

More lawsuits are a foregone conclusion for California high-speed rail

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When California voters approved \$9 billion in funding for a bullet train in 2008, the ballot measure included the strictest engineering and spending controls ever placed on a major state project.

Voters were told that the high-speed trains would hit 220 mph, get from Los Angeles to San Francisco in two hours and 40 minutes, operate without subsidies and obtain funding and environmental clearances for entire operating segments before construction.

The idea was to protect taxpayers from an abandoned project or one that would require indefinite taxpayer support.

Now, as state officials seek to begin construction on the \$68-billion project, those conditions have become a fertile breeding ground for lawsuits over the meaning of the language voters endorsed in the ballot proposition.

One key case hinging on these issues is working its way through state appellate court after a Sacramento judge ruled in November that the high-speed rail agency had failed to comply with 2008's Proposition 1A. The decision, state attorneys wrote in their appeal, could be "catastrophic" for the project.

Dan Richard, chairman of the high-speed rail authority, said the state would deliver a system that meets all legal requirements of the ballot measure.

"We are not trying to parse words and hide behind legal technicalities," he said.

But critics and opponents, including some key players from the project's past, say the rail authority is trying to circumvent the basic intent of the protections because the existing plan for the Los Angeles-to-San Francisco line can't meet them.

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The unusual specificity of Proposition 1A has been cited by bullet train promoters and critics to bolster their positions. And both sides have put the language and procedures set out in an 8,000-word piece of legislation underlying the ballot measure under an interpretive microscope. One example: Does a requirement to "design" the train so it can travel from L.A. to San Francisco in two hours and 40 minutes mean the state has to provide such service?

When the restrictions were written, they were considered unprecedented.

"This bond issue was extraordinary," said Quentin Kopp, a former state senator, state court judge and former chairman of the high-speed rail authority, when the restrictions were written. "I can't recall any general obligation bond issue that incorporated legal provisions to the extent this one does."

In Kopp's view, the state legislation and subsequent ballot measure were a conscious effort by the Legislature to place binding safeguards on the biggest infrastructure project in California history.

Rep. Alan Lowenthal (D-Long Beach), a former state senator who wrote many of the restrictions, said: "We didn't put them in as guidelines.... It was really clear what we wanted."

But high-speed rail supporters say the conditions were never intended to be a legal straitjacket, allowing opponents to gum up the whole purpose of the bond measure: building a bullet train.

"The conditions were unnecessary and ill conceived," said Rod Diridon, another former chairman of the state's rail agency and now executive director of a San Jose State University transportation institute. The language in the law provides "guidelines, not hard and fast rules," Diridon said.

Richard Katz, a former authority board member and state legislator, agreed the conditions should not be taken too literally.

"People voted for the concept of high-speed rail," he said. "You have to view this in the larger context of whether the high-speed rail authority is substantially complying with the requirements."

The competing interpretations of the ballot measure have created something of a legal Olympiad, with the main court battle being waged by Central Valley farmers and Kings County.

In addition to the suits over the bond act, the project has been hit with multiple environmental lawsuits. On Thursday, Central Valley opponents filed suit to obtain a restraining order on the project, alleging errors in the authority's environmental impact statement for the Fresno-to-Bakersfield section.

Two powerful potential opponents, Union Pacific Railroad and BNSF Railway, also are standing in the wings. Both freight railroads have filed extensive objections to the bullet train plans, arguing that its construction could interfere with their operations and violate their property rights.

Last month, Union Pacific attorneys appeared before the appellate court and asked that any decision permitting the state to sell additional high-speed rail bonds not support the state's contention that it met the requirements of Proposition 1A.

At that hearing, the appellate court justices were reviewing two decisions by Sacramento County Superior Court Judge Michael Kenny.

He ruled the state violated the law by failing to adopt a funding plan that had the necessary environmental clearances and identified all of the sources of money needed for the initial usable segment of the rail line from Merced to the San Fernando Valley.

Kenny told the rail authority to submit a new funding plan.

At the appellate court hearing, Deputy Atty. Gen. Ross Moody did not address whether the state has the money or the environmental clearances. Instead, he delved into the arcane language of Proposition 1A and the steps that must be taken before the state can actually spend money on the project.

Proposition 1A, Moody argued, requires two funding plans: an initial one intended for the Legislature to decide whether to appropriate funds, and a second version before the money can be spent on construction.

Moody said the courts have no authority to challenge the Legislature's decision on the first plan. If the opponents want to challenge the project, they must wait for the second funding plan, he said.

Stuart Flashman, an attorney for the plaintiff farmers and Kings County, argued that the first funding plan is crucial because that's where the state must show it has all environmental clearances needed for construction.

"The risk is you begin a system that cannot be completed," he told the three-member appellate panel.

A decision on the appeal is expected no later than this summer.

Another trial this year will examine whether the state is failing to comply with prohibitions on taxpayer-funded operating subsidies and requirements on the bullet train's end-to-end travel times.

The state rejects both of those allegations and points to projections saying the system will be highly profitable.

As with many issues, the travel time controversy is fraught with conflicting legal interpretations. In the official ballot pamphlet in 2008, proponents said riders would "travel from Los Angeles to San Francisco in about 2 1/2 hours for about \$50 a person."

But the language of the bond act says the system must be "designed to achieve" a trip time of 2 hours and 40 minutes between the cities.

So, will the state have regular service that meets those trip times? Or is the state required only to build a system able to provide such service?

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Richard recently said the bullet train will be capable of making the trip in the required time, and that it is the intent of the state to provide such service. Actual operating schedules will be determined by a private company contracted to operate the system under the supervision of the state, he added.

Flashman maintains that with the current design plans, no train will be able to meet the 2-hour-40-minute requirement and such service will never be available to travelers.

The issue of trip times and whether the future system can operate without a subsidy could go to trial this year, part of a long line of expected litigation.

"There are still a lot of fights to come," said attorney Michael Brady, who works with Flashman in representing Central Valley plaintiffs.

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Moody, the deputy state attorney general, said there ultimately could be as many as half a dozen suits stemming from issues in Proposition 1A.

"I think litigation is a foregone conclusion," he said in court.

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