McCleary City Council

AGENDA

October 22, 2014

7:00 City Council Meeting

Flag Salute
Roll Call
Public Hearings: Property Tax Levy
Public Comment:

Minutes: (Tab A)
Mayor's Report/Comments: The 2015 Preliminary Budget will be available no later than Oct. 31st

Staff Reports: Dan Glenn, City Attorney (Tab B)

Old Business:

New Business: 2015 BIAS Contract (Tab C)
2015 Fire District 5 Contract Renewal (Tab D)

Ordinances:

Resolutions:

Vouchers
Mayor/Council Comments
Public Comment
Executive Session
Adjournment

Americans with Disabilities Act (ADA)
Accommodation is Provided Upon Request

Please Turn Off Cell Phones – Thank You

The City of McCleary is an equal opportunity provider and employer.
La ciudad de McCleary es un proveedor de igualdad de oportunidades y el empleador.

CITY OF MCCLEARY
Regular City Council Meeting
Wednesday, October 8, 2014

ROLL CALL AND FLAG SALUTE — Councilmember's Reed, Schiller, Catterlin, Ator and Peterson.

ABSENT — None.

STAFF PRESENT — Present at the meeting were Todd Baun, Wendy Collins, George Crumb, and Dan Glenn.

PUBLIC HEARINGS

PUBLIC HEARING BUDGET REVENUE SOURCES — The hearing opened at 7:00 pm. The revenue sources are estimated by the potential revenues from taxes and utilities for the coming year. There are no major changes anticipated at this time. The hearing closed at 7:03 pm.

PUBLIC HEARING PROPERTY TAX LEVY — The hearing opened at 7:04 pm and recessed at 7:04 pm due to the lack of tax information from the Grays Harbor County Assessors Office. The hearing will resume on October 22, 2014 when the tax levy information will hopefully be available.

PUBLIC COMMENT — Gary Atkins wanted to know where the Mayor is at with our budget. He said a couple months ago the Mayor and Council asked everybody to get together and vote on whether to keep the police department. Mr. Atkins wanted the council to know his opinion now. He said there were a couple meetings about keeping the police department. Then the Mayor sent out letters saying if we didn't pass the levy we couldn't afford to keep the police department. Now the Mayor is telling everybody he is trying to find ways to keep the police department, which will cost us $200,000 more than the sheriff's office. The Mayor stated that is not particularly true, because the sheriff's contract would be for one deputy to replace our three police officers. Mr. Atkins said on the days he is in town, you do not see three officer's in this town at one time. He added he does not see one officer in this town. On Saturday and Sunday he watched a black diesel pickup rip up and down the hill. Every morning when he goes to work at 8:00 am, there is not officer around while our children are walking to school. Mayor Dent suggested he speak to the Police Chief and Mr. Atkins replied he is talking to the Mayor because he was elected as the Mayor to hear him because the Mayor works for us.

Mayor Dent added that he had attended both of the levy meetings. Mr. Atkins stated, "yes and you walked out of one hearing because you didn't like what was being said". Mayor Dent said he did walk out because it was getting too nasty-mouthed. Mr. Atkins asked the Mayor, "why are you wasting our time and trying to come up with money to keep three police officers that do no better than the Sheriff's department when we the people of McCleary voted against having the police department"? Mayor Dent said he believes it's more significant and important to keep our police department and a lot of people who voted against the levy, or did not vote at all, did not realize it meant losing the police department. Mr. Atkins said, "everybody knew it was going to be the loss of the police department. We have 18 percent crime rate lower than any other city nationally and locally so why do we need three officers"? Mayor Dent said it is so we can keep it at 18 percent. Mr. Atkins remarked there are more sheriff's in this town during the day than McCleary officers. Mayor Dent said he sees it differently. Mr. Atkins said Mayor Dent is not around the town and he never sees him. Mayor Dent said he has lived here since 1964 and Mr. Atkins said he understands that and hermits also live under rocks. Mayor Dent replied that he is not a hermit.

Chief Crumb addressed Mr. Atkins stating he drives by his house 10-15 times a day and it's not his fault that he doesn't see him. Chief Crumb came to his house the other day and knocked three different times loudly on his door when his dogs were running up and down the street and he wouldn't answer. The Chief spotted him thirty minutes earlier working in his back yard and his truck was still in the driveway. Chief Crumb said he recorded the incident. Mr. Atkins stated he must not have knocked too loud. Mayor Dent tried to end the conversation when Mr. Atkins addressed Chief Crumb and stated what he wants is for Chief Crumb to earn his income because he makes $100,000 a year and the average person makes $49,000 here in McCleary and Elma makes an average of $38,000 per year. He said, "you are making $100,000 to do what"? Mayor Dent called Mr. Atkins a "plant". Mr. Atkins called the Mayor a name, using angry profanity and Mayor Dent remarked, "okay out you go". Chief Crumb asked Mr. Atkins to step outside to discuss this issue further.

Attorney Dan Glenn said to stop for a second. He spoke to the crowd and stated, "it is better to remain silent and be thought a fool than to open your mouth and remove all doubt". He said there are one or more people that are very close to removing the doubt. He said he will make a non legal comment and stated there is a public comment time and Mr. Atkins made a comment, and Chief Crumb made his comments, however, the Council will probably agree this is getting out of control. In Yelm, they've had people removed from meetings and that is not the goal here. He asked everyone to remain civil and said if there are more comments to be made they can be made in writing to the Mayor and Council. Mr. Atkins said he wants to be heard. Mr. Glenn responded that had he been in another city meeting, he would have been removed after the comment he made a few minutes ago, which was not civil. He said it's time to move on to something more positive. Any additional comments can be sent to Mrs. Collins at the City.

MINUTES APPROVED

It was moved by Councilmember Ator, seconded by Councilmember Reed to approve the minutes from the September 24, 2014 meeting. Motion Carried 5-0.

CITY ATTORNEY REPORT

None.

MAYOR'S COMMENTS

Mayor Dent said copies of the draft revenues will be available online and in the front office, if a hard copy is needed.

DIRECTOR OF PUBLIC WORKS REPORT

Todd Baun has provided a report to the Council and is available if there are any questions.

PORTLAND ENERGY CONSERVATION, INC. (PECI) CONTRACT ASSIGNMENT

It was moved by Councilmember Ator, seconded by Councilmember Peterson to authorize the Mayor to sign the Acknowledgement of Consent to Assignment, changing the current name from PECI to CLEAResult Operating, LLC. Motion Carried 5-0.

FIRE DISTRCIT 5 CONTRACT

Fire District 5 is offering to continue the contract for another three years. The only difference is the COLA, which is between 2% and 4.5 %. Mayor Dent stated that Chief Banks of Rural 12 Board, McCleary Fire Chief Paul Nott and Todd Baun are in favor of it. Councilmember Schiller brought up an error he discovered so it will be held over until the next meeting. Joy Iverson noticed a change throughout the contract eliminating Elma. Mayor Dent said Elma is entertaining other options so McCleary is negotiating individually with Fire District 5 this year.

COASTAL COMMUNITY ACTION PROGRAM (CCAP) AGREEMENT

The agreement does not cost the City any money and it provides financial assistance for low income families in McCleary with their utility bills. **It was moved by Councilmember Ator, seconded by Councilmember Reed to authorize the Mayor to sign the CCAP agreement with clarification language reviewed and either approved or modified by Attorney Dan Glenn regarding the Credit Balances section. Motion Carried 5-0.**

APPROVAL OF VOUCHERS

Accounts Payable vouchers/checks approved were 38525-38576 including EFT's in the amount of $140,505.98 and 38577-38623 including EFT's in the amount of $45,175.27.

It was moved by Councilmember Reed, seconded by Councilmember Ator to approve the vouchers. Motion Carried 5-0.

PUBLIC COMMENT

Councilmember Catterlin had a conversation with Mayor Osgood of Elma at 5:30 today and he was told at Elma's next council meeting, they are going to make a decision to either go with the Grays Harbor County Sheriff's Office or run a $400,000 levy in February. If they go with the levy, and it fails, they will have to go with the Sheriff's office because they are $400,000 short. Mayor Dent said he does not see the necessity of another levy at this time for McCleary. Councilmember Schiller asked where did the Mayor get the extra funding for the police department when we've had a shortfall of $180,000. Mayor Dent said it will be evident when he sees the expenditure side where the cuts have been made. Councilmember Schiller went on to ask if the citizens would have voted yes on the levy, what would have been done. Mayor Dent said it would have been a different budget then. Mayor Dent said it would have paid for some police bills that are now cuts in the budget and that will be apparent when they get the projected expenditures.

Gary Atkins asked the Mayor why he has to be so secretive about everything. He doesn't care about if the police officers have a job, he only cares about where his money is going. He doesn't even have a sidewalk to get out of his front door but we are paying three police officers $400,000 to do nothing. If we can save $200,000, that is a lot of money. Mayor Dent stated the street fund is different than current expense, which is where the sidewalks are budgeted. Gary Atkins replied, yes but we take the electric fund and put it in the police fund.

EXECUTIVE SESSION	None.
MEETING ADJOURNED	**It was moved by Councilmember Ator, seconded by Councilmember Peterson to adjourn the meeting at 7:22 PM. The next meeting is scheduled for October 22, 2014 at 7:00 PM. Motion Carried 5-0.**

MEMORANDUM

TO: MAYOR AND CITY COUNCIL, City of McCleary

FROM: DANIEL O. GLENN, City Attorney

DATE: October 17, 2014

RE: LEGAL ACTIVITIES as of OCTOBER 22, 2014

THIS DOCUMENT is prepared by the City Attorney for utilization by the City of McCleary and its elected officials and is subject to the attorney-client privileges to the extent not inconsistent with laws relating to public disclosure.

1. **BIAS SOFTWARE AGREEMENT**: Ms. Collins has indicated BIAS has provided an agreement relating to software provision and services for 2015. She will be forwarding to me for review. I am going to bet it will be the usual matter of waiver of liability for most things. However, they have been cooperative in the past and I am assuming that they will be so this time.

I anticipate having the chance to review this weekend and will be able to provide you my opinion on Wednesday.

2. **AUDIT EXIT CONFERENCE**: As you are aware, the SAO and the City Administration, including myself, respectfully disagree on the matter of the interfund transfers in 2011-13. As you know, it is the classic does a generic statute which gives the SAO the authority to promulgate a generic accounting system overrule a specific statute mandating certain action. As I perceive their final position, it is that the City did not have the written information reflecting the analysis taken of the fiscal condition of the L & P fund prior to making the transfer. I have little doubt the staff member then involved primarily in working with the Mayor on budgeting did some form of analysis. However, as requested by the SAO, Ms. Collins is going to review the material and develop an analysis.

3. **PUBLIC RECORDS**: This has been mentioned in the past, but given the issues currently in process in Montesano, I

CITY OF McCLEARY
100 SOUTH 3RD STREET
McCLEARY, WASHINGTON 98557

feel it both necessary and appropriate to remind you of a very basic impact of the Public Records Act. (RCW 42.56)

First, the definition of a public record and a "writing" are very broad. RCW 42.56.010 provides as follows:

> (3) "Public record" includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. For the office of the secretary of the senate and the office of the chief clerk of the house of representatives, public records means legislative records as defined in RCW 40.14.100 and also means the following: All budget and financial records; personnel leave, travel, and payroll records; records of legislative sessions; reports submitted to the legislature; and any other record designated a public record by any official action of the senate or the house of representatives.
> (4) "Writing" means handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated.

Second, the appellate courts have made clear that any communication by an elected official or public employee, whether on a public device such as your I-Pads, on your personal computer, or, in today's world, a text message on your cell phone is subject to review as to whether or not it is a public record subject to potential disclosure under the Act.

Third, that requests may be made not only by media entities, but also by private citizens and that each must be honored and complied with.

4. **OIL TRAIN ISSUE**: So far as I know, you have not received the contacts in relation to this issue which have been received by both Elma and Montesano. I assume that is because the proposed transportation lines for the oil transport to the Port of Grays Harbor do not pass through McCleary. However, given the intensity with which the issue was discussed in

CITY OF McCLEARY
100 SOUTH 3RD STREET
McCLEARY, WASHINGTON 98557

Montesano, just in case the issue is brought before you I am attaching to the report two articles from the Municipal Attorneys conference of two weeks ago. I provided them to both of the other city councils.

In reviewing them, you will note that one is basically a Power Point presentation setting out the proposed routes and other information. The second is a presentation made by the Vancouver City Attorney as a result of Vancouver's being very much involved in the matter as a result of the Port of Vancouver taking the same basic position which has been taken by our Port. It is more of a legal analysis laying out the limited role of local governments in making decisions in this area and the dominant role of federal agencies.

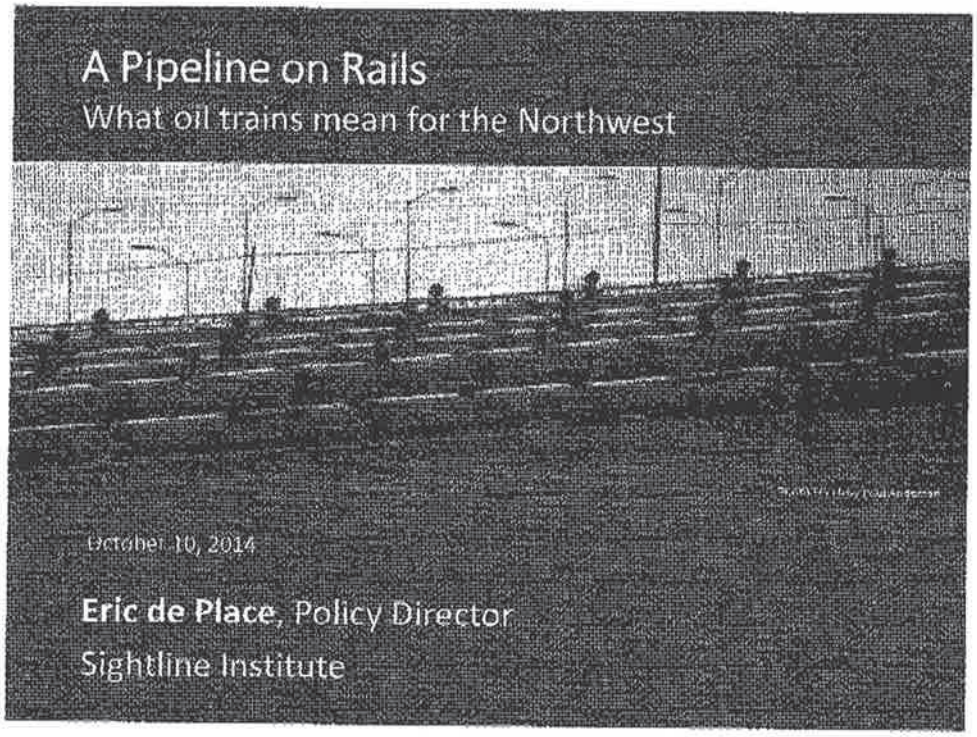
5. **CCAP LOW INCOME GRANT PROGRAM:** As you will remember, my concern was the provision that if an individual receives a grant for utility payment purposes and then terminates services, the contract requires that the City disburse any surplus to the individual rather then returning to CCAP. I spoke to the representative who transmitted the document to Ms. Collins, but she indicated she was unable to respond to the question. She referred me to the agency director, Mr. Hanson, for a response. He did call back, but when I returned his call, it turned out that he has a four day work week. Thus, I assume he will return my call on Monday and I hopefully will understand why a "refund" of moneys provided by a state agency for specific purposes would not get us into trouble with the SAO.

