



STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

April 17, 2017

Representative Mark Johnson
900 Court Street NE H489
Salem OR 97301

Re: HB 2131—Regulation of oil trains

Dear Representative Johnson:

You asked our office to provide an opinion analyzing the legal issues raised by House Bill 2131 and the -2 amendments to that bill. You asked, in addition, that we provide a brief outline of those issues.

Summary of Issues

As we discuss in more detail below, we believe that HB 2131 raises the following legal issues:

- Section 1 of the introduced bill expands the definition of “navigable waters” to include inland watersheds and drinking water intakes that abut high hazard train routes. That expanded definition would apply not only to the provisions of this bill, but also apply to other provisions of the oil and hazardous material spillage statutes.¹ We believe that the expansion is likely permissible, however, given that the United States Supreme Court has endorsed an expanded interpretation of the term “navigable waters” under both the Clean Water Act (CWA)² and the Oil Pollution Act (OPA).^{3,4}
- Section 5 of the bill requires high hazard train route operators in this state to have an approved oil spill prevention and emergency response plan in place. Although the contingency plan requirement could be argued to interfere with railroads’ common carrier obligations, we believe that such an argument would fail, because the bill does not prohibit a train from operating without a contingency plan.
- The contingency planning requirements of sections 1 through 11 of the bill could also be challenged as preempted under the Federal Railroad Safety Act (FRSA)⁵ or the Interstate Commerce Commission Termination Act (ICCTA),⁶ both of which include express preemption provisions.⁷ On the other hand, the OPA expressly provides that state and local spill response laws are *not* preempted by federal law. Because the only

¹ See ORS 468B.300 to 468B.500.

² 33 U.S.C. 1251 et seq.

³ 33 U.S.C. 2701 et seq.

⁴ The expanded definition of “navigable waters” is the only legal issue that is specific to the introduced version of the bill. All other issues discussed in this opinion are implicated by both the introduced version and the -2 amendments.

⁵ 49 U.S.C. 20101 et seq.

⁶ 49 U.S.C. 10101 et seq.

⁷ See 49 U.S.C. 20106 (FRSA’s preemption provisions); 49 U.S.C. 10501 (ICCTA’s preemption provisions).

case raising this issue was not decided on the merits, it remains unclear how a court would reconcile those competing preemption provisions.

- Section 14 of the introduced bill and section 13 of the -2 amendments provide for an annual assessment to be levied from applicable rail carriers. That assessment could be challenged under Article VIII, section 2, of the Oregon Constitution, which requires the proceeds of any tax on the distribution of oil to be deposited in the Common School Fund. Because the assessment would be measured by rail miles operated in the state rather than by the sale or distribution of oil, however, we do not believe that Article VIII, section 2, applies.
- The assessment provision might also be challenged on the ground that it violates the Commerce Clause of Article I of the United States Constitution, which prohibits levying taxes on freight traveling through a state. The ICCTA codified that prohibition by preempting state laws that manage or govern rail transportation. Whether the assessment in HB 2131 is preempted under the ICCTA, however, is complicated by the fact that the federal Hazardous Materials Transportation Act (HMTA)⁸ expressly permits the imposition of fees related to the transportation of hazardous materials if the fee is fair and used for a purpose related to transporting hazardous materials. The validity of HB 2131's assessment provision, therefore, may depend on whether a court would conclude that it is "fair." One possible vulnerability of the assessment's fairness under the HMTA is that it applies only to railroads and not to other carriers of hazardous material.
- A challenge to the assessment provision could also be raised under the Railroad Revitalization and Regulatory Reform Act (4-R Act),⁹ which prohibits states from enacting taxes that discriminate against rail carriers. We do not believe that a court would consider the assessment in this bill to be a "tax" for purposes of the 4-R Act, however, because it does not raise general revenues.
- Finally, section 12 of the introduced bill and section 14 of the -2 amendments require high hazard train route operators to provide proof of financial ability to pay the cost to clean up a worst case oil spill. Although the bill does not preclude a railroad that fails to comply with the financial responsibility requirement from operating within this state, it does impose civil penalties for a violation of that requirement. An argument could be raised that such a penalty interferes with railroads' common carrier obligations. Because that issue has not been adjudicated by a court, however, it is unclear whether such an argument would prevail.

