

# Memorandum

**To:** Wasco County Planning Commission      **Date:** September 21, 2016  
**From:** Ty K. Wyman *TKW*      **File No:** UNI45-86  
**Subject:** UPRR Written Comment –  
County File No.: PLASAR 15-01-0004

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This follows up on the applicant's hearing testimony and September 13 submittal of evidence. Specifically, it reviews a few of the main issues raised in the record and requests some revisions to staff's proposed approval conditions.

## **Main Record Issues**

Why now? Many opponents railed against UPRR for proceeding here in spite of the June 3 derailment. The derailment was unfortunate, and we have issued our sincerest apology. More importantly, however, we have worked directly with "Team Mosier" (the City, the Fire District, and the Mosier Community School) to understand and address the ways in which they were impacted, and implemented maintenance routines specific to the Gorge to prevent a future derailment here.

Nothing that occurred on June 3 lessens the need for the project. Borne of a commitment to serve customers across the nation, our legal duty is to transport hundreds of thousands of tons of freight over a 32,000 mile network every day.

Lastly, this application process has been underway for nearly three years. We proceeded with the September 6 hearing in keeping with permit processing timelines generally required under Oregon law.

Federal Preemption. In memoranda dated September 13, County staff and counsel discussed federal preemption of local government railroad regulation. We are glad for this discussion, as the issue is central to UPRR's above-stated duty.

In submitting its application to the County, UPRR stated that it undertook the process voluntarily because state and local permit requirements cannot be applied to any facility that is integrally related to the railroad's transportation operations.<sup>1</sup> UPRR did not make this statement casually and did not single out Wasco County. Rather, the statement reflected a considered evaluation of the law applicable to every railroad community. While “[r]ailroads are encouraged to work with localities to reach reasonable accommodations,” *CSX Transp., Inc. – Petition for Declaratory Order*, Surface Transportation Board (STB) Docket No. FD 34662 at n.14 (STB served March 14, 2015), the STB has also made it clear that state natural resource and environmental permit processes may not be used to impede rail

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<sup>1</sup> Application p. 2, dated Jan. 9, 2015:

UPRR is a “Class I” railroad under federal regulations. UPRR’s system consists of roughly 31,800 route miles, principally in the western and midwestern United States. Like other Class I railroads, UPRR is not averse to working cooperatively with local authorities to resolve critical local concerns. In fact, voluntary notification of potential projects is normal practice, and discussions between railroads and local authorities resolve most local conflicts.

UPRR therefore has engaged in the Wasco County permitting process voluntarily. Ordinarily, an interstate railroad is not required to obtain state or local construction permits to build any facility that is integrally related to the railroad’s transportation operations. Under the ICC Termination Act of 1995 (ICCTA), the federal Surface Transportation Board (STB) is vested with exclusive jurisdiction over interstate rail transportation (49 U.S.C. § 10501[b]). The ICCTA categorically preempts – regardless of context or rationale for the action – any form of state or local permitting that (1) could be used to deny the railroad the ability to conduct some part of its operations or (2) purports to regulate matters already regulated by the STB such as the construction of rail lines (*Village of Big Lake v. BNSF Ry. Co.*, 382 S.W.3d 125, 129 [Mo. App. 2012]).

ICCTA preemption has been applied to a wide variety of local permitting and land use requirements for the construction of facilities related to rail transportation. In particular, see *Village of Big Lake v. BNSF Ry. Co.*, 382 S.W.3d 125, 129 (Mo. App. 2012), specifically the holding that the ICCTA preempts the village’s ordinance – promulgated pursuant to federal law – requiring the railroad to conduct a hydrological and hydraulic study, provide the results to the village, and obtain a permit from the village before starting construction on interstate rail facilities. Also see *City of Auburn v. United States*, 154 F.3d 1025, 1028-30 (9th Cir. 1998), specifically the ruling that ICCTA preempts state and local laws providing for environmental review as they relate to the construction and operation of side tracks and rail facilities.

Nevertheless, as a policy matter, UPRR routinely applies for state and local construction permits and does not invoke ICCTA preemption unless the permitting becomes unduly prolonged or conditions are imposed that are incompatible with UPRR’s operating needs.

construction projects or operations.<sup>2</sup> The attached memorandum of the Steptoe & Johnson law firm in Washington D.C. (Exhibit A hereto) further explains the basis of UPRR's statement. We refer to it repeatedly below.

Project Alternatives. Opponents spoke about alternatives to the project as designed by the railroad. One suggested that the Planning Commission require us to cut a deal with BNSF to run on the Washington side of the Columbia River. Given the explanation of the Interstate Commerce Commission Termination Act provided in the Steptoe & Johnson memorandum, the Planning Commission cannot impose such a requirement.

Furthermore, the economic reality is that what trains cannot haul, trucks must. Therefore, the effect of denying the project as designed by the applicant would be a substantial increase in the number of trucks on I-84. For example, one intermodal train is the equivalent of approximately 280 trucks. As stated at hearing, nearly 61% of traffic that presently uses the Portland Subdivision is intermodal cargo.

Some opponents proffered alternative project designs, *e.g.*, extending the existing siding only to the east. Tempting as it might be to craft a perceived compromise, the Planning Commission does not sit as a mediator. Rather, it must simply judge the application as submitted. Approving anything other than the submitted design (and approval conditions offered herein) effectively denies the application. We remain committed to helping the communities in the Gorge better understand the need for the project and our operations, and why these alternatives will not work.

