

Lawyers shine light on Valley high-speed rail cases

High speed rail agency says fed law trumps state environmental rules

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By Tim Sheehan — The Fresno Bee

An appellate court brief in a high-speed rail lawsuit from the Bay Area could have far-reaching implications in the rest of the state -- including the San Joaquin Valley, where the first stretches of the statewide bullet-train network are supposed to be built.

Late Friday, The California High-Speed Rail Authority filed a brief with the 3rd District Court of Appeal in Sacramento claiming that federal environmental laws -- typically considered less stringent than the California Environmental Quality Act or CEQA -- supersede state regulations. In April, the federal Surface Transportation Board asserted that it has jurisdiction over the state's high-speed rail project.

The state Attorney General's Office, which represents the rail agency, believes that federal decision triggered provisions of national law that "pre-empt" the state's environmental laws.

The filing on Friday is part of the state's arguments that the appeals court should dismiss a CEQA suit by the city of Atherton and other Bay Area communities to overturn the rail authority's approval of Pacheco Pass, instead of the Altamont Pass, as the general route for high-speed trains between the Bay Area and the San Joaquin Valley.

If the court agrees, it could establish a precedent for sections of the high-speed rail project throughout the state.

"The issue of whether the project is subject to the California Environmental Quality Act ... will ultimately be decided by the courts," said Jeff Morales, the rail authority's CEO. He added that the agency "remains committed to environmental review of the project and will continue to work cooperatively with agencies responsible for resource and environmental protection."

Jason Holder, an Oakland attorney who represented Farm Bureau organizations in Madera and Merced counties and other plaintiffs in a now-settled CEQA lawsuit against the rail authority, said the key federal law, the National Environmental Policy Act, is considerably weaker than California's environmental rules. "CEQA is like NEPA, but with teeth," Holder told a gathering of the Fresno County Bar Association last week.

The rail authority hinted at its legal strategy in late June, when the attorney general notified the court that "the authority is examining the STB's jurisdictional decision to determine the potentially significant consequences that it may have in this case." That letter asked for a postponement of a July 22 hearing on the Atherton appeal. The court granted the delay and ordered both sides to submit briefs on the pre-emption issue.

The opposing attorney in the Atherton lawsuit, Stuart Flashman of Oakland, is out of the country on vacation until next week and was unavailable to comment on Friday's filing.

In an earlier letter to the court, however, Flashman discounted the idea of federal pre-emption in Atherton's appeal because the issue was not raised when the case was heard in Sacramento County Superior Court. He suggested that the judge "consider the (authority's) request with a jaundiced eye."

Flashman also represents Kings County in its lawsuit against the rail authority over whether the statewide plan conforms to the requirements of Proposition 1A, the \$9.9 billion high-speed rail bond measure approved by California voters in 2008. That case, in which a ruling is expected by the end of this month, would not be affected by the pre-emption question.

But a ruling on whether state or federal laws reign over the \$68 billion rail project could affect whether future environmental challenges are heard in state or federal court.

Opponents have repeatedly used CEQA, the state law, to target the high-speed rail project in state courts. In addition to the Atherton lawsuit, which dates to 2010, three separate lawsuits were filed last year in the Sacramento County Superior Court after the rail agency approved its Merced-Fresno section and adopted a 33,000-page environmental-impact report prepared under both the California Environmental Quality Act and the National Environmental Policy Act.

All three of those cases were settled this year, but more suits are all but certain as the rail authority moves forward with environmental reviews for other portions of the project. The agency is in the midst of preparing environmental reports under CEQA for its Fresno-Bakersfield section and for the Chowchilla Wye, a Y-shaped junction in Madera County connecting the Merced-Fresno section of the statewide rail system with an east-west line from the Bay Area.

The attorney general believes the federal Surface Transportation Board's decision -- which the rail authority argued against earlier this year -- not only changes the rules of the game, but also the arena in which the game should be played.

"Now that the STB has determined that the high-speed train system is under its jurisdiction ... the (Interstate Commerce Commission Termination Act) pre-empts CEQA in this case," Deputy Attorney General Danae J. Aitchison wrote in Friday's brief.

That means that instead of CEQA, Aitchison added, "federal environmental statutes such as NEPA, the Clean Air Act and Clean Water Act would apply to the project."

Morales, the rail authority's CEO, said there is "overwhelming overlap" between the state and federal environmental laws, and that his agency is committed to environmental protection beyond the laws, including fuel-efficient construction equipment to reduce pollution while the lines are built and using only renewable energy sources such as solar to generate electricity to power the trains.

"Those are things that aren't strictly required under federal or state law and that would not change based on the outcome of this," Morales told The Associated Press.

Flashman, the attorney for the Bay Area cities, has until Sept. 17 to respond to the state's latest arguments.

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