Golden Gate University Law Review

Volume 29
Issue 1 *Ninth Circuit Survey*

Article 11

January 1999

Environmental Law - City of Auburn v. U.S. Government

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ENVIRONMENTAL LAW

CITY OF AUBURN v. U.S. GOVERNMENT

154 F.3d 1025 (9th Cir. 1998)

I. INTRODUCTION

In *City of Auburn v. U.S. Government*,[1] the United States Court of Appeals for the Ninth Circuit held that the plain language of the Interstate Commerce Commission Termination Act (ICCTA) preempts state and local permitting laws regarding railroad operations.[2] The court reasoned that since the ICCTA gave the Surface Transportation Board (Board), a federal agency, exclusive jurisdiction over certain railroad matters, railroad companies were required to follow only federal permitting laws, not those of a state or city.[3] Thus, Burlington Northern Railroad (Burlington) is not subject to the environmental permitting laws of the city of Auburn (Auburn).[4]

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1. 154 F.3d 1025 (9th Cir. 1998). The appeal from the Surface Transportation Board was argued and submitted on June 3, 1998 before Judge Donald P. Lay, Judge Goodwin, and Judge Pregerson. The opinion, authored by Judge Lay, was filed on September 3, 1998.

2. *See* City of Auburn v. U.S. Government, 154 F.3d 1025, at 1033 (9th Cir. 1998). "The ICCTA abolished the Interstate Commerce Commission, created the [Surface Transportation Board], and granted the board jurisdiction over certain interstate rail functions and proceedings." *Id.* at 1028 n.3. *See also* the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (codified in scattered sections of 49 U.S.C.). The ICCTA went into effect on January 1, 1996 and although the issue of federal preemption over matters of interstate commerce is not new, this was the first time the Ninth Circuit had to rule on ICCTA's preemption specifically. *See City of Auburn*, 154 F.3d at 1030.

3. *See City of Auburn*, 154 F.3d at 1030. The ICCTA provides "[t]he jurisdiction of the Board over (1) transportation by rail carriers ... ; and (2) ... acquisition ... 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." 49 U.S.C. § 10501(b) (Supp. II 1997).

4. *See City of Auburn*, 154 F.3d at 1028.

The court also held that the Board did not abuse its discretion in approving Burlington's proposal to reacquire the Stampede Pass railroad line without conducting a full Environmental Impact Statement (EIS).[5] The court determined that the Board's sixty-page environmental assessment (EA),[6] constituted a "thorough, independent investigation of the environmental consequences" of reopening Stampede Pass.[7] Thus, the investigation was sufficient to satisfy the National Environmental Policy Act (NEPA).[8] Consequently, the Board's decision not to conduct an EIS was neither arbitrary nor capricious and was therefore upheld.

II. FACTS AND PROCEDURAL HISTORY

In the early 1980s, Burlington operated Stampede Pass, a 229-mile railway line in Washington through the Cascade Mountains.[9] In 1986, it sold the eastern 151-mile stretch to Washington Central Railroad.[10] However, Burlington continued to operate the seventy-eight-mile western section between

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5. *See id.* at 1033. The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 et seq. (1994), requires all federal agencies to prepare a statement, called an Environmental Impact Statement (EIS), detailing the environmental consequences of all "Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C) (1994).

6. Pursuant to Section 1508.9 of Title 40 of the Code of Federal Regulations, an agency is required to prepare an Environmental Assessment (EA) to aid in determining whether an EIS will be required by NEPA. Section 1508.9 provides:

> *Environmental Assessment*:
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> (a) Means a concise public document for which a Federal agency is responsible that serves to:
>
> (1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.
>
> (2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.
>
> (3) Facilitate preparation of a statement when one is necessary.
>
> (b) Shall include brief discussions of the need for the proposal, of alternatives as required by sec. 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

40 C.F.R. § 1508.9 (1998).

7. *See City of Auburn*, 154 F.3d at 1032.

8. *Id.* at 1033.