As always, this is not meant to be all inclusive. If you have any questions or comments, please direct them to me.

DG/le

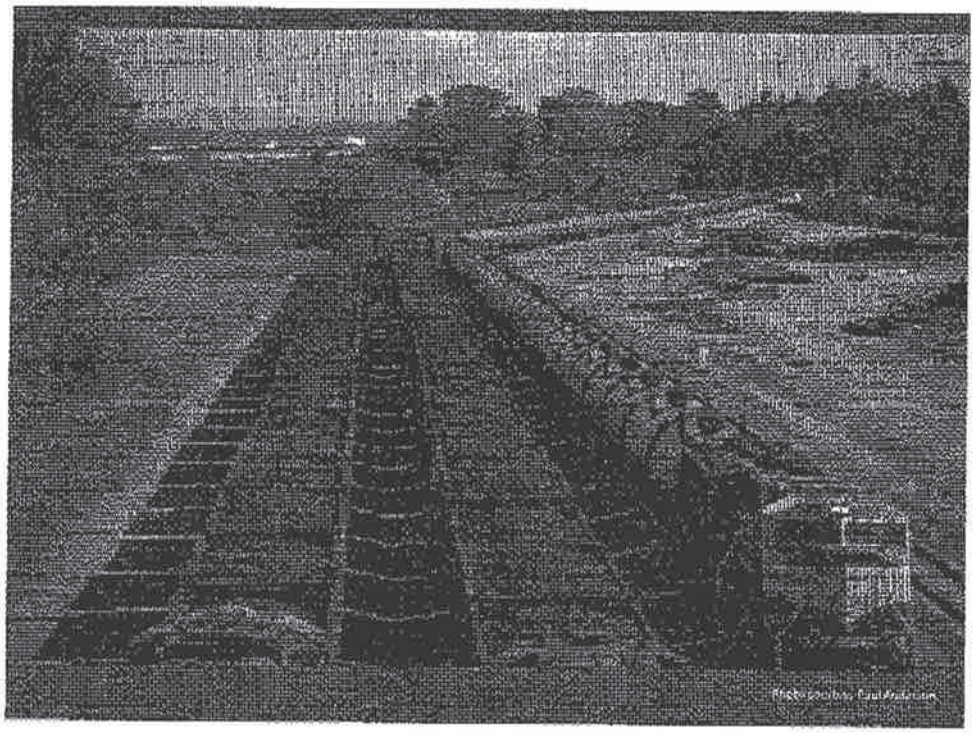
CITY OF McCLEARY
100 SOUTH 3RD STREET
McCLEARY, WASHINGTON 98557

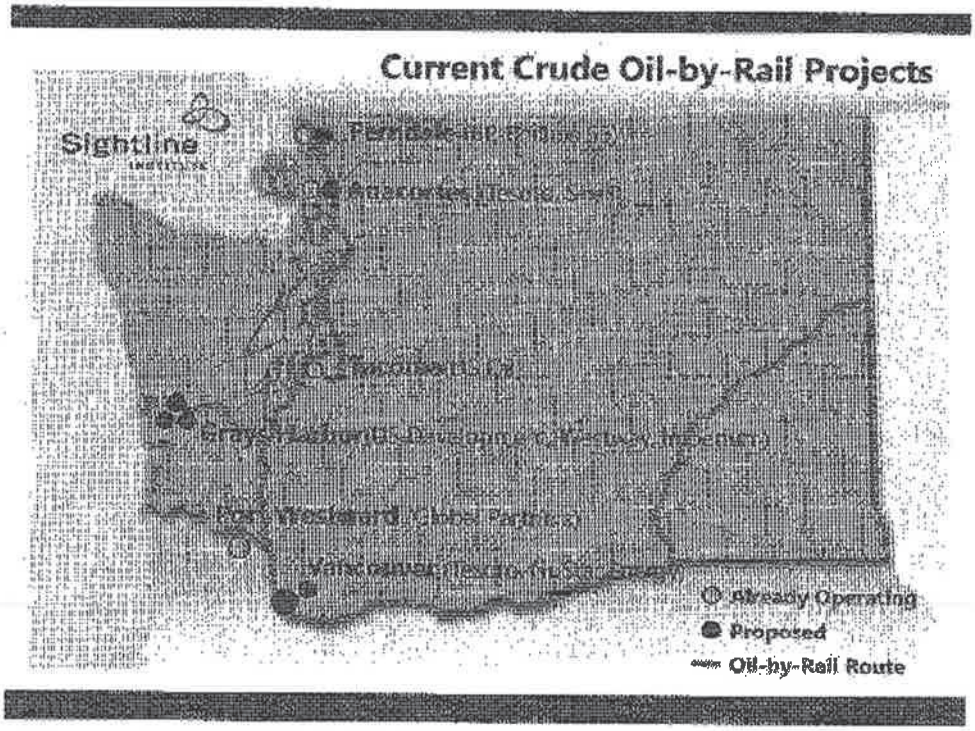
10/1/2014


A Pipeline on Rails
What oil trains mean for the Northwest
October 10, 2014
Eric de Place, Policy Director
Sightline Institute

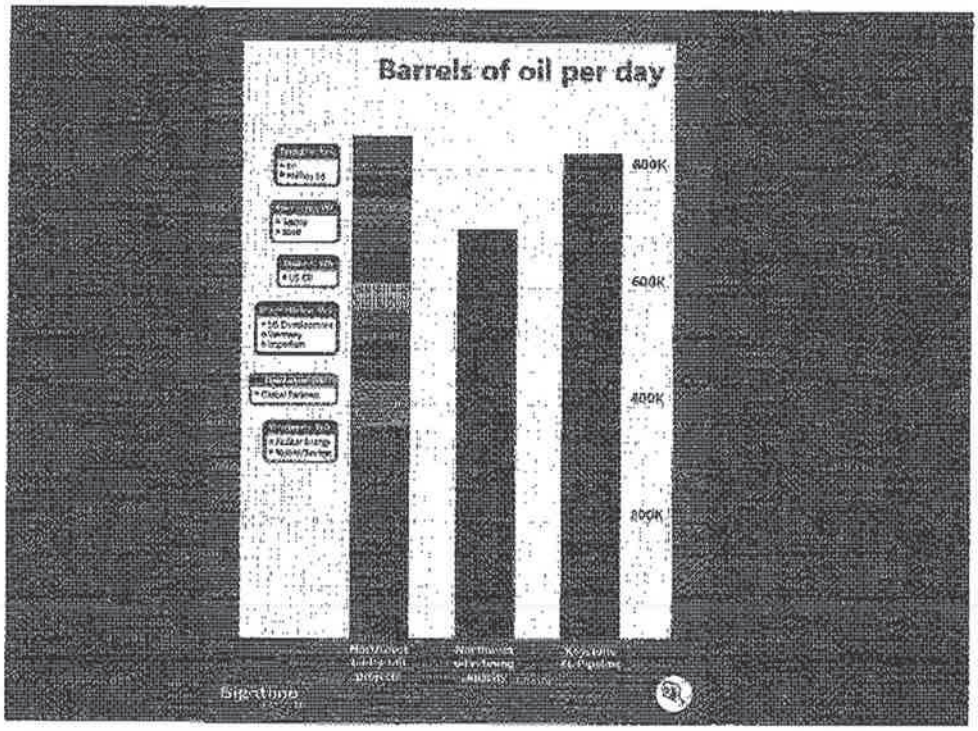

Sightline

1

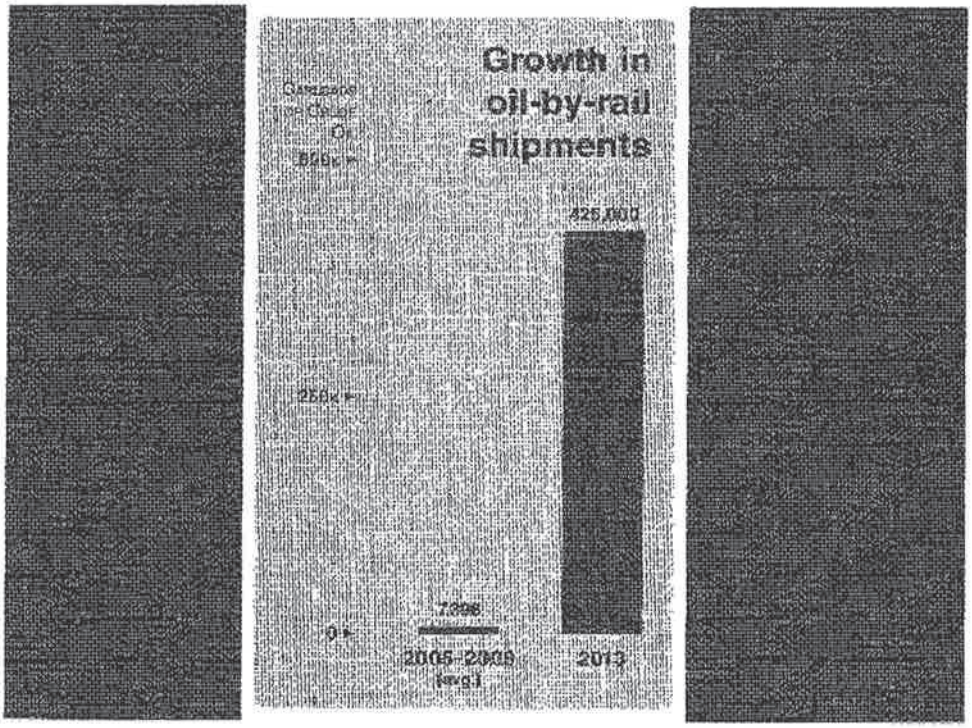


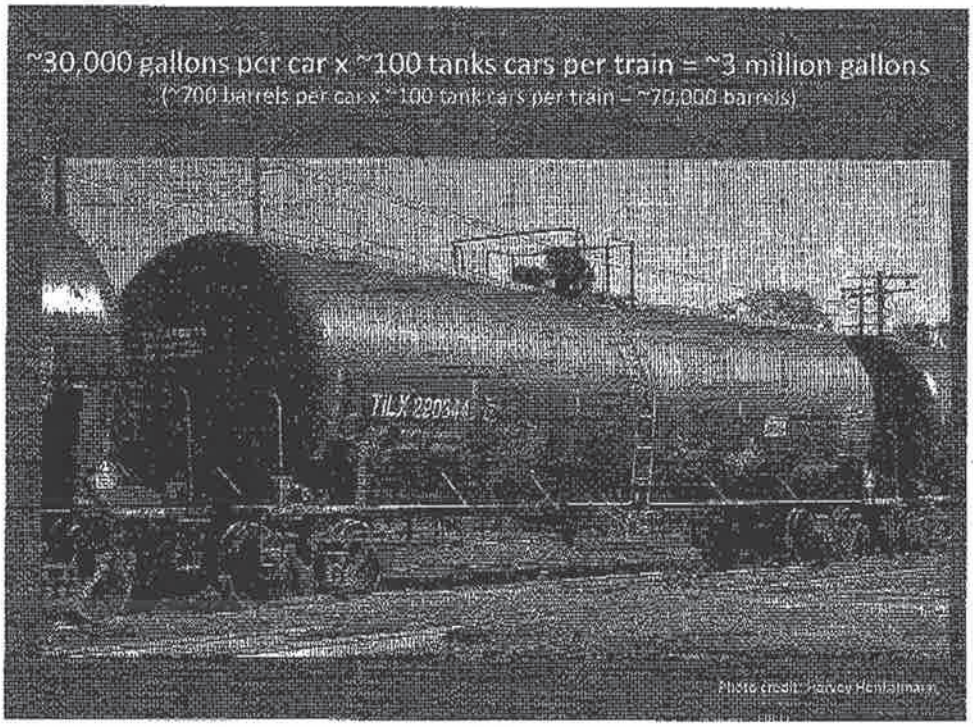

Current Crude Oil-by-Rail Projects
Sightline
Already Operating
Proposed
Oil-by-Rail Route

	Handling capacity (barrels per day)	Estimated loaded oil trains per day	Status
BP Refinery (Ferndale, WA)	70,000	1.0	Operational
Phillips 66 Refinery (Ferndale, WA)	35,000	0.5	In construction
Tesoro Refinery (Anacortes, WA)	50,000	0.7	Operational
Shell Refinery (Anacortes, WA)	60,000	0.9	Seeking permits
US Oil & Refining (Tacoma, WA)	35,000	0.5	Operational
US Development (Hoquiam, WA)	50,000	0.7	Seeking permits
Westway Terminals (Hoquiam, WA)	48,800	0.7	Seeking permits
Imperium Terminals (Hoquiam, WA)	70,000	1.0	Seeking permits
NuStar Energy (Vancouver, WA)	50,000	0.7	Seeking permits
Tesoro / Savage (Vancouver, WA)	360,000	5.1	Seeking permits
Global Partners (Clatskanie, OR)	30,000	0.4	Operational
Total Operational Capacity	**185,000**	**2.6**	
Total Potential Capacity	**858,800**	**12.3**	



10/1/2014

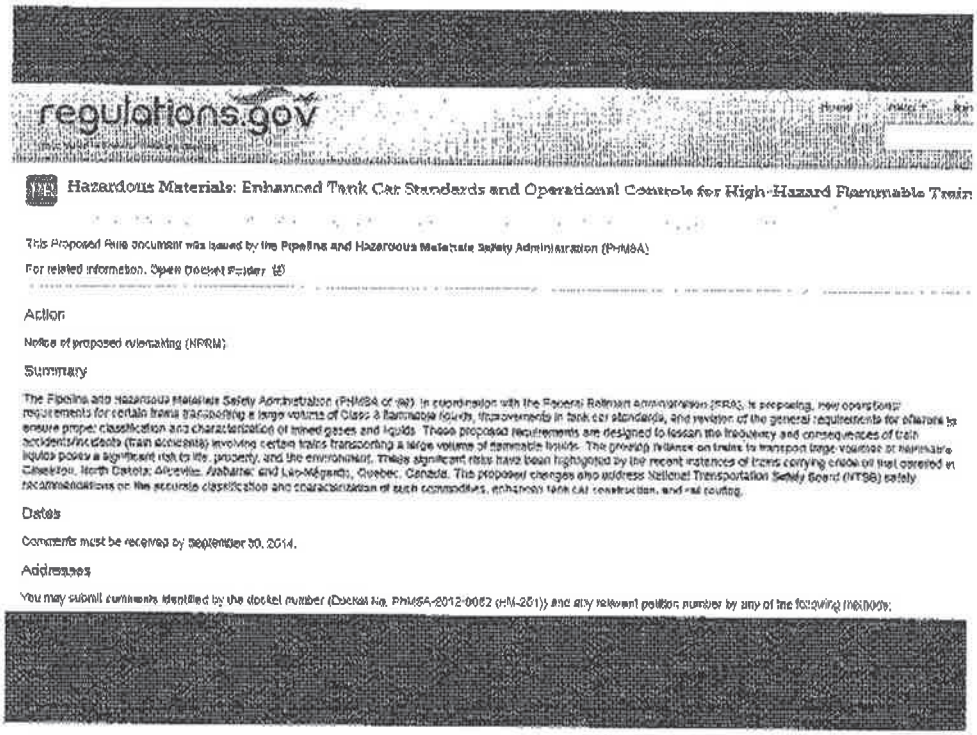

Growth in oil-by-rail shipments
425,000
250K
7,800
0
2005-2009 avg
2013


~30,000 gallons per car x ~100 tanks cars per train = ~3 million gallons
(~700 barrels per car x ~100 tank cars per train = ~70,000 barrels)
TILX 229344
Photo credit: Harvey Hentschmann

