdivision (d), the

validity of those expenditures will be reviewable." (*Id.*) Defendants argue, "[t]he only final design decisions the Authority has made involve the Merced-Fresno and Fresno-Bakersfield segments of the system, which Plaintiffs do not challenge." (*Id.* at p. 15, FN 11.)

The evidence before the Court indicates that the blended HSR system, as currently proposed, can accommodate ten trains in an hour. This allows for one train approximately every six minutes, with a delay between HSR trains of approximately fifteen minutes. (AG 013028, 013074.) Plaintiffs argue this demonstrates that the Authority cannot currently prove the blended HSR system complies with Section 2704.09, subdivision (c)'s headway requirement. Defendants contend that these claims are premature, and, that if they are ripe, the definition of "train" includes non-HSR trains, and with imminent technology, the system will be able to improve its six-minute headway to the required five-minute headway. Consequently, Defendants argue the system is "designed to achieve" five minute or less operating headway between trains, even though these trains are not all HSR trains.

With regard to operating time between San Francisco and San Jose, section 2704.09, subdivision (b)(3) requires the system to be designed to achieve maximum nonstop service travel time that shall not exceed thirty minutes. In January 2013, the Authority's consultants performed a simulation analysis to determine whether the blended system could currently comply with this requirement. (AG 022899.) Using a travel speed of 110 mph, the memorandum concluded the nonstop travel time would be 32 minutes. Using a speed of 125 mph, the travel time could be reduced to 30 minutes. Via a revised February 7, 2013 memorandum, the Authority's consultants concluded that, using a travel time of 110 mph the nonstop travel time would be 30 minutes. (AG 022912.) There is no clear explanation for this change in conclusions, other than an email exchange requesting that the consultants disregard the 125 mph proposal. (AG 022909.)

On February 11, 2013, this 30-minute travel time at 110 mph was presented to the

Authority via a memorandum. The memorandum indicated that "[f]urther improvements may be achievable through improved train performance, use of tilt technology, more aggressive alignments and higher maximum speeds." (AG 017435.)

Most troubling about this study is the fact that the Authority relied on a 4th and King Caltrain Station as the location in San Francisco from which the travel time should be calculated. (AG 013030, AG 022903, AG 013038.) The Authority acknowledged this fact during oral argument on this matter, and argued that section 2704.09, subdivisions (b)(1) and (3) do not require a specific San Francisco terminal, only requiring that the calculations be between "San Francisco" and the indicated destination. Plaintiffs argue the Bond Act requires the trip to start at the San Francisco Transbay Terminal, a location that is 1.3 miles further north, thus extending the time it will take a train to complete the required distance.

Section 2704.04, subdivision (b)(2) provides that "Phase 1 of the high-speed train project is the corridor of the high-speed train system between San Francisco Transbay Terminal and Los Angeles Union Station and Anaheim." Subdivision (b)(3) identifies specific high-speed train corridors, and lists, "(B) San Francisco Transbay Terminal to San Jose to Fresno." Subdivision (a) identifies that the purpose behind the Bond Act is "construction of a high-speed train system that connects the San Francisco Transbay Terminal to Los Angeles Union Station and Anaheim..." Consequently, it appears that the intent of the Bond Act was for the system to extend, in San Francisco, to the Transbay Terminal, not stop 1.3 miles short at a 4th and King Caltrain Station. This specific language and indication of intent does not conflict with a general referral to "San Francisco" in section 2704.09 subdivision (b)(1) and (3). It is reasonable to interpret this reference to "San Francisco" as indicating the Transbay Terminal identified as the intended San Francisco location in section 2704.04.

It appears, at this time, that the Authority does not have sufficient evidence to prove the

blended system can currently comply with all of the Bond Act requirements, as they have not provided analysis of trip time to the San Francisco Transbay Terminal, and cannot yet achieve five-minute headways (even allowing for the definition of "train" to include non-HSR trains). However, as Plaintiffs acknowledged during oral argument, the Authority *may be able* to accomplish these objectives at some point in the future. This project is an ongoing, dynamic, changing project. As the Court of Appeal noted, "[b]ecause there is no final funding plan and the design of the system remains in flux…we simply cannot determine whether the project will comply with the specific requirements of the Bond Act…" (*California High-Speed Rail Authority*, 228 Cal.App.4th at 703.)

There is no evidence currently before the Court that the blended system *will not* comply with the Bond Act system requirements. Although Plaintiffs have raised compelling questions about potential future compliance, the Authority has not yet submitted a funding plan pursuant to section 2704.08, subdivisions (c) and (d), seeking to expend Bond Act funds. Thus, the issue of the project's compliance with the Bond Act is not ripe for review. Currently, all that is before the Court is conjecture as to what system the Authority will present in its request for Bond Act funds. This is insufficient for the requested relief.

