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Friends of the Eel River, ICCTA Preemption, and the Future of California High Speed Rail Litigation

Christopher J. Butcher and Johannah E. Kramer*

Introduction

In July 2017, the California Supreme Court held in Friends of Eel River v. North Coast Railroad Authority (Eel River) that the federal Interstate Commerce Commission Termination Act (ICCTA) does not preempt the application of the California Environmental Quality Act (CEQA) to a California railroad project governed by the state’s subdivision, North Coast Rail Authority (NCRA), and operated by a private lessor, Northwestern Pacific Railroad Company (NWPCo). The holding interprets ICCTA’s deregulatory sphere as allowing the state, as a market participant, to impose environmental regulations on rail line development and repair, while also exploring the sovereign power that California possesses in enforcing local environmental ordinances on its own rail subdivisions.

The decision distinguishes CEQA as exempt from ICCTA’s established per se and as-applied preemptory power over state and local environmental ordinances and represents a shift in previous readings of ICCTA as applied to California’s state and local environmental ordinances. The holding also poses a possible conflict with the Ninth Circuit’s decision in City of Auburn v. United States (“Auburn”), which held that the ICCTA is broadly preemptive of state and local environmental ordinances that have an economic impact on rail line projects. The clash between the California Supreme Court’s holding in Eel River, the Ninth Circuit’s prior Auburn decision, and the Surface Transportation Board’s (STB) recent declaratory orders likely sets the stage for future litigation over this issue within the context of the California High Speed Rail (CHSR) project.

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1. Friends of Eel River v. N. Coast R.R. Auth. 3 Cal. 5th 677, 690 (2017) [hereinafter Eel River].

2. City of Auburn v. U.S., 154 F.3d 1025, 1033 (9th Cir. 1998) [hereinafter Auburn].
State and federal courts have differed in their approaches to interpreting ICCTA's preemptory power over state and local environmental regulations relating to projects that touch upon railroad redevelopment and construction.

The ICCTA's preemptory language is unquestionably broad when addressing state actions that constitute per se unreasonable interference with interstate commerce, but may be circumvented under certain circumstances. Specifically, the ICCTA categorically preempts state or local permitting capacity that could be used to deny a railroad the ability to conduct part of its operations, or to proceed with activities that the STB has authorized. Moreover, the ICCTA preempts any state and local regulations that are directly regulated by the STB, including construction, operation, and abandonment of rail lines; railroad mergers, line acquisitions, and railroad rates and service. For state and local actions that are not categorically preempted, the ICCTA still may preempt them as applied. When scrutinized under the as-applied standard, preemption is only avoided upon a factual showing that the action in question would not effectively prevent or unreasonably interfere with railroad transportation.

In previous rail line environmental preemption cases, California courts have generally upheld the application of CEQA when the facts allow for application of preemptory exceptions to the ICCTA. Meanwhile, the Ninth Circuit has held that the broad language of ICCTA, coupled with the blurred lines between economic and environmental regulation, places state and local environmental ordinances under the preemptory purview of ICCTA when these ordinance-mandated actions impact or impede the economic ability of rail line projects to go forward.

4. Id.
5. Id.
6. Id. at 327 ("We need not wade into the various complexities and intricacies presented by the broader question of federal preemption, because on the specific record before us it is clear that an exception to preemption, namely the market participation doctrine, applies.").
7. Auburn, 154 F.3d at 1031 ("... given the broad language of [ICCTA] § 10501(b)(2), (granting the STB exclusive jurisdiction over construction, acquisition, operation, abandonment, or discontinuance of rail lines) the distinction between "economic" and "environmental" regulation begins to
The Eel River California Supreme Court Holding

Eel River addresses CEQA’s application to state subsidiaries tasked with acquiring, operating, and repairing state-owned rail lines. The decision holds that the state is presumed to be entitled to engage in self-governance in this regard and may be operating properly under the market participant doctrine exception to ICCTA preemption.\(^8\)

