

## Updates

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CA Supreme Court Holds CEQA Not Preempted by Federal Rail Transportation Law for Projects Carried Out by State Agencies

The California Supreme Court has issued its decision in [\*Friends of the Eel River v. North Coast Railroad\*](#), an important case regarding preemption of state environmental law by the Interstate Commerce Commission Termination Act (ICCTA), which contemplates a unified national system of railroad lines subject to federal, not state, regulation.

The court agreed that the preemptive scope of the ICCTA is broad and that the statute preempts the California Environmental Quality Act for private rail owners and operators. But in a 6-1 decision, the majority held that CEQA was not preempted by the ICCTA for projects that are owned by a state agency.

### Background

This case concerned a railroad line running from Napa to Humboldt County. The railroad was previously owned and operated by private railroad companies that eventually failed.

The Legislature, concerned about service on this line, created the North Coast Railroad Authority (NCRA), giving the agency the power to acquire property to operate a railroad on the line and to select a public or private entity to operate transportation services. The NCRA obtained ownership rights over the railroad line and received state and federal funding. NCRA contracted with a private operator, Northwestern Pacific Railroad Company (NWPCo) to operate freight service on the line. The Surface Transportation Board (STB) approved NWPCo's application for an exemption from the certification to operate the line.

NCRA prepared an environmental impact report under CEQA for the resumption of freight rail service on a portion of the line and for limited repair and construction projects. Several groups challenged the EIR's adequacy and NCRA responded that CEQA did not in fact apply to the project because it was preempted by the ICCTA.

### Majority Opinion

Under the Supremacy Clause of the Constitution, Congress may preempt state law through federal legislation, either expressly or implicitly. The fundamental question regarding the scope of preemption is congressional intent.[1]

The majority and dissent agreed that Congress intended ICCTA's preemption of state regulation to be broad and that the ICCTA preempted CEQA in the regulation of privately owned railroads. The majority held, however, that because the railroad line here was owned by the NCRA, a state subsidiary, CEQA was not preempted by the ICCTA because there was no indication that Congress intended to preempt states' powers of self-governance.

**ICCTA preemption for private railroad owners and operators.** The majority noted that the regulation of the national system of railroads "is of peculiarly federal concern, rather than one involving historic state police powers" and recognized the broad preemptive scope of the ICCTA.[2] Under the ICCTA, the STB has exclusive jurisdiction over transportation by rail carrier, and its remedies are exclusive and expressly preempt state remedies with respect to regulation of rail transportation. The majority observed that:

The ICCTA is unifying and deregulatory; it would undermine these values if states could compel the railroad industry to halt service pending compliance with regulations that conflict with federal law or invade the regulatory field of the STB.[3]

The majority further observed that requiring a private rail carrier to undergo CEQA review as a condition of operations would impose an extensive state law regulatory burden on the rail carrier as a condition of providing service and would be inconsistent with the broad deregulatory purpose of the ICCTA. The majority therefore concluded that "[i]n the ordinary regulatory setting in which a state seeks to govern private economic conduct, requiring CEQA compliance as a condition of state permission to go forward with railroad operations would be preempted." [4]

For this reason, the majority held that CEQA causes of action could not be the basis for an injunctive order directed specifically at NWPCo to halt NWPCo's freight operations.

**ICCTA preemption of NCRA owned line.** The majority found the situation differed with regard to the NCRA, a state subsidiary. Here, the majority held, CEQA does not constitute regulation, rather it represents the state's self-governance—control exercised by the state over its own subdivision.

When CEQA conditions the issuance of a permit for private development on CEQA compliance, and thereby restricts the ability of private citizens and companies to develop their property, this seems plainly regulatory. But CEQA also operates as a form of self-government when the state or a subdivision of the state is itself the owner of the property and proposes to develop it.

According to the majority, the ICCTA's broadly deregulatory purpose creates considerable freedom "within the zone of the owner's control." [5] The majority reasoned that under the ICCTA, a private conglomerate that owns a subsidiary that is a railroad company could make its decisions based on its own internal guidelines. Likewise, the state as owner may make its decisions based on its own guidelines. And, in the majority's view, CEQA should be construed as such an "internal guideline" that governs the processes by which state agencies may develop or approve projects that may affect the environment—notwithstanding the fact that citizens can bring suit to enforce CEQA compliance.

The majority limited this holding to situations in which the specific project under consideration by the state was "within the owner's sphere of control" and thus "there was no inconsistency with regulation provided for by the ICCTA." The majority found that the track repair contemplated by the project "was within the owner's sphere under the ICCTA because the STB had chosen not to regulate track repair and renovation on existing lines." The majority also found that the resumption of freight service was within the owner's sphere of control because "the STB determined the level of service along the line did not cross a threshold that would require federal environmental review."

The majority found support for its conclusion in federal preemption cases. Courts have recognized a presumption that protects against undue federal incursions into the internal, sovereign concerns of the states. Courts have also recognized that a state's proprietary arrangements in the marketplace are presumed not to be preempted absent evidence of such expansive congressional intent.

#### Concurring Opinion and Dissent

Justice Kruger's concurring opinion agreed with the majority's reasoning that the ICCTA did not preempt CEQA's application to the NCRA but sought to clarify that the ICCTA might preempt particular CEQA remedies upon remand.

Justice Corrigan's dissent expressed skepticism about the majority's distinction between projects undertaken by public agencies and private projects over which an agency has power of approval: "The proposition that a law of general application may be considered a regulation of private activity, but not of public activity in the same sphere, appears to be unsupported by precedent." [6]

## Conclusion

This case contains important holdings regarding federal preemption of CEQA by the ICCTA. In particular, the court has drawn an important distinction between projects on state-owned railroads and projects on privately owned railroads, and held that CEQA generally is applicable to the former but not the latter category due to ICCTA preemption. Future cases may be needed to refine the line in terms of what constitutes state ownership. The court's decision leaves many unanswered questions about where the line is drawn between state-owned and privately owned projects, and regarding the circumstances under which CEQA review may be preempted even for state-owned projects (e.g., where the application of CEQA is deemed inconsistent with STB's exclusive regulation of interstate railroads).

The court's reasoning—particularly that federal preemption of state environmental review requirements is limited where the state has a proprietary interest or is acting as a market participant—may reach beyond the ICCTA. This case may weaken claims of federal preemption of CEQA and similar laws in circumstances where a state agency is involved in carrying out, beyond merely approving, the project.

A separate case on the issue of whether CEQA is preempted by the ICCTA was recently dismissed by the U.S. Court of Appeals for the Ninth Circuit in an unpublished opinion (*Kings County v. Surface Transportation Board*, No. 15-71780). The court determined that the STB decision on CEQA preemption for the California High-Speed Rail project was not a final agency action and therefore was not judicially reviewable.

## Endnotes

[1] Slip. Op. 21.

[2] Slip. Op. 18.

[3] Slip. Op. 34.

[4] Slip. Op. 36.

[5] Slip. Op. 46.

[6] Slip Op., J. Corrigan Dissenting 1–2.

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