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Before

Subcommittee on Railroads, Pipelines, and Hazardous Materials
Committee on Transportation and Infrastructure
U.S. House of Representatives

January 15, 2014

on

"A Review of the Challenges Facing California High Speed Rail"

Chairman Denham, Ranking Member Brown, and Members of the Subcommittee:

My name is Alissa M. Dolan, I am a Legislative Attorney in the American Law Division of the Congressional Research Service. I thank you for inviting CRS to testify today regarding the legal issues associated with challenges facing California High Speed Rail. Specifically, the Subcommittee has asked for a discussion of two recent California Superior Court cases, *Tos et. al. v. California High-Speed Rail Authority* and *California High-Speed Rail Authority and High-Speed Passenger Train Finance Committee v. All Persons Interested*, and specific provisions of the cooperative agreement between the Federal Railroad Administration and the California High-Speed Rail Authority regarding federal grant funds.

California High-Speed Rail and Proposition 1A Background

In 2008, California voters approved Proposition 1A (Prop 1A), the Safe, Reliable High-Speed Passenger Train Bond Act for the 21st Century, which was placed on the ballot following the California State Legislature's approval of Assembly Bill 3034. Prop 1A, now codified in Chapter 20 of Division 3 of the California Streets and Highways Code, provided for the issuance of $9.95 billion in state general obligation bonds to fund construction of a high-speed train between the Los Angeles and San Francisco areas.[1] Prop 1A also created specific requirements for the planning, development, construction, and operation of the system, which is to be overseen by the California High-Speed Rail Authority. In addition

[1] "Safe, Reliable High-Speed Passenger Train Bond Act for the 21st Century," AB3034, § 9, *codified at* CAL. STS. & HIGH. CODE § 2704.10.

to potential revenue from voter-approved state bonds, the Authority has also received federal grant funds, in part through the American Recovery and Reinvestment Act,[2] as discussed in detail below.[3]

Tos, et. al. v. California High-Speed Rail Authority

In November 2011, Kings County, California along with John Tos and Aaron Fukuda, taxpayers who live in Kings County, (plaintiffs) brought suit against the Authority and several state officials in the California Superior Court for the County of Sacramento.[4] The high-speed rail system is planned to go through Kings County. The suit, in part, challenged the validity of the funding plan that the Authority approved in November 2011, arguing that the plan's contents did not comply with the statutory requirements put in place by Prop 1A. The plaintiffs sought the issuance of a writ of mandate[5] that would direct the Authority to rescind its approval of the November 2011 funding plan.

Ruling on the Petition for a Writ of Mandate

In evaluating the plaintiffs' claim that the 2011 funding plan violated statutory requirements, the court applied an abuse of discretion standard of review, determining, "namely, whether [the Authority's] action was arbitrary, capricious, entirely lacking in evidentiary support, unlawful, or procedurally unfair..."[6] In an August 16, 2013 ruling, the court concluded that "the Authority abused its discretion by approving a funding plan that did not comply with the requirements of law."[7]

Section 2704.08 of the California Streets and Highways Code establishes both procedural and substantive requirements for two funding plans that the Authority must approve at different stages of development. The first "detailed funding plan" for the "corridor, or useable segment thereof" must be approved "no later than 90 days prior to the submittal to the Legislature and the Governor of the initial request for appropriation of proceeds" of bonds authorized under Prop 1A.[8] The plan "shall include, identify, or certify" several pieces of information, including:

- "the sources of all funds to be invested in the corridor, or usable segment thereof, and the anticipated time of receipt of those funds based on expected commitments, authorizations, agreements, allocations, or other means";[9] and
- that "the authority has completed all necessary project level environmental clearances necessary to proceed to construction."[10]

The court determined that the funding plan did not comply with either of these requirements.

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[2] Pub. L. No. 111-5, 123 Stat. 208, Div. A, Title XII.

[3] *See, infra*, "California High-Speed Rail and Federal Railroad Administration Grant Funds".

[4] Tos, et. al. v. Cal. High-Speed Rail Auth., No. 34-2011-00113919 (filed Nov. 14, 2011).

[5] CAL. CIV. PROC. CODE § 1085(a) ("A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by that inferior tribunal, corporation, board, or person.").

[6] Tos, et. al. v. Cal. High-Speed Rail Auth., No. 34-2011-00113919, slip op. at 6. (Aug. 16, 2013) [hereinafter *Tos I*].

[7] *Tos I*, slip op. at 7.

[8] CAL. STS. & HIGH. CODE § 2704.08(c).

[9] *Id.* at § 2704.08(c)(2)(D).

[10] *Id.* at § 2704.08(c)(2)(K).

Identifying Funding Sources

First, the court held that the plan did not identify the source of funds for the entire "corridor, or usable segment thereof," as was required by law.[11] The funding plan identified the "corridor, or usable segment thereof" at issue in the plan as one of two potential Initial Operating Sections (IOS): a usable segment of 290 miles from Bakersfield to San Jose or a usable segment of 300 miles from Merced to San Fernando. Each potential IOS included the Initial Construction Section (ICS), which was defined as a 130-mile segment from just north of Bakersfield to Fresno. Following approval of the funding plan, the Authority submitted the request for appropriation of bond proceeds and on July 18, 2012, the Legislature appropriated bond funds for the construction of the IOS from Merced to San Fernando.[12]

The court interpreted the law to "require[] the Authority to address funding for the entire IOS,"[13] from Merced to San Fernando. Additionally, the court stated that the funds identified in the plan must be "more than merely theoretically possible"[14] and the Authority must have a "reasonable present expectation of receipt [of the funds] on a projected date, and not merely a hope or possibility that such funds may become available."[15]