Analysis of House Bill 2131 (Introduced Version)

Section 1

Section 1 of the bill amends ORS 468B.300, the definitions that apply to Oregon's oil and hazardous material spillage statutes. These statutes are Oregon's state corollary to the federal OPA, which allows states to place stricter regulations than the OPA. Section 1 adds three new definitions ("high hazard train," "high hazard train route" and "listed sensitive area") and amends the existing definitions for "facility," "oils" and "navigable waters."

Section 1 adds a definition for the term "high hazard train." This allows the statutes to distinguish between any railroad transporting oil over navigable waters of this state and a

⁸ 49 U.S.C. 5101 et seq.

⁹ 49 U.S.C. 11510 et seq.

railroad that is transporting the oil in unit trains for purposes of contingency planning requirements. This bill currently uses the same threshold, 25 tanker railroad cars, as the definition of “high hazard train” used in Minnesota’s oil spillage statutes.¹⁰

This section also expands the definition of “facility” to include railroad cars. This ensures that all prohibitions, liabilities, duties and enforcement provided for under ORS 468B.305, 468B.310, 468B.315, 468B.320, 468B.325 and 468B.330 apply to all oil transported by rail over navigable waters of the state, regardless of whether the oil is transported as part of a high hazard train or via a smaller number of tank cars included in a train carrying a mix of cargo. Section 4 of the bill, however, specifically excludes railroad cars from the definition of “facility” as it applies to the contingency planning statutes, thus limiting the requirement for contingency planning to owners and operators of high hazard train routes.

Section 1 also amends the definition of “oil” to specifically enumerate certain petroleum products that are known to be increasingly transported by rail. While this amendment is not legally necessary given Oregon’s already inclusive definition of “oil” for purposes of the oil and hazardous material spillage statutes, we felt this was important for clarity.

Finally, section 1 expands the definition of “navigable waters” to include inland watersheds and drinking water intakes that abut high hazard train routes. This amendment is consistent with the OPA definition, which is “the waters of the United States, including the territorial sea.”¹¹ The amendment to the ORS 468B.300 definition of “navigable waters” will have the effect of requiring any owner or operator of a facility, not just the owner or operator of a high hazard train route, to update a contingency plan to include planning for inland watersheds and drinking water sources that abut high hazard train routes if the facility is located in an area where it is reasonably likely that a discharge from the facility could cause substantial harm to an abutting inland watershed or to drinking water.

To the extent that arguments challenging the expanded definition of “navigable waters” under this bill may be raised, the United States Supreme Court has endorsed an expansive interpretation of that term under both the CWA and the OPA.¹² In *U.S. v. Riverside Bayview Homes*,¹³ the Court held that Congress intended “navigable waters” to include more than would traditionally be associated with that term, so the Court determined that an expansive definition was in order.¹⁴ “The legislative history of the OPA and the textually identical definitions of ‘navigable waters’ in the OPA and the CWA strongly indicate that Congress intended the term ‘navigable waters’ to have the same meaning in both the OPA and the CWA.”¹⁵ As such, “the term ‘navigable waters’ is not limited to oceans and other very large bodies of water.”¹⁶

¹⁰ Minn. Stat. 115E.01, subdivision 11d.

¹¹ 33 U.S.C. 2701(21). The OPA defines “territorial seas” as “the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of 3 miles.” 33 U.S.C. 2701(35).

¹² *Sun Pipe Line Co. v. Conewago Contractors*, No. 4: CV-93-1995, 1994 U.S. Dist. LEXIS 14070, 9-14 (M.D. Pa. August 22, 1994).

¹³ 474 U.S. 121 (1985). The Supreme Court upheld regulations adopted by the Army Corps of Engineers (Corps), which defined “navigable waters” to include wetlands. Corps regulations defined “wetlands” as “areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions [and] generally include swamps, marshes, bogs, and similar areas.” 33 C.F.R. 328.3(c)(4). Excluding such areas from the scope of the CWA would subvert the CWA’s purpose.

¹⁴ *Riverside* at 133, citing S. Conf. Rep. No. 92-1236, p. 144 (1972); 118 Cong. Rec. 33756-33757 (1972) (statement of Rep. Dingell).

¹⁵ *Rice v. Harken Exploration Co.*, 250 F.3d 264, 267 (5th Cir. 2001).

¹⁶ *Rice* at 269.

