

# High-speed rail funding takes a big hit from Sacramento judge

BY TIM SHEEHAN

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A judge dealt a dual blow to plans for California's bullet train in a pair of rulings handed down Monday in Sacramento.

Sacramento County Superior Court Judge Michael Kenny denied a request by the California High-Speed Rail Authority to issue a blanket validation for the sale of more than \$8 billion in bonds from Proposition 1A, a high-speed rail measure approved by California voters in 2008.

In a separate but related case, the judge sided with Kings County farmer John Tos, Hanford homeowner Aaron Fukuda and the Kings County Board of Supervisors, who are suing the rail agency over its compliance with Prop. 1A. Kenny agreed to issue a writ of mandate ordering the rail agency to re-do its 2011 funding plan before spending any state bond money on construction of the proposed high-speed rail system.

Kenny's rulings, however, do not bar the state from selling the bonds. Nor did he order the rail authority to rescind its approval of contracts for work on the first 29-mile construction stretch from northeast Madera to the south edge of Fresno or block the state from spending federal stimulus or transportation money on the project.

One transportation expert said the rulings won't stop the project, but do shake public confidence in it.

The lawyer for opponents expressed satisfaction with Monday's decisions.

"It's not everything we asked for, but it's a lot," said Stuart Flashman, an Oakland attorney representing the Kings County opponents in both cases.

Together, the two rulings appear to hamstring the rail authority by severely limiting its available state funds and by delaying its spending efforts.

The effect is likely to further stall efforts to start construction on the rail line in the central San Joaquin Valley.

In a November hearing in the Tos case, Flashman likened the authority's situation to a saying attributed to humorist Will Rogers: "When you find yourself in a hole, the first thing to do is stop digging."

With Monday's ruling, Flashman said that Kenny "hasn't ordered the authority to stop digging, but I think he's telling them they're in a hole."

Leaders of the rail agency cast Kenny's rulings in a glass-half-full light.

"We are reviewing both decisions to chart our next steps, but it is important to stress that the court again declined the opposition's request to stop the high-speed rail project from moving forward," rail authority board Chairman Dan Richard said. "Additionally, the judge did not invalidate the bonds as approved by the voters in Proposition 1A."

"Like all transformative projects, we understand that there will be many challenges that will be addressed as we go forward in building the nation's first high-speed rail system," Richard added.

State Sen. Andy Vidak, R-Hanford, an outspoken critic of the rail authority, said the rulings reinforce his efforts to put high-speed rail back on the ballot in November 2014.

### **Prop. 1A compliance**

Kenny's ruling in the Tos/Fukuda/Kings County lawsuit, originally filed in December 2011, centers on the authority's 2011 funding plan and the agency's inability to certify completion of all of the environmental clearances needed for its "initial operating segment" — a stretch from Merced to Los Angeles that would be the first portion on which high-speed trains would carry passengers in 2022.

To date, the only portion for which environmental studies have been completed is the Merced-Fresno section. The rail authority expects to approve a final environmental report for its Fresno-Bakersfield section next spring, but has yet to issue draft reports for its Bakersfield-Palmdale or Palmdale-San Fernando Valley sections.

Kenny also noted that the authority failed to comply with Prop. 1A because the funding plan did not identify realistically available sources of money for the entire Merced-San Fernando Valley operating segment, as required by the law.

The authority has estimated that it will cost about \$30 billion to complete the Merced-San Fernando Valley work.

"When it comes to the funding, I think they're totally at sea," Flashman said. "They need \$30 billion, and they've only got \$6 billion. That's a big gap. I don't see how they get their (initial funding plan) finished" before moving on to creating a subsequent plan required before construction can begin.

The Federal Railroad Administration has provided grants of about \$3.3 billion in stimulus and transportation money for construction in the Valley from about Madera to north of Bakersfield. But that money comes with major strings.

The first is a requirement that the state pony up another \$2.7 billion from Prop. 1A to match the federal contributions.