The 2011 funding plan[16] satisfied this requirement with regard to the funding sources needed to complete the ICS. The plan identified approximately $6 billion dollars in state bond funds and federal grant funds that represented "the full amount of funding the Authority believes is needed to complete" the ICS.[17] However, the funding plan did not satisfy this requirement with regard to the funding sources for the remainder of the IOS, approximately 170 miles of rail. The full cost of completing the IOS was estimated to be $26 billion. The plan did not identify the specific source of these funds but rather anticipated that the additional funds would be identified not later than 2015.[18] Furthermore, the plan stated that "[t]he IOS will require a mix of funding from federal, state, and local sources to support construction in the years 2015 to 2021. Committed funding for this period is not fully identified."[19] The court described this portion of the plan as "candidly acknowledg[ing] that the [IOS] funds could not be identified as of the date of approval of the funding plan."[20] Additional discussion of funding sources in the plan identified only "theoretical possibilities and not [] sources of funds reasonably expected actually to be available starting in 2015."[21] Therefore, the funding plan failed to comply with the plain language of the statute "because it does not properly identify sources of funds for the entire IOS."[22]

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[11] *Id.* at § 2704.08(c)(2)(D).

[12] SB1029, § 9 (July 18, 2012); *see Tos I*, slip op. at 6.

[13] *Tos I*, slip op. at 7.

[14] *Id.*

[15] *Id.* at 8.

[16] The funding plan explicitly incorporated by reference another document entitled the California High-Speed Rail Program Draft 2012 Business Plan (Business Plan).

[17] *Tos I*, slip op. at 4.

[18] *Id.*

[19] *Id.* at 5. The Business Plan also states that "...with the exception of construction funding for the ICS, the mix, timing, and amount of federal funding for later sections of the [high-speed rail project] is not known at this time." *See id.*

[20] *Id.* at 8.

[21] *Id.*

[22] *Id.* at 9.

Certifying Completion of Environmental Reviews

Second, the court held that the plan did not comply with the statute requiring it to certify that the Authority had completed all necessary project level environmental clearances needed to proceed to construction. The funding plan certified that all project level clearances for the ICS would be completed at a later date, before the Authority expended any bond proceeds.

The court interpreted the statute to require the *completion* of all project level environmental clearances, not simply a promise to complete, for the *entire* IOS, not simply the ICS. Even though the text of the environmental clearance requirement does not use the term "corridor, or usable segment thereof," the court determined that the structure of section 2704.08 and its reference to "construction" "is most reasonably interpreted as pertaining to the entire 'corridor, or usable segment thereof' addressed by the funding plan, and not to the ICS, which is merely a portion of that corridor or usable segment."[23] Furthermore, the first funding plan is the only plan requiring the Authority to address project level environmental clearances. Therefore, if the first plan only required ICS environmental clearances, the Authority would not have to complete environmental clearances for the remainder of the IOS before being permitted to spend bond proceeds. The court characterized this interpretation as leading to an "unreasonable and unintended result" that would be "in fundamental conflict with the intent of the statute as a whole," and, therefore, bolstered its interpretation that the first funding plan must address environmental clearances for the full IOS.[24]

Additionally, the court rejected the notion that a certification pledging to complete the clearances in the future could satisfy a statute that required a certification that the clearances were already complete.[25] Since the funding plan only certified the future completion of ICS environmental clearances and did not address clearances for the remainder of the IOS, it failed to comply with the law.[26]

Remedies

After the court concluded that the Authority abused its discretion by unlawfully approving the 2011 funding plan, it turned to determining the appropriate remedy. The court noted that "as a matter of general principle, a writ [of mandate] will not issue to enforce a mere abstract right, without any substantial or practical benefit to the petitioner."[27] Therefore, the court had to determine if issuance of a writ would have any practical impact on the high-speed rail program.

In their original brief, the plaintiffs sought a writ of mandate that would direct the Authority to rescind its approval of the plan and all subsequent approvals it made in reliance on that plan. In a reply brief, the plaintiffs also argued, for the first time, that a writ should extend to the legislative appropriation made on the basis of the funding plan in July 2012.[28] The court first determined that it would not issue a writ of mandate relating to the 2012 legislative appropriation, for both procedural and substantive reasons. The court rejected this request on procedural grounds because "as a general rule, arguments raised for the first

[23] *Tos I*, slip op. at 10.

[24] *Id.*

[25] *Id.* at 11.

[26] *Id.*

[27] *Id.* at 12.

[28] *Id.* at 13

time in a reply brief will not be considered."[29] Substantively, the court concluded that nothing in the Prop 1A laws connected the validity of the appropriation to the funding plan's compliance with the law. Instead, "Proposition 1A appears to entrust the question of whether to make an appropriation based on the funding plan to the Legislature's collective judgment."[30] Therefore, even if approval of the funding plan was unlawful, the subsequent legislative appropriation was not invalid.

Next, the court concluded that it did not yet have enough information to determine whether a writ invalidating the funding plan and subsequent approvals by the Authority would have a practical effect on the program.[31] The parties were instructed to submit supplemental briefs providing more details about the subsequent approvals made by the Authority.

Ruling on Remedies

On November 25, 2013, the court ruled that issuance of a writ of mandate would have a real and practical effect.[32] The court concluded that creating and approving a first funding plan that complies with the statute is a necessary prerequisite to advancing the second funding plan required under section 2704.08(d), which must be approved before the Authority may expend any bond proceeds for most purposes,[33] including construction and acquisition of real property and equipment.[34] The court reached this conclusion by analyzing the text and structure of section 2704.08. It observed that only the first funding plan is required to address environmental clearances, while the second funding plan is silent on the issue.[35] Therefore, an interpretation that did not require a valid first funding plan before proceeding to the second funding plan would permit the Authority to expend bond proceeds without making the "critical certification" regarding environmental clearances.[36] In the court's view, the statute is "carefully designed to prevent" the kind of substantial delays or the need to redesign the project late in the process that may result from the Authority expending bond funds before having completed environmental clearances.[37] Therefore, a funding plan that requires the certification regarding environmental clearances must be interpreted as a necessary precursor to a funding plan that authorized the Authority to expend bond proceeds.[38] Issuing a writ that requires the Authority to rescind approval of the first funding plan has a

[29] *Id.* (citing Reichardt v. Hoffman, 52 Cal. App. 4th 754, 764 (1997); American Drug Stores, Inc. v. Stroh, 10 Cal. App. 4th 1446, 1453 (1992)).