Section 5

The existing language of ORS 468B.345 prohibits the operation of a “facility in the state” without first implementing an approved oil spill prevention and emergency response plan.¹⁷ Section 5 of the bill amends ORS 468B.345 to require high hazard train route operators in this state to have an approved oil spill prevention and emergency response plan in place. Due to common carrier obligations under federal law, state laws cannot prohibit trains without approved contingency plans from operating within state borders.¹⁸ For this reason, the amended provision exempts railroad cars from the definition of “facility” for the purposes of ORS 468B.345. To achieve the desired effect without conflicting with federal law, the language in the new subsection (2) requires high hazard train route operators to have a contingency plan on record but does not prohibit the trains from operating without one. A failure to comply with the contingency plan requirement, however, could subject a high hazard train route operator to civil penalties.¹⁹

Section 10

ORS 468B.365, before amendment, outlines contingency plan requirements for covered vessels and facilities, not including railroad cars, operating within this state. Section 10 of the bill amends ORS 468B.365 to require high hazard train routes to notify the Department of Environmental Quality (DEQ) in writing of any significant change affecting the contingency plan. Section 10 also permits the DEQ to “attach any reasonable term or condition to its approval or modification of a contingency plan” to require high hazard train route operators to have “sufficient resources to protect environmentally sensitive areas and to prevent, contain, clean up and mitigate potential oil discharges.”²⁰ The bill does not require high hazard train route owners or operators to show evidence of compliance with the OPA. Nor does it add high hazard trains to the list of facilities and vessels that the DEQ has a right to inspect under ORS 468B.375, because doing so may conflict with federal laws governing inspections or rights already conferred on Oregon’s Department of Transportation.

State law provisions similar to those in sections 1 through 11 of this bill were recently litigated in *Association of American Railroads v. California Office of Spill Prevention and Response*.²¹ In 2014, the California State Assembly passed California Senate Bill 861 (2014), which added inland waters to the state’s existing oil spill law and added railroads to its definitions and other provisions in order to better protect all waters at risk of oil spills.²² The California law also makes parties, including railroads, strictly liable “notwithstanding any other provision or rule of law,” for costs of cleaning up an oil spill and for damages from a spill.²³ The plaintiffs in *American Railroads* contended that the FRSA, the ICCTA and related federal regulations preempt SB 861 under the Supremacy Clause of Article VI of the United States Constitution. The plaintiffs specifically argued that California’s oil spill contingency planning requirements are preempted by the FRSA, and that the law’s financial responsibility requirements are preempted by the ICCTA.²⁴

¹⁷ ORS 468B.345 (1).

¹⁸ 49 U.S.C. 11101.

¹⁹ See ORS 468.140 (1)(b) (imposing civil penalties for violation of any provision of ORS chapter 468B).

²⁰ See HB 2131 at section 10 (amending ORS 468B.365), subsections (2) and (4)(a).

²¹ *Ass’n of American Railroads v. California Office of Spill and Response*, 113 F. Supp.3d 1052, 1059 (2015).

²² Chapter 35, 2014 Statutes of California (Enrolled Senate Bill 861).

²³ 33 U.S.C. 2702(a); chapter 35, 2014 Statutes of California (Enrolled Senate Bill 861).

²⁴ *American Railroads*, Plaintiffs’ Brief in Support of Motion for Preliminary Injunction, 1-2, Case No. 2:14-cv-02354-TLN-CKD (November 20, 2014), citing H.R. Rep. No. 91-1194 (1970), reprinted in 1970 U.S.C.C.A.N. 4104, 4110; 49 U.S.C. 20106(a)(2).

In defense of California's SB 861, the defendants and amici argued that both the OPA and CWA include nonpreemption clauses designed to preserve state authority to expand upon the respective federal laws.²⁵ The defending parties assert that the FRSA does not trump state clean water and oil spill laws because the FRSA preemption provision extends only to federal regulations governing train tracks, train cars and rail operations that specifically and entirely subsume the subject regulated by a state.²⁶ Because SB 861 does not promulgate regulations covered by the FRSA or other railroad specific safety laws, it covers subject matter that is distinct from that of the FRSA.²⁷ Regarding the plaintiffs' ICCTA preemption arguments, the amici pointed out that the ICCTA does not preempt state laws of general applicability that do not unreasonably interfere with interstate commerce.²⁸ In California's case, they argued, SB 861 extends a public safety and environmental law of general applicability to inland waters by making it applicable to railroads that transport oil through California. Thus SB 861 does not, according to the amici, constitute a state law targeting the railroads.²⁹