4

10/1/2014

10/1/2014



regulations.gov

Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains

This Proposed Rule document was issued by the Pipeline and Hazardous Materials Safety Administration (PHMSA)

For related information, Open Docket Folder (2)

Action

Notice of proposed rulemaking (NPRM)

Summary

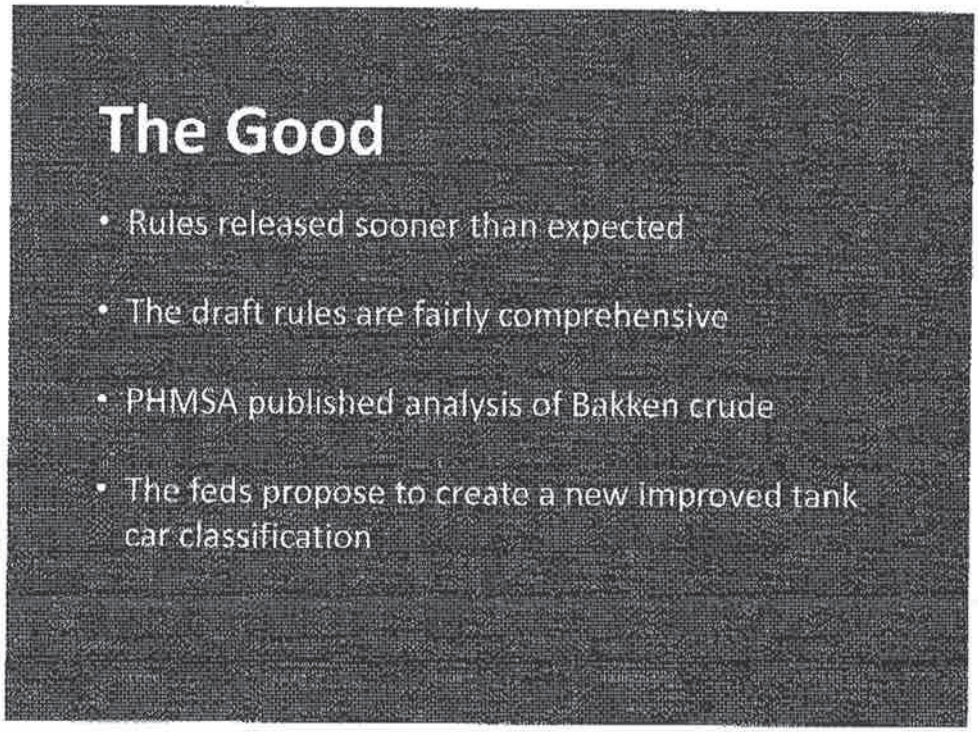
The Pipeline and Hazardous Materials Safety Administration (PHMSA or we), in coordination with the Federal Railroad Administration (FRA), is proposing new operational requirements for certain trains transporting a large volume of Class 3 flammable liquids, improvements in tank car standards, and revision of the general requirements for shippers to ensure proper classification and characterization of mined gases and liquids. These proposed requirements are designed to lessen the frequency and consequences of train accidents/incidents (train accidents) involving certain trains transporting a large volume of flammable liquids. The growing reliance on trains to transport large volumes of flammable liquids poses a significant risk to life, property, and the environment. These significant risks have been highlighted by the recent instances of trains carrying crude oil that derailed in Lakeidon, North Dakota; Aliceville, Alabama; and Lac-Mégantic, Quebec, Canada. This proposal changes also address National Transportation Safety Board (NTSB) safety recommendations on the accurate classification and characterization of such commodities, enhanced tank car construction, and rail routing.

Dates

Comments must be received by September 30, 2014.

Addresses

You may submit comments identified by the docket number (Docket No. PHMSA-2012-0082 (HM-251)) and any relevant petition number by any of the following methods:



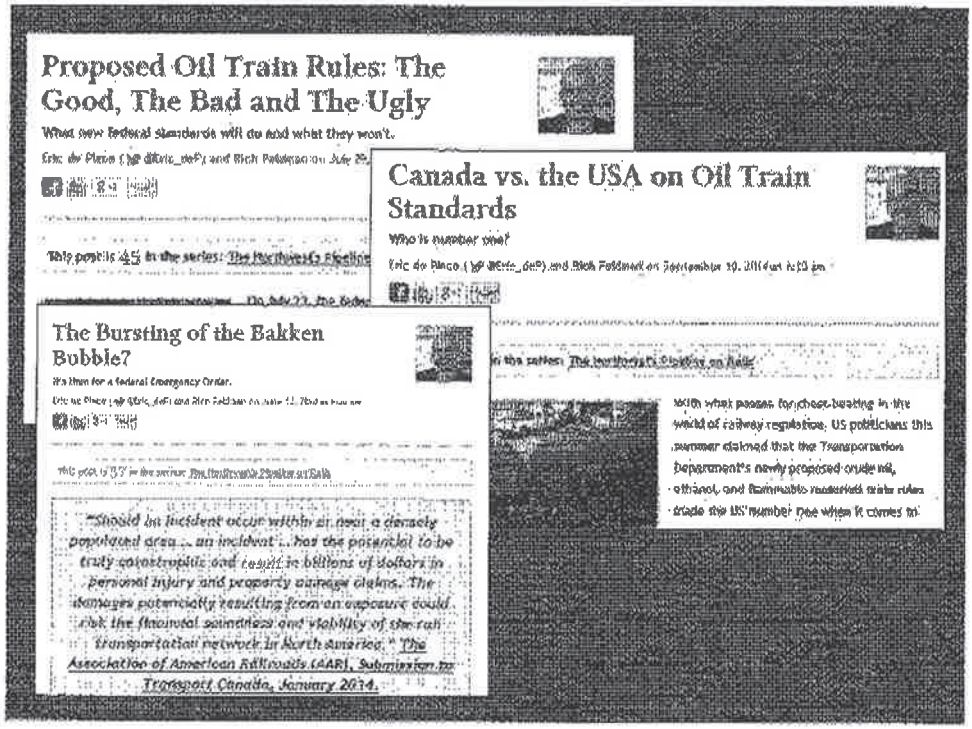
6

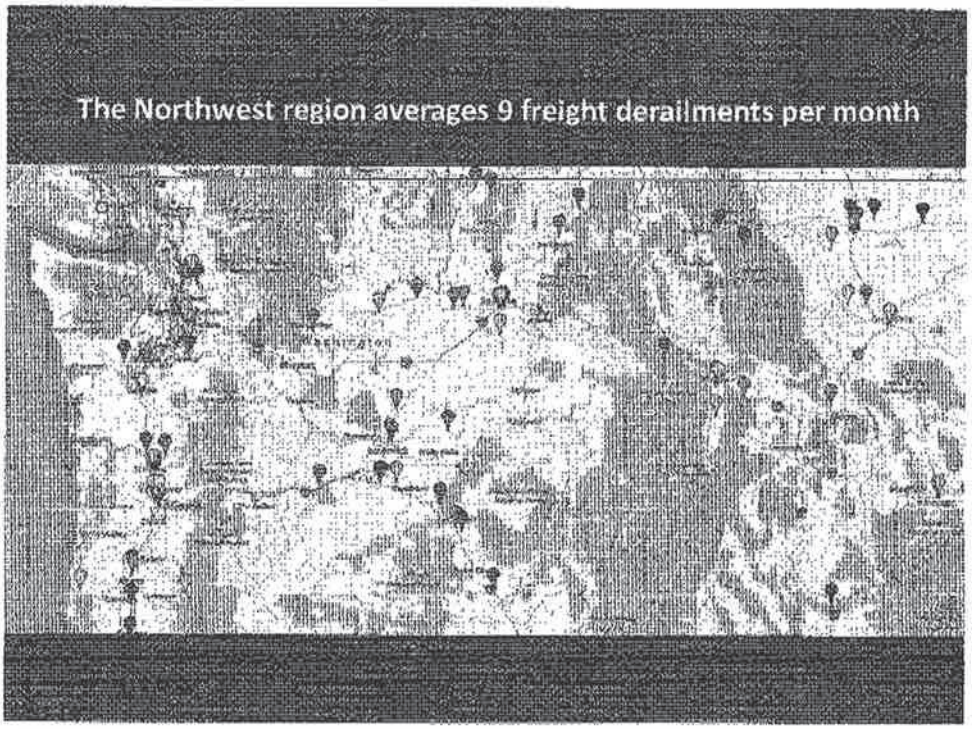
The Bad

- Only applies to "high-hazard flammable trains"
- No single tank car standard based on best available science. Instead...
  - Option 1 - developed by the fedl agencies
  - Option 2 - derived from RR + oil industry
  - Option 3 - based on upgraded tank car currently being built and what oil industry prefers

The Ugly

- No immediate ban on unsafe legacy DOT-111s
- Less dangerous flammable liquids allowed in legacy DOT-111s until 2018 or 2020
- Bottom outlet valves are allowed on tank cars
- Far weaker than Canadian proposals


Proposed Oil Train Rules: The Good, The Bad and The Ugly
What new federal standards will do and what they won't.
Canada vs. the USA on Oil Train Standards
Who is number one?
The Bursting of the Bakken Bubble?
It's time for a federal Emergency Order.
"Should an incident occur within an area a densely populated area ... an incident ... has the potential to be truly catastrophic and result in billions of dollars in personal injury and property damage claims. The damages potentially resulting from an exposure could risk the financial soundness and viability of the rail transportation network in North America." The Association of American Railroads (AAR), Submission to Transport Canada, January 2014.


The Northwest region averages 9 freight derailments per month

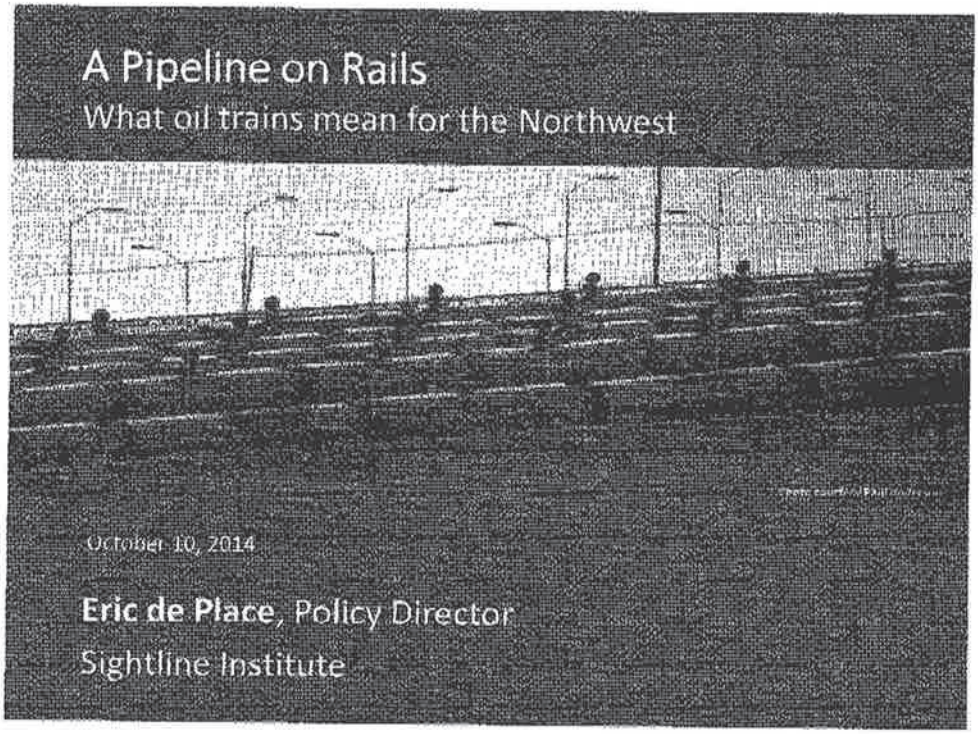
"There is not currently enough available coverage in the commercial insurance market anywhere in the world to cover the worst-case [train derailment] scenario."

— James Beardsley
Global rail practice leader for Marsh & McLennan Companies insurance brokerage unit

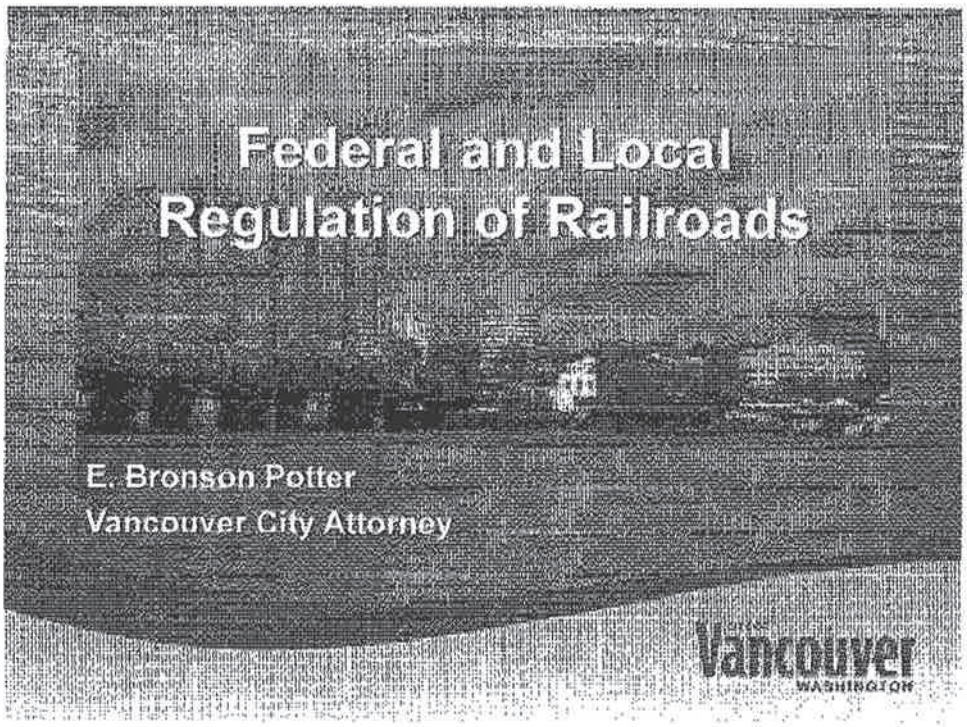
What's next for crude oil by rail?