[30] *Id.*

[31] *Tos I*, slip op. at 14. The court noted that issuing a writ invalidating all subsequent approvals may not be appropriate given that the statute states "[n]othing in [section 2704.08] shall limit the use or expenditure of proceeds on bonds... up to an amount equal to 7.5 percent of the aggregate principal amount of bonds" for the purposes specified. CAL. STS. & HIGH. CODE § 2704.08(g). It is possible that the subsequent approvals issued by the Authority could meet this requirement and, therefore, lack of compliance with the funding plan provisions should not prevent the Authority from executing those approvals. *See Tos I*, slip op. at 14.

[32] Tos, Fukuda, County of Kings v. Cal. High-Speed Rail Authority, No. 34-2011-00113919, slip op. at 2 (Nov. 25, 2013) [hereinafter *Tos II*].

[33] A funding plan is not required to be approved before up to 7.5 percent of bonds may be expended for the purposes of environmental studies, planning, and preliminary engineering activities; the acquisition of real property or rights-of-way, under certain circumstances; mitigation of environmental impacts resulting from the foregoing; and relocation assistance for owners and occupants of acquired property. CAL. STS. & HIGH. CODE § 2704.08(g).

[34] *Tos II*, slip op. at 2.

[35] *Id.* at 2-3.

[36] *Id.*

[37] *Id.* at 3.

[38] *Id.*

real and practical effect: "it will establish that the Authority has not satisfied the first required step in the process of moving towards the commitment and expenditure of bond proceeds."[39]

The court also addressed the question of whether a writ should direct the Authority to rescind subsequent approvals it made in reliance on the now-invalid 2011 funding plan. Based on the supplemental briefs submitted by the parties, the court focused on two construction contracts and whether those contracts "necessarily involve the present commitment of bond proceeds for construction-related activities"[40] that could only be expended by the Authority pursuant to the second funding plan required by section 2704.08(d). The court concluded that these contracts, which appear to be funded currently with federal grant money, do not necessarily commit bond proceeds and, therefore, the writ of mandate should not direct the Authority to rescind the contracts.[41]

With regard to these contracts, the plaintiffs argued that because the Authority is required to provide a certain percentage of matching funds for all federal grant money, the commitment of grant funds to the contracts guarantees that Prop 1A bond proceeds would eventually be spent to satisfy the matching requirements.[42] The court rejected the plaintiffs' argument for two reasons. First, the contracts contained termination clauses, meaning that since the Authority could terminate the contracts it is "not necessarily committed to spending the full face amount of those contracts."[43] Second, the court was unconvinced that the amount of federal grant funds projected to be spent on the contracts could not be matched through non-Prop 1A funds available to the Authority.[44] In other words, the court concluded that it was unclear how these contracts would be financed in the future and, thus, the use of Prop 1A bond proceeds was not yet inevitable.

Finally, the court also rejected the plaintiffs' request for a temporary restraining order or injunction prohibiting the Authority from continued expenditure of federal grant funds. The court reiterated that it was "not persuaded that the Authority's use and projected use of federal grant money necessarily amounts to the present commitment of Proposition 1A bond proceeds."[45] Furthermore, in general "the Authority's use of federal grant money is not regulated by Proposition 1A or its funding plan requirements."[46]

Legal Effect of the Writ of Mandate

The court issued a writ of mandate ordering the Authority to rescind its approval of the 2011 funding plan. Additionally, the court determined that approval of a valid funding plan under section 2704.08(c) is a necessary prerequisite to drafting and approval of the second funding plan required under section 2704.08(d), which is required before the Authority may expend bond proceeds.[47] Therefore, it appears as though the Authority must approve a funding plan that complies with the statutory requirements before it

[39] *Id.*

[40] *Id.* at 3.

[41] *Id.* at 4.

[42] *Id.* at 3.

[43] *Id.* at 4.

[44] *Tos II*, slip op. at 4. *See*, *infra*, "California High-Speed Rail and Federal Railroad Administration Grant Funds".

[45] *Tos II*, slip op. at 5.

[46] *Id.*

[47] *Id.* at 2-3.

can move forward towards using Prop 1A bond proceeds to fund construction or real property and equipment acquisition.[48]

Drawing from the court's analysis and assuming compliance with the other statutory requirements described in section 2704.08(c), the Authority will have to complete at least two tasks before seeking approval of a new funding plan. First, the Authority will have to identify funding sources for the entire IOS.[49] Based on the court's interpretation of the statute, these funding sources cannot be merely hypothetical; the Authority must have a reasonable present expectation of receipt of the funds on a projected date.[50] Second, the Authority will have to complete all necessary project level environmental clearances needed to proceed to construction for the entire IOS.[51] It appears as though the issuance of this writ of mandate has no direct effect on the Authority's ability to use federal grant funding or the California Legislature's July 2012 appropriation of bond funds.