## **Proposed Revised Approval Conditions**

### Traffic Impacts During Construction (Condition 7)

We ask the Planning Commission to add the underlined, clarifying language:

Temporary traffic impacts during construction activities shall be coordinated with the Oregon Department of Transportation and the Wasco County Public Works Department for roadways under their respective jurisdictions.

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<sup>2</sup> See, *e.g.*, *N. San Diego County Transit Dev. Bd.—Petition for Decl. Order*, STB Docket No. FD 34111 (STB served Aug. 21, 2002); *Union Pac. R.R. Co.—Petition for Declaratory Order—Rehabilitation of Missouri—Kansas-Texas R.R. Between Jude & Ogden Junction, TX*, STB Docket No. FD 33611, at 8 (STB served Aug. 21, 1998).

### Coal Cars (Condition 13)

The Steptoe & Johnson memorandum (p. 7) directly addresses this issue. As a railroad transportation company, we move all materials in accordance with federal law, industry standards and other operating rules to safely and efficiently move freight. We believe it is the customer's decision whether they want to cover their coal cars. Union Pacific does not own the rail cars, and as long as the commodity is given to us in accordance with all of the appropriate federal laws, we are obligated to transport it to its eventual destination. Furthermore, as we noted at hearing, UPRR:

1. Delivers coal only as far west as the Boardman PGE plant, thus does not at present transport it through the County; and
2. Accepts shipments from customers as long as they are lawfully contained.

For the foregoing reasons, the County may not enforce a requirement to cover coal cars and we ask the Planning Commission to delete proposed Condition 13.

### Train Operations (Conditions 15 and 20)

Staff proposed Conditions 15 and 20 read (respectively) as follows:

UPRR shall stay within the existing range of 20 to 30 trains per day as stated in the application materials.

The proposed development shall not directly result in significantly increased net volume of rail traffic, including number of individual trains, length of trains, or speed of trains.

Again, the Steptoe & Johnson memorandum directly addresses this issue. As explained therein (p. 5), federal law puts UPRR under the "common carrier" obligation, which requires it to transport freight upon reasonable request. This law would prevent the County from enforcing Conditions 15 and 20 as proposed by staff. Accordingly, we ask you to delete them.

## Federal Safety Standards (Condition 16)

This condition reads as follows:

UPRR to adhere to all FRA safety standards, a [sic] including any safety improvements that are optional.

As the Steptoe & Johnson memorandum explains (at p. 10):

The Federal Railroad Administration (FRA) exercises plenary authority over railroad safety. Union Pacific is required to adhere to those regulations. In Congress's view, subjecting interstate railroads to the nearly infinite variety of local regulatory regimes in which they operate would have a highly negative impact on safety as a whole. *See* H.R. Rep. No. 91-1194, reprinted in 1970 U.S.C.C.A.N. 4104, 4109. Under the federal regulatory scheme, Union Pacific obeys a single set of regulations and heeds the directives of one very empowered, knowledgeable, and on-the-job regulator on safety issues. 49 U.S.C. §§ 20101, 20103, 20106.

Union Pacific sometimes sets safety standards which exceed those required by the FRA. The FRA has determined that “the basic purpose of the statute – improving railroad safety – is best served by encouraging” but not mandating “regulated entities to do more than what the law requires . . . .” *Passenger Equipment Safety Standards*, 75 Fed. Reg. 1180, 1209 (Jan. 8, 2010). Consistent with the FRA's views, Union Pacific will look for opportunities to implement safety improvements and standards exceeding the FRA requirements in the project area, provided said improvements are in Union Pacific's judgement reasonable, rationally related to the operation, efficient and economical.

The Steptoe & Johnson memorandum also describes *United States v. Baltimore & O.R. Company*, 333 U.S. 169 (1948), in which the railroad voluntarily entered into an agreement restricting its common carrier obligations. The Court ruled that the subject landowner could not force the railroad to violate its federal law obligations as a common carrier.<sup>3</sup> The County may not enforce federal law governing railroads, so we ask the Planning Commission to delete this proposed condition.

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<sup>3</sup> The courts and the STB have repeatedly acknowledged the validity and importance of the *Baltimore* rule. *See Boyton v. Com. of Va.*, 364 U.S. 454, 460 (1960); *Railroad Ventures, Inc. v.*

### Wildfire Safety and Prevention (Condition 18)

Again, based on the Steptoe & Johnson memorandum, we ask the Planning Commission to revise this proposed condition as follows:

UPRR is required to comply with Chapter 11 for wildfire safety and prevention, to the extent that chapter does not conflict with federal requirements for fire safety. Required compliance with fire safety standards shall be disclosed to future land owners prior to sale of any parcel.

### Compliance with All Federal, State and Local Laws (Condition 19)

For the reasons set forth in the Steptoe & Johnson memorandum, we ask the Planning Commission to revise this proposed condition as follows:

UPRR must verify the use complies with all applicable federal laws, and all state and local laws not otherwise preempted by federal law.

### Additional Access (Condition 21)

Staff proposes here that UPRR work with the Columbia River tribes to provide access. As described in my September 13 memorandum to the Planning Commission:

1. UPRR has a track record of working with tribes to make such access happen;
2. Staff's finding on this issue does not describe any project impact that necessitates or even supports a condition requiring UPRR to provide this access;
3. Entities other than the tribes (*viz.*, City of Mosier and OPRD) also seek river access for their own purposes;

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*Surface Transp. Bd.*, 299 F.3d 523, 560-61 (6th Cir. 2002); *see also Railroad Ventures, Inc. – Abandonment Exemption – Between Youngstown, OH and Darlington, PA*, 4 STB 467, 2000 WL 1125904, at \*3 (STB 2000); *Wichita Terminal Ass'n, et al.—Petition for Declaratory Order*, STB Finance Docket No. 35765, 2015 WL 3875937, at \*7 (STB June 23, 2015) (voluntary agreements cannot be used to unreasonably interfere with the railroad's operations).