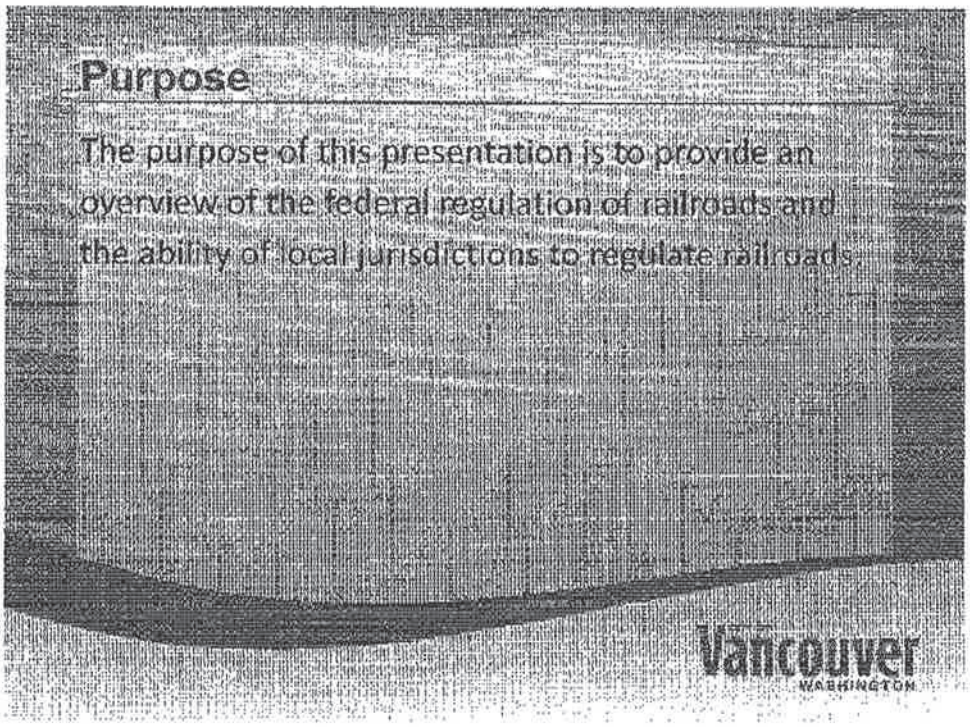
Politics

Calls mount to end ban on oil exports as US production booms

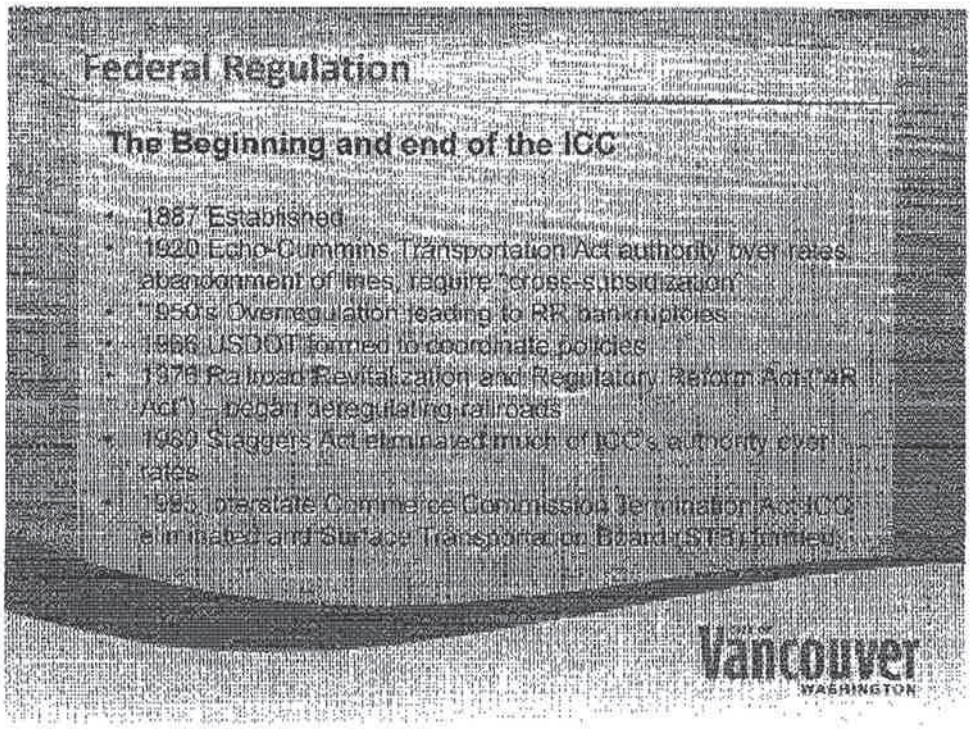

A Pipeline on Rails
What oil trains mean for the Northwest
October 10, 2014
Eric de Place, Policy Director
Sightline Institute

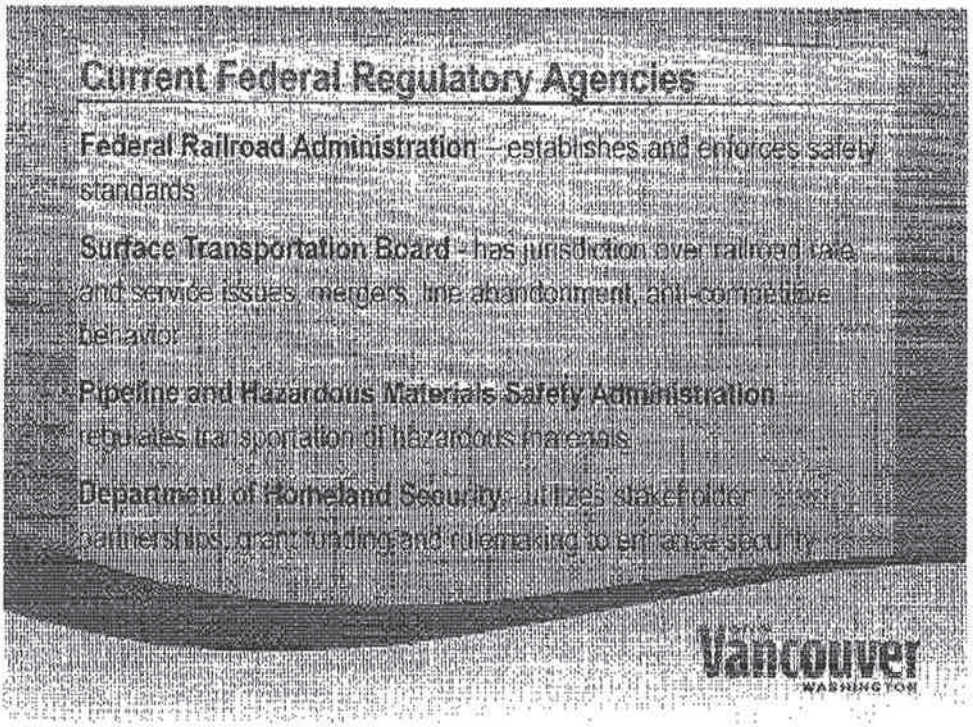
10/1/2014


Federal and Local
Regulation of Railroads
E. Bronson Potter
Vancouver City Attorney
Vancouver
WASHINGTON


Purpose
The purpose of this presentation is to provide an overview of the federal regulation of railroads and the ability of local jurisdictions to regulate railroads.
Vancouver
WASHINGTON

1


Federal Regulation
The Beginning and end of the ICC
1887 Established
1920 Echo-Cummins Transportation Act authority over rates, abandonment of lines, require "cross-subsidization"
1950s Overregulation leading to RR bankruptcies
1966 USDOT formed to coordinate policies
1976 Railroad Revitalization and Regulatory Reform Act ("4R Act") – began deregulating railroads
1980 Staggers Act eliminated much of ICC's authority over rates
1995 Interstate Commerce Commission Termination Act: ICC eliminated and Surface Transportation Board (STB) formed
Vancouver
WASHINGTON


Current Federal Regulatory Agencies
Federal Railroad Administration – establishes and enforces safety standards
Surface Transportation Board - has jurisdiction over railroad rate and service issues, mergers, line abandonment, anti-competitive behavior
Pipeline and Hazardous Materials Safety Administration – regulates transportation of hazardous materials
Department of Homeland Security - utilizes stakeholder partnerships, grant funding and rulemaking to enhance security
Vancouver
WASHINGTON

10/1/2014

Constitutional Considerations

Interstate Commerce Clause Article I, Section 8 – Congress is granted the power to "regulate commerce with foreign nations and among the several states."

Supremacy Clause Article VI, Clause 2 the authority of Congress to regulate interstate commerce supersedes that of the states or local government.

Vancouver WASHINGTON

Preemption Over Operations

Interstate Commerce Commission Termination Act

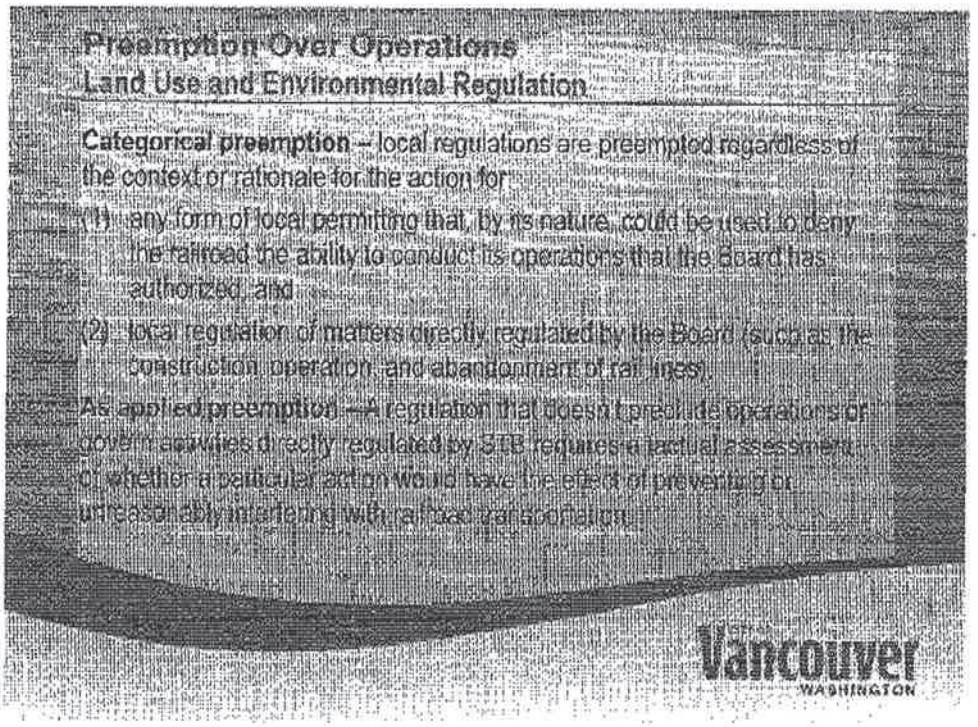
49 USC 10501

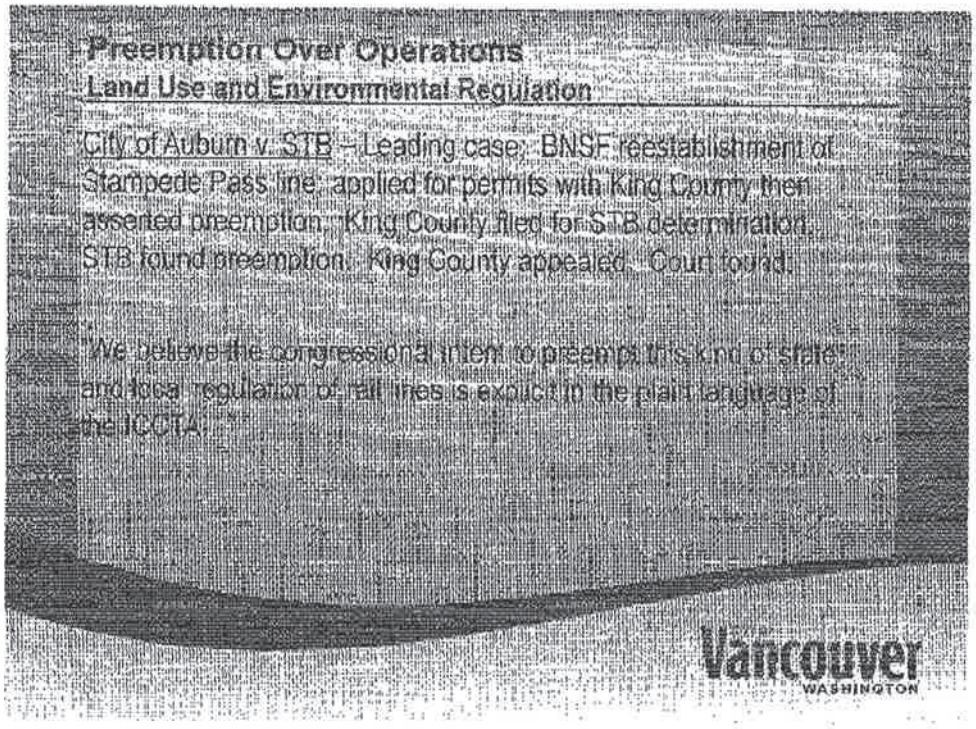
(b) The jurisdiction of the Board [STB] over—

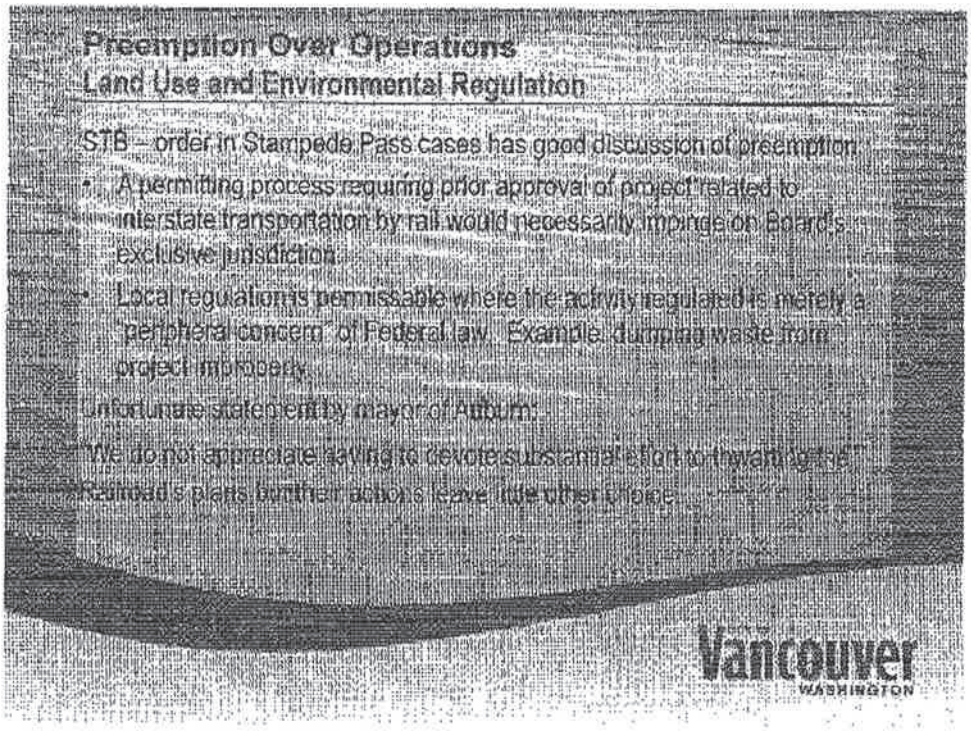
(2) the **construction**, acquisition, **operation**, abandonment, or discontinuance of facilities, even if the tracks are located, or intended to be located, entirely in one State.