On June 18, 2015, the court granted the defendants' motion to dismiss. The court did not reach the merits of the case, finding instead that the dispute was not ripe for review. Specifically, the court found that because compliance with the forthcoming regulations would be within the plaintiff's control, and because the lack of implementing regulations meant the railroads had not been coerced into compliance, the plaintiffs could not establish "a concrete plan to violate the law."³⁰ Similarly, the court held that the plaintiffs failed to establish a genuine threat of prosecution, finding that letters from the state to the railroads discussing enforcement timelines were general statements, "not sufficiently imminent" threats.³¹

The railroads did not file a notice of appeal within the 30-day deadline. Because the *American Railroads* decision rested on jurisdictional grounds, it offers limited insight into what a court hearing a challenge to this bill might do. The goal in preparing this bill was to amend the laws in a manner that would arguably constitute a proper expansion and exercise of state authority under the OPA. That said, the arguments presented by both parties in *American Railroads* were based on reasonable interpretations of the law. Given the resolution of that case, it is still an open question as to whether the amendments to Oregon's oil and hazardous material spillage statutes contained in this bill would be determined by a court to be proper expansions and exercises of state authority under the OPA or to constitute the impermissible regulation of railroads and to be preempted under FRSA or the ICCTA.

Section 12

Section 12 of the bill amends ORS 468B.390 to require a railroad that owns or operates a high hazard train route in Oregon to have proof of financial ability to pay the cost to clean up a worst case oil spill. Specifically, a high hazard train route owner or operator would be required to prove its ability to cover (a) the actual costs of removing spilled oil, (b) any civil penalties or fines imposed in connection with an oil spill and (c) the costs of natural resource damage.

²⁵ *American Railroads*, Amici Applicants' Brief in Support of California Office of Spill Prevention and Response, et al., 3, 7-9, Case No. 2:14-cv-02354-TLN-CKD (January 15, 2014); 33 U.S.C. 2718(a) and (c); see also S. Rep. No. 101-94 at 6-7 (1989), reprinted in 1990 U.S.C.C.A.N. 722, 727-728.

²⁶ *American Railroads*, Amici Applicants' Brief in Support of California Office of Spill Prevention and Response, et al., 10-12, Case No. 2:14-cv-02354-TLN-CKD (January 15, 2014).

²⁷ *Id.*

²⁸ *Id.* at 12, citing *Ass'n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1095 (9th Cir. 2010).

²⁹ *American Railroads*, Amici Applicants' Brief in Support of California Office of Spill Prevention and Response, et al., 13, Case No. 2:14-cv-02354-TLN-CKD (January 15, 2014).

³⁰ *American Railroads*, 113 F. Supp. 3d 1052, 1059 (2015).

³¹ *Id.* at 1060.

Section 12's financial responsibility requirement largely tracks that of Washington's recently enacted oil train legislation. Washington's statute requires "a railroad company that transports crude oil in Washington" to submit information to the Washington Utilities and Transportation Commission "relating to the railroad company's ability to pay damages in the event of a spill or accident involving the transport of crude oil by the railroad company in Washington."³² The statute does not impose a monetary fine or prohibit a railroad company from continuing operations in the state for failure to comply with the financial reporting requirements. Indeed, the statute expressly provides that the commission may not use that information as a basis for "engaging in economic regulation of a railroad company" or for "penalizing a railroad company." It appears that those disclaimers, and the lack of a monetary fine or preclearance requirement, are designed to ensure that the statute would withstand a challenge on grounds that it is preempted by federal law. Because Washington's law has not yet been subject to legal challenge, however, it remains unclear whether it would withstand such a challenge.

Section 12 of the bill, unlike the Washington law, does subject a high hazard train route operator to possible civil penalties for failure to comply with the financial responsibility statement provisions.³³ This could be argued to violate federal law. In *City of Chicago v. Atchison*,³⁴ the United States Supreme Court invalidated a city ordinance that required any new motor carrier desiring to transfer interstate passengers between railroad terminals in Chicago to obtain a certificate of convenience and necessity from the city. The Court concluded that the ordinance, by giving the city "veto power" over a motor carrier's ability to furnish transfer service between terminals, would interfere with provisions of the federal Interstate Commerce Act "provid[ing] for the smooth, continuous and efficient flow of railroad traffic from State to State subject to federal regulation."³⁵ In *Railroad Transfer Service, Inc. v. City of Chicago*,³⁶ the Court extended the reasoning of *Atchison* to invalidate a new Chicago ordinance that required certain transfer companies to obtain a permit from the city to operate. Part of the required showing for a city permit was proof that the operator would have the "financial ability" to render 'safe and comfortable' service, to replace and maintain equipment, and to pay all judgments arising out of vehicle operation.³⁷ The Court concluded that the ordinance's imposition of a monetary fine and possible criminal sanctions for violations of the ordinance was the sort of "'veto power' which *Atchison* held the city may not exercise."³⁸ We are not aware of any legal challenge to recent state oil train legislation that has invoked either of those Chicago cases. Nevertheless, it is possible that the reasoning of those cases could be argued to apply here—i.e., to prohibit a state from imposing monetary penalties for a railroad's failure to show financial ability to pay for an oil spill.³⁹