4. Two of these stakeholders (tribes and OPRD) have yet to publish a crossing design (or even a location) that meets their interests;
5. Federal and state policy is to limit railroad grade crossings to the extent possible; and
6. Any selected design must comply with UPRR design standards and obtain a license to cross its right-of-way. UPRR has committed to work with the communities and entities specified in this process to facilitate access where it is safe and reasonable.

Notwithstanding the fact that it is under no obligation to do so, UPRR again offers to help the County reach a decision that balances the foregoing public interests. Specifically, we ask the Planning Commission to revise the staff proposed condition as follows:

UPRR will provide funding not exceeding \$2,000,000.00 to support planning, permitting, and building up to two railroad crossings to facilitate access to the Columbia River in the manner herein described. Within 30 days of commencing project construction, UPRR will deposit \$2,000,000.00 with an escrow agent of the County's choice. The County may draw upon this account for the purposes of planning, permitting, and building up to two railroad crossings to facilitate access to the Columbia River in the manner herein described.

The County will, within 90 days of this approval, convene those agencies that seek river access within the County (presumably including the City of Mosier (the City), the Columbia River Inter-Tribal Fish Commission (CRITFC<sup>4</sup>), and Oregon Parks & Recreation Department (OPRD)). The convened stakeholders may select up to two (2) locations within Wasco County at which they wish to cross the railroad and (2) preliminary designs of such crossings. Upon convening the stakeholders, the County will promptly ask the City whether it wishes to waive its right to improvement of the Rock Creek crossing as described in its March 25, 2015 letter agreement with UPRR. If the City does not waive this right, then the Rock Creek crossing will constitute one of the two selected crossings.

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<sup>4</sup> CRITFC is made up of the Yakama, Warm Springs, Umatilla and Nez Perce tribes.

The County will promptly notify UPRR of the selected preliminary design(s). UPRR will, pursuant to its normal course of business, evaluate the selection(s) for compliance with its standards and policies governing such crossings. The County here acknowledges that these standards and policies include, but are not limited to, assurance that the crossings will operate in a manner safe for UPRR's employees and agents, as well as the public.

Any balance remaining in the escrow account five years after its deposit will be refunded to UPRR.

### Stamped Retaining Walls (Condition 25)

We ask the Planning Commission to revise this proposed condition as follows:

Concrete retaining walls shall be stamped with a natural basalt rock pattern to emulate the surrounding landscape, to the extent they are visible from Key Viewing Areas.

### Signs (Condition 30)

Again referencing the Steptoe & Johnson memorandum, we ask the Planning Commission to revise this proposed condition as follows:

To the extent feasible under applicable safety standards, all sign support structures and the backs of single sided signs to be dark brown or black with a flat, non-reflective finish, consistent with the Interstate 84 Corridor Strategy.

### Signal Lights (Condition 33)

Staff proposes here a condition that would require changes to UPRR's uniform signal systems and standards. In the interest of safety, we ask the Planning Commission to delete it.

UPRR has uniform signal systems and standards across its network. These systems and standards comply with federal requirements for roadway signals. Any deviation from these standards would trigger modification and federal notification requirements, and have the potential to negatively affect the safety of train operations.

This condition would result in signals in the project area being different than the signals in the rest of the Gorge and on UPRR's system. This poses a significant risk of confusion to the train crews as they approach the signals. For example, if the light in a signal is out for whatever reason, the train crew has rules which require them to treat the signal as red. But if the signal masts are different than the standard masts, crews may not recognize them and fail to stop – which could lead to a collision. The safest course is to maintain uniformity in all UPRR signals and affiliated structures.

#### Plants (Condition 40)

We ask the Planning Commission to revise this proposed condition as follows:

Remove and conserve plants that will be directly affected; replant immediately following construction in accordance with the applicant's Sensitive Species and Wildlife Habitat Protection and Rehabilitation Plan.

#### Weed Control (Condition 41)

We ask the Planning Commission to revise this proposed condition as follows:

Implement weed control procedures during project construction to prevent spread of noxious weeds to native plant habitats.

#### Impacts (Condition 44)

Staff proposed this condition to have UPRR work with the Oregon Parks and Recreation Department on a Columbia River access feasibility study. We find nothing in the record to substantiate UPRR's obligation to mitigate impacts on a park that was built nearly 100 years after the railroad. Nonetheless, we commit in proposed Condition 21, above, to provide for planning, permitting, and building access for OPRD and other stakeholders. Given that proposal, we ask the Planning Commission to delete staff proposed Condition 44.

#### Tribal Fishing (Condition 47)

As proposed by staff, this condition reads as follows:

Prior to construction, UPRR shall work with the Confederated Tribes of the Umatilla Indian Reservation on the development of a study to

analyze the impacts of trains on tribal fishing. The study shall identify uncontrolled crossings tribal fishers use and the number of train fatalities related to train traffic in the Gorge - both recent and those projected to occur in the future. The study shall include identifying and designating funding necessary to mitigate the impacts of additional trains. As a result of the study, crossings must be improved to better protect tribal members lawfully accessing the river under treaty rights established in 1855 and protected by the National Scenic Area Act.