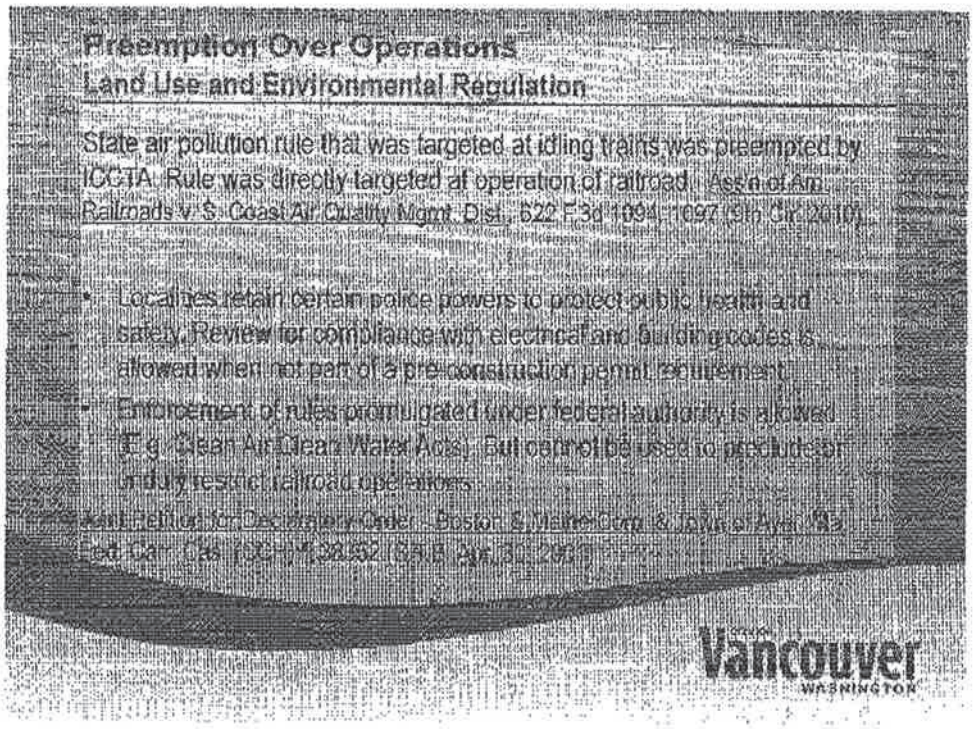
is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

Vancouver WASHINGTON


Preemption Over Operations
Land Use and Environmental Regulation
Categorical preemption – local regulations are preempted regardless of the context or rationale for the action for
(1) any form of local permitting that, by its nature, could be used to deny the railroad the ability to conduct its operations that the Board has authorized; and
(2) local regulation of matters directly regulated by the Board (such as the construction, operation, and abandonment of rail lines).
As applied preemption – A regulation that doesn't preclude operations of covered activities directly regulated by STB requires a factual assessment of whether a particular action would have the effect of preventing or unreasonably interfering with railroad operations.
Vancouver
WASHINGTON


Preemption Over Operations
Land Use and Environmental Regulation
City of Auburn v. STB – Leading case. BNSF reestablishment of Stampede Pass line, applied for permits with King County, then asserted preemption. King County filed for STB determination. STB found preemption. King County appealed. Court found,
"We believe the congressional intent to preempt this kind of state and local regulation of rail lines is explicit in the plain language of the ICCTA."
Vancouver
WASHINGTON


Preemption Over Operations
Land Use and Environmental Regulation
STB – order in Stampede Pass cases has good discussion of preemption:
• A permitting process requiring prior approval of project related to interstate transportation by rail would necessarily impinge on Board's exclusive jurisdiction.
• Local regulation is permissable where the activity regulated is merely a peripheral concern of Federal law. Example: dumping waste from project improperly.
Unfortunate statement by mayor of Auburn:
"We do not appreciate having to devote substantial effort to thwarting the Railroad's plans but their actions leave little other choice."
Vancouver
WASHINGTON


Preemption Over Operations
Land Use and Environmental Regulation
State air pollution rule that was targeted at idling trains was preempted by ICCTA. Rule was directly targeted at operation of railroad. Ass'n of Am. Railroads v. S. Coast Air Quality Mgmt. Dist., 622 F.3d 1094, 1097 (9th Cir. 2010).
• Localities retain certain police powers to protect public health and safety. Review for compliance with electrical and building codes is allowed when not part of a pre-construction permit requirement.
• Enforcement of rules promulgated under federal authority is allowed (E.g., Clean Air/Clean Water Acts). But cannot be used to preclude or unduly restrict railroad operations.
Vancouver
WASHINGTON

10/1/2014

Preemption Over Safety

Federal Railroad Safety Act (49 USC 20106) provides that the rules regulating railroad safety "shall be nationally uniform to the extent practicable" and expressly preempts state authority to adopt safety rules, save for two exceptions:

1. Local regulation may be adopted until Secretary of Transportation adopts a regulation "covering the subject matter"
2. Local regulation may be adopted that is additional or more stringent rule that is:

   (A) is necessary to eliminate or reduce an essentially local safety or security hazard;

   (B) is not incompatible with a law, regulation, or order of the United States Government; and

   (C) does not unreasonably burden interstate commerce.

Vancouver
WASHINGTON

Preemption Over Safety

Cases regarding preemption of safety regulations tend to focus on whether there is a federal regulation that "covers" vs. "touches upon" the same subject matter.

[t]o prevail petitioner must establish more than that they "touch upon" or "relate to" that subject matter, for "covering" is a more restrictive term which indicates that pre-emption will lie only if the federal regulations *substantially subsume* the subject matter of the relevant state law.

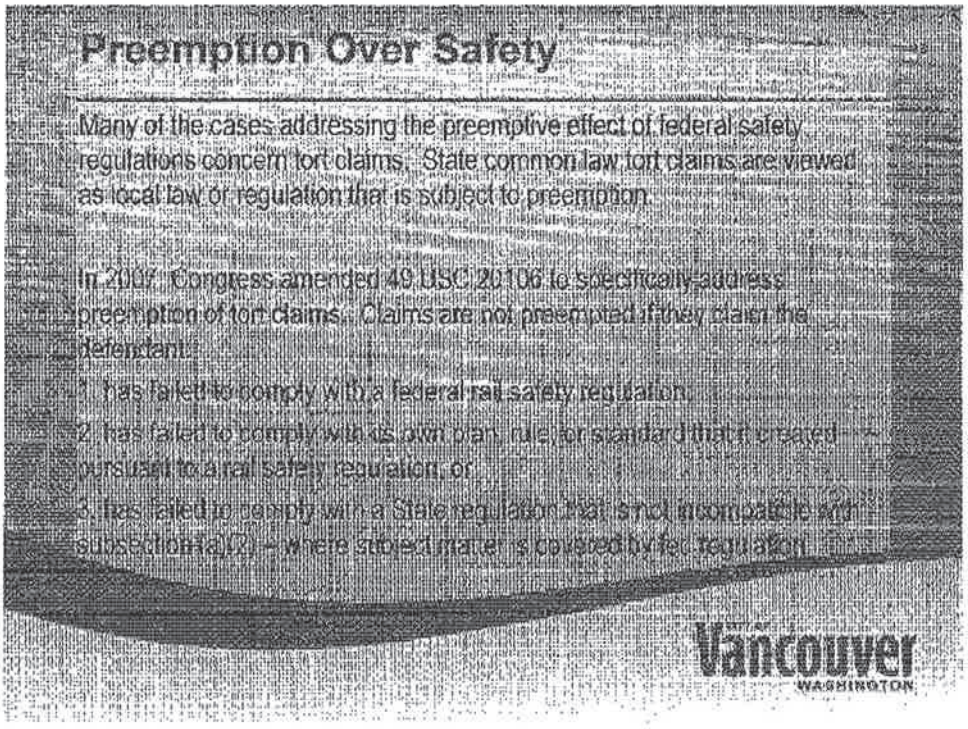
and whether the local regulation addresses a "essentially local safety hazard."

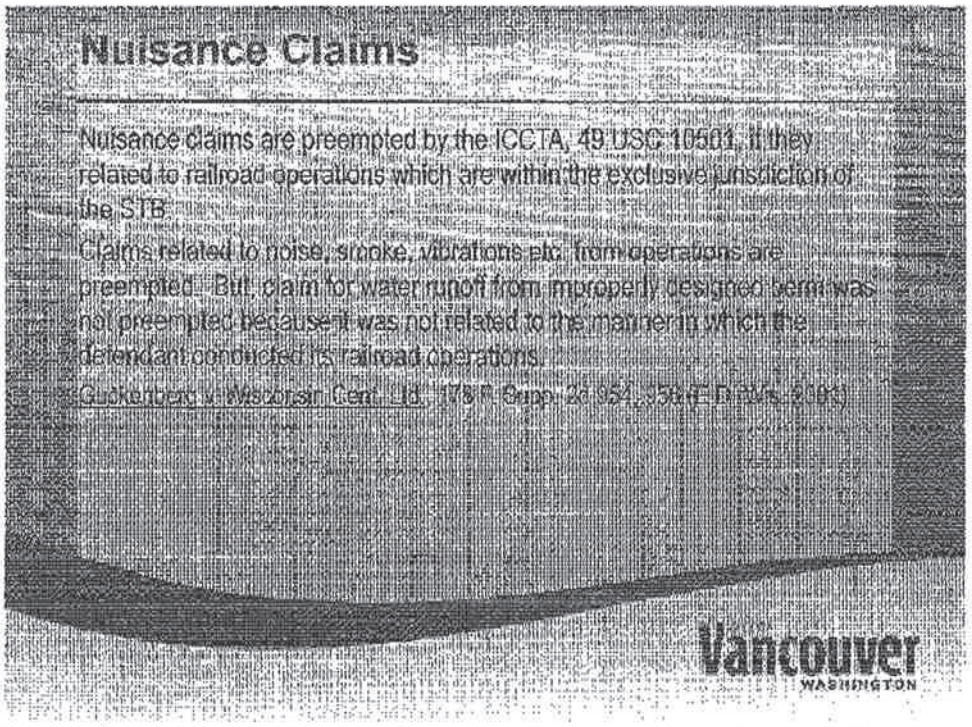
Steep grades and tight curves are not essentially local safety hazards. They exist in many places. California's regulations of 19 hazardous sites was invalidated. However, the court upheld regulations imposing penalties where RR's failed to comply with their own internal rules on train configuration in the absence of any federal rule.

Union Pac. R. Co. v. California Pub. Utilities Comm'n, 346 F.3d 851, [illegible]

Vancouver
WASHINGTON

6


Preemption Over Safety
Many of the cases addressing the preemptive effect of federal safety regulations concern tort claims. State common law tort claims are viewed as local law or regulation that is subject to preemption.
In 2007, Congress amended 49 USC 20106 to specifically address preemption of tort claims. Claims are not preempted if they claim the defendant:
1. has failed to comply with a federal rail safety regulation;
2. has failed to comply with its own plan, rule or standard that it created pursuant to a rail safety regulation; or
3. has failed to comply with a State regulation that is not incompatible with subsection (a)(2) – where subject matter is covered by fed. regulation.
Vancouver
WASHINGTON


Nuisance Claims
Nuisance claims are preempted by the ICCTA, 49 USC 10501, if they related to railroad operations which are within the exclusive jurisdiction of the STB.
Claims related to noise, smoke, vibrations etc. from operations are preempted. But, claim for water runoff from improperly designed berm was not preempted because it was not related to the manner in which the defendant conducted its railroad operations.
Guckenberg v. Wisconsin Cent. Ltd., 178 F. Supp. 2d 954, 956 (E.D. Wis. 2001)
Vancouver
WASHINGTON

Voluntary Agreements

Voluntary agreements may be enforced even if they relate to railroad operations. They have been treated as an admission by the railroad that they do not unreasonably interfere with railroad operations.

The Township of Woodbridge, NJ, et al., 42053, 2000 WL 1771044 (S.T.B. Nov. 28, 2000)

Query: A local regulation that directly affects railroad operations is preempted without regard to "unreasonable interference." Why this result?

Here, Conrail was sued and entered into a settlement agreement restricting the hours of operation of its switching yard. STB wash Hening them off the hook.

Vancouver WASHINGTON

Franchise Agreements

Cannot be used to terminate railroad operation. A provision in Salt Lake City's franchise agreement with UP that would allow termination of the franchise and removal of tracks was unenforceable without STB approval.

Union Pacific Petition for Declaratory Order, STB No. 34090 (2007).

City's claim that it is entitled to regulate the length of time trains may block a street based upon its franchise ordinance is not persuasive. Burlington concedes that it operates under a franchise agreement under ordinance No. 2,119, which was passed in 1903. The agreement is nonetheless an ordinance that is a key. Like any state law, a local ordinance is subject to Congressional preemption.

City of Seattle v. Burlington N. R. Co., 145 Wash. 2d 661, 41 P.3d 1169, 1171 (2002).

Vancouver WASHINGTON

10/1/2014

Franchise Agreements

Cannot be used to terminate railroad operation. A provision in Salt Lake City's franchise agreement with UP that would allow termination of the franchise and removal of tracks was unenforceable without STB approval.

Union Pacific Petition for Declaratory Order, STB No. 34090 (2006)

City's claim that it is entitled to regulate the length of time trains may block a street based upon its franchise ordinance is not persuasive. Burlington concedes that it operates under a franchise agreement under Ordinance No. 5[illegible] which was passed in 1903. The agreement is none other than an ordinance that is, as we like any state law, a local ordinance is deemed to Congress as a preemption.

City of Seattle v. Burlington N. R.R. Co., 145 Wash. 2d 661, 672, 41 P.3d 1169, 1175 (2002)

Vancouver WASHINGTON

Condemnation

Condemnation is subject to ICCTA preemption. Attempts to condemn railroad facilities are categorically preempted. "Unreasonable interference" is irrelevant.

Wisconsin Cent., Ltd. v. City of Marshfield, 160 F. Supp. 2d 1009, 1015 (W.D. Wis. 2001); Soo Line R. Co. v. City of St. Paul, 827 F. Supp. 2d 1017, 1022 (D. Minn. 2010)

Condemnation of abandoned (formal STB process) is permitted.

Jayhawk Northern R.R. v. Chicago & N.W. Transp. Co., 467 U.S. 522, 1984

Vancouver WASHINGTON

Quiet Zones

Quiet zones can be established with or without FRA approval. 49 USC 20153, 49 CFR Part 222

Without FRA approval: use specified safety measures or show low risk of collision based on formula.

With FRA approval, if you can't use specified measures, propose alternative measures.

Railroads do not have to construct or pay to construct any measures.

Failure to [illegible] horn in quiet zone cannot be a basis of liability.

City of Vancouver WASHINGTON

Questions?