D. Plaintiffs' remaining claims

Plaintiffs' remaining claims include:

1. The Authority has not proven that, pursuant to section 2704.09, subdivision (g), the HSR system will be financially viable.
2. The HSR system as proposed cannot meet the San Francisco-Los Angeles travel time required by the Bond Act.

For the reasons discussed above, the Court finds these claims are also not ripe for review. As the Court determined first in this ruling, the Bond Act is just that: a bond act providing for bond financing of an HSR system. Until the Authority attempts to utilize Bond Act funds, pursuant to the prerequisites identified in section 2704.08, the financial viability and San

Francisco-Los Angeles corridor designs remain in flux. The record provides, for example, that the Authority continues to focus on system trip time and that the analysis will change as the project changes. (AG 017554, AG 017556.)

As this Court has previously indicated, the key question at this time is whether the Authority has taken any action that precludes compliance with the Bond Act. Plaintiffs have failed to provide evidence at this time that the Authority has taken such an action. This is because, as of today, there are still too many unknown variables, and in absence of a funding plan, too many assumptions that must be made as to what the Authority's final decisions will be. While Plaintiffs have produced evidence that raises substantial concerns about the currently proposed system's ability to ultimately comply with the Bond Act, the Authority has yet to produce the funding plan that makes those issues ripe for review. Thus, Plaintiffs' claims must be denied.

IV. Conclusion

Via Proposition 1A, the voters enacted the "Safe, Reliable High-Speed Passenger Train Bond Act for the 21st Century." This Bond Act provided for financing of a high-speed rail system, to be designed and constructed by the High-Speed Rail Authority (established by the 1996 Rail Act). In order to qualify for financing, the Authority must be able to prove the system it proposes can attain certain standards, including performance times, and financial viability. While the blended system does not appear to have been initially considered by the 2005 and 2008 EIRs, section 2704.06 allows for a system that complies with the EIRs, *as modified*. The blended system complies with the 2012 modification, thus complying with the Bond Act requirements.

As of the date of this ruling, the Authority has not submitted a section 2704.08 funding plan, and consequently has not sought to utilize any Bond Act funds on the challenged system. To the extent non-Bond Act funds are being expended, Plaintiffs have not identified any basis upon which this Court should enjoin the use of said funds. The HSR system is not final, but instead

continues to evolve and change. As such, the issue of whether the HSR system complies with the Bond Act is not ripe for review.

The Petition and Complaint are **DENIED**.

In accordance with Local Rule 1.06, counsel for Defendants is directed to prepare an order denying the petition and complaint, incorporating this ruling as an exhibit to the order, and a separate judgment; submit them to counsel for Plaintiffs for approval as to form in accordance with Rule of Court 3.1312(a); and thereafter submit them to the Court for signature and entry in accordance with Rule of Court 3.1312(b).

DATED: March 4, 2016

MICHAEL P. KENNY

Judge MICHAEL P. KENNY
Superior Court of California,
County of Sacramento

CERTIFICATE OF SERVICE BY MAILING
(C.C.P. Sec. 1013a(4))

I, the undersigned deputy clerk of the Superior Court of California, County of Sacramento, do declare under penalty of perjury that I did this date place a copy of the above-entitled **RULING ON SUBMITTED MATTER** in envelopes addressed to each of the parties, or their counsel of record as stated below, with sufficient postage affixed thereto and deposited the same in the United States Post Office at 720 9th Street, Sacramento, California.

STUART M. FLASHMAN
Attorney at Law
5626 Ocean View Drive
Oakland, CA 94618-1533

MICHAEL J. BRADY
Attorney at Law
1001 Marshall Street, Suite 500
Redwood City, CA 94063-2052

SHARON L. O'GRADY
Deputy Attorney General
455 Golden Gate Avenue, Ste 11000
San Francisco, CA 94102-7004

TAMAR PACHTER
Supervising Deputy Attorney General
455 Golden Gate Avenue, Ste 11000
San Francisco, CA 94102-7004

RAYMOND L. CARLSON, ESQ.
Griswold LaSalle Cobb Dowd & Gin LLP
111 E. Seventh Street
Hanford, CA 93230

THOMAS FELLENZ
Chief Legal Counsel
770 L Street, Suite 800
Sacramento, CA 95814

Superior Court of California,
County of Sacramento

Dated: March 4, 2016

By: S. LEE
Deputy Clerk

DECLARATION OF SERVICE

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. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On March 17, 2016, I served the attached

