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Testimony of Stuart M. Flashman, J.D., Ph.D.
Legal Issues Surrounding Funding for California's High-Speed Rail Project

Testimony before the U.S. House of Representatives Committee on Transportation and Infrastructure, Subcommittee on Railroads, Pipelines, and Hazardous Material

Field Hearing – Continued Oversight of California High-Speed Rail
Monday, August 29, 2016
San Francisco, California

Chairman Denham,

Thank you for the opportunity to testify before your subcommittee today.

Let me start by making it clear that my testimony today is not intended to criticize high-speed rail as a concept. Certainly the examples of high-speed rail implementation in other countries have shown that it can provide significant benefits to the public transportation system, and that, if implemented prudently, it can be a cost-effective way of improving transportation efficiency while reducing greenhouse gas production. However, I am afraid that here in California too much has been promised and too little is being delivered.

My testimony will focus on the legal issues affecting funding California's high-speed rail project using State of California funds, and the associated risks to the federal treasury in the California High-Speed Rail Authority's (CHSRA) continued use of Federal Railroad Administration (FRA) administered federal grant funds to pay for construction and other activities.

As you know, CHSRA has received approximately $3.5 billion in grant funds through the Federal High-Speed Intercity Passenger Rail (HSIPR) program. In addition to that federal funding, CHSRA has potential access to $9 billion of state general obligation bond funds authorized by the 2008 Proposition 1A (Prop 1A) bond measure, and a continuing appropriation of 25% of the proceeds from California's greenhouse gas emissions "Cap and Trade" auction proceeds. While Prop 1A envisaged that CHSRA would secure private capital funding for its high-speed rail project, up to this point no private funds have been committed, nor is any private funding visible for the foreseeable future.

In 2012, CHSRA's Final Business Plan expected to receive $20 billion in federal funds between 2015 and 2021. Of course, no additional federal funds have been appropriated after 2010. The 2016 Business Plan now hypothesizes $10 billion in cap and trade auction proceeds revenue. I will return to the availability of that revenue at the end of my testimony.

Each of the two California governmental funding sources for CHSRA's project has legal issues associated with it, and I will discuss each of them in turn,

I. THE USE OF PROPOSITION 1A BOND FUNDS TO FINANCE CONSTRUCTION OF THE HIGH-SPEED RAIL SYSTEM.

While Prop. 1A allocated up to $9 billion for CHSRA's high-speed rail project[1], It placed numerous restrictions on the use of those funds. In *California High-Speed Rail Authority et al. v. Superior Court ("CHSRA v. Sup. Ct.")* (2014) 228 Cal.App.4th 676, California's Third District Court of Appeal referred to those restrictions as a "financial straitjacket," and stated that the restrictions were intended by the voters who approved the measure "to ensure the financial viability of the project." (*Id*. at p. 706.)

One set of restrictions, which were addressed in that court case, are contained in Streets & Highways Code §2704.08 subdivisions (c) and (d). These provisions place stringent procedural hurdles in front of CHSRA before it can spend bond funds on construction of its high-speed rail system. The other, which creates substantive requirements for the high-speed rail system to be constructed using bond funds, is contained in Streets & Highways Code §2704.09. It has at this point been addressed at the trial court level in the case *Tos et al. v. California High-Speed Rail Authority et al*., Sacramento County Superior Court Case No. 34-2011-00113919-CU-WM-GDS, judgment entered March 22, 2016. That judgment is now final and binding on the parties involved. A copy of that judgment is attached hereto as Exhibit A for the Committee's reference.

Prop 1A's procedural requirements on using bond funds for high-speed rail construction involve the preparation and approval of two successive funding plans, a first preliminary funding plan and a second final funding plan, for the high-speed rail corridor or "usable segment"[2] to which the funds would be applied.

In the first, preliminary, funding plan, which must be completed before CHSRA seeks an appropriation of bond funds for construction, CHSRA is required to Identify all sources of funding to be invested in the corridor/segment, including their expected time of receipt based on expected commitments, authorizations, agreements, allocations, or other means. In addition, CHSRA is required to make a series of certifications. These include:

- That construction of the corridor/segment can be completed as proposed in the plan;

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[1] Prop 1A also allocated $950,000,000 for "connectivity" grants to assist in funding other transportation projects that would improve the high-speed rail project's integration into California's transportation network.

[2] A usable segment is defined in Prop 1A as a segment of a corridor that contains at least two high-speed rail stations.

- That the corridor/segment [when complete] would be suitable and ready for high-speed train operation;
- That one or more passenger service providers can begin using the tracks or stations for passenger train service;
- That CHSRA's passenger service on the corridor/segment would not require and local, state, or federal operating subsidy;
- That CHSRA has completed all necessary project-level environmental clearances necessary to proceed to construction.

