

1 THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
2 FOR THE COUNTY OF SACRAMENTO
3 HON. MICHAEL KENNY, JUDGE DEPARTMENT 31

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5 JOHN TOS, AARON FUKUDA; AND COUNTY OF)
6 KINGS, A POLITICAL SUBDIVISION OF THE)
7 STATE OF CALIFORNIA)

8 PLAINTIFFS)

9)NO. 34-2011-00113919

10 VERSUS)

11 CALIFORNIA HIGH SPEED RAIL AUTHORITY;)
12 JEFF MORALES, CEO OF THE CHSRA;)
13 GOVERNOR JERRY BROWN; STATE TREASURER,)
14 BILL LOCKYER; DIRECTOR OF FINANCE, ANA)
15 MATASANTOS; SECRETARY (ACTING) OF)
16 BUSINESS, TRANSPORTATION AND HOUSING)
17 BRIAN KELLY; STATE CONTROLLER, JOHN)
18 CHIANG; AND DOES I-V, INCLUSIVE)
19 DEFENDANTS)

20 _____)

21 HIGH-SPEED RAIL AUTHORITY and)
22 HIGH-SPEED PASSENGER TRAIN FINANCE)
23 COMMITTEE, for the STATE OF CALIFORNIA)

24 PLAINTIFFS)

25 VERSUS)

26 ALL PERSONS INTERESTED IN THE MATTER)
27 OF THE VALIDITY OF THE AUTHORIZATION)
28 AND ISSUANCE OF GENERAL OBLIGATION)
BONDS TO BE ISSUED PURSUANT TO THE)
SAFE, RELIABLE HIGH-SPEED PASSENGER)
TRAIN BOND ACT FOR THE 21ST CENTURY)
AND CERTAIN PROCEEDINGS AND MATTERS)
RELATED THERETO,)

DEFENDANTS)

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30 FRIDAY, JULY 25, 2014

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32 REPORTER'S TRANSCRIPT OF PROCEEDINGS

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 (Telephonic appearance)

KATHERINE GREINER, CSR #3690

1 FRIDAY, JULY 25, 2014

2 --o0o--

3 The matter of John Tos, Aaron Fukuda, and County of
4 Kings, A Political Subdivision of the State of California,
5 Plaintiffs versus, California High Speed Rail Authority,
6 Jeff Morales, CEO of the CHSRA, Governor Jerry Brown; State
7 Treasurer, Bill Lockyer; Director of Finance, Ana
8 Matasantos; Secretary of Business, Transportation and
9 Housing, Brian Kelly; State Controller, John Chiang, and
10 Does I-V, Inclusive, Defendants, Case Number
11 34-2011-00113919, came on regularly this day before
12 Honorable Michael P. Kenny, Judge of the Superior Court of
13 the State of California, for the County of Sacramento, in
14 Department 31 thereof.

15 The Plaintiffs were represented by Stuart M.
16 Flashman, and Michael Brady, Attorneys at Law, acting as
17 their counsel.

18 The Respondents were represented by Sharon O'Grady
19 and Tamar Pachter, Deputy Attorney Generals, Office of the
20 Attorney General, Department of Justice acting as their
21 counsel.

22 The Defendant, California High-Speed Rail Authority,
23 was represented by Stephen C. Neal and Kathleen H.
24 Goodhard, Attorneys at Law acting as their counsel.

25 The Defendant, California High-Speed Rail Authority,
26 was represented by Thomas Fellenz, Attorney at Law acting
27 as their counsel.

28 Raymond L. Carlson, Attorney at Law, Amicus Counsel,

1 representing Kings County Water District, telephonic
2 appearance.

3 Katherine Greiner, Official Shorthand Reporter, was
4 personally present upon the Court and acting.

5 The following proceedings were had, to wit:

6 THE COURT: Good morning.

7 All right. Let's call the matter of John Tos versus
8 California High Speed Rail Authority. The parties could
9 please identify themselves for the record.

10 Start right hand side, counsel.

11 MR. BRADY: Michael Brady counsel for Plaintiffs.

12 MR. FLASHMAN: Stuart Flashman for the Plaintiffs
13 John Tos, et al.

14 MS. O'GRADY: Sharon O'Grady, Deputy Attorney
15 General for Respondents. And with me co-counsel Stephen
16 Neal of the Cooley firm for High Speed Rail Authority.

17 MR. NEAL: Good morning, your Honor.

18 THE COURT: Good morning.

19 MR. CARLSON: Raymond L. Carlson on behalf of
20 Amicus, Kings County Water District.

21 THE COURT: Anyone else wish to go on the record?

22 All right. Counsel who would like to begin?

23 MS. O'GRADY: Your Honor, we'd like to begin with
24 the motion. And the parties have a fundamental
25 disagreement about the course of this litigation.

26 Petitioners believe that they're entitled to a trial De
27 Novo complete with written evidence and testimony that was
28 never submitted to the Authority in the course of its

1 decision making.