The Eel River litigation originated in the Superior Court of Marin County, where environmental groups including Californians Against Toxics and Friends of the Eel River sued NCRA in opposition of its decision to resume service on its rail line, and for deficiencies within its CEQA-mandated Environmental Impact Report (EIR).\(^9\) The disputed line is comprised of the Eel River division, which stretches from Humboldt County (through the environmentally sensitive Eel River Canyon) into Napa County, where it connects with the Russian River division in Lombard, California.\(^10\) From Lombard, the line reaches its southern terminus in Mendocino County.\(^11\) Both the Eel River and Russian River divisions of the line were originally owned and operated by private companies, but upon economic failure, service was suspended and the entire line fell into disrepair.\(^12\) Concerned that abandonment of freight service would damage the economy, the state legislature created the NCRA in 1989, with the purpose of acquiring the line and selecting an entity to repair, update, and operate transportation services on the line.\(^13\) From 1990 to 2006, NCRA acquired ownership and easement rights over the line, and indicated through various agreements and plans that it was committed to CEQA compliance in relation to future projects on the line.\(^14\) In 2006, NCRA contracted with franchisee NWPCo to restart freight service to the line.\(^15\) In June 2011, following completion of the freight service project’s initial study and circulation of draft EIR for public comment, NCRA’s board of directors adopted a resolution certifying a final blur. For 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.\(^\_)\)

8. Eel River, 3 Cal. 5th at 735 – 38.
9. Id. at 699.
10. Id. at 691 – 92.
11. Id.
12. Id. at 692.
13. Eel River, 3 Cal. 5th at 692.
14. Id. at 692 – 93.
15. Id. at 694 – 95.
EIR. This EIR approved resumption of limited freight rail service to the Russian River portion of the line, as well as four construction and repair activities on that portion of the line.\textsuperscript{16} The final EIR disclosed that the project posed significant and potentially significant adverse environmental effects, some of which could not be mitigated. It also omitted discussion of the northern Eel River portion of the line, as the Board had no intention of resuming service north of the Lombard connection.\textsuperscript{17}

In July 2011, plaintiffs, Friends of the Eel River and Californians for Alternatives to Toxics, filed separate petitions for writ of mandate against NCRA and NWPCo as a real party in interest, alleging inadequacies and CEQA violations associated with the project’s final EIR.\textsuperscript{18} NCRA responded to petitioners’ writs by arguing that the line was subject to federal ICCTA regulation, instead of CEQA, and removed the matters to the Ninth Circuit.\textsuperscript{19} The Ninth Circuit found that plaintiffs were not attempting to litigate a federal cause of action and returned the matters to the state trial court.\textsuperscript{20} While litigation was pending, the NCRA’s board of directors issued a resolution in April 2013 rescinding the final EIR, and stated that they were not required to prepare an EIR for the project.\textsuperscript{21}

The trial court held that the ICCTA broadly preempted CEQA, and the First Appellate District affirmed.\textsuperscript{22} The First Appellate District held that the market participant doctrine did not defeat preemption, facially disagreeing with the \textit{Town of Atherton v. California High-Speed Rail Authority} ("Atherton")\textsuperscript{23} court’s finding of a market participant preemption exception.\textsuperscript{24} The First