California High-Speed Rail Authority and High-Speed Passenger Train Finance Committee v. All Persons Interested

Background

Section 2704.12 of the California Streets and Highways Code creates the High-Speed Passenger Train Finance Committee (Finance Committee or Committee).[52] The Finance Committee is charged with authorizing the issuance and sale of Prop 1A bonds upon the request of the Authority. Following the Committee's approval of bond sales, the Treasurer shall sell the bonds according to the terms and conditions specified by the Committee.[53] All provisions of the State General Obligation Bond Law[54] (Bond Law) apply to Prop 1A bonds and are incorporated into the California State and Highways Code provisions regulating California high-speed rail.[55]

On March 18, 2013, the Authority adopted a resolution requesting that the Finance Committee authorize the issuance of nearly $8.6 billion in bonds.[56] On the same day, the Finance Committee adopted a resolution authorizing this issuance.[57] The day after the Committee authorized issuance of the bonds, the Committee and the Authority (plaintiffs) filed a complaint for validation of bonds in the Superior Court of California for the County of Sacramento.[58] A validation complaint is a specific suit a public agency may

[48] *See* CAL. STS. & HIGH. CODE § 2704.08(d). However, this requirement does not prevent the Authority from expending up to 7.5 percent of bond proceeds, for specific purposes, before the funding plans are approved. *See id.* at § 2704.08(g).

[49] *See id.* at § 2704.08(c)(2)(D).

[50] *See Tos I,* slip op. at 8.

[51] *See* CAL. STS. & HIGH. CODE § 2704.08(c)(2)(K); *Tos I,* slip op. at 10.

[52] The Committee consists of the Treasurer; the Director of Finance; the Controller; the Secretary of Business, Transportation and Housing; and the chairperson of the Authority or a designated representative acting in his or her place. CAL. STS. & HIGH. CODE § 2704.12.

[53] *Id.* at § 2704.10; *see* CAL. GOV'T CODE § 16731.

[54] CAL. GOV'T CODE §§ 16720 *et seq.*

[55] CAL. STS. & HIGH. CODE § 2704.11.

[56] *See* High-Speed Rail Auth. and High-Speed Passenger Train Finance Comm. v. All Persons Interested in the Matter of the Validity of the Authorization and Issuance of General Obligation Bonds to be Issued Pursuant to the Safe, Reliable High-Speed Passenger Train Bond Act for the 21st Century, No. 34-2013-00140689, slip op. at 11 (Nov. 25, 2013) [hereinafter Validation Ruling] (citing Authority Resolution #HSRA 13-03).

[57] *Id.* (citing Finance Committee Resolution IX).

[58] *Id.*

initiate in California state courts "to determine the validity" of an agency decision or action.[59] A state board, department, agency, or authority "may bring an action to determine the validity of its bonds..."[60] in the Superior Court of the County of Sacramento. In the validation proceeding, the state agency, the plaintiff, must publish a summons in a newspaper of general circulation chosen by the court,[61] essentially giving notice to "all interested persons to the matter" that they may contest the validity or legality of the action.[62] A successful validation claim brought by a government agency may erase any uncertainty regarding the legitimacy of the agency's actions. The plaintiffs sought a judgment determining that their actions relating to authorization and issuance of the bonds "were, are, and will be valid and binding and were, are, and will be in conformity with the applicable provisions of law..."[63]

Complaint for Validation of Bonds

In evaluating the validity of the Committee's bond issuance authorization, the court noted that the scope of judicial review in this type of action is limited.[64] Based on California precedents, judicial review of an agency's quasi-legislative action (the decision to authorize Prop 1A bonds) is limited to "whether there was substantial evidence to support the legislative decisions."[65] In other words, the court should review whether the body's actions were "arbitrary, capricious or entirely lacking in evidentiary support," rather than conduct a *de novo* review.[66]

To determine whether the Finance Committee's authorization of bonds was supported by substantial evidence in the record, the court examined the statutory requirements that applied to the Committee's decision-making process. The Finance Committee's approval of bond issuance is governed by section 16730 of the Bond Law, which applies to authorization of bonds generally, and section 2704.13 of the California Streets and Highways Code, which applies specifically to Prop 1A. Section 16730 states that the Committee "shall determine the necessity or desirability of... issuing any bonds authorized to be issued and the amount of... bonds then to be... issued and sold."[67] Similarly, section 2704.13 states that the Committee "shall determine whether or not it is necessary or desirable to issue bonds... and, if so, the amount of bonds to be issued and sold."[68]

Therefore, the legal question the court had to answer was whether there was substantial evidence in the record to support the Finance Committee's determination that the issuance of nearly $8.6 billion in bonds was necessary or desirable on March 18, 2013. The court concluded that it could find "no evidence in the record of proceedings" to support such a determination.[69] The record of proceedings submitted to the court contained little more than the text of the Authority's Resolution approving the issuance of bonds. The resolution itself contains "bare findings of necessity and desirability which contain no explanations of

[59] CAL. CIV. PROC. CODE § 860.

[60] CAL. GOV'T CODE § 17700.

[61] CAL. CIV. PROC. CODE § 861.

[62] CAL. CIV. PROC. CODE §§ 861, 861.1.

[63] Validation Ruling, slip op. at 2-3.

[64] *Id.* at 4.

[65] *Id.* at 5 (citing Morgan v. Community Redevelopment Agency, 231 Cal. App. 3rd 243, 259-60 (1991)).

[66] *Id.* The court further noted that "such limited review is grounded in the doctrine of separation of powers, acknowledges the expertise of the agency, and derives from the view that courts should let administrative boards and officers work out their problems with as little judicial interference as possible." *Id.*

[67] CAL. GOV'T CODE § 16730 (no emphasis in text).

[68] CAL. STS. & HIGH. CODE § 2704.13.