UPRR is not clear on the meaning of “a study to analyze the impacts of trains on tribal fishing.” To the extent “impacts” concern access, UPRR has recently met with representatives of the CTUIR to discuss access. In addition, UPRR respectfully submits that access is adequately addressed in UPRR’s response to Condition 21, which is an attempt to expand access by adding two locations. In that regard, this project would have a positive impact on the CTUIR’s access to fishing areas. Therefore, UPRR would incorporate its response to Condition 21 as a response to this Condition.

To the extent “impacts” have an intended meaning broader than or other than access, UPRR is aware of, appreciates and respects that the CTUIR has concerns generally about fossil fuels being transported through the Gorge, and how its fishing rights would be impacted if those fuels derailed into the Columbia river. Respectfully, those concerns extend well beyond the limits of the project area, and are therefore beyond the scope of the permit application at hand.

UPRR has no way to know whether, where and to what extent tribal members access fishing areas at uncontrolled locations. Regardless, the best way to mitigate access at uncontrolled locations is to provide additional, controlled access, as outlined in UPRR’s response to Condition 21.

We appreciate the opportunity to comment and are happy to take any questions you might have.

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## MEMORANDUM

To: Ty K. Wyman  
From: Alice Loughran **AEL**  
Date: September 21, 2016  
Subject: Wasco County File No.: PLASAR 15-01-0004 – UPRR Mosier Double Track

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You asked me to review and opine on the enforceability, under federal law, of approval conditions that County staff has proposed for attachment to the referenced permit application. I am happy to do so.

As explained below, federal law would preempt the County from enforcing certain of the conditions proposed including numbers 13, 15, and 20, as well as aspects of condition 19. This preemption would apply notwithstanding the fact that the project is located in the Columbia Gorge National Scenic Area. I respond to specific points rendered by County counsel on that issue.

## DISCUSSION

### **I. Legal Framework: The Railroad's Common-Carrier Duties And Preemptive Federal Regulation**

#### **A. Union Pacific's Common Carrier Duties**

Through the permit, the County seeks to impose limitations on the number of cars and types of cargo transported by rail – issues that lie at the heart of the common carrier obligation. As an interstate freight railroad, Union Pacific has a statutory duty to provide “transportation or service upon reasonable request.” 49 U.S.C. § 11101(a). This duty dates back more than a century, originally adopted at common law and later incorporated in the 1887 Interstate Commerce Act. *See Amer. Trucking Ass'ns v. Atchison, T. & S. F.*



*Ry. Co.*, 387 U.S. 397, 407 (1967). It is long recognized that railroads “exercise a public employment and are therefore bound to serve all customers alike, without discrimination.” *Primrose v. Western Union Tel. Co.*, 154 U.S. 1, 14 (1894). “Their obligation as common carriers is comprehensive and exceptions are not to be implied.” *Amer. Trucking Ass’ns*, 387 U.S. at 407.

This common-carrier obligation includes the duty to accept shipments of hazardous materials. See *Riffin v. Surface Transp. Board*, 733 F.3d 340, 344-38 (D.C. Cir. 2013). A railroad cannot “renege on its common carrier commitment” on grounds that the materials are “too hazardous” if, in fact, the shipments meet federal safety and security regulations. *United States, DOE, et al. v. Baltimore & O.R. Co.*, 364 I.C.C. 951, 959 (1981).<sup>1</sup> This duty is imposed in significant part because hazardous materials—which fuel cars and heat homes—have been deemed “essential to the economy of the United States and the well being of its people.”<sup>2</sup> The Ninth Circuit and other courts have rejected attempts by state and local officials to push the problem “somewhere else” by prohibiting the transport of hazardous materials through the local jurisdiction.<sup>3</sup>

## **B. Uniform, pervasive and preemptive federal regulation**

“Congress and the courts have long recognized a need to regulate railroad operations at the federal level.” *City of Auburn v. U.S. Government*, 154 F.3d 1025, 1029 (9th Cir. 1998). Railroad operations are inherently federal because the trains traverse multiple state boundaries on their way to their final destinations. Over the last several decades, Congress made a considered judgment that uniform and measured regulation of interstate railroad operations is the best way to maximum safety. Congress has now placed authority over rail transportation exclusively with the Surface Transportation Board and other federal agencies, in order to ensure that decisions relating to rail regulation are based upon the best interest of the nation as a whole.

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<sup>1</sup> See also *Union Pacific R.R. Co. – Petition for Declaratory Order*, STB Finance Docket No. 35219, 2009 WL 1630587, at \*1 (June 11, 2009) (railroad has “an obligation to quote common carrier rates and provide service for the transportation of chlorine”); *Classification Ratings of Chemicals, Conrail, April 30*, 3 I.C.C. 2d 331 (1986) (400 classes of dangerous chemicals); *Trainload Rates on Radioactive Mat’l, E.R.R.*, 362 I.C.C. 756 (1980) (hazardous radioactive materials), *aff’d sub nom. Consolidated Rail Corp. v. Interstate Commerce Comm’n*, 646 F.2d 642 (D.C. Cir. 1981); *United States Energy Research & Dev. Admin. v. Akron Canton & Youngstown R.R.*, 359 I.C.C. 639 (1978) (high level nuclear waste), *aff’d sub nom. Akron Canton & Youngstown R.R. v. Interstate Commerce Comm’n*, 611 F.2d 1162 (6th Cir. 1979).

<sup>2</sup> *Hazardous Materials: Transportation of Explosive by Rail*, 68 Fed. Reg. 34,370, 34,472 (June 9, 2003).