2 Respondents believe that this is a mandamus matter
3 that needs to be considered on the Administrative record.
4 The standard of review is whether the Authority's decision
5 is supported by substantial evidence was arbitrary and
6 capricious and that can only be determined by what the
7 Authority had in front of it and nothing -- testimony and
8 documents created later that were never submitted to them
9 when they made the decision.

10 This is a huge infrastructure project. To
11 complete -- this design of the complete system is not even
12 finished. But as the Authority proceeds with step by step
13 with its decision making, it does so with the aim of
14 complying with the design criteria of the Bond Act. And
15 its decision that it is in compliance are reflective in its
16 Business Plan and Funding Plan.

17 When it does this it's assisted by -- it has a lot
18 of input. It has some of the best high speed rail experts
19 in the world. It has experienced staff. It's subject to
20 oversight by the general accountability office and the
21 state auditor, legislatively mandated Peer-Review Group,
22 the Department of Finance and the Legislature itself.

23 THE COURT: Let me interrupt you because I do
24 understand that. Let me, I guess, pose a question that
25 I've been wrestling with all week and maybe the parties can
26 assist me. What is the record on a project which is
27 evolving and dynamic?

28 And the difficulty I'm having, is that this Court

1 normally sees records for discreet projects, projects that
2 essentially have been completed and the Court can then
3 basically review that record and review the issues
4 associated with that record and make a determination as to
5 whether or not compliance with the law has occurred.

6 And in this particular case we don't have that. We
7 have an on-going project. We have Business Plans in 2012,
8 we have Business Plans in 2014, we'll have additional
9 Business Plans in the future.

10 And, yet, what the Court is being asked to do is to
11 make a determination with regard to compliance with Prop 1A
12 based on a project which has been approved by the Authority
13 to this point and yet which the Court recognizes is going
14 to continue to evolve.

15 So how does the Court basically make a determination
16 and what is the determination? Is the determination that
17 in fact a future High Speed Rail project which is projected
18 is improper? Is proper? Where is this at? There's a
19 temporal aspect to the parties appearance before the Court
20 today which seems to be absent in terms of how this has
21 been briefed.

22 Is the Court to basically simply anticipate, assume
23 where this is going? Maybe you can each give me some sense
24 of that, because the difficulty for this Court is I've
25 never seen something like this. I've seen lots of cases in
26 the past but there's always a discreet process with a
27 discreet record.

28 Here, what the Authority seems to be asking is for a

1 discreet report for an evolving project. And what the
2 Petitioner's seem to be asking for is an open record for a
3 discreet decision at this point in time and needs to
4 recognize that the project is going to continue to evolve.

5 MS. O'GRADY: Your Honor, that actually goes to a
6 ripeness issue which is whether this is now the time to
7 make these decisions. But in terms of where we are now,
8 everything the Agency does is supported by a record.

9 We have a complete record for the 2014 Business Plan
10 which is the current status of the plan. There will be a
11 plan in 2016, but no one here today can tell you what that
12 plan is going to be and how it will deviate.

13 The best we can do is to present what the Authority
14 has now and all of that is supported by an Administrative
15 record. And no extra record evidence is going to add
16 anything legitimate to that because the future is unknown.

17 THE COURT: Mr. Flashman, you want to weigh in on
18 this?

19 MR. FLASHMAN: Yes, your Honor. It is an
20 interesting question and I think the answer is that it's
21 true that this project does evolve, it does change
22 somewhat, but the main thrust of the project is gradually
23 as it was jelly. And as it jells we can look at that and
24 say, is this jelling into something that is going to
25 satisfy the ballot measure or not. And our position
26 basically --

27 THE COURT: Let me interrupt you on that.

28 MR. FLASHMAN: Okay.

1 THE COURT: I don't disagree with that question but
2 with one additional qualification. At what point is the
3 Court making that determination?

4 MR. FLASHMAN: I think what the Court needs to look
5 at and in some ways this is very analogous to the HAPA v
6 ACTA case. Because you have to ask well, when does this
7 case ripen? At what point can you say this has gotten to a
8 point where these decisions have effectively been made,
9 whether they've been formally made or not, they have
10 effectively been made and certain aspects of this project
11 are locked in enough that you can say regardless of what
12 other little changes may be made here and there, enough --
13 we know enough about this project to be able to say
14 either -- well, you can say one of three things, either it
15 is going to satisfy Prop 1A requirements, it's not going to
16 satisfy Prop 1A requirements, or it is potentially possible
17 you end up saying, it's too early to tell.

18 You know, maybe, for example, for the two hours and
19 forty minutes we can say it's going to be somewhere between
20 two hours and 30 minutes and three hours and we can't tell
21 yet exactly where in that frame it's going to be, in which
22 case you have to say this is not ripe.

23 THE COURT: But doesn't that argue for what the
24 Authority has been stating, which is that the Court should
25 take a finite period of time, for example, the adoption of
26 the 2014 Business Plan, the record should be the record
27 that is before the Authority for the 2014 Business Plan,
28 and the questions that have been posed to the Court are

1 whether or not the particular project criteria can be met
2 within the context of that 2014 Business Plan?

