

November 4, 2014

237042

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E. Street, SW
Washington, DC 20423-0001

ENTERED
Office of Proceedings
November 4, 2014
Part of
Public Record

Re: STB Finance Docket -FD-35861_0
Update: Opinion about the HSR Authority's request for
declaratory relief

Dear Ms. Brown,

I have written to this body a number of time over the past 18 months in order to give you an educated layman's prospective. I have followed this project for five years and attended literally hundreds of High-Speed Rail Board Meetings as well as Legislative and other government meetings. I have written more than 250 articles on the subject. I am also on the board of Community Coalition on High-Speed Rail but do not write this letter as their representative.

My objective is to inform you of another side of this argument and ask you to consider these facts. It should not be said that that this body backed a new rail system in California without understanding the condition of the project. I am hoping for a more objective look from the STB.

Comments on Declaratory Relief:

October 9, 2014, the High-Speed Rail Authority sent the board a request to the STB for declarative relief and they were in a great hurry for the answer.

According to Rail Authority's newest document, they propose declaratory relief because there is an environmental case set for a case management meeting in November and those plaintiffs might be able to convince a judge to grant a construction injunction and if granted it will stop the project from going forward.

But in actuality the [case](#) will not be heard until mid summer 2015 and according to Doug Carstens, attorney for that case therefore the Authority's request for an expedited decision is way out of line.

He offers this message in his commentary to the STB:

“Petitioners have not filed any motions seeking injunctive relief in the trial court proceedings related to the Fresno-Bakersfield segment.[] Briefing has not begun, and a hearing on the merits is not expected until at least July 2015. Thus, the Authority's request for expedited consideration is unnecessary and premature. Declaratory relief is only available to address an actual controversy..”

This appears to be an example of the High-Speed Rail Authority again crying wolf as they push others to rush into decision without necessity in order to give them a remedy in their back pocket should they need it later. Or it might act as a shield discouraging others from filing suit.

The reality is, an injunction rarely occurs with a project of this magnitude however if the court did grant it, it would most likely require the project opponents to put up an enormous bond, not easily done.

Are they ready for construction?

One would also assume that in order to be worried about the project being stopped this month, the Authority would actually be in the midst of construction. But they are not.

In order to be ready for construction you need the funds to build it, land to build on, a fully designed plan and master railroad agreements and the successful filing of the 2nd funding plan, which the Appellate Court **required**. None of which they have or have done. The Authority is just not ready to go.

While the Authority's legal representative declares, the Rail Authority has commenced work on the first portion of the Central Valley. Perhaps that means they began work on Hwy 99 or began work on few bridges or grade separations for the city of Fresno or knocked down a structure or two they acquired. Technically one could say they have

commenced work but it's not the same as construction in earnest

They have argued for several years that they had to begin construction by 2012, then it was 2013 and here we are today close to 2015 and no construction in earnest has begun.

John Popoff, Deputy Program Director wrote a court declaration for a suit which was settled out of court for the Madera to Fresno segment, dated November 2, 2012. They too were fearful of an injunction back then. In his sworn statement he said, "A delay of five to eight months from an injunction, in concert with an already aggressive schedule to meet a February 2017 Final Acceptance date, likely would render the project incapable of meeting the March 31, 2017, completion date necessary to meet the federal September 30, 2017, deadline. " He does go on to say with double shifts and change orders it might be possible but it would be expensive with change orders. I will attempt to attach the declaration.

That's exactly two years ago.

Please watch this 2 minute and 49 second you-tube about change in the sworn testimony of Popoff. He changed the wording of when they predicted the project would begin.

<http://www.youtube.com/watch?v=lcBaJ7Lqrf0>

Another example, which shows how the Rail Authority is not ready for construction, is demonstrated in the design/build vendor process.

Tutor Perini was selected in April 2013 as the design/builder for the Madera to Fresno section and they still don't have a fully designed segment 18 months later. The Authority just received bids for the design/build contract for the Fresno to Bakersfield segment (CP-2-3) on October 30, 2014 and after awarded, they must finish a design plan, which could take a year or more to complete.

So suffice it to say there is plenty of time before the Rail Authority is ready to do anything on the Fresno to Bakersfield segment.

Funding is inadequate:

Funds are really scarce, the Authority hasn't completed the court required second funding plan and it seems all they have is the newly won but inadequate, California cap-and-trade funds.