9. *See* City of Auburn v. U.S. Government, 154 F.3d 1025, 1027 (9th Cir. 1998). Auburn lies at the west end of the line and Pasco at the east end. *See id.*

10. *See id.* at 1027.

the cities of Cle Elum and Auburn.[11] In 1996, Burlington sought to reacquire the 151-mile eastern portion of Stampede Pass, and requested the Board's approval.[12] As a part of the reacquisition, Burlington proposed to complete repairs and improvements on the line, thus reestablishing the line as a third main rail to the Pacific Northwest.[13] Burlington initially submitted local permit applications for this project.[14] However, during the review process it asserted that the local permitting laws were preempted by federal regulation, specifically the ICCTA.[15]

Prompted by Burlington's claim of federal preemption, King County, Washington sought a declaration by the Board clarifying whether the ICCTA preempted state and local permitting laws.[16] The Board responded affirmatively and issued an informal declaration.[17] The declaration stated that the ICCTA precluded King County from reviewing the environmental impact of Burlington's proposed operations on the Stampede Pass line.[18] In August 1996, King County requested a formal declaration, which the Board issued on September 25, 1996.[19]

At the same time, pursuant to federal law, the Board conducted an EA of Burlington's proposal to reacquire, repair and improve the Stampede Pass.[20] The EA concluded that the project would have no significant environmental impact if certain mitigation measures were implemented.[21] Thus, the Board ap-

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11. *See id.* Cle Elum lies along the Stampede Pass line between Auburn and Pasco. *See id.*
12. *See City of Auburn*, 154 F.3d at 1027-28.
13. *See id.* at 1028. Some of the improvements included "replacement of track siding and snow sheds, tunnel improvements and communication towers." *Id.*
14. *See id.*
15. *See id.*
16. *See City of Auburn*, 154 F.3d at 1028.
17. *See id.*
18. *See id.*
19. *See id.*
20. *See id.* at 1028-29.
21. *See City of Auburn*, 154 F.3d at 1029.

proved Burlington's proposal in October 1996.[22] Auburn then appealed this decision to the Ninth Circuit.[23]

III. THE COURT'S ANALYSIS

A. FEDERAL PREEMPTION

The Ninth Circuit reaffirmed the sovereignty of federal law over local law with respect to interstate commerce.[24] Beginning with an historical analysis, the court noted cases that recognized the long-established exclusive federal jurisdiction over railroad operations.[25] Most cases held "[l]ocal authorities have no power to regulate interstate rail passengers."[26] With specific regard to the ICCTA, they held that a broad interpretation of ICCTA preemption over state regulation was consistent with the federal government's exclusive jurisdiction.[27] Thus, state laws affecting railroads were subject to the "plenary and exclusive" power of the federal government.[28]

Auburn contended that case law supported a narrower interpretation of the federal government's ability to pre-empt state law.[29] However, the court rejected Auburn's argument holding that "[a]ll cases cited by the parties [adopted] a broad

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22. *See id.*

23. *See City of Auburn*, 154 F.3d at 1029. Auburn also appealed to the Ninth Circuit another decision by the Board. *See id.* at 1028 n.5. Shortly before the Board had issued its formal declaratory order to King County, Auburn had requested to be designated as a party of record in the proceeding. *See id.* at 1028. The Board denied the request suggesting that Auburn submit its own petition for a declaratory order. *See id.* Once Auburn complied, however, the Board denied the petition and claimed that it was essentially a request to reconsider the declaratory order requested by King County. *See id.* The Ninth Circuit dismissed this issue on appeal as moot because Auburn would not have received any new relief. *See City of Auburn*, 154 F.3d at 1028 n.5.

24. *See* City of Auburn v. U.S. Government, 154 F.3d 1025, 1027 (9th Cir. 1998).

25. *See id.* at 1029 (citing Houston, E. & W. Tex. Ry. v. United States, 234 U.S. 342, 350-52 (1914); Pittsburg & Lake Erie R.R. v. Railway Labor Executives Ass'n, 491 U.S. 490, 510 (1989)).

26. *City of Auburn*, 154 F.3d at 1029 (citing City of Chicago v. Atchison, T. & S.F. Ry., 357 U.S. 77, 88-89 (1958); *Colorado* v. United States, 271 U.S. 153, 165-66 (1926)).

27. *See City of Auburn*, 154 F.3d at 1030 (citing CSX Transp., Inc. v. Georgia Public Services Comm'n, 944 F. Supp. 1573, 1581 (N. D. Ga. 1996); Burlington Northern Santa Fe Corp. v. Anderson, 959 F. Supp. 1288, 1294-95 (D. Mont. 1997)).

28. *See City of Auburn*, 154 F.3d at 1029.

29. *See id* at 1030.

reading of Congress' preemption intent, not a narrow one."[30] Thus, interstate commerce, and railroads, had been and will continue to be governed exclusively by federal authority.