3 And, in fact, if you prevail you prevail. If you
4 don't prevail you have another opportunity to potentially
5 down the road depending on what comes out in the 2016
6 Business Plan or some other adoption or action by the
7 Authority?

8 MR. FLASHMAN: I think part of the problem is that
9 we don't see this as just being an action by the Authority
10 which is why we have a lot of defendant's named not just
11 the Authority's. Because there are a lot of other players
12 here that have a say so in what goes forward here.

13 So, for example, the 2012 Business Plan and the 2014
14 Business Plan were both presented to the Legislature. And
15 in response to that, the Legislature has, in fact, made
16 appropriation. They made an appropriation in 2012 and they
17 made another appropriation in 2014. And those
18 appropriations are really what says this is going forward.

19 Let's take the 2012 Business Plan and the 2012
20 appropriation. So the Authority submitted a Business Plan
21 and a Funding Plan to the Legislature in 20 -- well, in
22 2011. And then it submitted a final Business Plan, a
23 revised Business Plan in 2012. And then the Legislature
24 looked at all that and looked at other things, had
25 hearings, you know, legislative hearings and had floor
26 discussion, floor debate and at the end of that whole thing
27 the Legislature decided we're going to go ahead and approve
28 that appropriation.

1 And then sent it to the governor. And the governor
2 looked at it all -- we don't know what exactly he had
3 before him because that's not -- certainly wasn't a public
4 process, and decided he was going to sign it, he was not
5 going to do a line item veto and say I'm not going to
6 approve this part.

7 So it wasn't locked in in terms of that
8 appropriation until that happened. Once that was -- once
9 that was approved, the money was there for the Authority to
10 go forward with what it had proposed. But until that
11 happened, all you had was the Authority's proposals but
12 without the approval of the Legislature and the governor it
13 didn't really commit anything to anything.

14 And indeed --

15 THE COURT: But how does that really make a
16 difference? I mean, the bottom line is still going to be
17 has the Authority approved a project which is in compliance
18 with Prop 1A?

19 MR. FLASHMAN: Right.

20 THE COURT: And the question becomes, is the
21 Authority pursuing that project in compliance with Prop 1A
22 as of, for example, 2014, at the adoption of the class
23 Business Plan, is the plan that the Authority has put
24 forward one that complies?

25 And why wouldn't the Court look at that -- look at
26 that 2014 Business Plan, for example, as a finite point in
27 time and address the issues that you have raised with
28 regard to speed, subsidy, things of that nature and make a

1 determination as to where the Authority is going?

2 Is either in compliance or not in compliance with
3 the Business Plan --

4 MR. FLASHMAN: Well --

5 THE COURT: -- under Prop 1A. I apologize.

6 MR. FLASHMAN: The Authority in its brief the
7 Authority has argued that we have the sole authority to
8 plan, construct and operate the High Speed Rail Project.
9 And that's certainly true that they can put together plans
10 and if they get the money they can construct it and if they
11 get an operator and money to operate they can operate it.

12 But what's missing there is they can't do any of
13 that without the Legislature and the governor okaying it.

14 THE COURT: Well, I understand that. But
15 essentially I'm not sure that becomes that necessary. If
16 in fact the Court were to determine that the High Speed
17 Rail Authority is not in compliance with its 2014 Business
18 Plan with Prop 1A, then the Court would essentially
19 preclude or likely preclude the Authority to be in
20 compliance. Would potentially exclude any expenditures
21 until there was compliance. But if the Authority is in
22 compliance, they go forward.

23 I'm not sure why the Legislature and the governor
24 matter at that point.

25 MR. BRADY: I'd like to comment, your Honor. I
26 think you're right and it touches on the issue of ripeness.
27 For example, the trip time issue. The Authority is now on
28 record through someone that they say is an expert that they

1 will, in fact, comply with the requirement that they get
2 the passengers from LA to San Francisco in two hours and 40
3 minutes or less. So that is on record; that's part of the
4 plan.

5 We say this is impossible. It is not correct. It's
6 not supported by evidence. And so that issue could be
7 decided. And we want to go to trial.

8 THE COURT: What record do you use to decide that
9 issue?

10 MR. BRADY: They're using the 2014 record and they
11 say repeatedly, we will do this. And they're on record
12 with documents filed with your Honor. Mr. Vacca's
13 declaration.

14 THE COURT: Let me interrupt you. And why wouldn't
15 the Court essentially utilize the 2014 Business Plan record
16 in terms of trying to address that particular issue? Why
17 is there a need for something greater than that 2014
18 record?

19 MR. BRADY: Well, all of the 2014 record was not
20 contained within the Administrative record. The
21 Administrative record -- am I right there, the
22 Administrative record does not include all of the 2014
23 record?

24 THE COURT: Miss O'Grady.

25 MS. O'GRADY: Your Honor, at the time the record was
26 lodged in 2013, the 2014 plan had not been released either
27 in draft or final form. So the record for the writ
28 proceeding that has already occurred has to be supplemented

1 to include an appropriate Administrative record for the
2 2014 plan.