[PROPOSED] JUDGMENT DENYING PETITION AND COMPLAINT

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, addressed as follows:

Stuart M. Flashman, Esq.
Law Offices of Stuart M. Flashman
5626 Ocean View Drive
Oakland, CA 94618-1533
E-mail Address: Stu@stuflash.com
Attorney for Petitioners

Michael J. Brady, Esq.
Ropers, Majeski, Kohn & Bentley - Redwood City
1001 Marshall St, Suite 500
Redwood City, CA 94063
E-mail Address: mbrady@rmkb.com
Attorneys for Petitioners

Raymond L. Carlson, Esq.
Griswold, LaSalle, Cobb, Dowd & Gin, L.L.P.
111 E 7th Street
Hanford, CA 93230
E-mail Address:
carlson@griswoldlasalle.com
Attorneys for Kings County Water District

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 March 17, 2016, at San Francisco, California.

Susan Chiang
Declarant

Signature

EXHIBIT 5

DEPARTMENT OF FINANCE
OFFICE OF THE DIRECTOR

EDMUND G. BROWN JR. • GOVERNOR
STATE CAPITOL ■ ROOM 1145 ■ SACRAMENTO CA ■ 95814-4998 ■ WWW.DOF.CA.GOV

March 3, 2017

Jeff Morales
Chief Executive Officer
California High-Speed Rail Authority
770 L Street, Suite 620
Sacramento, CA 95814

San Francisco to San Jose Peninsula Corridor Funding Plan

Dear Mr. Morales:

In 2008, California voters approved $9.9 billion in bond funding for high-speed rail with the Safe, Reliable High-Speed Passenger Train Bond Act for the 21st Century (Proposition 1A). Under Proposition 1A, as outlined in Streets and Highways Code Section 2704.08(d), the Director of Finance must review a funding plan for each corridor or segment to determine if "the plan is likely to be successfully implemented" prior to the Authority's expenditure of Prop 1A bonds for construction under that plan.

The High-Speed Rail Authority submitted a funding plan for the San Francisco to San Jose Peninsula Corridor to the Department of Finance on January 3, 2017. Proposition 1A requires that an independent consultant prepare a report assessing each funding plan. Finance has received and reviewed the independent consultant's report on the Peninsula Corridor funding plan. Finance also received and reviewed comments by the Joint Legislative Budget Committee, other legislators, the Legislative Analyst's Office, the Legislature's California High-Speed Rail Peer Review Group, and the Community Coalition on High-Speed Rail. Finally, Finance received and reviewed the Authority's response to the Legislative Analyst's Office's analysis of the plan, which attached the independent consultant's supplemental report evaluating projections of revenue and operating profit/loss.

Requirements under the Funding Plan
Proposition 1A requires the Authority to submit a funding plan that specifies the usable segment, estimates segment construction costs, identifies funding sources, provides a report on projected ridership and operating revenue, describes changes since the preliminary 2011 funding plan, and outlines contract terms. These elements are reviewed below.

Usable Segment and Construction Costs
The Peninsula Corridor funding plan identifies the segment as from the 4th and King Station in San Francisco to Tamien Station in San Jose, which includes high-speed rail stations at 4th and King Station in San Francisco and Diridon Station in San Jose. As for estimated construction costs, the funding plan estimates that it will cost $1.98 billion to design and construct the electrified infrastructure and purchase vehicles.

Funding Sources
The funding plan for this segment identifies the amount, source, and estimated time of receipt for all construction funding. State, local, and federal funding have all been committed to this Project.

The Legislature has appropriated $600 million of Proposition 1A bond funding for the Project. Proposition 1A states that, where feasible, the system should be placed within existing transportation corridors. The High-Speed Rail Authority's 2012 Business Plan outlined "bookend" projects in existing rail corridors where the Caltrain and Metrolink services operate which, after suitable investments are made, could accommodate high-speed rail service. The Legislature appropriated $1.1 billion in bond funds for these bookend projects in Chapter 152, Statutes of 2012 (SB 1029). Chapter 216, Statutes of 2013 (SB 557), apportioned $600 million of this amount for the electrification of Caltrain's rail service.

In addition to $600 million in Proposition 1A funding, the state has committed up to $113 million in Cap and Trade auction proceeds or other Authority resources, a $20 million grant under the Transit and Intercity Rail Capital Program, and $8 million of Prop 1B bond funding. Various local sources have committed a total of $262 million. The federal government is the source of $331 million in Federal Transit Administration Formula Program funds and $647 million in Section 5309 Core Capacity funds.