[69] Validation Ruling, slip op. at 14.

how, or on what basis, it made those findings…[,] no summary of the factors the Finance Committee considered and no description of the content of any documentary or other evidence it may have received and considered."[70] No other supporting documents or information alluded to in the Committee's resolution were included in the record prepared by the plaintiffs for the court to review.[71]

The court rejected several arguments put forth by the plaintiffs, a selection of which are discussed below, as to why the record constituted sufficient evidence to support the Committee's decision. First, the plaintiffs argued that the Authority's request for issuance of bonds itself proved that issuance was objectively necessary or desirable. The court rejected this contention and noted that the Authority's request only proved that the Authority believed the issuance to be necessary or desirable.[72] If the Authority's subjective belief was enough evidence to validate the Finance Committee's action, the result would be an "abdication of discretion by the Finance Committee to the Authority."[73] Such an interpretation is not supported by either the Bond Law or Prop 1A provisions that specifically require the Finance Committee, not the Authority, to determine necessity or desirability. The court concluded that the "voters, in approving Proposition 1A, intended to empower the Finance Committee to serve as an independent decision-maker, protecting the interests of taxpayers by acting as the ultimate 'keeper of the checkbook.'"[74] Second, the court dismissed the plaintiff's contention that there were other sources of supporting evidence beyond the Finance Committee's resolution. The court refused to consider the public comments received in the Authority's March 18, 2013 meeting relating to the decision to issue bonds because the record showed that those comments were only received by the Authority, not the Finance Committee.[75]

Legal Effect of the Validation Proceeding

The court ruled that it had "the authority to decline to validate legislative action authorizing the issuance of bonds where," as determined in this case, "such action did not comply with applicable legal requirements."[76] Therefore, the court denied the plaintiffs a validation judgment, holding that "the Finance Committee's determination that it was 'necessary and desirable' to authorize the issuance of bonds to finance construction of the high-speed rail project as of March 18, 2013 is not supported by any evidence in the record, and therefore did not comply with an essential legal requirement."[77]

The effect of a validation judgment is governed by California Civil Procedure Code section 870. The section provides an opportunity to appeal, where a "notice to appeal [must be] filed within 30 days after the notice of entry of the judgment."[78] It further states that:

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[70] *Id.*

[71] *Id.*

[72] *Id.* at 15.

[73] *Id.* at 15-16.

[74] *Id.* at 16.

[75] *Id.* at 17. Additionally, the content of those comments is not included in the record. The court also considered, and rejected, purported supporting evidence the Committee received while in closed session on March 18, 2013 that was not visible in the record and the argument that the Finance Committee's expertise in relation to bond issuances and high-speed rail projects provided sufficient evidence. *Id.* at 18.

[76] Validation Ruling, slip op. at 19. The court considered the fact that "there are no validation cases specifically reviewing a finance committee's determination that a bond issuance is desirable" to be "essentially irrelevant" to determining the court's authority in this case. *Id.*

[77] *Id.* at 20.

[78] CAL. CIV. PROC. CODE § 870(b).

> The judgment, if no appeal is taken, or if taken and the judgment is affirmed, shall...thereupon become and thereafter be forever binding and conclusive, as to all matters therein adjudicated or which at the time could have been adjudicated, against the agency and against all other persons, and the judgment shall permanently enjoin the institution by any person of any action or proceeding raising any issue as to which the judgment is binding and conclusive.[79]

As of January 7, 2014, no judgment on the plaintiff's validation complaint has yet appeared on the California Case Management System for the California Superior Court for the County of Sacramento.[80] Prior to issuance of that judgment and a statement from the court relating to relief granted, it appears to be difficult to determine the specific effect of the denial of the validation claim. However, based on public statements, it appears that the Authority and the Finance Committee will move forward by restarting the validation process to attempt to obtain a successful validation judgment.[81] Presumably, this process will require the Finance Committee to issue a new resolution authorizing the issuance of bonds that would seek to remedy the evidentiary deficiencies identified by the court relating to the necessity or desirability of issuing bonds.

California High-Speed Rail and Federal Railroad Administration Grant Funds

In 2009, California applied for federal grant funds made available for high-speed and intercity passenger rail projects (HSIPR) in the American Recovery and Reinvestment Act (ARRA).[82] Between 2010 and 2011, the Authority was selected to receive approximately $2.5 billion in ARRA funds, through both its initial application for funds and redistribution of funds granted to other states that subsequently rejected them.[83] Additionally, the Authority received approximately $928 million in funding from the Transportation, Housing, and Urban Development and related Agencies Appropriations Act for 2010 (FY2010 grant funds), similarly through an initial selection and subsequent redistribution of funds

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[79] CAL. CIV. PROC. CODE § 870(a).

[80] Search for Documents and Tentative Rulings for Docket No. 34-2013-00140689, California Case Management System, *available at* https://services.saccourt.ca.gov/publicdms/Search.aspx. The court did issue a judgment on December 12, 2013 relating to a cross-complaint for a determination of invalidity filed by the Kings County Water District. *See* Judgment Dismissing the Cross-Complaint of Kings County Water District for Determination of Invalidity (filed Dec. 12, 2012), High-Speed Rail Auth. and High-Speed Passenger Train Finance Comm. v. All Persons Interested in the Matter of the Validity of the Authorization and Issuance of General Obligation Bonds to be Issued Pursuant to the Safe, Reliable High-Speed Passenger Train Bond Act for the 21st Century, No. 34-2013-00140689. The court granted the Authority's motion to dismiss the cross-complaint based on deficiencies in the summons the Kings Country Water District was required to issue under California Civil Procedure Code §§ 860, *et. seq.* The court's analysis on this issue is contained in a Minute Order issued on November 22, 2013. *See* Minute Order (filed Nov. 22, 2013, 9:00AM), High-Speed Rail Auth. and High-Speed Passenger Train Finance Comm. v. All Persons Interested in the Matter of the Validity of the Authorization and Issuance of General Obligation Bonds to be Issued Pursuant to the Safe, Reliable High-Speed Passenger Train Bond Act for the 21st Century, No. 34-2013-00140689.