\begin{itemize}
\item 16. \textit{Id.} at 696 – 98.
\item 17. \textit{Id.} at 698.
\item 18. \textit{Eel River}, 3 Cal. 5th at 699.
\item 19. \textit{Id.} at 700.
\item 21. \textit{Eel River}, 3 Cal. 5th at 700.
\item 22. \textit{Id.} at 701.
\item 23. \textit{Atherton}, 228 Cal. App. 4th at 333 – 34.
\item 24. \textit{Friends of the Eel River v. N. Coast R.R. Auth.}, 230 Cal. App. 4th 85, 117 (2014) [reversed by \textit{Eel River}] ("Although \textit{Atherton} presents a situation factually and procedurally similar to the one before us, we respectfully disagree with the court’s analysis, which overlooks the genesis and purpose of the market participation doctrine and does not adequately answer the question of how a third party’s challenge to an EIR under CEQA can reasonably be viewed as part of the government’s proprietary activities.") (emphasis in original).\
\end{itemize}
Appellate District instead argued that *Atherton* inappropriately applied the market participant doctrine,\textsuperscript{25} and differed from the facts at hand. The First Appellate District noted that *Atherton* questioned whether a CEQA analysis was required as part of the process for determining where to place a rail line, while the present case concerned the requirement of CEQA analysis as a condition of resuming rail operations.\textsuperscript{26} In addition to rejecting the *Atherton* court’s market participant exception holding as applied to the present litigation, the First District Court of Appeal also rejected the plaintiffs’ view that state sovereignty and self-governance, protected under the Tenth Amendment of the U.S. Constitution, requires ICCTA’s preemptory power be interpreted as sparing the state’s control over NCRA, its own subdivision.\textsuperscript{27}

In December of 2014, the California Supreme Court granted petitioners’ petition for review as related to the preemption issue. The court began by examining the general principles of and presumptions associated with federal preemption, and addressed the *Gregory-Nixon* rule.\textsuperscript{28} This rule states that, when interpreting Congressional legislation, there must be unmistakably clear language to establish an intrusive exercise of Congress’ commerce clause powers against a state, and that when there is the possibility of preemption, the law should be presumed as preserving a state’s chosen disposition of its own power, in the absence of a clear and plain statement from the legislature.\textsuperscript{29}

The court applied these general preemption principles to the ICCTA’s statutory construction and historical background.\textsuperscript{30} The court found that, although the ICCTA contains an express preemption provision and contemplates a unified national rail system, it was intended to combat rail monopolies while minimizing the need for federal regulatory control.\textsuperscript{31} The court determined that the ICCTA expressly allows private rail owners to govern themselves internally via market-based self-correction and corporate bylaws, so long as those internal governances do not conflict with the ICCTA or other federal regulatory agencies.\textsuperscript{32} The court concluded that in the ordinary regulatory setting, where a state seeks to regulate a private rail

\begin{itemize}
  \item \textsuperscript{25} Id. at 116 – 17.
  \item \textsuperscript{26} Id. at 108.
  \item \textsuperscript{27} Id. at 119.
  \item \textsuperscript{29} Id. at 705.
  \item \textsuperscript{30} Id. at 706 – 11.
  \item \textsuperscript{31} Id. at 710 – 11.
  \item \textsuperscript{32} Id. at 690 – 91.
\end{itemize}
carrier, applying CEQA to condition the ability of the rail carrier to go forward with its operations would be preempted by the ICCTA.33

Despite these preliminary findings of possible preemptory power, the court held that the Court of Appeal’s finding was overbroad and incorrect, and instead utilized the deregulatory nature of ICCTA, presumption principles, and the market participant doctrine to support the view that CEQA was not preempted by ICCTA in this case.34

The court determined that the application of CEQA to a public entity charged with developing state property is not a classic regulatory behavior, particularly when there is no encroachment on the STB’s regulatory jurisdiction, or inconsistency with the ICCTA.35 Rather, they held that the application of CEQA constitutes self-governance on the part of a sovereign state.36

In advancing this argument, the court determined that once general ICCTA compliance obligations are met, private rail owners may govern themselves internally via market-based self-correction and corporate bylaws, so long as those internal governances do not conflict with the ICCTA or other federal regulatory agencies.37 The court found that the ICCTA’s preemption clause does not clearly show that the ICCTA was intended to deny decisions made by owners of rail lines, in this deregulated field, when the state, rather than a private entity, is the owner of a rail line.38 The court concluded further that the disputed project was within the owner’s (the state’s) sphere of control, and that CEQA application was proper.39

Returning to the Nixon-Gregory presumption doctrine, the court interpreted that Congress, in adopting preemptory provisions with the