3 THE COURT: But you're not arguing about that.

4 MS. O'GRADY: We're not arguing about that.
5 Obviously, the record has to be brought up to date because
6 the 2014 plan, although it follows on the 2012 plan, has
7 new components and new analysis and actions that the
8 Authority has done in response to various input that they
9 received from the Peer-Review Group and the General
10 Accountability Office and others.

11 So it would have to be brought up to date. But the
12 point is, it's a fulsome record and all of the components
13 are addressed are contained in that record.

14 And in terms of -- I think the Court can do no more
15 than look at a snapshot in time. I mean, if the Court
16 decides, which we would disagree with, that the blended
17 system per se as mandated by the Legislature doesn't comply
18 with the Bond Act then, you know, that would be a decision
19 the Court could make.

20 But it doesn't need to go outside the record.
21 There's no -- it doesn't need to go outside the record for
22 trip time which is covered in the Business Plan, nor does
23 it need to go outside the record for the subsidy issue
24 which is dealt with at length in the Business Plan.

25 THE COURT: I seem to agree. Because it seems
26 otherwise what the Court is doing is essentially going off
27 on its own tangent in terms of a review. But it seems like
28 we need a discreet point in time upon which the review

1 occurs.

2 And so the discreet point in time that it seems the
3 parties are at least, I'll call it more or less on the same
4 page, is the 2014 Business Plan in terms of the last action
5 by the Authority. I'm not saying that you agree with what
6 I'm saying entirely. But the last action by the Authority
7 in terms of the funding for this project was the 2014
8 Business Plan.

9 There's a record that the Authority utilized to
10 arrive at that 2014 Business Plan that seems to be the
11 snapshot in time. I think that's a fair way of
12 characterizing it.

13 You've got a snapshot in time and is the Authority's
14 plan as of that 2014 Business Plan in compliance with Prop
15 1A. And is there a record that basically the Authority
16 utilized. There would be with augmentation. And then what
17 you have is essentially review based on that record and a
18 determination as to whether or not compliance with Prop 1A
19 occurred.

20 MR. FLASHMAN: Your Honor, I certainly agree that
21 the record for the 2014 Business Plan is certainly very
22 relevant and appropriate for the Court to be looking at.
23 But I don't know that that -- in fact, I would disagree
24 that that constitutes the record. Or, if you will, the
25 Administrative record for this case.

26 And that's because the Business Plans do not in
27 themselves commit anybody to anything. They are not an
28 action item. They are not -- again, as they were created

1 legislatively, they are essentially a report to the
2 Legislature.

3 THE COURT: But the Business Plan at least reflects
4 the Authority's direction with regard to the three key
5 issues that you have raised. Don't they?

6 MR. FLASHMAN: That's correct. But the Authority
7 isn't the only player.

8 THE COURT: But the Authority is what we're
9 primarily talking about here. I understand that there's
10 other players. I understand the Legislature appropriates,
11 the governor signs. But we're talking primarily about the
12 Authority's plan and whether or not the Authority's plan is
13 in compliance.

14 MR. FLASHMAN: Well, let me give you an analogy.
15 Let's take the analogy of, let's say, a draft EIR. When an
16 agency writes a draft EIR they will often choose the
17 preferred alternative. And they say this is at the moment
18 where we think we're going. And then they complete the EIR
19 and they certify the EIR and they make the decision. And
20 what they decide as a decision maker may not be the same as
21 what they decide as when they picked the preferred
22 alternatives. They may look at the final EIR and say no,
23 when we look at everything, that's not where we're going.

24 Well, in this case we have the Authority that
25 essentially writes this Business Plan, and I would say
26 that's their draft EIR with the preferred alternative, but
27 then it's the Legislature that decides what are we going to
28 provide money for. And that's more like the actual

1 approving of a project.

2 THE COURT: But that's still -- but the Authority
3 still remains the implementing agency. If in fact that
4 occurs, you still have your right, if you wish, to
5 challenge that. You don't lose anything at that point in
6 time.

7 MR. FLASHMAN: Well, what we lose is -- in other
8 words, again, if we look at from the standpoint of an
9 Administrative record, if we had an EIR and you're asking
10 about challenging the decision to move ahead with the
11 project that has just been approved based on an EIR, we
12 have a whole record not just up to the draft EIR, we have
13 the whole record up to the point when the Agency made its
14 decision.

15 And in this case decisions -- for example, let's
16 take the 2012 appropriation. That 2012 appropriation was
17 based upon the Business Plan and the Funding Plan. But as
18 it was approved by the Legislature it also approved --
19 included the money for the bookends which was not part of
20 the Funding Plan.

21 And while it was discussed in general terms with the
22 Business Plan, back in their brief the Authority said,
23 well, we didn't ask for that appropriation, the director of
24 finance was who submitted that appropriation request.

25 So what's the record for that? And yet that's very
26 relevant to the question about are we -- is this in
27 violation or in compliance with Prop 1A. Does that -- does
28 the bookend funding, for example, does the electrification

1 of Caltrain, does that fit in -- in the blended system,
2 which that's part of, does that fit into the requirements
3 of Prop 1A? Or does it violate the requirements of Prop
4 1A.