<sup>3</sup> *Southern Pacific Transp. Co. v. Public Service Comm’n of Nevada*, 909 F.2d 352, 358-59 (9th Cir. 1990); *CSX Transp. v. Williams*, 406 F.3d 667 (D.C. Cir. 2005); *Union Pacific R.R. Co. v. City of Las Vegas*, 747 F. Supp. 1402 (D. Nev. 1989).



In 1995, Congress enacted ICCTA and ceded to the Surface Transportation Board (“STB”) oversight for all matters relating to interstate rail commerce. *See* 49 U.S.C. § 10501(b). The ICCTA establishes exclusive jurisdiction and exclusive remedies. The STB’s jurisdiction over rail transportation is “exclusive” (*id.*) and applies to rail facilities and property “regardless of ownership or agreement concerning use.” 49 U.S.C. § 10102(9)(A). ICCTA provides that “the remedies provided under this part with respect to regulation of rail transportation are exclusive and ***preempt the remedies provided under Federal or State law.***” 49 U.S.C. § 10501(b) (emphasis added). ICCTA is therefore unique among federal statutes in extending the preemptive effect of the STB’s exclusive jurisdiction to cover *federal law* remedies involving “regulation of rail transportation.” 49 U.S.C. § 10501(b). Congress understood that uniform regulation of rail transportation by the STB could be undermined by the application of federal law to rail operations as well as state law. “Every court that has examined the statutory language has concluded that the preemptive effect of section 10501(b) is broad and sweeping.” *City of Creede, Co.—Petition for Declaratory Order*, FD 34376, 2014 STB LEXIS 486 at \*10 (Served May 3, 2005).

In addition, Union Pacific’s handling of hazardous commodities is now governed by a comprehensive scheme of federal regulation. *See Southern Pacific Transp. Co. v. Public Service Comm’n of Nevada*, 909 F.2d 352, 357 (9th Cir. 1990) (“[t]he extent of federal regulation in the area of transportation, loading, unloading and storage of hazardous materials is comprehensive”) (quotations and citation omitted). In 1990, Congress explicitly prohibited local authorities from discriminating against the shipment of hazardous materials. *See Hazardous Materials Transportation Uniform Safety Act of 1990*, codified at 49 U.S.C. 5101 *et seq.* The Hazmat Act expressly preempted any “requirement of a State, a political subdivision of a State, or Indian Tribe” that differs from the Act’s regulations over the transportation of hazardous materials. 49 U.S.C. § 5125(b) (emphasis added). The U.S. Department of Transportation’s implementing regulation provides: “A law, order, or other directive of a State, a political subdivision of a State, or an Indian tribe that designates, limits, or prohibits the use of a rail line . . . for the transportation of hazardous materials . . . is preempted.” 49 C.F.R. § 172.822 (emphasis added). Thus, the Eighth Circuit held that the local authorities cannot interfere with or limit the use of a railroad line despite concerns about the hazardous nature of the cargo being shipped. *See Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community*, 991 F.2d 458, 463-64 (8th Cir. 1993).

Railroad safety is subject to the comprehensive oversight of a third federal agency – the Federal Railroad Administration (“FRA”). In 1970, Congress recognized that interstate railroads cannot efficiently comply with overlapping, potentially contradictory, local regulatory requirements for railroad safety. 49 U.S.C. § 20106(a)(1). Thus, Congress enacted the Federal Safety Railroad Act to provide pervasive, uniform, and preemptive regulation by the Secretary of Transportation. 49 U.S.C. §§ 20101, 20103,



20106. Congress directed the U.S. Secretary of Transportation to “prescribe regulations and issue orders *for every area of railroad safety* supplementing laws and regulations in effect on October 16, 1970.” 49 U.S.C. § 20103(a) (emphasis added). Those regulations set the “Federal standard of care” under which the railroad is expected to act. 49 U.S.C. § 20106(2)(b)(A). The Secretary has delegated his authority to the FRA, which administers a wide variety of rail safety regulations that address track and roadbed conditions (speed of trains); signal systems; locomotive and freight car specifications; emergency preparedness; hours of service of railroad employees; qualification standards for certain employees; and alcohol and drug testing of railroad employees, among other things. 49 C.F.R. Parts 200-268. No function of the FRA is more important than ensuring safety in the Nation’s transportation system. *See* 49 U.S.C. § 103(c) (providing that FRA “shall consider ... safety as the highest priority”).

No one – not the railroad industry, not the industries all over the country that produce and use hazardous materials, and not the Federal Government – takes lightly safety concerns about the shipment of hazardous materials in interstate commerce. That is why those shipments have always been among the most heavily regulated by the Federal Government, and that is why the Federal Government and the rail industry have worked particularly closely together since the Lac-Mégantic, Quebec derailment to redouble efforts to maximize the safe transportation of those commodities.<sup>4</sup> But the continued transportation of these products is considered important to the nation’s economy; indeed, railroads have been held to a common carrier obligation to carry hazardous materials in significant part because they have been deemed important to the economic health of the country. *Notice, Hazardous Materials: Transportation of Explosives by Rail*, 68 Fed. Reg. 34,470, 34,472 (June 9, 2003).