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33. Eel River, 3 Cal. 5th at 720.
34. Id. at 720 – 23.
35. Id. at 723.
36. Id.
37. Eel River, 3 Cal. 5th at 723 – 26.
38. Id. at 724 (“If a private owner has the freedom to adopt guidelines to make decisions in a deregulated field, we see no indication the ICCTA preemption clause was intended to deny the same freedom to the state as owner. The ICCTA does not appear to us to be intended to effect a blanket preemption of state law governing how a state’s own subdivision—its subsidiary—will enter and engage in the railroad business, so long as there is no inconsistency with regulation provided for by the ICCTA.”).
39. Id. at 724 – 25 (The Court bolstered its stance by citing to the STB’s decision to not regulate track repair and renovation on the line, and the STB’s determinations that the project did not cross the threshold for establishing the requirement of federal environmental review. Under this unregulated sphere, the state was free to regulate itself via CEQA).
ICCTA, did not intend to deprive the state of its sovereign authority over internal governance. The court found that ICCTA preemption of CEQA mandates in this case would interpose improper federal authority between California and NRCA, its own municipal subdivision, constituting a federal threat of encroachment on the state’s arrangement for conducting its government. Absent language otherwise, the state, operating under the Gregory-Nixon standard of skepticism, presumed that Congress did not intend to preempt or intrude upon the state’s ability to self-govern. Preempting the state’s ability to adopt laws governing its own development schemes would leave the state without the tools to govern its own subdivision, thus depriving the state of its ability to make decisions to carry out goals, which the state legislated, regarding its own development projects. This includes undertaking environmental mitigation or deciding not to undertake a project at all because of its environmental hazards. The court found that affirming ICCTA preemption over CEQA would commit the state to a one-way ratchet – able to enter the rail business, but without the capacity to require anything of the subordinate agency it set up to carry out the state’s rail initiative.

The court then turned to its second interpretive presumption, finding that the market participant doctrine applied, and holding that the state was not acting as a regulator of others, but rather, as a marketplace participant, entitled to the same rights and protections as private actors in the market. The court acknowledged that the market participant doctrine is not entirely on point because it is ordinarily used to analyze preemption when a state interacts with private parties as a participant in a private marketplace, and does not address a state’s ability to govern its own governmental subsidiary. Nevertheless, the court continued its analysis under the doctrine, and held that, because states operating in a private marketplace are subject to the same burdens imposed by Congress on private owners, courts will presume that Congress will afford states, as owners, the same

40. Id. at 725.
41. Eel River, 3 Cal. 5th at 729.
42. Id. at 729, quoting Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) ("Crucially, what is at stake here is the state trying to govern itself—to engage in 'decisions[s] [sic] of the most fundamental sort for a sovereign entity.'" (original emphasis)).
43. Eel River, 3 Cal. 5th at 729 – 30.
44. Id.
45. Id. at 730 – 31.
46. Id. at 734.
47. Id. at 736.
freedoms as private parties. In applying this presumption (due to the nonregulatory behavior of state’s action), the court determined that the application of CEQA to NCRA could be analogized to a private corporation’s enforcement of its own bylaws. For this reason, the court concluded the State, like a private actor, was entitled to the market participant exception to provide it with the freedom to govern how its subsidiary engaged in the railroad business.

The court was careful to establish that CEQA-mandated actions might cross the line into as-applied preempted regulation if the review process imposes unreasonable burdens outside of the particular market in which the state is the owner and developer of a railroad. The court also acknowledged that its holding does not mean that the ICCTA has no power to govern state-owned rail lines, and that preemption by ICCTA is proper when addressing state regulation of rail carriers which directly conflict with the STB or ICCTA.