5 And, yet, the record we have if you don't look at
6 that appropriation is not complete.

7 THE COURT: Miss O'Grady.

8 MS. O'GRADY: Your Honor, the appropriation is not a
9 design decision and preceded the 2014 plan. So -- because
10 the appropriation was made back in 2012.

11 But an appropriation -- they can make an argument
12 that the appropriation violates the Act. But that doesn't
13 bring in witness testimony and extrinsic evidence; that is
14 Legislative history.

15 And, you know, if there's a flaw in the
16 appropriation, they can make that argument just as they
17 would make any other argument of statutory invalidity or a
18 conflict between statutes. That doesn't get them to
19 outside the Administrative record.

20 And obviously the Administrative record doesn't
21 preclude legislative history. But it does preclude and
22 Western States does preclude experts and testimony and
23 reports that were not presented to the Authority that
24 contradict them.

25 And if you look at their trial briefs and if you
26 look at their experts that's exactly what they purport to
27 do.

28 They disagree with the 2012 Business Plan and

1 disagree with trip time and those are extra record evidence
2 that's simply not permissible on a mandamus review of a
3 discretionary agency's decision.

4 MR. BRADY: Could I just make a few comments on
5 this, your Honor? It's a 526a CCP proceeding and a
6 declaratory relief proceeding. Miss O'Grady and counsel
7 for the other side, have not demonstrated that we are
8 somehow put into a cage and precluded from introducing all
9 relevant evidence up until and including the time of trial
10 that bear on whether this is an illegal expenditure and
11 whether Proposition 1-A has been violated. It is not a
12 mandamus procedure alone. It is these other --

13 THE COURT: Let me interrupt you though. There's a
14 problem. Because of the fact that this is a dynamic
15 evolving project unless we pick a snapshot in time it's
16 almost impossible for this Court to ever answer this
17 question.

18 Because if at any point in time that you pick if in
19 fact we're going to assume that it's evolving, which it is,
20 there's always a potential for some change. And so if the
21 Court basically accepts that there's a potential for change
22 in terms of project design at any point in time until it's
23 completed, there's an open question there.

24 And that's what I'm trying to at least resolve and
25 that's why I do think Miss O'Grady used the proper term, we
26 have to basically make a determination based on a snapshot
27 in time where they are at that point in time. And that
28 decision is going to be basically reflective of that

1 particular compliance with Prop 1A at that point in time.

2 That doesn't preclude potential later litigation as
3 a result of any future changes that may occur. But if I
4 take what you're saying, Mr. Brady, and I simply say you
5 can do whatever you want up until the day of trial the
6 thing that's always hanging over the Court's head is it can
7 change.

8 And that change is what creates so much difficulty
9 in terms of trying to decide how to render a decision, how
10 to decide what the record is going to be.

11 And the only way to eliminate that problem is to
12 pick a point in time and say, the decision that the Court
13 is going to render will be reflective of whether or not the
14 Authority is in compliance with Prop 1A at that point in
15 time.

16 MR. BRADY: But you pick a point in time which is
17 the 2014 Business Plan and with their statements that we
18 will get the passenger there on time, there will be no
19 subsidy, the blended system does not make the goals of Prop
20 1A unachievable. And then we should be allowed to present
21 the evidence up until the time of the trial that shows that
22 that Business Plan, making these representations, cannot be
23 accomplished.

24 That's what our point is. We have the right -- and
25 incidentally, a great deal of the evidence was placed
26 before this Court in March and April 2013, about 15 months
27 ago when we had our hearing because we were supposed to
28 brief the entire case, not just mandamus, but 526a and

1 declaratory relief. And we did so. They did not.

2 But we did so. We had 15 declarations. Expert
3 declarations placed before you.

4 And those are in the record of this court and I
5 assume the Authority has read them.

6 But my basic point is, you have the plan, you have
7 the representations, no subsidy of the trip time is fine,
8 the blended system will not interfere at all. We have this
9 evidence. We're ready to go to trial on it. We don't need
10 any more discovery. It's abundant evidence.

11 We want the right to go to trial on the 526a and
12 declaratory which are entirely different than the mandamus.

13 THE COURT: Miss O'Grady.

14 MS. O'GRADY: Your Honor, in our brief we discussed
15 the 526a issue which they didn't respond to in their
16 opposition. But 526a certainly gives some standing and
17 certainly puts that issue whether there's an illegal
18 expenditure. But as the Supreme Court held in the Nathan
19 Sure case that doesn't give them the right to go outside of
20 the Administrative evidence. Otherwise, taxpayer cases
21 would have open-ended trials where people who maybe had a
22 more direct interest in the subject matter would be limited
23 to mandamus.

24 This is a mandamus. At the heart of this case is a
25 mandamus case and 526a does not convert it into a civil
26 trial.

27 The issue is whether the Authority's decisions were
28 arbitrary and capricious or supported by substantial

1 evidence as in -- as in the case of Carrancho there were
2 numerous public meetings, opportunities for input by the
3 public including these Petitioners. The Administrative
4 record includes all public comments and there is no -- the
5 nature of it is being plead under 526a does not change the
6 evidentiary question.