E. Bronson Potter | City Attorney

CITY OF VANCOUVER, WASHINGTON

City Attorney's Office

Physical: 415 W 6th Street • Vancouver, WA 98660

Mailing: PO Box 1995 • Vancouver, WA 98668-1995

P: (360) 487-[illegible] | TTY: (360) 487-8602 | F: (360) 487-850[illegible]

[illegible]

City of Vancouver WASHINGTON

Federal and Local Regulation of Railroads

WSAMA FALL CONFERENCE

October, 2014

E. Bronson Potter

Vancouver City Attorney

The purpose of this presentation is to provide an overview of the evolution and the current federal regulation of railroads and the ability of local jurisdictions to regulate railroads.

A. Federal Regulation:

1. The Beginning and end of the ICC

1887 the Interstate Commerce Commission is created by the ICC Act

Westerners concerned with rate discrimination and power of RRs

Initially ICC had little real power,

During World War I Woodrow Wilson nationalized the railroads

1920 Echo-Cummins Transportation Act charged ICC with setting minimum rates; extending and abandoning lines; requiring "cross-subsidization" of routes (use profits from one line to cover losses of another line)

By the 1950's the ICC had gained regulatory authority over rail, shipping, and trucking. It also had the authority to set rates, approve mergers and require continued operation of unprofitable lines.

Led to overregulation of railroads and excess capacity of rail lines

Required to

Railroads unable to compete with other modes of transportation

Unable to obtain return on investment

Deferred maintenance on lines

Bankruptcies

1966 USDOT formed to coordinate policies to encourage a national transportation policy

Federal Railroad Administration is a part of USDOT that focuses primarily on RR safety

1976 passage of the Railroad Revitalization and Regulatory Reform Act ("4R Act") – began deregulating railroads

1980 Staggers Act eliminated much of ICC's authority over rates

1995 Interstate Commerce Commission Termination Act (ICCTA) 49 USC 701 et seq eliminated the ICC; transferred what powers ICC had to the Surface Transportation Board

2. Current Federal Regulatory Agencies

1. Federal Railroad Administration:

Part of USDOT. The FRA was created by the Department of Transportation Act of 1966. It establishes and enforces safety standards. Among many other areas, the FRA regulates track and equipment inspections; employee training and certification programs; train operations; the capabilities and performance of signaling systems, etc. USDOT authority to regulate transportation of crude oil is found at 49 USC 5103(b). In many states, FRA safety inspectors are supplemented by state safety inspectors.

2. Surface Transportation Board

While the nation's railroad industry was largely deregulated by the Staggers Act of 1980, railroads today are subject to economic regulatory oversight by the Surface Transportation Board (STB). STB is a 3 member panel administered by USDOT. Today, the STB has jurisdiction over railroad rate and service issues, rail restructuring transactions (mergers) and has the authority to take action, including setting maximum allowable rates, if it is determined that a railroad has engaged in anti-competitive behavior. In addition, railroads are subject to most antitrust laws, and in areas where they do have limited exemptions they are regulated by the STB.

3. Pipeline and Hazardous Materials Safety Administration

Also part of USDOT. Within PHMSA, the Office of Hazardous Materials Safety develops, processes, proposes, and recommends regulations governing the safe and secure transportation of hazardous materials by railroad, highway vehicle, aircraft, or vessel. PHMSA also prepares the public and first responders to reduce consequences if an incident does occur.

4. Department of Homeland Security

Unlike in aviation, where TSA has employees performing security functions, the Department of Homeland Security utilizes stakeholder partnerships, grant funding and rulemaking to enhance security in surface modes including railroads.

B. Local regulation of Interstate Railroads and Federal Preemption

1. Constitutional Considerations:

Interstate Commerce Clause Article I, Section 8, Clause 3 U.S. Constitution: Congress is granted the power to "regulate commerce with foreign nations and among the several states..."

Under the Supremacy Clause Article VI, Clause 2 the authority of Congress to regulate interstate commerce supersedes that of the states or local government.

2. Interstate Commerce Commission Termination Act of 1995

49 USC 10501(B):

(b) The jurisdiction of the Board [STB] over--

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) 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,

is exclusive. Except as otherwise provided in this part, 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.

3. Land Use and Environmental Regulation

The courts have found two broad categories of state and local actions to be preempted regardless of the context or rationale for the action: (1) any form of state or local permitting or

preclearance that, by its nature, could be used to deny the railroad the ability to conduct its operations or to proceed with activities that the Board has authorized, and (2) state or local regulation of matters directly regulated by the Board (such as the construction, operation, and abandonment of rail lines).

Otherwise the section 10501(b) preemption analysis requires a factual assessment of whether a particular action would have the effect of preventing or unreasonably interfering with railroad transportation.

Leading cases and STB orders addressing preemption follow:

Case Law:

City of Auburn v. Surface Transportation Board 154 F.3d 1025 (9th Cir. 1998), as amended (Oct. 20, 1998)

BNSF wanted to reestablish the Stampede Pass rail line between Cle Elum and Pasco. Initially sought local permits then asserted that local regualtuion was preempted by ICCTA. King County sought an informal opinion and then a formal opinion from the STB which ruled that the local land use regualtions were preempted. King County, Kent and Auburn argued that ICCTA only preempted economic regulation, not local land use and environmental regulations.

"We begin by first noting that Congress and the courts long have recognized a need to regulate railroad operations at the federal level. Congress' authority under the Commerce Clause to regulate the railroads is well established."

We find that the plain language of two sections of the ICCTA explicitly grant the STB exclusive authority over railway projects like Stampede Pass. Section 10501 of the ICCTA, which governs the STB's jurisdiction, states the board will have *exclusive* 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) (1997). The same section states 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) (1997).

We believe the congressional intent to preempt this kind of state and local regulation of rail lines is explicit in the plain language of the ICCTA and the statutory framework surrounding it. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996).[7] Because congressional intent is clear, and the preemption of rail activity is a valid exercise of congressional power under the Commerce Clause, we affirm the STB's finding of federal preemption.

CSX Transp., Inc. v. Georgia Public Service Comm'n, 944 F.Supp. 1573 (N.D.Ga.1996), the district court found that Georgia's regulation requiring state approval of a railroad's proposal to scale down or close a railroad agency was preempted by § 10501(b)(2) stating: "It is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations." 944 F.Supp. at 1581. "Interpreting the preemption clause in the ICC Termination Act to be broad enough to preempt state regulation of agency closings," the court stated, "is consistent with the Act's grant of exclusive jurisdiction over almost all matters of rail regulation to the STB."

Ass'n of Am. Railroads v. S. Coast Air Quality Mgmt. Dist., 622 F.3d 1094, 1097 (9th Cir. 2010) State air pollution rule that was targeted at idling trains was preempted by ICCTA. Generally speaking, ICCTA does not preempt state or local laws if they are laws of general applicability that do not unreasonably interfere with interstate commerce. As stated by our sister circuits, ICCTA "preempts all 'state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation.' What matters is the degree to which the challenged regulation burdens rail transportation...."

Humboldt Baykeeper v. Union Pac. R. Co., C 06-02560 JSW, 2010 WL 2179900 (N.D. Cal. May 27, 2010) ICCTA preemption only displaces " 'regulation,' i.e., those state laws that may reasonably be said to have the effect of 'managing' or 'governing' rail transportation" and permits "the continued application of laws having a more remote or incidental effect on rail transportation."

Green Mountain R.R. Corp. v. Vermont, C.A.2 (Vt.) 2005, 404 F.3d 638, certiorari denied 126 S.Ct. 547, 546 U.S. 977, 163 L.Ed.2d 460 Interstate Commerce Commission Termination Act preempted pre-construction permit requirement of Vermont's environmental land use law with respect to transloading and storage facilities that rail carrier sought to construct on its property, given that carrier was restrained from development until permit was issued, requirements for permit were not set forth in any schedule or regulation that carrier could consult to ensure compliance, and issuance of permit awaited and depended upon discretionary rulings of state or local agency; although state argued that law was environmental, rather than economic, regulation, permitting process necessarily interfered with carrier's ability to construct facilities and conduct economic activities.

Harris County, Texas v. Union Pacific R. Co., S.D.Tex.2011, 807 F.Supp.2d 624 In determining the preemptive scope of the Interstate Commerce Commission Termination Act (ICCTA) provision that establishes the jurisdiction of the Surface Transportation Board (STB), courts distinguish two types of preempted actions: (1) categorically preempted actions, which include state or local regulations that prevent or govern activities directly regulated by the STB, and thus are preempted on the basis of the act of regulation itself rather than on the basis of

reasonableness, and (2) actions that are preempted "as applied," which covers state or local actions according to a factual assessment of whether those actions have the effect of preventing or unreasonably interfering with railroad transportation.

STB jurisdiction to resolve preemption issues. Courts will refer matters to the STB for resolution. Also, lawsuits are subject to dismissal for lack of jurisdiction. Congress abrogated district court jurisdiction under § 1331 when it placed exclusive jurisdiction of railroad transportation under the STB. *Flynn*, 98 F.Supp.2d at 1192; *see also* 49 U.S.C. § 10501(b) (1999). City of Encinitas v. N. San Diego Cnty. Transit Dev. Bd., 01-CV-1734-J AJB, 2002 WL 34681621 (S.D. Cal. Jan. 14, 2002).

STB decisions are subject to review by the court of appeals. 28 USC 2821.

STB Orders:

Cities of Auburn & Kent, Wa-Petition for Declaratory Order-Burlington N. R.R. Co.-Stampede Pass Line, 2 S.T.B. 330 (1997)

At the outset, we reaffirm here our determination that a state or local permitting process for prior approval of this project, or of any aspect of it related to interstate transportation by rail, would of necessity impinge upon the federal regulation of interstate commerce and therefore is preempted. The power to authorize the construction of railroad lines and the power to authorize railroads to operate over them has been vested exclusively in the Board by 49 U.S.C. 10901.

Not all state and local regulations that affect interstate commerce are preempted. A key element in the preemption doctrine is the notion that only "unreasonable" burdens, *i.e.*, those that "conflict with" Federal regulation, "interfere with" Federal authority, or "unreasonably burden" interstate commerce, are superseded. The courts generally presume that Congress does not lightly preempt state law. *Medtronic Inc. v. Lora Lohr,* 116 S. Ct. 2240, 2250 (1996). Also, preemption does not deprive the states of the "power to regulate where the activity regulated [is] a merely peripheral concern" of Federal law. *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 243 (1959). *See CSX Transportation v. Easterwood,* 507 U.S. 658 (1993) (federal regulations adopted by the Secretary of Transportation under the Federal Railroad Safety Act preempt negligence action only insofar as it was alleged that petitioner's train was traveling at an excessive speed). In short, where the state or local law can be applied without interfering with the Federal law, the courts have done so.

We also agree with the Cities that state or local laws providing for permitting and environmental review, in other areas, need not be found to discriminate against interstate commerce. This process, initiated in the state legislature or local governing body, is ordinarily within the localities' legitimate policing powers. However, where the local permitting process could he used to frustrate or defeat an activity that is regulated at the Federal level, the state or local process is preempted. Here, the Cities' admitted goal Is to constrain BN's train operations that we have already approved in *BNSF Control* in order to force BN to fund infrastructure improvements related to the line. For example, Charles A. Booth, mayor of the City of Auburn, has indicated that:

We do not appreciate having to devote substantial effort to thwarting the Railroad's plans but their actions leave little other choice.

Joint Petition for Declaratory Order - Boston & Maine Corp. & Town of Ayer, Ma, Fed. Carr. Cas. (CCH) ¶ 38352 (S.T.B. Apr. 30, 2001)

State and local regulation cannot be used to veto or unreasonably interfere with railroad operations. Thus, state and local permitting or preclearance requirements (including environmental requirements) are preempted because by their nature they unduly interfere with interstate commerce by giving the local body the ability to deny the carrier the right to construct facilities or conduct operations. Zoning ordinances and local land use permit requirements are preempted where the facilities are an integral part of the railroad's interstate operations. State and local regulation is permissible where it does not interfere with interstate rail operations, and localities retain certain police powers to protect public health and safety.[25] For example, non-discriminatory enforcement of state and local requirements such as building and electrical codes generally are not preempted. Id. at 8-9; Flynn. While a locality cannot require permits prior to construction, the courts have found that a railroad can be required to notify the local government "when it is undertaking an activity for which another entity would require a permit" and to furnish its site plan to the local government. Of course, whether a particular Federal environmental statute, local land use restriction, or other local regulation is being applied so as to not unduly restrict the railroad from conducting its operations, or unreasonably burden interstate commerce, is a fact-bound question. Accordingly, individual situations need to be reviewed individually to determine the impact of the contemplated action on interstate commerce and whether the statute or regulation is being applied in a

discriminatory manner, or being used as a pretext for frustrating or preventing a particular activity, in which case the application of the statute or regulation would be preempted.

Desertxpress Enterprises, LLC--Petition for Declaratory Order, Fed. Carr. Cas. (CCH) ¶ 37238 (S.T.B. June 25, 2007)
This case involved a proposed project to construct an approximately 200-mile interstate high speed passenger rail system between Victorville, CA, and Las Vegas, NV. Petitioner seeks an order from the Board declaring that this project is not subject to state and local land use restrictions, and other permitting requirements in California and Nevada, or to state and local environmental laws. The project, which is passenger-only, is "transportation by rail carrier" subject to the Board's jurisdiction. This means that Federal environmental statutes, such as NEPA,[7] the Clean Air Act, and the Clean Water Act, and the regulation of railroad safety under the Federal Railroad Safety Act, will apply to this proposal. See, e.g., City of Auburn, 154 F.3d at 1031-33; Friends of the Aquifer, et al., STB Finance Docket No. 33966, slip op. at 4-6 (STB served Aug. 15, 2001). However, state permitting and land use requirements that would apply to non-rail projects, such as the California Environmental Quality Act, will be preempted.

Joint Petition for Declaratory Order-Boston & Maine Corp. & Town of Ayer, Ma, 33971, 2001 WL 1174385 (S.T.B. Oct. 3, 2001) Local regulation premised on federal law is not preempted. To the extent that state and local agencies promulgate EPA-approved statewide plans under federal environmental laws (such as "statewide implementation plans" under the Clean Air Act or Clean Water Act), ICCTA generally does not preempt those regulations because it is possible to harmonize ICCTA with those federally recognized regulations. However, STB opinions are that even when enforcing federal regulations, local jurisdictions cannot unreasonably burden or interfere with interstate commerce. It cannot be used to preclude or unduly restrict railroad operations.

4. Safety Regulation.

The Federal Railroad Safety Act (49 USC Subtitle V) provides that the rules regulating railroad safety "shall be nationally uniform to the extent practicable," and expressly preempts state authority to adopt safety rules, save for two exceptions.

49 USC 20106 (a) National uniformity of regulation.—

(1) Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable.

(2) A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order--

(A) is necessary to eliminate or reduce an essentially local safety or security hazard;

(B) is not incompatible with a law, regulation, or order of the United States Government; and

(C) does not unreasonably burden interstate commerce.

Union Pac. R. Co. v. California Pub. Utilities Comm'n, 346 F.3d 851, 858 (9th Cir. 2003) Following derailments including one the disseminated the Sacremento River, the Calif Public utility Commission issued an order issued identifying nineteen sites located in California mountains as local safety hazards and adopting regulations governing operations at thirteen of these sites. In deciding what is meant by an "essentially local safety hazard, the court said "a workable definition of an "essentially local safety hazard," defining it as one which is not "adequately encompassed within national uniform standards." The court found that steep grades and sharp curves are not essentially local hazards.