CHSRA completed its first preliminary funding plan for a segment it designated as the "Initial Operating Segment", which would extend either from San Jose to Bakersfield (IOS-North) or from Merced to Burbank (IOS-South), in the Spring of 2012. A lawsuit challenged that plan. In *CHSRA v. Sup. Ct*., the court of appeal ruled that approval of a preliminary funding plan was not a final action or determination, and therefore the objections based on noncompliance with Prop 1A's requirements were not yet ripe for adjudication.

The second, final funding plan requires similar, but more detailed, information about the corridor/segment, including the estimated full cost for its construction (included the estimated escalation of costs during construction and appropriate reserves) and the sources of all funds to be used in the construction and when those funds will be received, based on authorizations, allocations, or other commitments or assurances received. In addition, it requires one or more reports, prepared by one or more independent financial consultants, evaluating the plan and indicating that:

- The corridor/segment can be completed as proposed in the funding plan;
- When completed, it would be suitable and ready for high-speed train operation;
- Upon completion, one or more passenger service providers can begin using the tracks or stations for passenger rail service;
- The passenger rail service to be provided by CHSRA will not require an operating subsidy.

The consultant report(s) must also discuss the risks and risk mitigation strategies proposed in the plan.

The final funding plan, including the consultant report(s), must be provided to the State Director of Finance and to the Chairperson of the Joint Legislative Budget Committee. Within sixty days, the Director of Finance, after receiving comments from the Joint Legislative Budget Committee, is to make a determination, accompanied by findings, of whether the funding plan is likely to be successfully completed. If so, CHSRA may then enter into commitments to expend the bond funds. According to the court of appeal's decision in *CHSRA v. Sup. Ct*., only at this point would a legal challenge for noncompliance with Prop. 1A's requirements ripen.

The substantive requirements that Prop. 1A places on the system to be built using bond funds, contained in §2704.09, specify the following:

1. The trains must be electrically powered and capable of "sustained maximum revenue operating speeds of no less than 200 miles per hour."

2. Each of the various corridors to be served has an associated maximum nonstop service travel time. Of special note are that the travel time between San Francisco (Transbay Transit Center) and San Jose (Diridon Station) must be no more than 30 minutes, and that between San Francisco and Los Angeles (Union Station) must be no more than 2 hours and 40 minutes.
3. Achievable headway (time between successive trains) must be no more than five minutes.
4. There must be no more than 24 stations on the entire system.
5. There can be no station between Gilroy and Merced
6. Trains must be able to bypass any station at full operating speed.
7. No change of train can be required to traverse an entire corridor.
8. The alignments chosen by CHSRA must be financially feasible.
9. The system must minimize urban sprawl and environmental impacts
10. To the extent possible, the system is to preserve wildlife corridors and mitigate any impacts on animal migration.

Prop 1A also requires that bond funds provide no more than 50% of the construction funding for any corridor/usable segment. (§2704.08(a).) In its decision in the *Tos et al.* lawsuit, the trial court noted that there appeared, at present, to be substantial questions about whether CHSRA's proposed system could meet requirements numbers 2 and 3. It also found, however, that until CHSRA was ready to begin using bond funds for construction, these issues were not yet ripe for determination by the courts.

The 2012 legislative appropriations for the high-speed rail system, contained in SB 1029, included $3.2 billion of FRA federal grant funds and $2.6 billion of Prop. 1A construction funds to complete a segment running from Madera to Bakersfield Also included in SB 1029 was 1.1 billion of Prop. 1A HSR construction funds to be used for improvements to conventional rail segments in the "bookends" between San Jose and San Francisco and between Burbank and Los Angeles. These appropriations were intended to pave the way for high-speed rail service in these areas. The Legislature specifically required that expenditure of these funds required prior preparation of the funding plans required by §2704.08.

This latter requirements is particularly problematic for the San Francisco – San Jose segment, where $600 million is proposed to help fund Caltrain's electrification project (with an estimated current total cost of approximately $2.1 billion) because §2704.08 requires that the segment be fully funded, and that, when completed, it be suitable and ready for high-speed train operation. Not only is Caltrain's electrification project not yet fully funded, but it is undeniable that without further track and other improvements, it will not be suitable and ready for high-speed train operation. These deficiencies would appear to make it improper for Prop. 1A construction funds to be used until there is full funding available to complete a high-speed rail ready segment. Those funds are nowhere to be found.

Caltrain's governing body, the Peninsula Corridor Joint Powers Board ("PCJPB"), with the cooperation of CHSRA, has now proposed a legislative "fix" for this problem. The proposed legislation, AB 1889, attempts to redefine (or in the bill's word "clarify") the language in Prop. 1A so that "suitable and ready for high-speed train operation" would

mean only that the segment would be suitable and ready for high-speed train operation *once additional improvements were funded and constructed*. As an attorney who has spent considerable time studying the provisions of the California Constitution (Article XVI, Section 1) that govern the use of voter-approved bond funds, this bill appears to violate those constitutional requirements unless its proposed changes are first submitted to and ratified by California's voters.

