

U.S. board: Federal law on high-speed rail trumps state environmental lawsuits

By Tim Sheehan



At a news conference Nov. 19, 2014, Jared Blumenfeld, regional administrator of U.S. Environmental Protection Agency, Pacific Southwest, steps down from one of four massive cranes that will be used to build a high-speed rail line through the Valley. JOHN WALKER — THE FRESNO BEE | [Buy Photo](#)

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A three-member panel of presidential appointees has potentially derailed seven lawsuits challenging the [California High-Speed Rail Authority](#)'s approval of its Fresno-Bakersfield bullet-train route and raised questions about how California environmental law will apply to other planned rail sections across the state.

The [U.S. Surface Transportation Board](#), in a [ruling issued late Friday](#), declared on a 2-1 vote that the [California Environmental Quality Act, or CEQA](#), "is categorically pre-empted" in connection with the Fresno-Bakersfield route, which the federal panel OK'd for construction earlier this year.

"CEQA ... by its very nature, could be used to deny or significantly delay an entity's right to construct a line that the (federal) board has specifically authorized," the ruling stated, "thus impinging upon the board's exclusive jurisdiction over rail transportation."



Therefore, board chairman Daniel Elliott III and vice chairwoman Deb Miller stated, lawsuits against the rail line — filed under CEQA by plaintiffs in Kings and Kern counties in Sacramento County Superior Court — and the ability of state judges to issue injunctions to halt work are barred by a federal law that “expressly pre-empts any state law attempts to regulate rail construction projects.”

The board’s third member, Ann D. Begeman, disagreed. “The authority has come before the board many times asserting its commitment” to both CEQA and the federal National Environmental Policy Act (NEPA), she wrote in her dissent. “The authority should live up to its commitments and the board should refrain from undermining them.”

The California Environmental Quality Act is generally considered to be more stringent than the national law, particularly in its requirements that projects take steps to avoid, minimize or make up for harmful effects identified in environmental impact reports.

The Surface Transportation Board first exercised its power over the California high-speed train project in April 2013 because it will be linked to the larger interstate rail system.

Elliott is a former railroad union attorney, while Miller is a former secretary of the Kansas Department of Transportation. They and Begeman, a former Republican Senate committee staff director, were all appointed to the board by President Barack Obama.

The immediate effect of the federal declaration is unclear, both on the pending lawsuits and on how it may affect environmental analysis and regulation for the rest of the statewide rail project. “We are still digesting the opinion,” Kings County Counsel Colleen Carlson said Monday. Kings County is a plaintiff in one of the CEQA lawsuits, as well as in other litigation against the rail authority and the state over the agency’s compliance with Proposition 1A, a \$9.9 billion high-speed rail bond measure approved by California voters in 2008.

“It’s a marathon and we are expecting a long race,” Carlson said of the county’s legal fight. “But (we) never expected the authority to pull the rug out from under Californians and ignore the very law that allowed the project in the first place.”

Carlson said the plaintiffs would advise Sacramento County Superior Court Judge Michael Kinney, who has been assigned to hear the Fresno-Bakersfield lawsuits, about the federal board’s ruling and seek his direction on the cases status. But, she added, the declaration “practically invites more litigation.”

In a brief statement late Monday, rail authority spokeswoman Lisa Marie Alley said the agency is “still working to determine what this translates to as we continue to move forward.”

Over the course of several years, working under the California Environmental Quality Act and the federal [National Environmental Policy Act](#), the state rail agency and the [Federal Railroad Administration](#) produced a detailed [environmental impact report](#), comprising thousands of pages of analysis and technical data for its Fresno-Bakersfield section. The report evaluated the potential effects of high-speed rail construction and operation on homes, farms, businesses and communities along the route. The rail authority board certified the EIR in May and officially approved a route for the rail line through the southern San Joaquin Valley.

The seven lawsuits against the rail authority quickly followed, alleging that the environmental analysis inadequately addressed the potential effects and thus violated CEQA. One suit was filed jointly by Kings County, Citizens for California High-Speed Rail Accountability and the Kings County Farm Bureau. The other six cases were filed by Kern County, the cities of Bakersfield and Shafter, and a church, hospital and real-estate development firm in Bakersfield.

Fearing that the lawsuits could result in court orders to delay construction, attorneys for the rail authority petitioned the Surface Transportation Board in October for a declaration that California courts could not issue injunctions against the Fresno-Bakersfield project because it had already received federal approval. The petition was based on a section of the federal Interstate Commerce Act that gives the Surface Transportation Board exclusive jurisdiction over rail

transportation.

The Surface Transportation Board went even further than the state rail agency asked, not only barring injunctions but essentially issuing a blanket order preventing state courts from enforcing CEQA — which allows lawsuits to challenge projects — on the already-approved Fresno-Bakersfield segment. “As a practical matter, we find it difficult to separate the prohibitive injunctive remedy available under CEQA from a California state court’s ability to enforce compliance with CEQA itself,” Elliott and Miller wrote.

The board steered clear of interpreting Prop. 1A’s requirements that the authority comply with CEQA as a condition of using the state bond funds to build the project. “The relevant regulatory actions for purposes of our pre-emption analysis here are the third-party CEQA enforcement suits, not the state law that authorized funding for the (high-speed train) system,” Elliott and Miller wrote. “Whether CEQA compliance is required before the authority is allowed to obtain or use Proposition 1A funding is a question of state law for a state court to decide.”

The [Fresno-Bakersfield section](#) is the second piece of the statewide bullet-train system for which the rail authority has prepared environmental impact reports. The analysis for the first section, from [Merced to Fresno](#), was certified and a route approved in 2012. A design-and-construction contract was awarded last year for a 29-mile stretch from Madera to Fresno, with some demolition work beginning this summer.

While the board’s ruling Friday ostensibly applies only to the Fresno-Bakersfield section, the language in the decision casts uncertainty over eight additional high-speed rail segments for which the state has yet to complete an environmental analysis: [San Francisco-San Jose](#), [San Jose-Merced](#), [Bakersfield-Palmdale](#), [Palmdale-Burbank](#), [Burbank-Los Angeles](#), [Los Angeles-Anaheim](#), [Merced-Sacramento](#) and [Los Angeles-San Diego](#).

Both the Merced-Fresno and Fresno-Bakersfield environmental reports were prepared by the state rail authority and the Federal Railroad Administration — which has put up more than \$3 billion in federal stimulus and transportation grants for construction in the Valley — with the aim of complying with both CEQA and NEPA. Additionally, in documents dating to 2007 and as recently as this summer, the rail authority and FRA stated that their environmental work on all of the rail sections in the state would be done under both the state and federal environmental laws.

Stuart Flashman, an Oakland attorney who represents opponents to the rail authority’s plans, said the effects of the Surface Transportation Board’s ruling “are about as clear as mud.” He said his clients fear the decision sets the stage for circumventing CEQA on other sections of the high-speed train system and other transportation projects over which the federal board has jurisdiction that might conflict with state agencies. “The board said CEQA is totally pre-empted, end of story,” he said.

Flashman wrote to the Surface Transportation Board on behalf of the Community Coalition on High-Speed Rail, Transportation Solutions Defense and Education Fund (TRANSDEF) and California Rail Foundations in opposition to the rail authority’s pre-emption petition. None of them are involved in the CEQA lawsuits against the Fresno-Bakersfield section, but they are critical of plans for the statewide rail project. Flashman said he believes the ruling will eventually be challenged in federal court, “and this could be a case that goes all the way to the U.S. Supreme Court” because of its potential precedent not only in California, but for other states as well.

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