7 THE COURT: Mr. Brady, anything else you wanted to
8 say in response?

9 MR. BRADY: Excuse me, your Honor?

10 THE COURT: Any response?

11 MR. BRADY: I would just say, once again, that
12 you've got the Administrative record and we have this
13 evidence that was presented. 526a has never -- it was
14 challenged by demurrer, the demurer was ultimately
15 overruled and the declaratory -- the demurer was ultimately
16 overruled.

17 And this evidence has been submitted to the Court
18 and I think you have to respect the fact that it's a
19 distinct cause of action.

20 We spent eight months litigating before your Honor
21 the writ of mandate and they said in the writ of mandate
22 you can only attack the Funding Plan. No environmental
23 clearances for what you picked. You don't have enough
24 money to complete the project that you picked. The usable
25 segment. They said you're limited to that. So we limited
26 to that and the Court ruled.

27 Now we move on to the 526a and the declaratory which
28 presents entirely different issues on which we should be

1 entitled to present relevant evidence as to whether their
2 flat -- their representations in their Business Plan can be
3 believed at all.

4 Do they have any credibility whatsoever? Are they
5 supported by substantial evidence? We should be entitled
6 to do that. Not limited to the Administrative record like
7 we were in August and November when you heard the mandamus
8 matter.

9 MR. NEAL: Your Honor, may I pile on just a little
10 bit on this point? I'm will try and be quite restrained in
11 what I say or the topics.

12 But just to emphasize what my co-counsel said
13 already. The whole premise of the Petitioner's case is
14 that because they've pled under 526a as well as mandamus
15 that they somehow are entitled to a trial De Novo
16 effectively under 526.

17 Of course if that's so you're going to have to be
18 involved in trials De Novo on a revolving plan for the rest
19 of your career until --

20 THE COURT: No, I'm not.

21 MR. NEAL: Okay. But the law is really clear. I
22 mean the Supreme Court in Nathan Sure versus Santa Monica
23 and Common Cause versus Board of Supervisors that said
24 explicitly that even in a 526a case the standard of review
25 is exactly the same as it is in a writ case and that that
26 is, did the agency essentially abuse its discretion based
27 on the record before it?

28 So the notion that somehow by pleading 526a they

1 have entitlement to a trial De Novo is just wrong. The
2 Supreme Court has consistently said that and the California
3 Court of Appeals consistently said that.

4 THE COURT: And I think, Mr. Brady, one of the
5 difficulties I'm having is it somewhat appears as if you're
6 trying to almost cut the Authority out of this process.
7 That's a difficulty for this Court.

8 This Court does not want to set itself up as some
9 kind of counter Authority. The view of this Court is that
10 we need to pick a specific point in time. And I think we
11 all at least reached some loose agreement that the 2014
12 Business Plan is at least the latest thing that the
13 Authority has done. There's a record that's basically
14 going to support that 2014 Business Plan. That seems to be
15 the starting point for this Court to review.

16 If you think in fact there's additional evidence
17 that should be considered, file your motion to augment and
18 then we can at least litigate whether or not additional
19 information should be provided to the Court, the Authority
20 can object if they wish to do so, they can accept it if
21 they wish to do so.

22 But I continue to have difficulty with what is the
23 nebulous dynamic nature of this. And, in fact, it's an
24 on-going and evolving project. Yet, the Court is asked to
25 give a discreet decision to some extent without reference
26 to the time. And that's the problem.

27 MR. FLASHMAN: Well, your Honor, I do want to take
28 this -- again, take us back to HAPA v ACTA, because there

1 are many ways -- there aren't a lot of cases that deal with
2 526a in this type of situation and that's the one case
3 that's published appellate decision that is, I think, in
4 many ways closest to this case in terms of what happens and
5 how you deal with it.

6 And in that case it was -- like this case it was
7 evolving. But what happened was, things got to a point
8 where between what was evidenced in terms of actions by
9 ACTA and by the CalTrans that were making it pretty clear
10 this is where we're headed. And there were, in fact,
11 admissions that were made in that case based on discovery,
12 there were admissions that, no, we're not doing that in
13 terms of the project that was described in the Expenditure
14 Plan.

15 And basically saying, we're doing this project,
16 we're not doing that project. At that point it was pretty
17 clear even though they hadn't yet even published the final
18 EIR yet. So they certainly had not made the formal
19 decision saying this is what we're going to do.

20 But what the Court concluded was, they have made it
21 clear enough as it was a project that had jelled enough to
22 be able to say, okay, here's our questions and here's what
23 we know, these questions are well enough defined by what we
24 know to be able to litigate them.

25 MR. NEAL: Your Honor.

26 MS. O'GRADY: Your Honor.

27 MR. NEAL: Can I respond real briefly? Your Honor's
28 suggestion that we proceed on the basis of the record that

1 exists with respect to the 2014 Business Plan and then let
2 the Petitioner move to augment if they think there's
3 something your Honor needs, is exactly the right way to go
4 on this and it's consistent with the California Oak
5 Foundation, for example.