Section 14

Section 14 of the bill creates new provisions for levying an annual railroad safety assessment. This section defines "applicable rail carrier" as a railroad operating in this state that

³² Rev. Code Wash. 81.04.560; see also Wash. Admin. Code 480-62-300(2) (requiring "[a]ny railroad company that transports crude oil in Washington" to submit annual report identifying, among other things, "[a]ll insurance carried by the railroad company that covers any losses resulting from a reasonable worst case spill").

³³ See ORS 468.140 (1)(b) (imposing civil penalties for violation of any provision of ORS chapter 468B).

³⁴ 357 U.S. 77 (1958).

³⁵ *Id.* at 85, 87 (interpreting predecessor statute to 49 U.S.C. 11101).

³⁶ 386 U.S. 351 (1967).

³⁷ *Railroad Transfer Service*, 386 U.S. at 353-354, quoting Chicago ordinance.

³⁸ *Id.* at 360.

³⁹ It is unclear how far the reasoning of the Chicago cases extends. Under a broad reading, those cases could be interpreted to preclude the imposition of civil penalties for a railroad's failure to comply with state regulations. If interpreted that broadly, the civil penalties that attach to the amendments to ORS 468B.345 by section 5 of the bill—i.e., the penalties for a high hazard train route operator's failure to have an approved contingency plan in place—might be similarly vulnerable to challenge.

is classified as a Class I or Class II carrier under federal regulations.⁴⁰ The assessment is to be divided proportionally among the applicable rail carriers, “based on the total track miles operated by the applicable rail carrier within this state.” There are currently two Class I railroad operators in Oregon, Union Pacific and Burlington Northern Santa Fe Railway (BNSF), and only one Class II operator, Portland & Western Railroad. Union Pacific, BNSF and Portland & Western run high hazard trains in Oregon. Moneys collected under the assessment would be deposited in the new Oil and Hazardous Material Transportation by Rail Action Fund that was established under ORS 453.394. Moneys in that fund are appropriated to the State Fire Marshal to be used “only for the payment of costs associated with the development and effective implementation of the plan adopted under ORS 453.392 for the coordinated response to oil or hazardous material spills or releases that occur during rail transport.”⁴¹

The assessment levied by section 14 of the bill may be argued to conflict with the requirement in Article VIII, section 2, of the Oregon Constitution, that “the proceeds from any tax or excise levied on . . . the . . . distribution . . . of oil or natural gas” be deposited in the Common School Fund. In *Northwest Natural Gas Co. v. Frank*,⁴² the petitioners, energy resource suppliers, argued that an Oregon Department of Energy assessment based on the petitioners’ prorated share of the total number of British thermal units of energy sold in Oregon was a tax subject to Article VIII, section 2. Oregon’s Supreme Court agreed, determining that the “assessment” in that case was “a tax measured by the sale of natural gas and oil . . . [that] is subject to Article VIII, section 2(1)(g) . . . and, therefore, is dedicated to the Common School Fund[.]”⁴³ The court also concluded, however, that a later adopted assessment measured by the energy resource suppliers’ gross revenues was not subject to Article VIII, section 2. Here, the bill levies an assessment on certain railroads measured by rail miles operated in this state rather than measured by the sale or distribution of oil. We therefore believe that, under *Northwest Natural Gas*, Article VIII, section 2, would not apply to dedicate the proceeds from the assessment to the Common School Fund.⁴⁴

If the assessment in the bill were argued to be considered a tax on the distribution of oil, however, it is an open question as to whether Article VIII, section 2, applies to oil and natural gas produced outside Oregon. The Supreme Court declined to address this issue in *Northwest Natural Gas*.⁴⁵ Although the Oregon courts have not addressed this issue, the Attorney General did issue an opinion in 1981 addressing the question “Does subparagraph (g) of sec 2(1) of Art VIII of the Oregon Constitution apply to oil or natural gas produced outside of Oregon?” The answer was no, although the conclusion was not free from “substantial doubt.”⁴⁶

The Attorney General reached his conclusion after first finding a “latent ambiguity” in the language of the section when the first and second sentences of the paragraph are read

⁴⁰ See 49 C.F.R. 1201.