Note that since November 14, 2012 after 8 auctions, the state has received \$833 million in revenue. That's the total over 2 years. Revenues will rise as the Petroleum companies are added to the Cap-and-trade umbrella on January 1, 2015 however the revenues would have to increase to \$16 billion a year for the Governor to raise \$4

billion a year for about six years in order to build the 300 mile usable segment.

There is no private money available and according to the Independent Peer Review Group, it will be 2028 or later before there is interest and federal funds have been denied three years in a row.

Recent California Appellate decisions:

The case of the hour is called [*Atherton II*](#) and the Appellate Court's unfavorable decision delivered on July 24, 2014. It may be one of the chief reasons that the Authority is coming to the STB asking for declaratory relief. It originated as an appeal concerning an Environmental Impact Report for the San Francisco to San Jose segment.

Just before the case went to trial, the HSR Authority went to the court with the issue of federal preemption, which delayed the hearing since the court ordered briefing on the subject. Prior to the appeal, this case had originated in October 4, 2010 prior to the STB involvement.

APPEAL written by the Attorney General's office
http://transdef.org/HSR/Appeal_assets/AG%20Letter%20to%20Court%20re%20STB.pdf

In the end it was a split decision. The appellate court ruled in favor of the high-speed rail authority on the environmental challenges but they did not agree that federal preemption

existed. When the appeals court ruled that the Market Participant Exception applied to the Authority, it meant that CEQA was not preempted and it still applied to this project.

Here is their decision:

http://transdef.org/HSR/Appeal_assets/Ruling.PDF

In addition the court thought it was really odd that the Attorney General's office would fight that preemption of federal law when they are supposed to be the defenders and enforcers of state law. By the way the AG's office usually fights the other side of this argument in other cases, protecting the state's laws.

The Appellate Court said this:

“As we discussed briefly ante, the Authority contends that that it alone can invoke the market participation doctrine as an exception to federal preemption of CEQA. It notes that petitioners and amici cite only cases where the doctrine was used defensively by a public entity to protect actions it elected to take in the market. It provides no authority supporting the argument that the power to “invoke” the doctrine is reserved for it to selectively assert in order to exempt those projects of its choosing from federal preemption.

This case is unusual to say the least; the state entity, represented by the state's Attorney General, is inexplicably arguing for federal preemption instead of defending the application of state law. We would better understand if the

Authority's position was that federal law preempts CEQA and there is nothing the state can do to change that result--like it or not, the law is the law and all must abide by it. The Authority, however, admits the market participation doctrine could apply, apparently if the state chose not to oppose its application, and it "remains free to assert the market participant exception to federal preemption in exercising its proprietary judgment and discretion." The Authority's position appears to be that it alone has discretion to decide whether to require its project, the HST, to comply with CEQA.

In making this argument, the Authority ignores that its power is circumscribed by the provisions of Proposition 1A, the voter-approved bond measure to fund the HST. The Authority's discretion is not unfettered; it must follow the directives of the electorate. As explained ante, one of those directives is compliance with CEQA."

One could make the very same argument in the request for Declaratory Relief. Why is a state agency asking to disregard state law and have federal law preempt it?

De-publishing Atherton ruling and Declaratory Relief:

Since the Authority didn't win the *Atherton II* case in regard to federal preemption and no doubt very displeased about it, the Rail Authority is now asking for the California Supreme Court for the de-publication of the Appellate decision in the Atherton 2 case, meaning others are not supposed to use the case for precedent. Per their brief, they apparently do not want to appeal to the State's Supreme Court. Why?

Most likely because of the time it might take or their fear they would not like the outcome if the State High-Court reviewed the case.

http://transdef.org/HSR/Appeal_assets/Request%20for%20Depublication%20Letter%20Brief.pdf

Here is Stuart Flashman's reply to the request to depublish. He is the attorney for the *Atherton II* case and obviously believes this important decision should stand.

In his [letter to the Supreme Court](#) he notes, "all of the letters requesting depublication argue that the decision was wrongly decided. They argue that the Court of Appeal erred in construing the legislature's and the voters' intent in creating and funding the High-Speed Rail Authority. If the Attorney General wished to press these points, her proper recourse was to petition for review, and the other agencies could have supported review. However, depublication is not intended to express the Court's opinion on the correctness of a decision. (Rule of Court 8.1125 subd. (d).)"

He also said, "If the parties seeking depublication feel that major state transportation projects should not be subject to CEQA review, that argument should be addressed to the Legislature, which clearly knows how to exempt classes of projects from CEQA review when it feels such exemption is warranted."

And now as indicated and explained in this letter, the Rail Authority is trying a third attempt and is coming to this board for declaratory relief.