### C. Columbia River Gorge Compact

In 1986, Congress gave its consent to a compact between the States of Oregon and Washington to create the Columbia River Gorge Commission. 16 U.S.C. § 544c(1); U.S. Const. Art. 1, § 10, cl. 3. At every opportunity, Congress took great pains to ensure that the Commission would function as a regional agency, not as a federal agency. In particular, Congress made clear that the Commission is a “regional entity” and “shall not be considered an agency or instrumentality of the United States for purposes of any Federal law[.]” 16 U.S.C. § 544c(1)(A). Congress also disclaimed any responsibility of the United States for any contract or other obligations of the Commission. 16 U.S.C. § 544(b).

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<sup>4</sup> *See, e.g., Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains*, 80 Fed. Reg. 26643 (May 8, 2015) (final rulemaking to “increase the safety of flammable liquid shipments by rail”); *see also Hazardous Materials: Enhancing Rail Transportation Safety and Security for Hazardous Shipments*, 74 Fed. Reg. 20752 (Apr. 16, 2008).



Significantly, Congress did not give the Commission any authority to regulate interstate rail operations. That authority is vested “exclusively” with the STB. 49 U.S.C. § 10501(b). Moreover, Congress intended that the Commission’s authority derive from state law, not federal law. *Skamania County v. Woodall*, 16 P.3d 701, 705-07 (Wash. App. Div. 2 2001). “Had Congress wanted the Commission to apply federal law, it could have made the Commission a federal agency.” *Id.* at 706. Furthermore, Congress “reserves a prominent role for county ordinances, for county officials interpreting those ordinances, and for state courts.” *Id.* at 706-07. “By expressly reserving this role for the counties and state courts, the [federal] Act preserves some degree of local control and uses local and state expertise – expertise that will be in state common law, not federal law or some undefined ‘Commission law.’” *Id.* at 707.

## **II. The County Has Proposed Conditions that are Preempted by Federal Law**

### **A. Proposed Condition 15 (Train Car Limitations)**

The County has proposed conditions on the land use permit that fall within the federal regulatory regime and are preempted by federal law. For example, Condition 15 directs Union Pacific to “stay within the existing range of 20 to 30 trains per day as stated in the application materials.” This condition is unlawful because the County cannot limit rail traffic when necessary to meet shipper needs.

As explained, Union Pacific is required by federal law to provide “transportation or service upon reasonable request.” 49 U.S.C. § 11101(a). The ICCTA explicitly overrides state and federal laws that seek to regulate rail activities. 49 U.S.C. § 10501(b). There can be no question that condition 15 regulates rail activities. “Regulating when and where particular products may be carried by rail . . . would constitute direct regulation of railroad activities” and therefore is preempted by the ICCTA. *CSX Transp., Inc. – Petition for Declaratory Order*, FD No. 34662, 2005 WL 584026, at \*8 (STB served Mar. 14, 2005), *pet. for recon. denied* (STB served May 3, 2005).<sup>5</sup> In addition to the ICCTA, the Hazmat Act expressly prohibits states and local authorities from interfering with hazardous materials transportation. 49 U.S.C. § 5125(b); 49 C.F.R. § 172.822.

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<sup>5</sup> Thus, when the District of Columbia prohibited the transportation of hazardous materials within a 2.2 mile radius of the U.S. Capital Building following the September 11 attacks, the Surface Transportation Board and D.C. Circuit struck down the ordinance. “The D.C. Act would unreasonably interfere with interstate commerce, and if permitted to exist, would likely lead to further piecemeal attempts by other localities to regulate rail shipments.” *Id.*; see also *CSX Transp., Inc. v. Williams*, 406 F.3d 667 (D.C. Cir. 2005) (directing the district court to preliminarily enjoin the D.C. Act).



The County cannot avoid this outcome by requiring Union Pacific to agree to the condition. Even if Union Pacific was willing to accept this and other conditions, Union Pacific lacks authority to voluntarily agree to them. The Supreme Court has repeatedly stated that even private contracts may not be used to limit or avoid a railroad's statutory common-carrier obligations. See *United States v. Baltimore & O.R. Company*, 333 U.S. 169 (1948) (even where railroad voluntarily enters into a private contract, the contract is unlawful and unenforceable to the extent it requires a railroad to violate its common-carrier obligations); *Louisville & Nashville R.R. v. Motley*, 219 U.S. 467, 486 (1911) (settlement agreement with a railroad was unenforceable because its enforcement would require the violation of a federal statute applicable to railroads); *Railroad Ventures, Inc. v. Surface Transp. Bd.*, 299 F.3d 523, 560-61 (6th Cir. 2002); *Crowley v. Northern Pac. Ry. Co.*, 123 P. 998, 1001 (Wash. 1912) (a case similar to *Mottley*, where the court held that the railroad cannot be liable for damages for breach of contract when federal common carrier law made further performance of the contract on its part impossible). Similarly, the STB has repeatedly stated that agreements "cannot interpreted or enforced in a way that would affect [the railroad's] common carrier obligations." *Wisconsin Dep't of Transportation – Petition for Declaratory Order – Rail Lines in Almena, Cameron, and Rice Lake, Barron County, Wis.*, FD 35455, 2011 WL 5456760, at \*4 (STB Nov. 10, 2001); *Santa Cruz Regional Transp. Comm.—Petition for Declaratory Order*, FD 35491, 2011 WL 2011 WL 6257999, at \*5 (STB Dec. 11, 2011). Thus, even if the permit were the equivalent of a contract, Union Pacific could not agree to – and the County could not impose – conditions on the free flow of rail transportation.

Nor can the County avoid ICCTA preemption by claiming that it is acting pursuant to federal law. In particular, County's counsel opines that "preemption is not intended to interfere with local implemental of federal environmental statutes." (Memo at 1). In the first place, the County is not a federal agency and is not acting pursuant to federal environmental laws. See *Skamania County v. Woodall*, 16 P.3d 701, 705-07. But even assuming the County were acting pursuant to federal law, the conditions would be precluded by the ICCTA.