⁴¹ ORS 453.394 (2).

⁴² 293 Or. 374 (1982).

⁴³ *Id.* at 376.

⁴⁴ It is important to recognize that, although the court characterized the assessments in *Northwest Natural Gas* as a “tax” for purposes of Article VIII, section 2, the court’s phraseology in that case has no bearing on the question of whether a bill containing a prorated assessment would be considered a tax bill, i.e., a bill for raising revenue, for purposes of Article IV, section 18 or 25, of the Oregon Constitution. Article IV, sections 18 and 25, require bills for raising revenue to originate in the House and pass both chambers by a three-fifths majority. Here, we do not consider the bill to be a bill for raising revenue because the bill directs the proceeds from the assessment to specific funds to be used to confer on the persons paying the assessment, the railroads, the special benefits of contingency planning review and other services by the state related to emergency response along the rail miles operated by the railroads. See *Bobo v. Kulongoski*, 338 Or. 111 (2005), and *Northern Counties Trust v. Sears*, 30 Or. 388 (1895) (explaining what qualifies as a bill for raising revenue).

⁴⁵ *Northwest Natural Gas* at 382.

⁴⁶ 41 Op. Att’y Gen. 552 (1981).

together.⁴⁷ This then allows the application of rules of statutory (and constitutional) construction and an examination of the history behind the constitutional amendment. On the basis of this examination, the Attorney General concluded:

In the circumstances we conclude that the second sentence, in establishing a limitation on the tax rate based on “value of all oil and natural gas produced or salvaged from the earth or waters of this state” was intended to and should be construed to limit the dedication in the first sentence to the same “oil and natural gas produced or salvaged from the earth or waters of this state.”⁴⁸

Although the Attorney General’s conclusion is not free from doubt, it is consistent with the legislative history of the resolution that referred the constitutional amendment. Thus, on the basis of our own knowledge of the legislative history and the conclusion of the Attorney General, we conclude there is a strong argument that the assessment on oil derived outside of Oregon but transported through Oregon by an applicable rail carrier may be applied to oil spill response rather than deposited in the Common School Fund. However, the issue remains unsettled by the courts and is therefore likely to face challenges and possible negative treatment upon adjudication.

Moreover, the proposed assessment in section 14 of the bill may be argued to conflict with the Commerce Clause of Article I of the United States Constitution, the ICCTA, the HMTA or the 4-R Act.

The Commerce Clause prohibits obstructions to interstate commerce in the form of assessments on freight traveling through a state:

That a state cannot levy a tax upon property in transit to other states and countries is clear, because the property then has no situs in the state, in the proper legal sense of that word. It would be a most serious evil, and a direct obstruction to interstate commerce, for any state to exercise the power of taxing property while in commercial transit to other states or countries.⁴⁹

Congress codified state taxation of freight in transit as a burden on interstate commerce in the ICCTA by preempting “those state laws that may reasonably be said to have the effect of ‘managing’ or ‘governing’ rail transportation.”⁵⁰ A factual assessment of whether the action would have the effect of preventing or unreasonably interfering with railroad transportation is necessary to determine whether the ICCTA preempts a state or local regulation.⁵¹ Federal courts have held that the ICCTA preempts a broad array of state laws, including requirements for preconstruction permitting of a transload facility,⁵² environmental and land use permitting,⁵³ demolition permitting⁵⁴ and requirements for railroad companies to obtain state approval related

⁴⁷ *Id.* at 555.

⁴⁸ *Id.* at 557.

⁴⁹ *Ogilvie v. Crawford County*, 7 F. 745, 746 (C.C.D. Iowa 1881).

⁵⁰ *Norfolk Southern Railway Company v. City of Alexandria*, 608 F.3d 150, 157-158 (4th Cir. 2010) (city ordinance regulating the transportation of bulk materials, including ethanol, and city permit unilaterally issued to the railroad under the ordinance regulating the transport of ethanol to the railroad’s transload facility, were preempted by the ICCTA) (citation omitted).

⁵¹ *Emerson v. Kansas City S. Ry. Co.*, 503 F.3d 1126 (10th Cir. 2007); *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439 (5th Cir. 2001).

⁵² *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638 (2nd Cir. 2005).

⁵³ *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998).