The court then denounced Auburn's reliance on ICCTA's legislative history for the meaning and intent of the ICCTA.[31] Auburn argued that Congress intended the ICCTA to preempt only state and local "*economic* regulation of rail transportation, not the traditional state police power of environmental review."[32] The court, however, dismissed this argument, finding the language of the ICCTA to be clear.[33] A statute's language is conclusive when it is clear on its face.[34] Reliance on legislative history, therefore, is proper only when the purpose or intent of a statute is ambiguous or misleading.[35]

According to the Ninth Circuit, the clear language of the ICCTA expressly granted the federal government, specifically the Board, exclusive authority over projects like Stampede Pass.[36] In so deciding, the court relied on section 10501(b)(2) of the ICCTA.[37] This section commands the Board to exercise *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 within one State."[38] Further, the court noted language in section 11321 precluding "state and municipal laws" from interfering with merger or acquisition transactions.[39] On this basis, the court held that the

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30. *Id.*

31. *See id.* at 1029-30.

32. *Id.* at 1029. Auburn relied on a Congressional report, which stated that Congress meant to "occupy [ ] the entire field of economic regulation of the interstate rail transportation system," but leave for the states "the police powers reserved by the Constitution." H. R. Rep. No. 104-311, 104th Cong., 1st Sess, at 95-96 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 807-08 (alteration in original).

33. *See City of Auburn*, 154 F.3d at 1030.

34. *See id.* at 1029.

35. *See id.* at 1030.

36. *See id.*

37. *See id.*

38. *City of Auburn*, 154 F.3d at 1030 (citing 49 U.S.C. § 10501(b)(2) (1997)). *See supra* note 3 for text of § 10501(b)(2).

39. *See City of Auburn*, 154 F.3d at 1030 (citing 49 U.S.C. § 11321(a) (1997)). Section 11321(a) states:

clear language of the ICCTA preempted any state regulation of railroads.[40]

Auburn then attempted to limit ICCTA's jurisdiction over the state by distinguishing local environmental laws from those laws Congress intended to preempt.[41] Auburn's position was that Congress did not intend to limit the traditional state police power necessary to protect the health and safety of its citizens.[42] The court disagreed for two reasons. First, courts had only allowed state law to preempt federal law in the rare cases where a specific federal statute had clearly so intended.[43] Second, the court saw a lack of clear distinction between economic and environmental regulation.[44] The court reasoned that if "local authorities have the ability to impose 'environmental' permitting regulations on the railroad, such power will in fact amount to 'economic regulation' if the carrier is prevented from constructing, acquiring, operating, abandoning or discontinuing a line."[45] Thus, the court concluded that all state and local permitting laws, including environmental regulations, were explicitly preempted by the ICCTA.[46]

B. NEPA REVIEW

The Ninth Circuit began their review of the Board's decision not to prepare an EIS by acknowledging that appellate courts generally give great deference to an agency's determination

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> The authority of the Board under this subchapter is exclusive.... A rail carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that rail carrier, corporation or person carry out the transaction, hold, maintain, and operate property, and exercise the control or franchises acquired through the transaction."

49 U.S.C. § 11321(a) (1997).

40. *See City of Auburn*, 154 F.3d at 1030.

41. *See id.* at 1031.

42. *See id.* at 1029.

43. *See id.* at 1031. The Ninth Circuit cited to Chevron U.S.A., Inc. v. Hammond, 726 F.2d 483 (9th Cir. 1984), where it had allowed an Alaska statute to govern the discharge of ballast by oil tankers. *Chevron*, 726 F.2d at 489. In *Chevron*, the court found the Clean Water Act to have clearly "expressed its intent to allow the states to take an active role in abating water pollution." *Id.*

44. *See City of Auburn*, 154 F.3d at 1031.

45. *Id.*

46. *See id.*

regarding NEPA requirements.[47] The court reasoned, "[w]e are not free to substitute our judgment for that of the agency as to the environmental consequences of its actions.... Instead, our task is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions...."[48] Therefore, a court will overturn an agency's decision not to conduct a full EIS only if that decision was "arbitrary, capricious or an abuse of discretion."[49]

Auburn, however, argued that the Board abused its discretion.[50] Auburn asserted that the Board not only failed to take a "hard look" at the environmental consequences of reopening Stampede Pass,[51] but also failed to analyze alternatives.[52] Moreover, Auburn claimed that the mitigation measures proposed by the Board did not compensate for the environmental harm to support a "finding of no significant impact."[53]

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47. *See* City of Auburn v. U.S. Government, 154 F.3d 1025, 1032 (9th Cir. 1998).

48. *Id.* (quoting Association of Pub. Agency Customers, Inc., v. Bonneville Power Admin., 126 F.3d 1158, 1183 (9th Cir. 1997)).