In enacting the ICCTA, Congress made clear that "the remedies provided under this part with respect to regulation of rail transportation are exclusive and **preempt the remedies** provided **under Federal** or State law." 49 U.S.C. § 10501(b) (emphasis added). As the agency charged with administering this statute, the STB has concluded that ICCTA preempts other federal laws, which is precisely what the statute says. Thus, federal environmental laws are preempted if the "federal environmental laws are being used to regulate rail operations." *Grafton & Upton R.R. Co.—Petition for Declaratory Order*, FD 35779, 2014 STB LEXIS 12 at \*15 (Served Jan. 27, 2014). Recently, the STB reiterated this conclusion, noting that the EPA's adoption under the federal Clean Air Act of local government rules regulating locomotive emissions would likely be preempted by ICCTA because it would conflict directly with the goal of uniform regulation of rail transportation. See *U.S. Environmental Protection Agency –Petition for Declaratory*



*Order*, FD 35803, 2014 STB LEXIS 335 (Served Dec. 30, 2014). As the STB explained, the application of federal law in those circumstances is likely precluded by ICCTA because the proposed rules “would likely affect the railroads’ ability to conduct their operations, as it appears to decide for the railroads what constitutes unnecessary idling and also to influence the railroads’ choice of equipment and how to configure that equipment.”<sup>6</sup> This case provides more compelling grounds for preemption. The County seeks to use its land use powers to impose limits on the number of rail cars – subjects that go to the heart of the railroad’s common carrier obligations. ICCTA would preempt any enforcement of such condition.

In my experience, the railroads are not averse to working cooperatively with local authorities to resolve critical local concerns. Indeed, voluntary discussions between railroads and local authorities resolve most local conflicts. The STB, however, has made clear that the railroads are not permitted to comply with conditions that violate the ICCTA. While “[r]ailroads are encouraged to work with localities to reach reasonable accommodations,” *CSX Transp., Inc. – Petition for Declaratory Order*, STB Docket No. FD 34662 at n.14 (STB served Mar. 14, 2015), the STB has also made it clear that federal or state environmental permit processes may not be used to impede rail construction projects or operations. *See, e.g., Grafton & Upton R.R. Co.—Petition for Declaratory Order*, FD 35779, 2014 STB LEXIS 12 at \*15; *N. San Diego County Transit Dev. Bd.—Petition for Decl. Order*, STB Docket No. FD 34111 (STB served Aug. 21, 2002); *Union Pac. R.R. Co.—Petition for Declaratory Order—Rehabilitation of Missouri—Kansas-Texas R.R. Between Jude & Ogden Junction, TX*, STB Docket No. FD 33611, at 8 (STB served Aug. 21, 1998).

#### **B. Proposed Condition 13 (covers for coal cars)**

Condition 13 requires that coal cars be covered. This condition would mandate a fundamental change in the way coal is transported by rail in the United States. Coal is not currently transported in rail cars that use or are capable of using mechanical covers. Moreover, many rail cars used for coal transportation have design features that permit water to drain from the car under certain conditions. Nevertheless, the County effectively

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<sup>6</sup> Notably, where federal environmental laws have been applied to railroads, the courts have made it clear that they were *not* being applied in a way that regulated or obstructed rail operations. Thus, in *United States v. St. Mary’s Ry. W. LLC*, 989 F. Supp. 2d 1357, 1362 (S.D. Ga. 2013), a court concluded that EPA’s action against a railroad for discharges into wetlands made in connection with construction of a side track was not preempted by ICCTA, noting that it was “in no way a direct regulation on Defendant’s activities.” A limit on where construction waste could be dumped – the issue in that case – had no impact on the railroad’s ability to conduct rail operations or even a significant impact on the railroad’s construction activity. The court viewed the railroad’s conduct relating to disposal of construction by-products as collateral to the railroad’s core transportation activities, and therefore subject to Clean Water Act requirements.



asks to require installation of mechanical covers on rail cars, and to order Union Pacific to replace each rail car currently in use with a newly-designed rail car that does not have any holes along the side or bottom of the cars that might allow coal dust to disperse.

Coal transportation by rail would be impossible, at least in the near term, if Union Pacific were ordered to use covered cars for coal transportation or to change design features of cars used to transport coal. Safe and effective covers for rail coal cars are not commercially available and there currently is no feasible technology or infrastructure that would allow for the safe application or transport of mechanical covers on coal rail cars. Coal cars would have to be re-engineered and re-designed to accommodate mechanical covers and to eliminate current drainage features on cars. The question of whether car covers and other rail car design changes could be feasible for *future* use is not relevant here. There is no dispute that railroads could not *now* comply with an order requiring transportation of coal in re-designed, covered rail cars because the technology, equipment and infrastructure are not currently in place to comply with such an order. It would be physically impossible for railroads to comply with the condition and still provide rail service needed by railroads' coal shippers.