The second is that the federal money be exhausted and the work largely completed by the fall of 2017 — an ambitious schedule for a project widely deemed to be the largest public works project in California history.

The judge's ruling allows the state to front-load the spending of its federal contributions on the project. "The court is not persuaded that the Authority's use and projected use of federal grant money necessary amounts to ... commitment of Proposition 1A bond proceeds," Kenny wrote. "Moreover, the authority's use of federal grant money is not regulated by Proposition 1A or its funding plan requirements."

Monday's decision represents only a partial culmination of the Tos/Fukuda/Kings County lawsuit because it only wraps up one set of procedural challenges over the rail authority's compliance with Prop. 1A.

Still to come is a trial on allegations by the Kings County opponents that the rail agency's plan for a "blended system" in which high-speed trains will share tracks with the existing Caltrain commuter trains between San Jose and San Francisco is substantially different than what voters were promised in Prop. 1A in 2008.

That portion of the case, which Flashman said could be tried in March 2014, also asserts that the system cannot meet key performance requirements established by the proposition. Those include provisions that the system operate without public subsidies and that the trains be able to make a nonstop, one-seat trip between Los Angeles and San Francisco in two hours and 40 minutes.

### **Lack of bond oversight**

Kenny's ruling in the bond validation case doesn't bar the state from issuing or selling Prop. 1A bonds. But it does open the door to individual lawsuits challenging the validity of the bond issuance — something the rail authority had wanted to avoid by filing the case in March.

The case was intended to require any and all legal challenges to the bonds to be heard all at one time.

Kenny determined that the high-speed rail Finance Committee — a five-member group made up of the state treasurer, finance director, controller, transportation secretary and the rail authority

chairman — authorized the issuance of bonds without any substantial evidence that it was "necessary or desirable" to issue the bonds now.

The judge rejected arguments made by the state Attorney General's Office at a hearing in September that the rail agency's request for the bond sale was sufficient evidence for the Finance Committee to authorize the bonds.

"Some evidence other than the Authority's request is necessary to establish that the Finance Committee actually exercised its discretion in deciding on that request, and did not merely accept it without question," Kenny wrote.

Because the committee acted without evidence, Kenny added, it "therefore did not comply with an essential legal requirement" established by the language within Prop. 1A.

If the state's sale of Prop. 1A bonds is delayed or eventually barred by legal challenges, the rail authority would likely be hard-pressed to come up with the \$2.7 billion needed to meet its matching obligations to the federal government for the Madera-Bakersfield construction sections.

Flashman said the rail agency could appeal Kenny's bond-validation ruling but added that he did not believe an appeals court would be keen to overturn the decision.

"That's a pretty tall hill to climb," he said.

### **Dangers of delay**

The ultimate effect of the two rulings is unclear, but it likely will stall progress on a project that already has seen its schedule slide repeatedly. But the rulings themselves are likely not fatal blows to the project, said Rod Diridon Sr., executive director of the Mineta Transportation Institute at San Jose State University.

"These will certainly delay the project," said Diridon, who served for 10 years on the rail authority's board and was its chairman before stepping down in 2010. "But they are not terminal."

Diridon said he believes the authority can rework its funding plan, but acknowledged that the legal requirement for full environmental certification for the Merced-San Fernando Valley initial operating segment will be a deciding factor in accomplishing that feat.

More problematic is the prospect of multiple legal challenges over the bond validation, he said. "The authority wanted all of the cases against the bonds to be decided in one action, not individually," Diridon said. Now each case will be fought in court as it comes up, "and that's going to take some time."

Diridon said Kenny's rulings are just as important for what they did not do as for what they did.

"The judge did not invalidate the bonds, he did not invalidate any of the contracts, and he refused to approve a restraining order against the project," Diridon said. But the delays are likely to carry additional fallout for the rail authority.

"The real crisis, I think, is public confidence," he said. "You've got a project that's been going on for a long time, and it's delayed time and time again by very small groups of people who have used tremendous amounts of money to delay it. There's a tendency on this type of project, if it's delayed for a long time, to become a victim of inertia."

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