49. *City of Auburn*, 154 F.3d at 1032 (citing Greenpeace Action v. Franklin, 14 F.3d 1324, 1331 (9th Cir. 1992)). For the Ninth Circuit, this standard of review became more complicated after Alaska Wilderness Recreation & Tourism v. Morrison, 67 F.3d 723 (9th Cir. 1995), which assumed the standard of 'reasonableness' to apply to threshold decisions concerning the applicability of NEPA. *See Alaska Wilderness*, 67 F.3d at 727. Subsequent case law has reconciled *Greenpeace* and *Alaska Wilderness* to hold that, in the Ninth Circuit, legal issues regarding NEPA applicability are governed by the "reasonableness" standard while factual issues are governed by the "arbitrary and capricious" standard. *See* Northcoast Environmental Center v. Glickman, 136 F.3d 660, 667 (9th Cir. 1998), *see also* Lisa Braly, Summary *Northcoast Environmental Center v. Glickman*, 29 GOLDEN GATE U. L. REV. 89 (1999), for discussion of *Northcoast*. The rationale underlying this distinction is the expertise of the courts, or lack thereof, in agency matters. *See Alaska Wilderness*, 67 F.3d at 727. The less deferential standard of reasonableness is applied to legal issues, of which the courts are sufficiently knowledgeable. *See id.* On the other hand, courts know less about the factual issues and, therefore, use the more deferential standard with factual questions. *See id.*

50. *See City of Auburn*, 154 F.3d at 1032.

51. *See id.* Auburn believed that the increased traffic and noise in the city should have been investigated within the EA. *See id.* at 1032-33.

52. *See id.* at 1032. Section 1508.9(b) of Title 40 of the Code of Federal Regulations requires an EA to include a discussion of the proposal and its alternatives as well as any environmental impacts the proposal or the alternatives may have. 40 C.F.R. § 1508.9(b) (1998). *See supra* note 6 for the text of § 1508.9(b).

53. *See City of Auburn*, 154 F.3d at 1032. Auburn asserted that the mitigation measures were "vague, conclusory, and ineffective." *Id.*

The court rejected Auburn's arguments on the basis that the EA was a thorough investigation that addressed several environmental concerns.[54] In addition, the court noted that the Board provided a list of mitigation measures, as required by the regulations, and had specifically tailored three measures to address Auburn's concern over traffic delays at rail crossings.[55] The Board "observed the appropriate procedural requirements, allowed public comment, and properly informed the public of the environmental issues."[56] The Board met its requirements under NEPA's statutory guidelines and thus, the court affirmed the Board's rulings.[57]

IV. IMPLICATIONS OF DECISION

The dissolution of the Interstate Commerce Commission by the ICCTA has created considerable confusion over the status of commercial transportation regulation in some transportation industries.[58] However, the simultaneous creation of the Surface Transportation Board alleviated much of this uncertainty with respect to the railroads. Section 10501 of the ICCTA essentially gave the Board the same jurisdiction and authority as its predecessor, the Interstate Commerce Commission.[59] Thus, subsequent cases regarding the regulation of railroads, including *City of Auburn*, are not greatly affected by the change. Novel arguments for state and local intervention may be made, but as the court in *City of Auburn* has shown, courts are un-

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54. *See id.* at 1032. The EA addressed "rail traffic increases, transportation safety, energy, air quality, and noise." *Id.*

55. *See City of Auburn*, 154 F.3d at 1032 & n.6. The three measures the Board developed were (1) notice of expected train movements, (2) discussion of funding options for crossing upgrades, and (3) spacing of train movements to allow time for crossings to clear. *See id.* at 1033. However, the Board denied Auburn's suggestion of requiring the construction of grade-separated crossings. *See id.*

56. *City of Auburn*, 154 F.3d at 1033.

57. *See id.*

58. *See* Mark W. Flory et al., *Recent Developments in Commercial Transportation Litigation*, 33 TORT & INS. L. J. 343, 344 (1998). The confusion about the deregulation concerned its practical impact in areas other than the railroad industry. *See id.* For example, the Board assumed the ICC's responsibility for the transportation of "household goods, noncontiguous motor trade, passenger travel, undercharges and collective rate making." *Id.* However, the ICCTA "abolished most economic regulations and eliminated certification and permit requirements." *Id.*

59. *See id.* at 344.

willing to divest the federal government of its longstanding right to exclusive jurisdiction over interstate rail travel. Until the federal government begins to concede some of its exclusive authority, states will have to rely on federal regulations, rather than their own, to protect the environment.

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