Calif. Seems Set To Solve Split On Oil Rail Shipments

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Controversy over the shipment of crude oil by rail is on the rise. Now, the California Supreme Court is ready to weigh in on whether state law regulating such transportation is preempted by federal law.

Transportation of crude oil by rail has increased dramatically nationwide in the past several years. In 2013, railroads transported almost 40 million tons of crude oil across the U.S., as compared to approximately 20 million tons in 2012 and 7 million tons in 2011, according to the Association of American Railroads. Projections for crude by rail transport in the future continue to increase, due partially to delays in the approval of the Keystone XL pipeline. However, it is currently uncertain whether these projections will be diminished due to the plunging cost of oil.

On Dec. 10, 2014, the California Supreme Court granted petition for review in Friends of the Eel River v. North Coast Railroad Authority to resolve a split between the First and Third District Courts of Appeal. (230 Cal.App.4th 85 (2014), cert. granted, 339 P.3d 329, Cal. S.C. Case No. S222472 (2014).) The California Supreme Court will consider two questions:

- Does the Interstate Commerce Commission Termination Act (49 U.S.C. § 10101 et seq.) preempt application of the California Environmental Quality Act (Pub. Res. Code, § 21050 et seq.) to a state agency's proprietary acts with respect to a state-owned and funded rail line? Or, is CEQA not preempted in such circumstances under the market participant doctrine (see Town of Atherton v. California High Speed Rail Authority (2014) 228 Cal.App.4th 314)?

- Does the ICCTA preempt a state agency's voluntary commitments to comply with CEQA as a condition of receiving state funds for a state-owned rail line and/or leasing state-owned property?

Does the ICCTA Preempt CEQA?

In Friends of the Eel River v. North Coast Railroad Authority, the First District held that the ICCTA preempts CEQA because it contains a "broadly worded express preemption provision." (Friends of the Eel River, 230 Cal.App.4th at p. 767 (citing People v. Burlington Northern Santa Fe R.R. (2012) 209 Cal.App.4th 1513, 1517).) Remedies provided under the ICCTA, with respect to the regulation of rail transportation, are exclusive and preempt state laws that may reasonably have the effect of managing or governing rail transportation. The court noted that state actions may also be preempted when they would have the effect of preventing or unreasonably interfering with railroad transportation.

The court in Friends of the Eel River distinguished its reasoning from an earlier case that reached a contrary conclusion under similar facts, Town of Atherton v. California High Speed Rail Authority, 228 Cal.App.4th 314 (2014). (But see Friends of the Eel River v. North Coast Railroad Authority (2014) 230 Cal.App.4th 85, cert. granted, 339 P.3d 329 (2014).) In Town of Atherton, the Third District found that the market participant exception to preemption required the California High Speed Rail Authority to comply with CEQA for a portion of the rail line. (My colleague Michael Mills considered the issue of federal preemption and the market participation doctrine in railroad regulation in a previous blog post.) Actions taken by a state as a market participant are generally exempt from federal preemption. The court held that the market participation exception applied in Town of Atherton because the CHSRA was taking proprietary actions in the market, acting in its capacity as the owner of property, not as a regulator.

Does ICCTA Preempt a State Agency's Voluntary Commitments to Comply with CEQA?

In Friends of the Eel River, the First District held that the federal ICCTA preempts CEQA, even when the state agency has previously made a voluntary commitment to comply with CEQA. The First District affirmed the trial court's determination that the ICCTA preempted the North Coast Railroad Authority's obligation to comply with CEQA in repairing and operating rail lines in Northern California.

In that case, NCRA obtained funds from the California Department of Transportation ("Caltrans") pursuant to the Traffic Congestion Relief Program to maintain rail service. NCRA and Caltrans executed a master agreement that provided for the completion of "the environmental process" prior to requesting TCRP funds. As part of its strategic plan, NCRA indicated it would be issuing a CEQA categorical exemption for repair work on the existing line, and would begin preparation of an environmental impact report to review the impact of freight operations. NCRA certified a final EIR for the resumption of freight operations.

Two environmental groups filed petitions for a writ of mandate challenging the adequacy of the EIR. In response, NCRA and Northwestern Pacific filed demurrers on the grounds that the CEQA claims were preempted by the ICCTA. NCRA also rescinded its certification of the EIR, explaining that it had mistakenly believed it needed to complete review under CEQA, but that certification of the EIR was not required as a condition for Northwestern Pacific to operate the line. The court ruled in favor of NCRA.

Surface Transportation Board Decision

On Dec. 12, 2014, the STB issued a decision holding that the ICCTA preempts the application of CEQA to construction of the first segment of the California High Speed Rail line from Fresno to Bakersfield, agreeing with the court's reasoning in Friends of the Eel River v. North Coast Railroad Authority. (Docket No. FD 35861.) The ICCTA's decision states that the STB's regulation of "transportation by rail carriers" is "exclusive," and expressly disagreed with the court's decision in Town of Atherton to the extent that it held that federal law does not preempt CEQA.

The STB, which published its decision shortly after the court decided to hear the Friends of the Eel River case, specifically stated that it was issuing its decision to assist the court in resolving the conflicting decisions described above. Appellants in Friends of the Review are expected to file their opening briefs in late February 2015.

Controversy Over Crude by Rail Shipment Continues

The controversy over crude by rail continues unabated. Not only are crude by rail shipments on the rise, but lawsuits on the matter are also persistent. This past week in California, a coalition of environmental organizations[1] filed a lawsuit against the San Joaquin Valley Air Pollution Control District for "the piecemeal permitting process" of the Bakersfield Crude Terminal in Taft, California. (Communities for a Better Env't, et al. v. San Joaquin Valley Air Pollution Control Dist., filed Jan. 29, 2015.) The environmental organizations claim that there was a lack of adequate environmental review prior to permitting the terminal.

As demonstrated by this recent lawsuit, parties will continue to look to California law in their attempts to regulate transport of crude by rail in the state. However, state regulation of railroads raises the issue of federal preemption, and the California Supreme Court will now take on the task of resolving the appellate court split on this issue.