**Eel River, Ninth Circuit, and STB Incongruences Likely to Foster Subsequent Litigation**

While the California Supreme Court’s holding neither provides precedent for nor directly impacts future Ninth Circuit litigation concerning rail line projects in California, it illustrates the inconsistencies between state and federal interpretations of ICCTA’s interaction with CEQA. In *Auburn*, the Ninth Circuit held that ICCTA’s broad and relatively

48. *Eel River*, 3 Cal. 5th at 736-37 (The court, again referencing the Nixon-Gregory presumption principle, found that “… the market participant doctrine also instructs, in part, that because states operating in a private marketplace are subject to the same burdens imposed by Congress on private proprietors, courts will presume that Congress would afford states, as proprietors, the same freedoms as private proprietors.” (original emphasis)).

49. Id.

50. Id. at 731.

51. Id.

52. *Auburn*, 154 F.3d at 1030 (“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.’)”).
undifferentiated preemptory language was intended to protect rail lines from improper state economic regulation. The California Supreme Court has sidestepped this larger preemptory issue through its creative reading of the ICCTA and delineation that when the state is a market participant, its environmental—and indeed, economic—interventions are excused because they constitute self-governance. Both cases concern themselves more with the provisions of the ICCTA than the state and local environmental ordinances that they purport to protect and preempt. While factually different, the cases will likely be the subject of further litigation at the federal level.

In *Auburn*, the Ninth Circuit addressed a Washington rail line environmental review controversy in which state and local environmental review regulations were held to be preempted by the ICCTA through affirmation of a STB declaration to that effect. The court in *Auburn*, while examining federal preemption principles in the context of ICCTA, warned that, although legislative history may be a guide to understanding statutory purpose, in the absence of a clearly expressed legislative intention indicating otherwise, the language of the statute must ordinarily be regarded as conclusive, and there is no reason to resort to legislative history where statutory command is straightforward. In consideration of the plain language of the ICCTA, the *Auburn* court held:

... given the broad language of [the ICCTA], (granting the STB exclusive jurisdiction over construction, acquisition, operation, abandonment, or discontinuance of rail lines) the distinction between “economic” and “environmental” regulation begins to blur. For 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.

Although the Ninth Circuit in *Auburn* addressed Washington’s state and local environmental ordinances, the opinion turns on a broad reading of ICCTA’s general preemptory power over state and local environmental review laws. This broad interpretation of the ICCTA suggests that any state

53. *Id.* at 1031.
54. *Id.* at 1033.
55. *Id.* at 1029 – 1030.
56. *Auburn*, 154 F.3d at 1031.
57. *Id.* (“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.”); *id.* at 1033. (*State and...*)
and local environmental review regulations are categorically preempted by the ICCTA when they functionally operate as economic regulations—falling under the federal regulatory purview of the Commerce Clause.\(^\text{58}\)

Instead of following the Court’s ICCTA interpretation as set forth in \textit{Auburn}, the California Supreme Court in \textit{Eel River} based its ICCTA analysis on the deregulatory sphere of action, vis-à-vis an interpretive reading of the ICCTA, as well as on a lengthy discussion of legislative history on Congress’ original intent.\(^\text{59}\) The California Supreme Court did not address whether upholding the application of CEQA in \textit{Eel River} functionally operated as an economic regulation over the rail line. Instead, the court held that because the state was the owner of the rail line, and because the Nixon-Gregory standard requires unmistakably clear language to presume federal preemption applies, unilateral state enforcement of state subdivisions take precedent over federal preemption.\(^\text{60}\)

To reach their holding, the California Supreme Court conceded that CEQA-mandated actions might cross the line into as-applied preempted regulation, if the review process imposes unreasonable burdens outside the particular market in which the state is the owner and developer of a railroad, but argued that the facts in \textit{Eel River} did not cross this line because the state imposed the regulations on itself.\(^\text{61}\)

The holding in \textit{Eel River} not only conflicts with \textit{Auburn}, but the STB itself has stated in declaratory orders\(^\text{62}\) that the broad reading of ICCTA described in \textit{Auburn} is intended to categorically preempt CEQA.\(^\text{63}\) Specifically, in 2014, the STB addressed the prior First Appellate District decision,\(^\text{64}\) reversed by the California Supreme Court in \textit{Eel River}, in a