The disruption to the economy from the County's condition would be enormous. When rail congestion and extreme weather conditions caused delays in rail transportation of coal in 2014, numerous utility companies and public officials came to the STB with urgent requests that the STB take action to ensure the availability of coal, describing the potential adverse consequences of an interruption in coal supplies. Concern over the possible impact of service disruptions on the coal supply chain led the STB's staff to work with the Department of Energy and Federal Energy Regulatory Commission ("FERC") "in order to share information about the coal railroad supply chain as it relates to the reliability of energy production." *U.S. Rail Serv. Issues*, STB Docket No. EP 724 (STB served Dec. 30, 2014). Union Pacific was required to submit "to the Board its contingency plans for addressing any such shortfalls [in coal stockpiles], including a detailed description of the steps it takes to identify coal-fired plants at critical levels and to remedy acute shortages in a timely fashion." *Id.*

In 2005, when coal transportation was delayed in Wyoming due to problems with the stability of tracks used by heavy coal trains, utilities claimed that they suffered losses of hundreds of millions of dollars and their customers suffered serious interruptions in service.<sup>7</sup> FERC subsequently met with utility and railroad representatives "to examine concerns raised by certain electric utility associations with respect to coal inventories at power stations and rail coal deliveries to their member companies. These claims raise

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<sup>7</sup> Eleven utilities estimated that they incurred a total of \$228 million in costs from the service delays after the 2005 derailments. Congressional Research Service, *Rail Transportation of Coal to Power Plants: Reliability Issues* (Sept. 26, 2007).



serious questions about the adequacy of electricity supply in certain regions of the country as we enter the summer months.” *Federal Energy Regulatory Commission’s Discussions with Utility and Railroad Representatives on Market & Reliability Matters*, 71 Fed. Reg. 33746, 33746 (June 12, 2006). The STB was so concerned about the potential for disruption to the nation’s energy supply that it established the Rail Energy Transportation Advisory Committee, whose members include railroads, coal producers, electric utilities, the private railcar industry as well as STB members and representatives from the Departments of Energy and Transportation and the FERC. *See Establishment of a Rail Energy Transportation Advisory Committee*, STB Docket No. EP 670, at 2 (served July 17, 2007) (“The Board views the reliability of the nation’s energy supply as crucial to this nation’s economic and national security, and the transportation by rail of coal and other energy resources as a vital link in the energy supply chain.”).

The potential interruption of coal transportation due to the physical inability to comply with conditions – if adopted in this County and elsewhere – requiring use of car covers and re-designed cars, even in the near term, would cause severe damage to the U.S. economy. Congress sought to avoid precisely this result by preempting the regulation of rail operations under other federal law. Congress mandated the uniform regulation of rail operations under STB authority to ensure that the rail industry would be able to meet the needs of rail shippers and the U.S. economy. Congress created the STB precisely for that purpose and adopted an express preemption provision to preclude courts from overseeing rail operations through remedies arising under other law.

The STB has make it clear that railroads are not free to take any measures they wish to address coal losses in transit. Railroads do not load or unload rail cars, and many rail cars are not even owned by the railroads. *See Arkansas Electric Cooperative Corp.—Petition for Declaratory Order*, STB Docket No. 35305, slip op. at 12 (served March 3, 2011); *Reasonableness of BNSF Railway Company Coal Dust Mitigation Tariff Provisions*, STB Docket No.35557, slip op. at 19 (served December 13, 2013). Therefore any requirements for the use of rail car covers or the re-design of coal cars would have to be imposed on and implemented by coal shippers. Given the numerous and varied interests involved in regulating coal loading and transportation, the measures railroads can take in the area of coal loading practices are subject to regulation by the STB, which has already exercised its jurisdiction on two occasions to ensure compliance with the public interest objectives of ICCTA.

In short, the use of federal environmental law remedies to regulate the way railroads operate would be fundamentally repugnant to ICCTA. Here, condition 13 would have precisely the effect that Congress sought to avoid when it adopted the exclusive jurisdiction provisions of ICCTA and provided for preemption of state and federal law: it would subject railroads to conflicting operating mandates that would seriously impair rail transportation. As such, the County may not enforce a requirement to cover coal cars.



**C. Condition 20 (length of trains, train speed, volume)**

Conditions 20 purports to impose limits on the number of individual trains, the net volume of rail traffic (including the number of individual trains), the length of trains, or the speed of the trains. These subjects are preempted by federal law. *See Elam v. Kansas City S. Ry. Co.*, 635 F.3d 796 (5th Cir. 2011) (finding that a railroad's economic decisions are preempted including "those pertaining to train length, speed or scheduling").

**D. Proposed Conditions 16 & 19**

Conditions 16 and 19 are similarly preempted to the extent they seek to add duties on top of the FRA's now-uniform national regulation of safety standards. The Federal Railroad Administration (FRA) exercises plenary authority over railroad safety. Union Pacific is required to adhere to those regulations. In Congress's view, subjecting interstate railroads to the nearly infinite variety of local regulatory regimes in which they operate would have a highly negative impact on safety as a whole. *See* H.R. Rep. No. 91-1194, reprinted in 1970 U.S.C.C.A.N. 4104, 4109. Under the federal regulatory scheme, Union Pacific obeys a single set of regulations and heeds the directives of one very empowered, knowledgeable, and on-the-job regulator on safety issues. 49 U.S.C. §§ 20101, 20103, 20106.

Union Pacific sometimes sets safety standards which exceed that required by the FRA. The FRA has determined that "the basic purpose of the statute – improving railroad safety – is best served by encouraging" but not mandating "regulated entities to do more than what the law requires . . ." *Passenger Equipment Safety Standards*, 75 Fed. Reg. 1180, 1209 (Jan. 8, 2010). Consistent with the FRA's views, Union Pacific will look for opportunities to implement safety improvements and standards exceeding the FRA requirements in the project area, provided said improvements are in Union Pacific's judgement reasonable, rationally related to the operation, efficient and economical.