6 The cases that have allowed anything outside the
7 record have been cases where some very discreet issue has
8 come to the attention of the Court. Sometimes in Oak
9 briefed by the Court itself, where the Court after
10 reviewing the Administrative Record concluded there were
11 discreet issues which it needed further help.

12 But that happens after and it's an augmentation to
13 the Administrative record not as an open De Novo let's try
14 any issue they think of today or any issue they think of
15 tomorrow with all new evidence.

16 MR. FLASHMAN: Your Honor, I do think that there's a
17 point there. I do want to say that in terms of augmenting
18 the record and in terms of, for example, the California Oak
19 Foundation case specifically, what the Court recognized
20 when it started working on the case was, you know, I don't
21 have enough information and there's not enough information
22 in the Administrative record for me to be able to figure
23 out just what to do with this issue. And so I'm going to
24 ask the parties to basically provide me with additional
25 evidence, De Novo, based on this particular issue.

26 And that might be an appropriate way to go. But I
27 don't want it to be left in the format of saying, well, you
28 have to request augmentation of the record as is done under

1 the Western States Petroleum Association where essentially
2 you're trying to say we've got an Administrative record and
3 we're going to accept it, we have the set Administrative
4 record and the set proceeding and now we want to add
5 additional evidence to that record which, of course, under
6 Western States Petroleum Association for a formal action is
7 very, very, very narrow range of possibilities.

8 And we don't think that's the appropriate standard.
9 We are -- we could look at and live with the idea that we
10 have a record that includes what the Authority did, but
11 should also include other things such as what the
12 Legislature did and what the Governor did and what the
13 Authority did in less formal actions.

14 For example, the Authority points to, for example,
15 their decision to submit a federal grant and their decision
16 to put out for bid contracts, and said these are formal
17 acts. Well, no, they aren't.

18 They didn't have public hearings on those. They did
19 put them on their agenda but didn't have a noticed public
20 hearing. They didn't have the type of proceeding where in
21 Carrancho you had extensive opportunities for public
22 inquiry.

23 These were things that were sort of pro forma put on
24 the agenda and approved by the Authority without the type
25 of opportunities for public and opportunities for full
26 discussion that would have been present in Carrancho and
27 which is what Western States used as a dividing line
28 between a formal and informal proceeding.

1 So we're okay with saying, okay, we had a formal
2 proceeding on the Business Plan, let's use that as a
3 starting point. But we don't want to say, if it wasn't in
4 the Business Plan's Administrative record, you can't use
5 it.

6 THE COURT: Well, the Court would comment that this
7 is not your typical Western States Petroleum Association
8 type of situation. Here you do have essentially a discreet
9 project. Here you do not have a discreet project. You
10 have an evolving project which is one of the reasons why
11 we're having this decision. Very different.

12 Miss O'Grady, you want to say something?

13 MS. O'GRADY: Yes, your Honor. What the
14 Administrative record will consist of will be a matter that
15 I'm sure -- and I've already provided to the other side an
16 initial draft index, and to the extent that there are
17 appropriate materials to be included in the Administrative
18 record, they can be. But that don't convert this to a
19 trial De Novo with testimony.

20 And if there's a disagreement I think the proper
21 procedure is for them to augment the record and then the
22 Court can resolve whether a particular item of evidence is
23 appropriate or not.

24 But the default is this is a case governed by
25 Western States Petroleum and Carrancho which is very
26 similar to our situation of the Planning Decision. This is
27 not your formal hearing and it should proceed as such.

28 THE COURT: Mr. Flashman.

1 MR. FLASHMAN: I have to say I disagree that this is
2 the same as Carrancho. This is a much more complicated
3 situation than Carrancho which was a single agency making a
4 discreet determination based on an extensive public inquiry
5 process.

6 This is an on-going, as you say, an on-going
7 process. There have been a lot of players. It's not just
8 one agency making all the decisions. There are -- there's
9 the Legislature, there's the Governor, there's the
10 involvement of the FRA. All of these things are
11 interplaying together and it's not made in any one
12 particular point.

13 Again, just like Carrancho, Carrancho had a specific
14 decision made at a specific time and that's what was up for
15 challenge. Here, as you say, we have an on-going evolving
16 project and there have been a lot of decisions along the
17 way. If you limit it to just say, for example, the
18 Administrative record for the 2014 Business Plan, you're
19 ignoring all of the other decisions that were made before
20 that that really play into this and should have been
21 considered and the Court needs to be considering in
22 deciding does this fit or not.

23 In other words, what are the various decisions that
24 were involved in jelling this to the point where we feel we
25 can say this doesn't comply.

26 THE COURT: Are you talking about decisions by the
27 other agencies or are you talking about other decisions by
28 the Authority?

1 MR. FLASHMAN: Both. Both. As well as statements
2 that were made. For example, during the legislative
3 hearings on the 2012 budget, the chair of the Authority
4 testified before the Legislature and made statements that I
5 would say are party admissions and ought to be allowed in
6 as evidence as party admissions as to where the Authority
7 was intending to go.