Caltrain's application for the federal Core Capacity funds has progressed to a late phase in the grant approval process and Caltrain had secured $73 million of the $647 million in funding. However, in a letter dated February 17, 2017, the Federal Transit Administration informed Caltrain that FTA is deferring a decision on whether to execute the Full Funding Grant Agreement for the remaining funds so that the Project may be considered in conjunction with the development of the President's Fiscal Year 2018 Budget. While past transportation projects have received federal funding when they have advanced to this stage of the grant approval process, the FTA's letter has created uncertainty as to whether the remaining Core Capacity funds—representing nearly one-third of the segment's cost—will be provided.

Ridership and Operating Revenue
Proposition 1A requires that the funding plan address any ridership or operating costs for the Authority's operation of high-speed rail on the segment. The Peninsula funding plan does not specifically address ridership and operating costs because the Authority is not planning to operate high-speed rail passenger service on the Peninsula until the Valley to Valley line is completed. Chapter 744, Statutes of 2016 (AB 1889), clarifies that the Authority may use Proposition 1A for:

> *"capital cost for a project that would enable high-speed trains to operate immediately or after additional planned investments are made on the corridor or useable segment thereof and passenger train service providers will benefit from the project in the near-term."*

The funding plan notes that Caltrain will be able to start electrified service on this segment immediately upon completion of the Project, and indicates the Project will reduce overall run times and increase Caltrain ridership. The independent consultant concluded that the Project "will provide significant near term benefit to . . . [Caltrain's] passenger service operations" and that it will "provid(e) a foundation for eventual HSR service." The Authority's 2011 preliminary funding plan and its 2016 Business Plan indicated the Authority's rail service will not require a subsidy.

In response to requests for additional analysis, the independent consultant prepared a supplemental report evaluating the Authority's projections of revenue and operating profit/loss for the funding plan. This report confirms the Authority's conclusion that the planned level of service on the Peninsula is likely to be sufficient to operate without a subsidy after an initial start-up period.

Changes from the 2011 Funding Plan
Proposition 1A requires the Authority to describe any changes in this funding plan that differ materially from the funding plan required under Streets and Highways code section 2704.08(c). However, because the Legislature appropriated the funding for the Project without a plan, there is nothing against which to compare this funding plan.

Contract Terms
The funding plan includes a summary of the terms and conditions of the agreements the Authority has entered into for the construction or operation of the system, including a summary of the terms and conditions of the agreements that the Authority has entered into with Caltrain for the Project. Additionally, the Plan includes a summary of the construction agreements that Caltrain has entered into for the Project.

Risk Management
The independent consultant reviewed the Project and funding plan, identified risks, and offered strategies to address these risks. Additionally, the consultant concluded that Caltrain "has a well-developed Risk Management Process." The Authority has indicated it will continue to monitor risks to the project overall and the segment identified in the plan in its biennial Business Plans and Project Update Reports. Finally, Proposition 1A requires the Authority to promptly update the Administration and Legislature when events occur that could endanger the completion of the segment outlined in the funding plan and provide options to address these challenges.

Conclusion
As noted above, the February 17, 2017 letter from the Federal Transit Administration deferring the execution of the grant agreement to provide Core Capacity funding leaves a significant gap in the Project's financing plan. Absent this federal decision, the Peninsula funding plan would likely have been successfully implemented as proposed. That is, Caltrain would have been able to enter commitments to expend the Proposition 1A bond funds along with the other sources of funding. However, the federal decision prevents me from reaching a conclusion regarding the Project's financial viability at this time. Therefore, solely due to the federal decision, I am deferring action on the funding plan. This will allow more time for Caltrain to resolve the situation with the federal authorities. When the federal funding for the Project is secured, please inform me so I can make a final determination expeditiously.

Sincerely,

MICHAEL COHEN
Director

DECLARATION OF SERVICE BY E-MAIL and OVERNIGHT COURIER

Case Name: **Tos, John, et al. v. California High-Speed Rail Authority**
No.: **34-2016-00204740**

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]**. 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 April 11, 2017, I served the attached **DEFENDANT'S REQUEST FOR JUDICIAL NOTICE, SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES, AND DECLARATION OF COUNSEL** 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:

Michael J. Brady
Attorney at Law
Ropers, Majeski, Kohn & Bentley - Redwood City
1001 Marshall St, Suite 500
Redwood City, CA 94063
E-mail Address: *mbrady@rmkb.com*

Stuart M. Flashman
Attorney at Law
Law Offices of Stuart M. Flashman
5626 Ocean View Drive
Oakland, CA 94618-1533
E-mail Address: *Stu@stuflash.com*

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 April 11, 2017, at San Francisco, California.

Susan Chiang
Declarant

Signature

SA2016104863
20966148.doc