The Appeal of the Appellate Court decision and the Request for review to the California Supreme Court: Case: *Tos/Fukuda/Kings County*

To make a long story short: California's Supreme Court declined to review the Appellate decision. What does this mean? It means that the Rail Authority is stuck with the Appellate decision and it's tough.

As background, project opponents requested a State Supreme Court review of the Appellate decision but unfortunately they turned down the request at this time.

Judge Quentin Kopp, who was head of the California High-Speed Rail program during the battles of language preparation for the bond measure and AB 3034 in 2007 and 2008 believes that the State Supreme court will eventually agree to hear the case if project proponents attempt to maneuver past state requirements in the second funding plan. Quentin Kopp feels after the normal path of court challenges, the Supreme Court will eventually agree to hear the case.

The Authority board members have been quoted in the press as saying they're moving head quickly to build the project. But that is spin for the press and puts out a false impression of where they are in the process of getting ready to build in earnest. Most of all they not ready because the Appellate decision only offered a temporary reprieve, the gift of time.

See the article I wrote about this non-ruling. This is what the Rail Authority faces.

http://www.examiner.com/article/appellate-decision-on-bullet-train-or-aka-deferring-the-piper?cid=db_articles

Attorney Mike Brady describes the court ruling:

“Under the appellate decision, the first funding plan is meant to inform the legislature only, preliminary to the APPROPRIATION PROCESS. Once the appropriation is made, all provisions of 1A spring to life in the second funding plan and must be complied with before any Proposition 1A bond funds can be spent or used. The taxpayers and the voters in passing Proposition 1A wanted these protections to be sure this project was not as poorly managed as most other public works projects. These protections include, among others, the adequate funding requirement and the environmental completion requirements”

Brady also said, “The Court of Appeal decision said the Authority cannot access Prop1A bond funds until it goes through a rigorous procedure. Brady promised, “We will be there to enforce those requirements.”

Lawsuits are not their only problem:

The clock is ticking loudly day by day toward the September 2017 ARRA fund deadline. If the Rail Authority finds a way to begin construction, one has to ask, is too late to begin a project that cannot finish in time to complete the first segment?

Is it ok to leave a partially finished first segment since they will not have the funds to complete even first 130 miles, let alone the first 300 miles the state courts command?

Apparently the Federal Railroad Administration (FRA) was concerned and with the ARRA federal grants comes a requirement for a safety net, called an independent utility, just in case the Authority doesn't complete the segment they said they'd build. The High-Speed Rail Authority and the FRA agreed from the beginning that a new Amtrak route that runs parallel to an existing Amtrak route which straddles two segments between Madera to Fresno and Fresno to somewhere north of Bakersfield would serve that purpose.

But now we find out that the Authority has no authority to assure that Amtrak will actually use the line they built as the independent utility safety net. They do not control Amtrak. The San Joaquin Joint Powers Authority (SJJPA) controls the service.

Why did the FRA make a deal with the Authority for independent utility for which neither they nor the HSR Authority controlled? See page 12 of Morales letter to the STB about BNSF railroad concerns.

[http://www.stb.dot.gov/filings/all.nsf/ba7f93537688b8e5852573210004b318/9ece484dc06c6b5b85257d0100689a04/\\$FILE/236217.pdf](http://www.stb.dot.gov/filings/all.nsf/ba7f93537688b8e5852573210004b318/9ece484dc06c6b5b85257d0100689a04/$FILE/236217.pdf)

If the SJJPA intends to use the new track for service they must conduct an Environmental report. That could take a long time. The Authority never included the Amtrak diesel train as part of the high-speed rail system EIR that is supposed to be for electric trains.

Not electrified:

And in another strange twist, electrification was never included in the High-speed Rail EIR covering the first 300 miles since that is under auspices of the California Public Utilities Commission (CPUC). The CPUC sent the governor and SOS to send more money so they could add additional personnel to work this electrification part of the project. See that request and the letter on the last couple of pages from CFO of the HSR Authority.

http://www.cpuc.ca.gov/NR/rdonlyres/BF95706A-50B5-46CD-877F-BFDA85F6DC89/0/BCP_6ElectricalInfrastructurePlanngforHSRInitiative.pdf

So we have an electric train EIR without the power to run it with obviously no ability to test electric trains, one of the main reasons the valley segment was chosen as the starting point or so they said. We have no diesel EIR either so Amtrak cannot use the line if they want to in the near future.