8 THE COURT: Well, where they intended to go and
9 where they're going in 2014, may be completely different
10 issues.

11 MR. FLASHMAN: If they have been contradicted,
12 that's fine. But they should be part of the record for at
13 least in terms of deciding -- for this Court to decide
14 whether this has jelled, is this in fact going to some
15 particular place and what are the implications of that.

16 THE COURT: All right. Let me go back to my
17 original question. Why shouldn't the Court essentially
18 establish that the record is the record that existed before
19 the Authority at the time it adopted the 2014 Business Plan
20 with the understanding that the parties can move to augment
21 and with the further understanding this is not your typical
22 WSPA type case, Western States Petroleum Association,
23 excuse me.

24 MS. O'GRADY: Respondents believe that's the
25 appropriate course, your Honor.

26 MR. BRADY: So you have the 2012 Business Plan, the
27 2014 Business Plan, we previously agreed that the issues in
28 the 526a and declaratory relief actions would be limited.

1 This is not a ten issue case. It's about a four issue
2 case. I may be a little bit wrong on my numbers.

3 But, for example, is it economically viable? They
4 take the position in the 2014, 2012 Plan that it's
5 economically viable. No subsidy will be required.

6 THE COURT: I see three issues. I'm looking at the
7 Case Management Conference Statement. I see three issues
8 that are identified with one potential remedy. And that is
9 the nonstop service travel time, the financial viability,
10 and the blended rail question.

11 MR. BRADY: That's correct.

12 THE COURT: Then there's a remedy issue which has
13 been identified essentially as number four.

14 MR. BRADY: That's correct. And interestingly, in
15 March and April of 2013, we submitted an extensive brief on
16 526a and declaratory relief supported by some 15
17 declarations and 144 requests for judicial notice.

18 They never responded to that. Except in one
19 respect. They filed a declaration of one of their
20 engineers who said, oh, yes, we can accomplish the trip
21 time. His name was Mr. Vacca.

22 And for them to say that declarations are not
23 allowed when they submit their own declaration after
24 they're saying we have no right to do this, is very
25 interesting and constitutes I think an estoppel for them to
26 take the positions that they're taking today.

27 THE COURT: Well, I think we're getting ahead of
28 ourselves a little bit here. What I'm trying to do is at

1 least bite off a piece at a time so that I can chew it and
2 swallow it as opposed to taking on the entire case at one
3 time.

4 It seems to me we have at least a preliminary issue
5 of what's the record going to be, what's the Court going to
6 look at.

7 It seems to the Court that in fact what is proposed
8 is at least the simplest way to at least get started on
9 this matter. You'll have your opportunity, Mr. Brady and
10 Mr. Flashman, to augment that in any way you wish to try.
11 It's very possible the Authority may not even oppose it and
12 they may accept it.

13 If in fact there is an opposition then the Court
14 will consider whether or not the record should be augmented
15 to include the additional information.

16 MR. FLASHMAN: Could I make -- just to clarify. In
17 terms of saying "augmenting the record" that we're not
18 simply saying that, oh, this is a document that should have
19 been included because it really was before the Authority
20 but there may be issues where we feel the record is
21 inadequate based on what's before the Authority.

22 THE COURT: That's correct. There may be issues in
23 which the record should be augmented.

24 MR. FLASHMAN: Again, such as under California Oak
25 Foundation case that could mean new evidence.

26 THE COURT: I don't want to say yes or no to that at
27 this point.

28 MR. FLASHMAN: I'm just saying "could".

1 THE COURT: All right. Understood. Any other
2 comments?

3 All right. Miss O'Grady, you'll prepare the order
4 and share it with Mr. Flashman and Mr. Brady.

5 And Mr. Carlson I didn't hear from you, anything you
6 wanted to add?

7 MR. CARLSON: Your Honor, I just wanted to point out
8 that 526a case it seems like the issue that you brought up,
9 namely, that the -- that the matter is sort of in a dynamic
10 state is always going to be at least because if you waited
11 until later on in the process things become accomplished
12 fact and 526a remedy becomes less and less available.

13 So I just want to say in my view 526a does not equal
14 administrative mandate which is I take it what the
15 Authority's attempting to turn this phase of the case into.

16 THE COURT: Understood.

17 MR. CARLSON: That's all, your Honor.

18 THE COURT: All right. Thank you, Mr. Carlson.

19 Other comments by counsel? All right. Thank you
20 all.

21 MR. NEAL: Thank you, your Honor.

22 MS. O'GRADY: Thank you, your Honor.

23 MR. FLASHMAN: Thank you, your Honor.

24 MR. BRADY: Thank you, your Honor.

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2 STATE OF CALIFORNIA)

3)

4 COUNTY OF SACRAMENTO)

5 I, KATHERINE GREINER, hereby certify that I am an
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10 Court: Sacramento Superior Court
County of Sacramento

11 Judge: Hon. Michael P. Kenny

12 Department: 31

13 Case Name: JOHN TOS, ET AL
VERSUS
14 HIGH SPEED RAIL AUTHORITY, ET AL

15 Case Number: 34-2011-00113919

16 Date: Friday, July 25, 2014

17 I further certify that my said stenographic notes
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