⁵⁴ *Soo Line R.R. Co. v. City of Minneapolis*, 38 F. Supp.2d 1096 (D. Minn. 1998).

to business decisions.⁵⁵ In contrast, the courts typically uphold state and local regulations related to railroad operations as being not preempted by the ICCTA only in narrow circumstances.⁵⁶ The HMTA, on the other hand, permits the imposition of fees related to the transportation of hazardous materials, but only if the fee is “fair and used for a purpose related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response.”⁵⁷ Finally, the 4-R Act prohibits states from enacting a tax that “discriminates against a rail carrier.”⁵⁸

In *BNSF Railway Company, et al. v. California State Board of Equalization*, the Northern District of California recently granted plaintiff railroads’ motion for a preliminary injunction against enforcement of a similar California fee provision based on plaintiffs’ ICCTA, dormant Commerce Clause, HMTA and 4-R Act claims.⁵⁹ In 2015, the California State Assembly passed California Senate Bill 84 (2015), which required California’s Governor’s Office of Emergency Services (OES) to establish a schedule of fees “to be paid by each person owning any of the 25 most hazardous material commodities . . . that are transported by rail in California.”⁶⁰ The fee is to be based on the number of rail cars loaded with hazardous materials being transported within California.⁶¹ Railroads are responsible for collecting the fee from the shipper and then passing it on to the State Board of Equalization.⁶² The fees are placed in a railroad accident preparedness and immediate response fund.⁶³ If emergency response equipment purchased with the fee revenue is used for emergency response that is unrelated to rail accidents, the law requires reimbursement to the fund.⁶⁴

In granting a preliminary injunction to the plaintiffs against imposition of the fee, the court was sympathetic to the plaintiffs’ arguments that ICCTA preemption precludes imposition of the fee in the manner contemplated by California’s SB 84. While the HMTA allows for the assessment of a fair hazardous materials fee, the plaintiffs argued, and the court preliminarily agreed, that the ICCTA prevents the fee from being imposed in a manner that intrudes on the carrier-shipper relationship.⁶⁵ Because SB 84 seeks to compel railroads to collect fees from shippers on behalf the state, the court reasoned, the law intrudes on federal jurisdiction over the management of rail shipping charges, in violation of the ICCTA.⁶⁶ The court was also persuaded by the plaintiffs’ arguments that the fee was not “fair,” in violation of the HMTA, because the fee discriminates against rail in favor of other modes of transportation, particularly trucks, and that it violates the “internal consistency” test under the dormant Commerce Clause.⁶⁷ The court

⁵⁵ *Burlington Northern Santa Fe Corp. v. Anderson*, 959 F. Supp. 1288 (D. Mont. 1997).

⁵⁶ See, for example, *PCS Phosphate Co. v. Norfolk Southern Corp.*, 559 F.3d 212, 221 (4th Cir. 2009) (“voluntary agreements must be seen as reflecting the carrier’s own determination and admission that the agreements would not unreasonably interfere with interstate commerce” (citation omitted), though this rule is not absolute); *Green Mountain R.R. Corp.* (recognizing traditional police powers over the development of railroad property, provided the regulations do not discriminate against rail carriers or unreasonably burden rail carriage); *Florida East Coast Railway Company v. City of West Palm Beach*, 266 F.3d 1324 (11th Cir. 2001) (upholding local zoning regulations applied to railroad-owned land used for nonrailroad purposes by a third party); *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295 (3rd Cir. 2004) (miscellaneous state and local laws having nothing to do with transportation); *Adrian & Blissfield R.R. v. Village of Blissfield*, 550 F.3d 533 (6th Cir. 2008) (state statute requiring railroads to pay for pedestrian crossings across railroad tracks were determined not to be preempted by the ICCTA).

⁵⁷ 49 U.S.C. 5125(f).

⁵⁸ 49 U.S.C. 11501(b)(4).

⁵⁹ *BNSF Railway Company, et al. v. California State Board of Equalization*, No. 16-cv-04311-RS, 2016 U.S. Dist. LEXIS 149884, 3-4 (N.D. Cal., October 28, 2016).

⁶⁰ Cal. Gov’t Code 8574.32 (a)(1).

⁶¹ Cal. Gov’t Code 8574.32 (b)(2).

⁶² Cal. Gov’t Code 8574.32 (b)(2) and (4).

⁶³ Cal. Gov’t Code 8574.44 (a) and (b).

⁶⁴ Cal. Gov’t Code 8574.44 (i).

⁶⁵ *BNSF Railway Company* at 8-11.