[81] *See* Juliet Williams, *High-speed Rail Officials Say Plan is on Schedule*, SAN DIEGO UNION-TRIBUNE, Dec. 5, 2013, http://www.utsandiego.com/news/2013/dec/05/feds-deny-early-approval-of-ca-rail-segment/all/ ("At a meeting of the board that oversees the California High-Speed Rail Authority, board members voted in closed session to start work on a new request for blanket approval from the courts to sell $8.6 billion in voter-approved bonds, after a Sacramento County judge denied such a request last week."); Jessica Calefati, *Bullet Train: Rail Authority Says It's Full Speed Ahead for Project*, SAN JOSE MERCURY NEWS, Dec. 5, 2013, http://www.mercurynews.com/california-high-speed-rail/ci_24662778/high-speed-rail-authority-try-again-get-bond ("[Dan] Richard [(chairman of the Authority)] on Thursday also announced that the state will repeat its effort to get the judge's approval, and he directed the authority's staff to begin researching what the state must do to be successful this time.").

[82] Pub. L. No. 111-5, 123 Stat. 208, Div. A, Title XII.

[83] *See* Grant/Cooperative Agreement, Federal Railroad Administration, "California High-Speed Rail Authority," No. FR-HSR-009-10-01-05, Attachment 3A at 78-79. (Dec. 5, 2012) [hereinafter ARRA Agreement].

originally granted to other states.[84] These funds are dedicated to design and construction of the initial Central Valley section of the rail line.

Generally, the administration of federal grant programs is governed by the statutes that create the program; regulations, including government-wide guidance issued by the Office of Management and Budget (OMB); and a grant agreement or cooperative agreement[85] signed by the administrating agency and grantee. The funds granted under ARRA are subject to several statutory requirements. First, the grants must conform to the conditions established in section 24405 of Title 49 of the United States Code, which include, in part, Buy America provisions and requirements relating to railroad rights-of-way.[86] FY2010 grant funds must also comply with specific provisions of section 24402 and 24403 of Title 49 of the United States Code.[87] Second, ARRA allows the federal share of the project costs for which a grant is made to be up to 100 percent.[88] FY2010 grant funds allow the federal share of project costs to be up to 80 percent.[89] OMB regulations contained in Part 200 of Title 2 of the Code of Federal Regulations provide general guidance relating to grant administration.[90]Additionally, the Department of Transportation has promulgated regulations creating uniform administrative requirements for grants to local and state governments.[91]

The cooperative agreements signed by the FRA and the Authority contain the most specific grant terms and conditions. The discussion of grant conditions herein is limited to conditions directly governing the grantee's matching fund contribution requirements, the grantor-agency's payment methods, and the grantor-agency's rights relating to violations of the cooperative agreement.

Cooperative Agreements

The FRA and the Authority have signed several cooperative agreements that govern the administration of the grant funds. Cooperative Agreement FR-HSR-0009-10-01-00, and its subsequent five amendments, govern the approximately $2.5 billion in ARRA grant funds. The most recent amendment, Cooperative Agreement FR-HSR-0009-10-01-05 (ARRA cooperative agreement), discussed in detail below, was executed in December 2012. Cooperative Agreement FR-HSR-0118-12-01-00 (FY2010 cooperative agreement) governs the approximately $928 million in FY2010 grant funds.

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[84] *See* Pub. L. No. 111-117, 123 Stat. 3056; ARRA Agreement, Attachment 3A at 78-79.

[85] Grant agreements are used when agency participation in a project is limited. Alternatively, cooperative agreements are used when greater federal participation is anticipated. *See* 31 U.S.C. §§ 6304, 6305; High-Speed Intercity Passenger Rail Program, Notice of Funding Availability, 74 Fed. Reg. 29900, 29923 (June 23, 2009).

[86] *See* Pub. L. No. 111-5, 123 Stat. 208.

[87] *See* Pub. L. No. 111-117, 123 Stat. 3057; 49 U.S.C. § 24402(a)(2), (f), (i); 49 U.S.C. § 24403(a), (c). These requirements generally address project management and oversight.

[88] *Id.* ARRA grants are also subject to statutory requirements covering a broad range of topics that are outside the scope of this memorandum, such as grantee procurement, civil rights, environmental protections, and ARRA-specific grant conditions. *See* 74 Fed. Reg. 29923-25.

[89] Pub. L. No. 111-117, 123 Stat. 3057.

[90] *See* 2 C.F.R. Part 200; "Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Final Guidance," 78 Fed. Reg. 78590 (Dec. 26, 2013).

[91] *See* 49 C.F.R. Part 18.

Grantee Matching Funds

The cooperative agreements establish cost-sharing responsibilities between the FRA and the Authority, as grantee, that dictate the maximum percentage of the total project costs that can be funded through federal grant money. For a majority of grant funds authorized under ARRA, approximately $2.4 billion, federal grant funds can account for 49.8182 percent of the project costs, while the Authority must provide for 50.1818 percent of the costs.[92] However, for the $86 million in grant funds redistributed to the Authority in May 2011, federal grant funds can account for 80 percent of the project costs, with the Authority contributing the remaining 20 percent.[93] Under the ARRA cooperative agreement, the Authority's total funding contribution "shall not be less than" approximately $2.5 billion.[94] For the first award of FY2010 grant funds, $715 million issued in December 2010, federal funds can be used to pay for 70 percent of the project costs, while the Authority's share must be at least 30 percent.[95] For the second award of FY2010 grant funds, $213 million issued in May 2011, federal funds can be used for 80 percent of the project costs, while the Authority's share must be at least 20 percent.[96] Under the FY2010 cooperative agreement, the Authority's funding contribution "shall not be less than" approximately $359 million.[97]

The cooperative agreements do not appear to mandate that Authority matching funds be derived from a specific source. The ARRA cooperative agreement notes that the Authority expects to use Prop 1A bond proceeds to fund its portion of the project:

> FRA recognizes that unless otherwise stated herein, the Grantee anticipates using proceeds of Proposition 1A bonds to provide the Grantee's match funding... but that the issuance and sale of Proposition 1A bonds are subject to certain other state legal requirements. In the event the Grantee does not expect such proceeds to be available in time to provide the contributory match concurrent with its request for grant funds, the Grantee shall make all reasonable efforts to secure a substitute funding source to deliver the required funding...[98]

This statement clearly anticipates that the Authority will provide its matching funding using Prop 1A bond proceeds, but it does not limit the Authority to this source of funds. Similarly, the FY2010 cooperative agreement mentions both Prop 1A bonds and state appropriated funds in its discussion of grantee funding, without limiting the grantee's contribution to those sources:

> The Grantee has entered into this Agreement with the firm intention of completing all of the tasks described herein, including providing the Grantee contribution of funding assistance for those tasks. The Grantee will seek and diligently pursue any needed appropriations from the California State Legislature and diligently seek to satisfy such other requirements in Proposition 1A in a timely and appropriate manner as necessary to meet the payment obligations and project funding assistance contribution it has agreed to assume under this Agreement.[99]

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[92] ARRA Agreement, Attachment 1, § 5(b)-(c) at 2.

[93] *Id.* at Attachment 1, § 5(d)-(e) at 2.

[94] *Id.* at Attachment 1, § 5(f) at 2.

[95] Grant/Cooperative Agreement, Federal Railroad Administration, "California High-Speed Rail Authority," No. FR-HSR-0118-12-01-00, Attachment 1, § 5(b)-(c) at 2-3 (Nov. 18, 2011) [hereinafter FY2010 Agreement].

[96] *Id.* at Attachment 1, § 5(d)-(e) at 3.

[97] *Id.* at Attachment 1, § 5(f) at 3.

[98] ARRA Agreement, Attachment 1, § 5(j) at 3.

[99] FY2010 Agreement, Attachment 1, § 5(j) at 4.

The cooperative agreements also establish the form of payment that the FRA will make to the Authority for allowable expenses under the grants, which are defined in the agreement.[100] The agreements describe two potential types of payment by the FRA. The first is reimbursement payment by the FRA, where "payment of FRA funding... shall be made on a reimbursable basis, whereby the Grantee will be reimbursed, after submission of proper invoices for actual expenses incurred."[101] This is the only payment method described in the FY2010 cooperative agreement and appears to apply to all funds administered under that agreement.[102] The reimbursement method is described in the ARRA cooperative agreement as the default payment method that applies unless the agreement specifically states that another payment method is available.[103]

A second kind of payment method is included in the ARRA cooperative agreement—advanced payment by the FRA: "FRA may use the advanced payment method to fund requests expenses as permitted by 49 C.F.R. 18.21(c) consistent with the FRA-approved Funding Contribution Plan after receipt and approval of a written justification and request from Grantee."[104] The federal regulation cited requires that advanced payment only be used when grantees and subgrantees "maintain or demonstrate the willingness and ability to maintain procedures to minimize the time elapsing between the transfer of the funds and their disbursement by the grantee or subgrantee."[105]

The Funding Contribution Plan (Plan), which includes both ARRA and FY2010 funds, is included as an exhibit to the most recent amendment of the ARRA cooperative agreement.[106] The Plan "designates scope activities that are authorized to be paid with Federal funds, using [the] advance payment method, until Prop 1A bond sale or April 2014, whichever is earlier."[107] These activities include "Phase 1 Planning, [Preliminary Engineering,] & Environmental"; real property acquisitions, including right of way acquisitions; and specific activities under "[Design-Build], Program Management, Contract Work, & Contingency."[108] Overall, assuming that the advanced payment method option expires on April 1, 2014 and up until that point only ARRA funds are expended, the Plan appears to anticipate up to approximately $925 million in ARRA funds being spent under the advanced payment method.[109] Under the Plan and the cooperative agreements, it appears that the reimbursement payment method will be in effect after the advanced payment method expires on April 1, 2014 or Prop 1A bonds are sold, whichever is earlier.[110]

The cooperative agreement allows for the advanced payments to be made, consistent with the Plan, even though the lack of concurrent contributory matching funds may cause the Authority to "temporarily exceed" the maximum federal share percentage allowed by the agreement.[111] The agreement states that

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[100] *See* ARRA Agreement, Attachment 2, § 7(b)(4) at 25; FY2010 Agreement, Attachment 1, § 7 at 4.

[101] FY2010 Agreement, Attachment 1, § 7 at 4; ARRA Agreement, Attachment 1, § 7 at 4.

[102] FY2010 Agreement, Attachment 1, § 7 at 4

[103] ARRA Agreement, Attachment 1, § 7 at 4

[104] *Id.*

[105] 49 C.F.R. § 18.21(c).

[106] ARRA Agreement, Exhibit 3, "Funding Contribution Plan," [hereinafter Funding Contribution Plan].

[107] *Id.* at 1. Some of the activities designated as eligible for advanced payment "require FRA approval prior to issuing [notice to proceed] for any design and construction activities..." *Id.*

[108] *Id.*

[109] *Id.* Approximately $462 million of ARRA funds are predicted to be spent in California fiscal years 2013 and 2014, running from July to June. *Id.* at 1-2.

[110] *See* Funding Contribution Plan 1; ARRA Agreement, Attachment 1, § 7 at 4; ARRA Agreement, Attachment 2, § 7(b) at 24-25.

[111] *See* ARRA Agreement, Attachment 3, "Program Estimate/Budget" at 58; *id.* at Attachment 3A, "Project Budget" at 93.

