Clay R. Smith
Chief Editor, AILD
CWAG & AG Alliance
1807 W. Bannock St. **I** Boise ID 83702
208.350.6426 (Direct Dial) **I** 208.724.9780 (Cell)
Clay.Smith@cwagweb.org

BNSF Railway Co. v. Clark County—Interstate Commerce Commission Termination Act preempted county's permitting requirements imposed as part of a Columbia River Gorge Compact land-use plan on railroad construction project

Congress consented to the creation of the Columbia River Gorge Compact between Oregon and Washington in 1986. 16 U.S.C. §§ 544 to 544p. The Gorge Act had in part an objective of "establish[ing] a national scenic area to protect and provide for the enhancement of the scenic, cultural, recreational, and natural resources of the Columbia River Gorge." *Id.* § 544a(1). A regional agency (Columbia River Gorge Commission) appointed by the compacting States administers the Compact and "was directed to adopt a management plan ... and, in turn, each county in the Scenic Area was required to 'adopt a land use ordinance consistent with the management plan' and subject to the Commission's approval." The Act further specifies that "[t]he Commission shall carry out its functions and responsibilities in accordance with the provisions of the interstate agreement ... and shall not be considered an agency or instrumentality of the United States for the purpose of any Federal law." *Id.* § 544c(1)(A). Consistent with Act's mandate, the Commission has adopted a management plan for the scenic area, and Clark County has enacted land use ordinances approved by the Commission that require a permit "'[p]rior to [a developer] initiating any use or development.'" The ICCTA, enacted in 1995, contains a broad preemption provision under which the Surface Transportation Board has primary jurisdiction over "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located or intended to be located, entirely in one State." 49 U.S.C. § 10501(b)(2).

In 2018, BNSF Railway Company commenced an upgrade and construction project within the Scenic Area. When Clark County officials informed it of the permitting requirement and an impasse occurred over the duty to comply, BNSF sued in federal district court alleging that the ICCTA preempted any such requirement. The district court agreed. *BNSF Ry. Co. v. Clark County*, 438 F. Supp. 3d 1199 (W.D. Wash. 2020).

The Ninth Circuit affirmed on appeal. *BNSF Ry. Co. v. Clark County*, Nos. 20-35205 & 20-35390, 2021 WL 3730738 (9th Cir. Aug. 24, 2021). The appellants advanced two arguments: (1) "the Gorge Act is a federal environmental statute and that [the court] must harmonize the Gorge Act with the ICCTA"[;] and (2) "even if the Gorge Act is not itself a federal environmental law, it is a federal law that authorizes the Clark County permitting process and must, therefore, be harmonized with the ICCTA."

As to the first argument, the panel concurred with the district court that "the Gorge Act is not a 'nationwide environmental statute .... [It] is limited to a specific portion of the country and delegates almost all authority to the state and local ordinances to manage and adopt ordinances.'"

Rather, the Act "simply provides a framework for Oregon and Washington to cooperatively manage a shared area of land." The panel added that, unlike various nation-wide environmental laws conditioned on Environmental Protection Agency approval, "implementation of the Gorge Act through the management plan is not subject to final federal approval" and that "Appellants point to no provision of the Gorge Act that, like the [Clean Air Act], might similarly transform a local county ordinance into a regulation with the force and effect of federal law." Equally fatal was the fact that "Congress was quite clear that nothing in the Compact made the actions of the Commission the actions of the federal government." The panel thus concluded:

> [T]he Gorge Act does not establish national environmental standards similar to those that states must implement through EPA-approved plans. The Gorge Act provides a framework for a commission of state-appointed officials to adopt a management plan and implement it through county land use ordinances. Critically, the Commission retains final say over the approval and enforcement of the management plan and local county ordinances, and enforcement actions may be brought in state court.

The second argument was no less unpersuasive. Rejecting the appellants' reliance on in *BNSF Railway Co. v. California Department of Tax and Fee Administration*, 904 F.3d 755 (9th Cir. 2018), where the court held that the Hazardous Materials Transportation Act must be harmonized with the ICCTA and allowed imposition of fair state fees on transporting hazardous materials, the panel reasoned that "the Gorge Act contains no provision authorizing Clark County to extend its permitting processes to railroads—the Gorge Act makes no mention of railroad regulation at all." It further rejected "a slightly different argument" that the Gorge Act required harmonization "as 'specific statute that applies to a specific geographic area'":

> Although it is true that the Gorge Act applies to a specific geographic area, the ICCTA applies to specific subject matter—railroad regulation. Because nothing in the Gorge Act gives the counties general and exclusive jurisdiction over all activities within the Columbia River Gorge area, we must give greater weight to the ICCTA, which governs this historically federal area. There is no apparent conflict between, and thus no reason to harmonize, the Gorge Act and the ICCTA.

In sum, "[e]nforcing the Clark County permitting process against the railroads has more than an incidental effect on railroad activity and is thus preempted by the ICCTA."

Decision link: https://cdn.ca9.uscourts.gov/datastore/opinions/2021/08/24/20-35205.pdf