On the other hand, CPUC's regulations to impose civil penalties for RR violating its own internal rules was upheld. The FRA failed to "cover" the actual subject matter: the FRA was aware that dangers existed, but it chose to test compliance rates rather than seek to mandate compliance with any particular rule or penalties. This is insufficient to preempt CPUC's regulation. 346 F.3d at 866.

Southern Pacific Transportation Co. v. Public Utilities Comm. of California, 820 F.2d 1111 (9th Cir.1987) (per curiam), *aff'g,* 647 F.Supp. 1220 (N.D.Cal.1986) (holding that a state rule regulating the distance between train tracks and surrounding buildings was not preempted by FRA regulations of track drainage and visibility, because the state regulations were designed to

guarantee a safe working environment for train employees, while the federal regulations were designed simply to facilitate speedy maintenance work).

5. Safety Regulations and Tort Claims

CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 113 S. Ct. 1732, 123 L. Ed. 2d 387 (1993)

Widow brought lawsuit alleging that RR was negligent for failing to maintain adequate warning devices and operating too fast for conditions. State tort common law is a "law" subject to FRSA preemption. To prevail on the claim that the regulations have pre-emptive effect, petitioner must establish more than that they "touch upon" or "relate to" that subject matter, for "covering" is a more restrictive term which indicates that pre-emption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law.

Held that: (1) regulations adopted by the Secretary of Transportation under the Federal Railroad Safety Act did not preempt requirements imposed by state common law of negligence regarding railroad's duty to maintain warning devices at a railroad crossing. They merely establish the general terms under which States may use federal aid to eliminate hazards and (2) speed limits imposed by federal regulation on freight and passenger trains operating along specific types of track preempted any common-law claim that conductor, while operating train at speed within federal limits, was negligently proceeding too fast under circumstances, so as to be liable for motorist's death.

Norfolk S. Ry. Co. v. Shanklin, 529 U.S. 344, 351, 120 S. Ct. 1467, 1473, 146 L. Ed. 2d 374 (2000) We granted certiorari to resolve a conflict among the Courts of Appeals as to whether the FRSA, by virtue of 23 C.F.R. §§ 646.214(b)(3) and (4) (1999), pre-empts state tort claims concerning a railroad's failure to maintain adequate warning devices at crossings where federal funds have participated in the installation of the devices. Where conditions exist such that sections 646.214(b)(3) and (4) establish a standard of adequacy that "determine[s] the devices to be installed" when federal funds participate in the crossing improvement project. *Easterwood*, 507 U.S., at 671, 113 S.Ct. 1732. If a crossing presents those conditions listed in (b)(3), the State must install automatic gates and flashing lights; if the (b)(3) factors are absent, (b)(4) dictates that the decision as to what devices to install is subject to FHWA approval. See *id.*, at 670–671, 113 S.Ct. 1732. In either case, § 646.214(b)(3) or (4) "is applicable" and determines the type of warning device that is "adequate" under federal law. As a result, once the FHWA has funded the crossing improvement and the warning devices are actually installed and operating, the regulation "displace[s] state and private decisionmaking authority by establishing a federal-law requirement that certain protective devices be installed or federal approval obtained" and preemption applies.

Veit, ex rel. Nelson v. Burlington N. Santa Fe Corp., 171 Wash. 2d 88, 249 P.3d 607 (2011)

The Supreme Court held that:

1 Federal Railroad Safety Act (FRSA) preempted excessive speed claim brought by motorist based on railroad's internal speed limits;

2 saving clause of FRSA did not "save" excessive speed claim brought against railroad by motorist; and

3 motorist's excessive speed claim did not fall within the narrow "specific individual hazards" exception to preemption under FRSA.

2007 Legislative Clarification for events occurring after January 18, 2002:

49 USC 20106 ...

(b) Clarification regarding State law causes of action.--(1) Nothing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party--

(A) has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section;

(B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or

(C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).

6. Nuisance claims:

Rushing v. Kansas City S. Ry. Co., 194 F. Supp. 2d 493, 500-01 (S.D. Miss. 2001)

Claim for noise and vibration was preempted. But claim for flooding could be pursued. The Court finds, for the reasons discussed above, that to the extent the Plaintiffs seek to use state law to control noise production by regulating the manner in which the Defendant operates its

switch yard, for example by restricting the hours at which time it may conduct switching and whistle-blowing activities, controlling the number of trains engaged in switching operations at any given time, and by requiring that the Defendant employ different techniques when braking its trains, all of which would result in an economic impact on the Defendant, the state law has been preempted by the ICCTA which vests exclusive jurisdiction in the STB over such matters. But, the design/construction of the berm does not directly relate to the manner in which the Defendant conducts its switching activities; and drainage problems resulting from the construction of the berm would not implicate the type of economic regulation Congress was attempting to prescribe when it enacted the ICCTA.

Guckenberg v. Wisconsin Cent. Ltd., 178 F. Supp. 2d 954, 956 (E.D. Wis. 2001)

Plaintiffs allege that the coupling and uncoupling of trains, squealing of wheels, braking noises, slamming of cars, switching direction of train travel, flying switches of railroad cars, idling locomotive diesel engines and other similar incidents occur as many as 60 times per month, lasting as long as several hours per episode. Plaintiffs seek redress under Wisconsin's common law of nuisance and pray for both actual and punitive damages. The Court concludes that the Guckenbergs' common law nuisance action is preempted. Because the conduct at issue in this case pertains to the "operation ... of a side track ... intended to be located, entirely in one State," the STB's jurisdiction over WCL's conduct is "exclusive.

See also: In *Friberg v. Kansas City Southern Railway Company,* 267 F.3d 439 (5th Cir.2001); *Village of Ridgefield Park v. New York, Susquehanna & Western Railway Corp.,* 163 N.J. 446, 750 A.2d 57 (2000),

7. Voluntary Agreements - may be enforced and are not subject to preemption

The Township. of Woodbridge, NJ, et al., 42053, 2000 WL 1771044 (S.T.B. Nov. 28, 2000)

In essence, Conrail agreed to curtail the idling of locomotives and the switching of rail cars behind Rosewood Lane between 10:00 p.m. and 6:00 a.m. These voluntary agreements must be seen as reflecting the carrier's own determination and admission that the agreements would not unreasonably interfere with interstate commerce. Moreover, Conrail has not shown that enforcement of its commitments would unreasonably interfere with the railroad's operations. STB specifically noted its decision did not address a situation of an agreement that actually was unduly burdensome.

8. Franchises

The STB recently expressed the opinion that any party seeking the abandonment or discontinuance of rail service must obtain the appropriate authority from the Board. Thus, a provision in Salt Lake City's franchise agreement with UP that would allow termination of the franchise and removal of tracks was unenforceable without STB approval. 49 USC 10501b and 10903 prevent a local order or regulation that would sever a line or prevent operation. Union Pacific Petition for Declaratory Order STB No. 34090 (2001).

Here, the City's claim that it is entitled to regulate (the length of time trains may block a street) based upon its franchise ordinance is not persuasive. Burlington concedes that it operates under a franchise agreement under Ordinance No. 9119, which was passed in 1903. The agreement is nonetheless an ordinance-that is, a law. Like any state law, a local ordinance is subject to Congressional preemption.
City of Seattle v. Burlington N. R. Co., 145 Wash. 2d 661, 673, 41 P.3d 1169, 1175 (2002)

9. Anti-Blocking Rule

People v. Burlington N. Santa Fe R.R., 209 Cal. App. 4th 1513, 1516, 148 Cal. Rptr. 3d 243, 244 (2012) General order No. 135 of the California Public Utilities Commission (PUC) regulates the length of time a stopped railroad train may block public grade crossings. Appellant Burlington Northern Santa Fe Railroad (BNSF) was convicted, after a bench trial, of a misdemeanor violation of that order. The order provided that a public grade crossing which is blocked by a stopped train ... must be opened within 10 minutes, unless no vehicle or pedestrian is waiting at the crossing. "[A]lthough ICCTA's pre-emption language is unquestionably broad, it does not categorically sweep up all state regulation that touches upon railroads; interference with rail transportation must always be demonstrated. The ICCTA "preempts all 'state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws [of general application] having a more remote or incidental effect on rail transportation. The State of California, by regulating the time a stopped train can occupy a public rail crossing, has necessarily and directly attempted to manage railroad operations. Accordingly, we conclude that general order No. 135 is preempted by the ICCTA.

City of Seattle v. Burlington N. R. Co., 145 Wash. 2d 661, 41 P.3d 1169 (2002) City cited railroad for 19 violations of city ordinances. The Superior Court, King County, Michael S. Spearman, J., rejected railroad's arguments that ordinances were void for vagueness, violated Commerce and Due Process Clauses of the United States Constitution, and were preempted by the Interstate

Commerce Commission Termination Act (ICCTA) and Federal Railroad Safety Act of 1970 (FRSA). Railroad appealed. The Court of Appeals, 105 Wash.App. 832, 22 P.3d 260, reversed and dismissed the citations. On grant of railroad's motion for review, the Supreme Court, Ireland, J., held that city ordinances prohibiting railroad switching activities from interfering with the use of any street or alley, or impeding property access, for a period of time longer than four (4) consecutive minutes, and prohibiting switching on arterial streets during peak hours were preempted by both the ICCTA and the FRSA.

10. Condemantion

Condemnation is subject to preemption.

Wisconsin Cent. Ltd. v. City of Marshfield, 160 F. Supp. 2d 1009, 1013 (W.D. Wis. 2000) City sought to condemn a passing track in order to construct a highway. Defendant attempts to distinguish attempts to regulate railroads from exercises of state police power to promote public safety. It argues that its actions do not constitute "regulation" within the meaning of the ICCTA. The Court holds that condemnation is regulation. In using state law to condemn the track defendant is exercising control—the most extreme type of control—over rail transportation.

Soo Line R. Co. v. City of St. Paul, 827 F. Supp. 2d 1017, 1022 (D. Minn. 2010) The city's argument that preemption of condemnation required a factual inquiry into whether it unreasonably interferes with railroad operations was rejected. Because the City's proposed condemnation is *per se* preempted, the City's factual "as applied" arguments concerning whether the proposed easement would unreasonably interfere with CP's activities are not relevant, regardless of whether or not discovery has been commenced. Rather, it is the act of regulation itself that triggers the preemption analysis in this case, not the reasonableness of the regulation.

Hayfield Northern R.R. v. Chicago & N.W. Transp. Co., 467 U.S. 622 (1984) (state proceeding to condemn railroad property did not interfere with the Interstate Commerce Act because the state process followed the abandonment of the line pursuant to the ICC's process and the line was no longer part of the national transportation system).

11. Spurs and sidetracks – are within STB jurisdiction, 49 USC 10501; but there isn't a STB process for abandonment.

12. Quiet Zones

Quiet zones can be established with or without FRA approval. 49 USC 20155 49 CFR Part 222

Without approval if:

a) certain specified safety measures ("Supplemental Safety Measures" or "SSM"S") are utilized on all crossing in the segment. Must provide FRA and affected railroads with notice; or

b) zone has a low risk of collision based on a formula (the Quiet Zone Risk Index) that it is below a national standard (the "National Significant Risk Threshold") then use of SSM's at some crossings Is sufficient.

The rules do not require railroads to construct any improvements for quiet zones.

With approval if:

If it is not feasible to use SSM's, cities can apply to the FRA proposing Alternate Safety Measures ("ASM's"). FRA conducts mathematical analysis of risk for approval.

Final rule provides that the failure to use a horn in a quiet zone cannot be the basis for liability.

12. Washington RR statutes and reg's

23 U.S.C.A. § 130 requires states to conduct and maintain a "survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices . . .

Washington UTC:

The UTC regulates railroad safety, including approving new grade crossings and closing or altering existing rail crossings, investigating train accidents, inspecting public-railroad crossings, approving safety projects and managing safety education through Operation Lifesaver.

RCW 81.40 RR employees

RCW 81. 53 RR crossings

WAC 480-60 RR clearance rules

WAC 480-62 RR operating rules

City of McCleary
100 S 3rd
McCleary, Washington 98557

BIAS SOFTWARE
your BARSmart® partner

Order form for: **City of McCleary**
Account Contact Wendy Collins

Prepared on: **October 9, 2014**

2015 Annual Service Fee: $8,821.01

ORDER FORM

Order Prepared For:		Order Prepared By:	
Company:	**City of McCleary**	Company:	**BIAS Software**
Contact:	**Wendy Collins**	Contact:	**Mark Felchlin**
Address:	**100 S 3rd** **McCleary, Washington 98557**	Address:	**327 E Pacific** **Spokane, Washington 99202**
Phone:	**(360) 495-3667**	Phone:	**509.443.3332**
Email:	**wendyc@cityofmccleary.com**	Email:	**mark@biassoftware.com**

ORDER DETAILS

Professional Services

Product	Modules	Qty.	Sub-total	Extended Price
2015 Annual Support	Financial	1	$1,350.00	$1,350.00
2015 Annual Support	Payroll	1	$1,552.50	$1,552.50
2015 Annual Support	Cash Receipting	1	$1,350.00	$1,350.00
2015 Annual Support	Utilities	1	$1,912.50	$1,912.50
2015 Annual Support	Permitting	1	$1,350.00	$1,350.00
	Total IT Services:	BIAS Managed Back-up - All		$600.00
	Total Cloud Licenses:			$0.00
			Other Fees:	
SIGN & RETURN BY 11.30.14			Discounts:	
			Tax	$706.01
			Grand Total (Tax Included)	**$8,821.01**

Enhancements

Purchase Orders , Online Payments, Job Costing, Itron Interface,

YOU'RE INVITED

2015 BIAS Rally

Come see what BIAS Community is all about!

Tuesday, February 17th – Friday, February 20th

The Davenport Hotel | Spokane, WA

more info www.biassoftware.com/rally

Sign Up: Contact Sue at 509.443.3332

City of McCleary
100 S 3rd
McCleary, Washington 98557

Contract Special Terms

During the Contract Term and for one year thereafter, Customer shall not disclose the pricing or terms hereunder to any third party without Customer notifying BIAS in writing prior to disclosure.

PAYMENT:

Annual Support Fee is due on the contract year by January 31st. Invoice will be generated upon receiving signed Order Form.

Remarks

WINDOWS XP

BIAS will no longer install BIAS Software on XP computers. Microsoft discontinued support for Windows XP in April of 2014. Since then we have continued to support Windows XP, however the risks involved in maintaining an unsupported OS in today's environment is great. Therefore we will be discontinuing support for Windows XP as of the end of 2014. This means we will no longer install BIAS software on XP machines and we will provide a very limited if any troubleshooting for existing XP machines.

BIAS offers several installation options including: Stand alone, Workgroup, Client-server, and **(new!)** Hosted. Our IT staff will work with you to find the right fit for your organization.

Please feel free to contact us if you have any questions about the Order Form details.

Upon signature by Customer and submission to BIAS, this Order Form shall become legally binding and governed by the Master Subscription Agreement between BIAS and Customer unless otherwise agreed by BIAS and Customer.