II THE USE OF "CAP AND TRADE" AUCTION FUNDS TO FINANCE HIGH-SPEED RAIL CONSTRUCTION.

In 2006, the California Legislature passed AB 32, the California Global Warming Solutions Act of 2006. Among other things, that act called upon the California Air Resources Board ("ARB") to devise market-based compliance mechanisms to supplement direct regulation of greenhouse gas ("GHG") generation.[3] In 2012, ARB finalized its decision to implement a market-based compliance mechanism as a "cap and trade" system. The system, which has also been implemented by the European Union and some other countries and states, is analogous to a system devised as part of the federal Clean Air Act. Under the cap and trade system, ARB establishes a "cap" on statewide GHG production. This cap is then allocated among the various sources of GHG emissions. For each source, there are financial penalties for exceeding the cap. However, a source can purchase additional allocations of GHG production, either from ARB or from other GHG producers who have either reduced their production of GHG or had previously purchased an additional allocation. The allocations are periodically auctioned off by ARB. Thus the idea is that as the cap is gradually lowered, GHG production will follow suit. In addition, the auctions will generate revenue that can be used to fund activities that will directly reduce GHG concentrations, either by reducing GHG production (e.g., developing more efficient cars, or ways of producing energy that produce less, or no GHG emissions), or by "sequestration" – that is, taking more GHG out of the atmosphere – for example by tree planting).

As you may be aware, the cap and trade auctions have been challenged as being a tax on GHG producers that does not meet the California Constitution's requirements for enacting a tax measure. That challenge is now pending in California's Third District Court of Appeal. In addition a more specific legal challenge has been filed, focused on ARB's decision to identify CHSRA's high-speed rail construction as an acceptable use of funds collected through the cap and trade auctions. That challenge is based on ARB's failure to take into account the many millions of tons of GHG released during the manufacture of the cement being used in the high-speed rail construction. The lawsuit alleges that, because of that cement production, building the high-speed rail system will actually result in a net *increase* in GHG emissions until far beyond AB 32's target date of 2020, a result directly contrary to the intent of AB 32.

Finally, it must be noted that in between the legal uncertainty clouding the cap and trade system, the fact that the current legislative authorization for that system will expire in

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[3] Greenhouse gas (GHG) is a shorthand used to designate various gaseous air constituents that absorb solar radiation and prevent its from leaving the earth. These gases contribute to the "greenhouse effect" where the Earth's overall temperature increases, causing global climate change. While there are numerous contributing greenhouse gases, the largest single contributor is carbon dioxide.

2020, with the Legislature thus far unwilling to extend it[4], and the economic downturn of the "Great Recession," which in itself greatly reduced California's GHG emissions, recent cap and trade auctions have produced only meager amounts of revenue for the State. In the last two auctions, only approximately $18 million was produced. While the Legislature has approved a continuing appropriation of 25% of cap and trade revenue to the high-speed rail project, the revenue provided by the last two auctions amounted to only $4.5 million – a drop in the bucket compared to the billions the system will require for the construction of even an initial usable segment. This makes CHSRA current estimate of receiving $10 billion in cap and trade auction revenue appear highly unrealistic, even if it is found legally defensible.

In short, CHSRA has, at the moment, no credible source of state funding to match its current federal HSIPR grants. I will leave it to CHSRA and its supporters to explain where that money will be found.

[4] Both nationally and internationally, momentum appears to be shifting towards revenue-neutral carbon taxes, where the proceeds collected are returned to the public and the business community in the form of lower tax rates and rebates. This would, of course, eliminate that tax revenue as a source for high-speed rail capital funding.

Exhibit A

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FILED ~~ENDORSED~~
MAR 22 2016
By S. Lee, Deputy Clerk

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]~~ ORDER DENYING PETITION AND COMPLAINT

Hearing Date:	February 11, 2016
Dept:	31
Judge:	The Honorable Michael P. Kenny
Action Filed:	February 14, 2011

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 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.

The Court, having considered the papers, the Second Amended Administrative Record, matters as to which the Court has taken judicial notice as set forth herein, and the arguments of the parties at hearing, 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.

Now, therefor, and for the reasons set forth in the Ruling, it is hereby ordered as follows:

1. Plaintiffs' and Petitioners' Request for Judicial Notice, filed November 2, 2015, is GRANTED as to items 2, 3 and 4, and DENIED as to items 1 and 5.

2. The Petition and Complaint are denied.

IT IS SO ORDERED

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

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.

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