⁶⁶ *Id.*

⁶⁷ *Id.* at 15-16.

rejected the plaintiffs' argument, however, that SB 84 was a discriminatory "tax" against a rail carrier in violation of the 4-R Act. The court concluded that the plaintiffs had "made no serious showing that the fees imposed under SB 84 were designed to 'raise general revenues' and can properly be characterizes as a tax."⁶⁸

Again, this bill does not, on its face, purport to levy a tax on property in transit but, rather, places an assessment on railroads based on rail miles operated. The assessment applies directly to the railroads, not to the shippers as in California's SB 84, and moneys collected may be used *only* for activities related to high hazard train routes. The assessment also does not raise general revenues and likely could not be considered a "tax" for purposes of the 4-R Act.⁶⁹ For those reasons, we believe that this bill is prepared in a manner that has a better chance of withstanding scrutiny than SB 84. Nevertheless, arguments that the effect of the language in this bill is to tax property in transit, that it otherwise violates the ICCTA, that it is unfair to railroads in violation of the HTMA or that it otherwise violates the Commerce Clause may be issues raised in opposition to the bill.

In particular, we believe that the assessment, as drafted, could be challenged on the basis that it unfairly discriminates between rail transportation and other modes of hazardous material transportation. In the *BNSF* case, the railroads presented evidence that, although railroads and trucks carry roughly equal amounts of hazardous materials throughout the country, trucks experience approximately 15-20 more hazardous material incidents, measured per ton-mileage, than railroads do.⁷⁰ The court found that evidence persuasive, concluding that California had not shown that it was fair under the HMTA to impose a fee that distinguishes between the modes of hazardous material transportation.⁷¹ The court noted that that was "particularly so given that the law on its face contemplates that at least some, if not all, of the spill response resources to be funded by the fees will be equally useful in addressing trucking accidents."⁷² Thus, the court found that two fairness concerns were implicated under the HMTA: (1) that the California bill did not apply neutrally to all carriers of hazardous material; and (2) that the expenditure of moneys collected under the California fee was not limited to programs relating to the transportation of hazardous material by rail. Here, the bill is drafted to address the second of those concerns—i.e., to limit the expenditure of moneys collected under the assessment to activities related to high hazard train routes. The assessment provision nevertheless remains vulnerable to challenge on the ground that it does not apply neutrally to all carriers of hazardous material.

-2 Amendments to House Bill 2131

The -2 amendments to HB 2131 contain only minor changes to the introduced version of the bill and, with one exception, raise the same legal issues. The one exception is that, unlike the introduced version, the -2 amendments do not alter the definition of "navigable waters" to include inland watersheds and drinking water intakes that abut high hazard train routes and therefore do not implicate the concerns addressed above regarding the expanded definition of "navigable waters."

⁶⁸ *Id.* at 17-18.

⁶⁹ *See id.* at 17; *see also Union P. R.R. v. PUC*, 899 F.2d 854, 858 (9th Cir. 1990) (holding that Oregon assessment levied to recoup costs of regulating railroad operations within state was "used only to finance the [regulatory] program" and therefore "there could be no fear the State would assess Union Pacific unfairly or for the purpose of raising general revenue in violation of the spirit of the 4-R Act").

⁷⁰ *BNSF Railway Company* at 12.

⁷¹ *Id.* at 12.

⁷² *Id.* at 14.

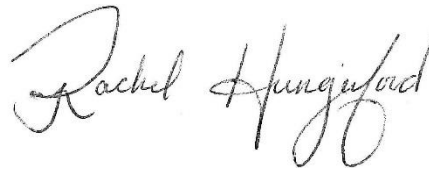
Conclusion

House Bill 2131 and the -2 amendments to the bill largely track the current laws in Minnesota and Washington, which have yet to be challenged, and make an effort to address certain unique attributes of Oregon law. Both versions of the bill are intended to monitor high hazard train routes and to prepare for a worst case oil spill scenario involving a high hazard train route without triggering preemption under federal law. Because several aspects of state oil train legislation have not been fully adjudicated, however, it is possible that certain provisions of the bill, if enacted, would face scrutiny in court.

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel's office are prepared solely for the purpose of assisting members of the Legislative Assembly in the development and consideration of legislative matters. In performing their duties, the Legislative Counsel and the members of the staff of the Legislative Counsel's office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

DEXTER A. JOHNSON
Legislative Counsel

A handwritten signature in cursive script that reads "Rachel Hungerford". The signature is written in black ink and is positioned above the typed name of the signatory.

By
Rachel Hungerford
Staff Attorney