"there is an opportunity for substantial cost saving... if the Grantee is allowed to accelerate the expenditure of ARRA funds."[112] Despite this accelerated spending of federal funds, "the Grantee remains responsible for ensuring that the matching contribution at Project completion" complies with the agreement.[113] Therefore, after the expiration of the advanced payment method, the Plan envisions that the Authority will provide "catch-up" Prop 1A matching funds, since the federal funds expended under the advanced payment method will have exceeded the maximum federal cost-sharing percentage.[114] Once the Authority's matching funds have caught up to the required grantee cost-sharing percentage of the total expenditures, estimated to occur in April 2015, the Plan envisions the use of mixed matching funds, ARRA funds, and FY2010 funds.[115]

Violations of the Cooperative Agreement

Based on the provisions of the cooperative agreements regarding the Authority's matching funds, it appears as though the Authority must begin providing its grantee matching funds in April 2014, when it is scheduled to expend approximately $63 million of Prop 1A funds.[116] Therefore, it does not appear that the Authority's failure to obtain bond proceeds or secure other matching funding has led to a violation of the cooperative agreements at this time.

The cooperative agreements establish the FRA's rights when a violation or anticipated violation of the agreement occurs, giving it several options to address such an event. The FRA may choose to take advantage of these terms if the Authority violates an agreement in the future. The FRA may "suspend or terminate all or part" of the grant funding provided for in the ARRA and/or FY2010 cooperative agreements if one of the following events occurs: (1) the Authority violates the terms of the Agreement; (2) the FRA determines that the purpose of the statute authorizing the grant program is not "adequately served" by continuing the grant assistance; or (3) there is a "failure to make reasonable progress on the Project."[117] Additionally, the ARRA cooperative agreement specifically states that the FRA may terminate or suspend financial assistance if it determines that the Authority "may be unable to meet the contributory match percentage" and "complete the Project according to the Project Schedules" in the agreement.[118] Based on the text of the cooperative agreements, the decision to terminate or suspend grant funding is left to the discretion of the FRA.[119]

Under certain circumstances, the "FRA reserves the right to require the Grantee to repay the entire amount of FRA funds provided under this [cooperative] Agreement or any lesser amount as may be determined by FRA."[120] Under the ARRA cooperative agreement, the FRA may take advantage of this

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[112] *See* ARRA Agreement, Attachment 3, "Program Estimate/Budget" at 58; *id.* at Attachment 3A, "Project Budget" at 93.

[113] *See* ARRA Agreement, Attachment 3, "Program Estimate/Budget" at 58; *id.* at Attachment 3A, "Project Budget" at 93.

[114] *See* Funding Contribution Plan 2.

[115] *See id.* It appears as though the Funding Contribution Plan does not envision expenditure of the FY2010 grant funds until 2017. *See id.* at 5.

[116] *Id.* at 3. The Funding Contribution Plan also estimates that approximately $179 million of Prop 1A funds will be expended between April 1, 2014 and June 30, 2014. *Id.* at 1-2.

[117] ARRA Agreement, Attachment 2, § 23(a) at 37; FY2010 Agreement, Attachment 2, § 23(a) at 26-27.

[118] ARRA Agreement, Attachment 2, § 23(a) at 37.

[119] *See id.*; FY2010 Agreement, Attachment 2, § 23(a) at 26-27. The grantee may be entitled to a hearing if an enforcement action is taken against it. *See* 49 C.F.R. § 18.43(b) ("the awarding agency will provide the grantee or subgrantee an opportunity for such hearing, appeal, or other administrative proceeding to which the grantee or subgrantee is entitled under any statute or regulation applicable to the action involved.").

[120] ARRA Agreement, Attachment 2, § 23(b) at 37. *See* FY2010 Agreement, Attachment 2, § 23(b) at 27.

repayment of funds if the Authority "fails to adhere to the Funding Contribution Plan or [the] FRA determines the [Authority] will be unable to meet the contributory match percentage" in the agreement.[121] Furthermore, if the FRA chooses to require repayment, it "may collect on such a claim by means of administrative offset against funds payable by the United States to, or held by the United States for, the State of California."[122] Under the FY2010 cooperative agreement, the FRA may require repayment if it determines that the grantee "willfully misused Federal assistance funds" by taking specific actions.[123] This agreement does not specifically address the method of repayment.[124]

The ARRA cooperative agreement includes additional FRA rights. If the Authority "fails to secure and deliver its required match funding contribution pursuant to the Funding Contribution Plan," the FRA has the option of requesting a "statement of resolution."[125] The Authority would then be required to "provide a written description of the facts and circumstances leading to its failure and a detailed proposal and timeline for resolving those issues."[126] The FRA chooses whether or not to accept the proposal, with modifications possible. If the proposal is accepted, the grantee is given "time to resolve the issues in accordance with the proposal."[127] A grantee's failure to provide required matching funds or failure to adhere to other terms of the cooperative agreement may lead to the grantee's suspension or debarment from further participation in Department of Transportation-administered surface transportation grant programs.[128] Similarly, such failures "may adversely affect any future decisions regarding any future requests for funding under any grant program administered by the FRA or the U.S. [Department of Transportation]."[129]

In recognition of the FRA's various rights to amend, suspend, or terminate the cooperative agreement if the Authority does not provide matching funds, the agreement also requires the Authority to provide written notice to the FRA when any circumstance arises that might prevent the Authority from delivering required matching funds.[130]

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[121] ARRA Agreement, Attachment 2, § 23(b) at 37.

[122] ARRA Agreement, Attachment 2, § 23(c) at 37. These funds include both FRA funds payable to California and other DOT funds payable to California. *Id.*

[123] FY2010 Agreement, Attachment 2, §23(b) at 27.

[124] *See id.*

[125] ARRA Agreement, Attachment 2, § 23(g) at 38. The statement of resolution is also available when a grantee "fails to make reasonable use of the Project property, facilities or equipment"; or fails to adhere to the terms of the cooperative agreement. *Id.*

[126] *Id.*

[127] *Id.*

[128] ARRA Agreement, Attachment 2, § 23(d) at 38.

[129] ARRA Agreement, Attachment 2, § 23(f) at 38.

[130] *See* ARRA Agreement, Attachment 2, § 2(d) at 21.