Name: _____

Title: _____

Date: _____

Signature:

Please sign digitally or print and fax to 888.228.0030 or email to sue@biassoftware.com.

WHAT YOUR FINANCIAL SOFTWARE IN THE CLOUD CAN DO FOR YOU!

BIAS SOFTWARE

amazon web services™

Only

$100 **per month + $10 per user**

BIAS CLOUD *(BIAS on the Internet)*

BIAS Software Cloud brings the power of "Financial Computing" to you without strings, giving your staff simple, protected access to your financials wherever and whenever they need it. Best part is it requires no installation, IT maintenance, training, new equipment, or most of all a long term commitment. We also include all setup support and upgrades. If you change your mind later, you can always go back to your desktop because your data belongs to you.

Great thing is wherever you go you can access BIAS as close as the nearest internet, yet as protected as your online banking.

BENEFIT

- Reliably fast access
- Automatic, worry free back-ups
- Easy access from anywhere
- Banking-level reliability and protection
- Client no longer has to pay for expensive server/workgroup hardware upgrades
- Network management is significantly reduced
- Good-bye to IT/equipment start-up costs
- Free from spending IT hours on software/hardware maintenance
- Eliminates unpredictable expenses
- Scales up or down painlessly
- It's ready now.... Just upload the start-up data and go

FEATURE

- Maintaining local Software and Hardware drains your IT Budget very quickly. When you shift your Hardware, Software and Network to the cloud it saves you significant amount of time and costs.
- When running through the cloud you always get the most recent update without having to check-in. The security is always kept current with the latest release.
- You no longer have to guess what the future costs will be to upgrade your hardware or IT software. You also have the flexibility of scaling up or down as your local governments needs change.

Call BIAS to assist you with purchasing our hosting service. You must have a BIAS Software Service Agreement to use BIAS Cloud. Contact Sue Cronk at 509.443.3332 or sue@biassoftware.com to learn more.

Ask about a "Try Before You Buy" program!

INTERLOCAL AGREEMENT
For
EMS AVAILABILITY and SERVICES

By and Between

GRAYS HARBOR
FIRE PROTECTION DISTRICT #5

And

CITY OF MCCLEARY

INTERLOCAL AGREEMENT

THIS AGREEMENT is made and entered into upon the dates set out below by and between Grays Harbor Fire District #5, Washington (hereinafter known as the Provisioner, or Fire District #5), and City of McCleary (hereinafter known as the Entity or the city).

RECITALS

A. RCW 39.34.080 authorizes public fire districts to enter into contracts with one or more public agencies to perform service, activity, or undertaking which each public agency entering into the contract is authorized by law to perform: PROVIDED, that such contract shall be authorized by the governing body of each party to the contract.

B. The Parties have exchanged proposals in relation to the continuation of the provision of emergency medical services by the District to those within the Entities jurisdictions. The entities have reached an agreement as to the terms and conditions for the provision of and payment for such services.

C. The Parties wish to memorialize the terms of that Agreement.

NOW THEREFORE, for good and valuable consideration, the receipt of which is acknowledged by all Parties, it is agreed as follows:

Section 1. **Term, Termination, and Renewal.**

1.1. This agreement shall commence on the 1st day of January, 2015, (the "Commencement Date") and shall expire on December 31, 2017, (the "Initial Term"). This agreement shall automatically be renewed for an additional three (3) year term, subject to neither party providing a written request to enter into negotiations no later than one hundred and twenty (120) days prior to the expiration date of the term.

1.2. The Initial Term is subject to earlier termination in accordance with Section 3 hereof.

Section 2. **Duties of Fire District #5.** Throughout the Term, the District shall be responsible for the following duties:

2.1 **Ambulance and Emergency Medical Services.** Fire District #5 shall operate and staff an Advanced Life Support ambulance service. The Ambulance Service shall stock and maintain at least two ambulances in accordance with ALS (Advanced Life Support) standards. The Ambulance Service shall operate with at least one ambulance 24 hours per day, seven days per week. Additional ambulances may be utilized for back-up purposes as needed. The Ambulance Service shall respond to all 911 aid calls occurring within the entity in accordance with Chapter 246-976 WAC with the exception of the calls which are identified as Public Assistance Calls which shall be responded to by the respective Entities within their individual boundaries. The formal written definition of this excluded call for service shall be provided in writing to the City by the District

A. Performance Standards. Fire District #5 shall operate the Ambulance Service in compliance with the requirements set forth in 246-976 WAC for the provision of Ambulance Services. The Ambulance Service shall meet requirements of response time and availability set forth therein.

B. Management. The District's Board of Commissioners shall manage the Ambulance Service.

C. Staffing. Fire District #5 shall staff the Ambulance Service at a level of service of no less than one paramedic and one emergency medical technician at all times unless a different level of staffing is agreed to by the Parties in writing.

D. Response Plan.

1. Fire District #5 will dispatch an appropriately staffed ambulance to all 911 aid calls within the Entity within its capabilities other than a call identified as a Public Assistance call.

2. Fire District #5 shall provide emergency medical and transport services as necessary to all ALS and BLS patients originating within the Entity.

3. Fire District #5 shall maintain response times, service levels, and availability consistent with, and not less than, the minimum requirements set forth in Chapter 246-976 WAC. The District shall provide pre-hospital and paramedic services to the residents of the Entity at no lesser level than provided to residents of Fire District #5 subject to the provisions of Section 2.4.

E. Rehabilitation and Standby. Fire District 5 shall provide rehabilitation and standby services to the Fire Department of the Entity for major fire incidents. This function shall be ideally performed by off-duty Fire District 5 EMS personnel to protect the availability of the on-duty unit though the on-duty unit may initially respond.

F. Service Limitation. The above services shall be rendered on the same basis as such services are provided to areas within the District, but the District assumes no liability for failure to do so by reason of any circumstances beyond its control. In the event of simultaneous calls whereby facilities of the District are taxed beyond its ability to render equal services, the officers and agents of the District shall have discretion as to which call shall be answered first. The District shall be the sole judge as to the most expeditious manner of handling and responding to emergency calls.

2.2 Notice of Proposed Rate Changes.

A. In the event District undertakes consideration of an action which would result in a change in the fees and costs charged to the individual user of its service, whether related to the response itself, a mileage charge, or supplies provided in the course of a response, it shall provide the Entity with written notice of the proposed changes no less than twenty-one days prior to the date at which Fire District #5's Commission will consider adoption of any such proposed change.

B. The District's Commission will take into consideration in good faith any concerns or recommendations the Entity may have in reference to said changes. Any rates established shall not distinguish between service provided to individuals within the boundaries of Entity limits and service provided to individuals within the boundaries of Fire District #5.

2.3 **Provision of Information.** The District shall provide the Entity such information as may be reasonably requested in relation to the performance of this contract, including such matters as call levels and totals, fiscal performance, and operational status and projections.

3. **Termination for cause.** This agreement may be terminated prior to the expiration date of the Term specified in Section 1 for cause. This shall apply in the event that a party contends the other party has failed to comply with a duty created by this agreement. In that event, the party shall give the other party written notice specifying in reasonable detail the duty breached. In the event the recipient party does not take reasonable steps to correct the failure within fourteen days of receipt of the notice, then the other party may give written notice of its decision to terminate the agreement 90 days following the date of the giving of the notice.

4. **Fiscal Matters.** In recognition of the importance of the contracting Entity's understanding of the Fire District's fiscal operations, the District agrees to make its budgetary records and information available to representatives of the contracting Entity upon request of the entity, but in any event no more frequently than quarterly. In furtherance of that, the District's Chief Financial Officer shall cooperate fully in responding to any requests for information, as well as to meeting with contracting party's representatives during the course of the review of the District's fiscal operations.

5. **Compensation:**

5.1. For provision of the services to be provided by the District pursuant to this Agreement for the year 2015, the entity shall pay to the District the sums set forth in Paragraph A of Attachment #1. The responsibility of the Entity shall be as set forth upon that attachment.

5.1.A. The equal monthly installment shall be paid by the entity directly to the District with an equal amount to be paid on or before the 15th day of each month thereafter during the term of this contract.

5.2. As of January 1, 2015, the annual amount to be paid to the District by the contracting entity shall be adjusted by a percentage established as the average of the

Seattle-Tacoma-Bremerton Area Bi-Monthly Index CPI-U (October to October) and the US All City Average (November to November). [Example: S-T-B Area Bi-monthly Index CPI-U is 4.0% and the US All City Average CPI-U for that period is 3.0%. The adjustment to be utilized is 3.5%.) In no event shall the adjustment be less than two (2) percent nor greater than four point five (4.5) percent.

6. **Notices**.

6.1 Any and all notices or communications required or permitted to be given under any of the provisions of the Agreement shall be in writing and shall be deemed to have been given upon receipt when personally delivered or two (2) days after deposit in the United States mail if sent by first class, certified mail, return receipt requested. All notices shall be addressed and delivered to the parties at the addresses set forth below or at such other address as a party may specify by written notice to the other party. Further, as to any notice not personally delivered, it shall be mailed with one copy being sent by first class mail, postage prepaid, and the other by certified mail, return receipt requested.

6.2. Any notice to be given to the City shall be given in writing to the Clerk-treasurer of the City by leaving that notice at the Office of the Clerk-treasurer during normal business hours or mailing it as set forth above to the attention of the Clerk-treasurer of the City as follows:

McCleary: 100 S. 3rd Street, McCleary, WA 98557.

6.3. Any notice to be given to the District shall be given in writing to the District by leaving the notice with the individual in charge of the emergency medical service division of the District or by mailing it to the Grays Harbor Fire District #5, Attention: Chief P.O. Box 717, Elma, WA 98541.

7. **Entire Agreement/Modification**. This Agreement represents the entire agreement of the parties with respect to the subject matter hereof and supersedes all prior negotiations or discussions with respect thereto. This Agreement may be amended or modified by written instrument signed by the parties hereto after approval by their respective governing bodies. Such amendments may be for the

purposes of, among other things, adding or deleting parties to this Agreement.

8. **Assignment.** No party to this Agreement may assign its rights or obligations hereunder.

9. **Counterparts.** This Agreement may be executed in counterparts, each of which shall be an original, but all of which taken together shall constitute but one and the same instrument.

10. **Filing Requirements.** Upon execution of the Agreement, the parties shall file or post a true and complete copy thereof in compliance with the provisions of Chapter 39.34 RCW.

11. **Authorization.** Each Party does hereby represent and warrant to the others that it is duly authorized to enter into and to carry out the Terms of this Agreement.

12. **Indemnification & Insurance:**

12.1 Any and all claims, suits, or judgments for liability which hereafter arise on the part of any and all persons as a direct or indirect result of the acts or omissions of the District (including its officers, employees, and agents) in carrying out its duties under this Contract shall be the sole obligation of the District. The District shall defend, indemnify, and hold harmless the Entities, (including their officials, officers, employees, and agents) in full, including costs, expenses, and attorneys' fees, for any and all acts or failures to act on the part of the District, its officers, agents, and employees.

12.2 The District shall purchase and maintain such insurance as will protect against claims, damages, losses and expenses arising out of, or resulting from, all activities relating to this Contract. Such insurance coverage shall name the Entity as additional named insured's and shall be for a minimum of the following amounts:

A. Bodily Injury liability - $2,000,000

B. Property Damage liability - $1,000,000

The limits set out above shall be per incident limits and not aggregate limits. Certificates of Insurance in accordance with this paragraph shall be filed with the Clerk-treasurer of the City within thirty calendar days of the effective date of this Contract. Such policies shall provide that Entity shall receive notification from the insurer no less than ninety calendar days prior to any cancellation, expiration, or termination of the policy.

13. **Other Provisions:**

13.1 **Severability:** Each provision of this Contract stands independent of all other provisions. If any provision of this Contract or the application thereof to any persons or circumstances is held invalid, such invalidity shall not affect other terms, conditions, or applications which can be given effect without the invalid term, condition, or application. Should any provision be adjudged invalid, that judgment shall not invalidate the total Contract; only provisions judged invalid shall not be enforced.

13.2. **Dispute Resolution & Enforcement:**

A. In the event of any dispute arising out of this Agreement, the Parties agree they shall attempt to resolve the dispute by informal discussions. In the event such efforts are not successful, they may submit the dispute to non-binding mediation and binding arbitration under the then prevailing rules of the American Arbitration Association: PROVIDED, that, in the event either party objects to the submission of the matter to arbitration within 30 days after demand for arbitration has been filed with an appropriate agency, then the procedure shall be terminated and the matter shall be processed as the Parties deem appropriate through the Courts of the State of Washington.

B. In the event of resolution of a covered dispute by either arbitration or litigation, in addition to any other relief granted to the substantially prevailing party, if any, the arbitrator or court shall award that party reasonable

attorneys' fees and costs incurred in prosecuting or defending the matter, as the case may be.

C. Any action at law, suit in equity, or judicial proceeding for the enforcement of this contract or any provisions hereto shall be instituted only in the Courts of competent jurisdiction within Grays Harbor County, Washington.

13.3. **Interpretation:** Each party has had the opportunity to have this Agreement reviewed by Counsel of its choice prior to execution. Therefore, the rule of interpretation against the drafter shall not apply.

13.4. **Taxes:** As an independent contractor and governmental entity, the District is solely responsible for the payment of all payroll taxes (including but not limited to FICA, FUTA, federal income tax withholding, workers' compensation, and state unemployment compensation) on behalf of all persons providing services pursuant to this Contract. Further, the District shall maintain any and all business and other required licenses. The Entity reserve the right to require annual certification by the District of its compliance with the terms of this paragraph and, at its own expense, to have the compliance confirmed by a Certified Public Accountant or such other qualified financial professional as it may deem appropriate.

13.5 In the event one of the three recipient contracting parties provides facilities or equipment to the District for use in the District's operations required under the terms of this contract, prior to such utilization, an amount shall be agreed upon between the District and the providing entity. That amount shall be credited against the monetary amount which the providing entity would otherwise be required to pay under the terms of this Contract.

EXECUTED by the District this 9th day of October, 2014.

GRAYS HARBOR COUNTY FIRE
PROTECTION DISTRICT NO. 5

Jerry Bailey 10-9-14
JERRY BAILEY, Fire Commissioner

DAVE HAUGE, Fire Commissioner

Eric S Patton 10-9-14
ERIC PATTON, Fire Commissioner

ATTEST:

Patty Smith
PATTY SMITH, District Secretary

EXECUTED by the City at the CITY OF MCCLEARY this _____ day of October, 2014.

CITY OF McCLEARY:

_____
D. GARY DENT, MAYOR

ATTEST:

_____
WENDY COLLINS, Clerk-treasurer

Attachment #1

A. ANNUAL AMOUNT FOR 2014 BY ENTITY

1. McCleary $79,917.24

B. MONTHLY PAYMENTS FOR 2014

1. McCleary $ 6,659.77

C. ANNUAL AMOUNT FOR 2015 FOR THE ENTITY SHALL BE SET AS THE 2014 RATE PLUS THE INCREASE PERCENTAGE ESTABLISHED IN SECTION 5.2. MONTHLY AMOUNT SHALL BE SET TAKING THE ANNUAL AMOUNT AND DIVIDING IT BY 12.