It is also well know there are no electrical grids over the Tehachapi's, which according to an expert that testified at a Senate Meeting, it could take decades to develop. This

entire you-tube video was made in 2012, not much has changed on the electrical grid situation. See MM 2:10 for Richard Tolmach rail planner give a statement about the project inadequacies including the very important electrical inadequacy.

<https://www.youtube.com/watch?v=FOQeCtcxYDQ&list=UULpiKaBjaacPw7g5K1nkRXw&index=68>

Property Acquisitions:

In addition to lawsuits, the lack of rail agreements, design incompleteness and the difficult job in acquiring properties that could take years to complete, time the Authority doesn't have. See the Fresno Bee report on Property acquisition. Read more here:

http://www.fresnobee.com/2014/08/23/4084847_land-deals-slowing-rail-plan.html?rh=1#storylink=cpy

“The California High-Speed Rail Authority needs to buy more than 550 pieces of property to build its first 29-mile stretch of rail line between Avenue 17 in Madera to American Avenue south of Fresno. More than 1150 pieces of land are needed to get to the Northern tip of Bakersfield.”

Prop 1A and Operational deficiencies:

In reality the plan design of the first 29 miles is not complete, thousands of properties need to be acquired from Madera to Bakersfield and they can't spend state bonds at this time.

In order to file the Second funding plan required by the Appellate Court, they must provide environmental certification for 300 miles and show where the funds are coming from to complete the first operable segment, not the first construction segment, a term the Authority made up since they don't have the \$25 billion to complete the first usable segment.

The Authority also hasn't figured out how to get over or through the Tehachapi Mountains in compliance with Prop 1A laws. That's part of the Initial Operating Segment, Bakersfield to Palmdale.

You can't assign the same high speeds and fast travel times that you can achieve by traveling through long tunnels through a mountain when in fact your route must slowly meander down a very steep mountainside because of the cost to build tunnels. See the article written about some of these issues. http://www.examiner.com/article/high-speed-rail-spin-and-new-central-valley-headaches?cid=db_articles

But the Authority's top engineer swore in a court declaration, the time requirements of two hours and forty minutes can be made but only if he chooses to use unrealistic speeds and times demonstrated by a computer program in what is called a pure run. The Rail Authority believes that all they need to prove is that the computer is working and is that it's theoretically possible to make those someday if you invest in very expensive infrastructure especially in those "blended"

areas. But it won't be possible right now and won't be demonstrated in a real timetable for real people to use.

The bond measure did not indicate that it was ok to first build a different kind of project to help local transit and later build the real one, the one with the high-speed rail. There was money set aside in the bond measure for local transit, it was called connectivity funds, almost a billion dollars set for local transit to connect easier to High-Speed Rail. Prop 1A was to be used exclusively for the building of an electrified high-speed rail system but now the situation is changing and the Rail Authority is in the midst of building "a rail modernization program" since they know they can't build a high-speed rail project.

More suits are coming:

There is a civil suit, which will test the Authority's promises to the public in regard to travel times and subsidy. It's called the 526A suit and is part two of the ***Tos/Fukuda/Kings County*** case. Here's what Project opponents attorney Mike Brady says about the new civil upcoming case.

"We are moving toward trial in what we call our taxpayer standing suit under CCP 526a. This suit is separate and is NOT AFFECTED by the Appellate or the Supreme Court decision. It involves different issues; Judge Kenny has already rejected major efforts to dismiss our suit. We are currently putting together the body of evidence that will be introduced at that trial.

The four issues are: 1. Will the HSRA be able to carry the LA passenger to SF in the mandated 2 hours, 40 minutes? 2. Does the adoption of the "blended system" by the HSRA violate Prop 1A since the voters never approved the blended system, and it makes the goals of the high-speed rail system unachievable? 3. Will a subsidy be required for operating costs, something forbidden expressly by Prop 1A? 4. Is the HSR system financially and physically viable.

The case is supposed to start this Spring.

Conclusion:

I ask that the STB allow the process to work and not allow the Rail Authority to hide using the board as a shield. CEQA and NEPA have been a part of this project since the early 2000 time frame, please let it continue. CEQA doesn't stop projects since the agency has the power of the ultimate tool, what's called "overriding considerations."

Let the process unfold, as it should. It's imperative that the STB not offer protection to a project with this many problems.

This shouldn't be about rail at any cost; it should be about project viability and your organization should take the high-road and not aid this project since there is a real chance that federal and state funds will be wasted.

Thank you, Kathy Hamilton
California taxpayer
Katham3@aol.com