\cite{Id.}

\cite{Eel River, 3 Cal. 5th at 706 – 711.}

\cite{Id. at 732 – 733.}

\cite{Eel River, 3 Cal. 5th at 731.}

\cite{The intent of STB’s declaratory orders are to eliminate controversy and remove uncertainty in areas which fall under the STB’s jurisdiction. See 5 U.S.C. § 554(e) (2012); 49 U.S.C. § 721 (2012).}

\cite{Surface Transportation Board Reporter (S.T.B.), FD 34914 at 5, (June 27, 2007), available at https://perma.cc/X4DD-VDUB (Having determined that the STB had exclusive jurisdiction over petitioner’s rail line on ICCTA grounds, the Board stated in its conclusion: “... state permitting and land use requirements that would apply to non-rail projects, such as the California Environmental Quality Act, will be preempted [by the ICCTA]”).}

\cite{Eel River, 3 Cal. 5th.}
declaratory order, and found that the ICCTA categorically preempts CEQA.\textsuperscript{65} The 2014 order also held that when considering arguments alleging infringements upon state sovereignty in this regard, that:

Our analysis indicating that [ICCTA] preempts third-party attempts to enforce CEQA against a state agency does not infringe upon California’s state sovereignty because the CEQA enforcement actions are not being brought by the state. Rather, the enforcement actions in state court are being brought by third parties against a state agency under the guise of state law.\textsuperscript{66}

In 2015, the STB issued an affirmatory order which reiterated the 2014 order and further explained:

. . . the correct analysis of [ICCTA] and congressional intent of that provision is that application of CEQA through third-party enforcement suits would conflict with the Board’s jurisdiction and could potentially block or significantly delay the construction of a rail line authorized by the Board. [citation to the 2014 order]. As a result, [ICCTA] preempts application of CEQA [in this case] and it is only the environmental review conducted at the federal level [ . . .] that need be applied to the Line.\textsuperscript{67}

The STB’s and federal courts’ interpretation of the ICCTA appears to directly conflict with the California Supreme Court’s holding in Eel River, and it is likely that these issues will be revisited by the Ninth Circuit and potentially the United States Supreme Court in the near future, especially given their relevance to the CHSR project.

**Eel River and CHSR**

California is currently in the planning, approval, and construction stage of implementing sections of the CHSR. In consideration of the direct and indirect (e.g., CEQA litigation) costs of CEQA compliance, the application of CEQA to state and local approvals required to proceed with

\textsuperscript{65} See *Surface Transportation Board Reporter* (S.T.B.), supra note 63.

\textsuperscript{66} Id.

\textsuperscript{67} *Surface Transportation Board Reporter* (S.T.B.), FD 35861 at 4, (May 4, 2015), https://perma.cc/T57U-7DKC.
the CHSR project has the potential to further inflate the costs of this approximately $64 billion-dollar project.\textsuperscript{68}

Potential CEQA-litigation related delays in development of CHSR not only have the potential to run up the public tab to complete the project, but ironically, could lead to increased air quality impacts. The CHSR is scheduled to run on renewable energy during operations, as well as reduce state transportation greenhouse gas and CO\textsubscript{2} emissions.\textsuperscript{69} Until CHSR is completed, individuals who would otherwise utilize the rail line may instead be required to use fossil-fuel emitting modes of transportation to efficiently travel between southern and northern California in the interim.

While California residents will not be able to board CHSR anytime soon, the California Supreme Court’s holding in \textit{Eel River} essentially guarantees that the project will be on a nonstop track to federal court over ICCTA’s preemptions provisions and the application of CEQA to CHSR.


\textsuperscript{69} See California High-Speed Rail Authority, \textit{Contribution of the High-Speed Rail Program to Reducing California’s Greenhouse Gas Emission Levels}, at 6, (June 2013), \url{https://perma.cc/XD9M-UND3}.