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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

UNION PACIFIC RAILROAD COMPANY,

No. _____

Plaintiff,

v.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

**ROD RUNYON, Commission Chair of the
Wasco County Board of County Commissioners,**

STEVE KRAMER, County Commissioner of the Wasco County Board of County Commissioners,

SCOTT HEGE, County Commissioner of the Wasco County Board of County Commissioners,

ANGIE BREWER, Planning Director of the Wasco County Board of County Commissioners,

BOWEN BLAIR, Chair of the Columbia River Gorge Commission,

GORHAM BLAINE, Member of the Columbia River Gorge Commission,

DAN ERICKSON, Member of the Columbia River Gorge Commission,

ROBERT LIBERTY, Member of the Columbia River Gorge Commission,

RODGER NICHOLS, Member of the Columbia River Gorge Commission, and

ANTONE MINTHORN, Member of the Columbia River Gorge Commission,

Defendants.

Plaintiff Union Pacific Railroad Company (“Union Pacific”) respectfully files this Complaint for Declaratory and Injunctive Relief. Defendants are the Planning Director and the Wasco County Board of County Commissioners (“Commissioners”) and the Oregon-based Members of the Columbia River Gorge Commission. Defendants are named in their official capacities.

NATURE OF THE ACTION

1. This Complaint arises out of the Commissioners' attempt to veto a track expansion project necessary for the development of the national rail system. Union Pacific, an interstate freight railroad, owns a mainline track and operates trains that run within the Columbia River Gorge. This segment of track has become a bottleneck for interstate freight trains moving through the Gorge area. Union Pacific plans to alleviate the most significant chokepoint in the Gorge area by extending and upgrading a second track adjacent to the existing mainline track near the City of Mosier. Once completed, the total length of the double track will be about 5.37 miles. With this improvement, trains moving in opposite directions can pass one another without stopping near the Mosier area. The Commissioners are now attempting to block this critical infrastructure improvement through the application of the Wasco County National Scenic Area Land Use and Development Ordinance ("County Ordinance" or "NSALUDO").

2. Union Pacific seeks a declaratory order that federal law preempts the permitting process imposed by the County Ordinance. The Interstate Commerce Commission Termination Act (ICCTA) expressly preempts "remedies provided under Federal or State law" and vests the Surface Transportation Board, a federal agency, with "exclusive" jurisdiction over "transportation by rail carriers" and "the construction ... [and] operation . . . of ... [rail] facilities." 49 U.S.C. § 10501(b). The Ninth Circuit has ruled that state and local permitting requirements (including environmental requirements) are preempted by the ICCTA. *See Oregon Coast Scenic R.R., LLC v. State of Oregon Dep't of State Lands*, 841 F.3d 1069, 1076-77 (9th Cir. 2016); *City of Auburn v. U.S. Gov't*, 154 F.3d 1025, 1029-31 (9th Cir. 1998). Union Pacific thus seeks a declaration that the NSALUDO permitting process is preempted by federal law, and seeks an

injunction preventing defendants from enforcing the permitting requirements and otherwise interfering with this interstate project.

3. Union Pacific further seeks a declaration that the Commissioners' application of the NSALUDO to this rail project imposes an impermissible burden on interstate commerce in violation of the Commerce Clause of the United States, U.S. Constitution, Art. I, Section 8.

PARTIES

4. Union Pacific is a corporation organized under the laws of the State of Delaware. Its principal place of business is Omaha, Nebraska.

5. Defendants Rod Runyon, Steve Kramer, and Scott Hege are Commissioners of the Wasco County Board of Commissioners. They are sued in their official capacities under the rule of *Ex Parte Young*. See *Ex parte Young*, 209 U.S. 123, 152-154 (1908).

6. Defendant Angie Brewer is the Planning Director for Wasco County. She is sued in her official capacity under the rule of *Ex Parte Young*. The Planning Director has responsibility for enforcing the County Ordinance. See NSALUDO, § 15.010.

7. Defendants Bowen Blair, Gorham Blaine, Dan Erickson, Robert Liberty, Rodger Nicols, and Antone Minthorn are the six Oregon-based members of the Columbia River Gorge Commission. They are sued in their official capacity under the rule of *Ex Parte Young*. The Members of the Columbia River Gorge Commission are not officers or employees of the United States for any purpose. 16 U.S.C. § 544c(a)(5). The Columbia River Gorge Commission is not an agency or instrumentality of the United States for the purpose of any federal law. 16 U.S.C. § 544c(a)(1)(A).

8. With the exception of Defendant Angie Brewer, all defendants are citizens of the State of Oregon. Defendant Angie Brewer is a citizen of the State of Washington.

JURISDICTION AND VENUE

9. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 2201, because this action arises under the U.S. Constitution and laws of the United States. This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1337, because this action arises under an act of Congress regulating commerce, specifically, the ICCTA. Because the parties are completely diverse in citizenship and the amount in controversy exceeds \$75,000, Union Pacific also invokes this Court's diversity jurisdiction pursuant to 28 U.S.C. § 1332.

10. Venue resides in this district pursuant to 28 U.S.C. § 1391(b) in that, upon information and belief, all Defendants maintain offices and/or reside within the district. Further, a substantial part of the events giving rise to Union Pacific's claims occurred in this district and the property that is the subject of the action is situated in this district.

FACTUAL ALLEGATIONS

Union Pacific's Portland/Hermiston Mainline Track

11. Union Pacific provides freight transportation services across a rail network consisting of approximately 32,100 railroad route miles linking communities and commercial markets in twenty-three States including the State of Oregon.

12. Union Pacific owns and operates several mainline tracks in the State of Oregon. These tracks are part of Union Pacific's western region corridor, which serves citizens and businesses throughout the western United States. The western corridor stretches from points in

Oregon, Washington, Idaho, and western Montana in the Pacific Northwest to many points throughout the Southwest of the country.

13. A critical part of the western corridor is the mainline track running between Portland and Hermiston, Oregon. This mainline track starts in Portland and heads east where it enters the Columbia River Gorge. It passes through the Columbia River Gorge on the Oregon side, running adjacent to the Columbia River and through or near cities such as Hood River, Mosier, The Dalles, and Hermiston. In the Hermiston area, Union Pacific's mainline track branches, with one line heading northeast to Spokane, Washington and another line southeast toward Idaho.

14. Union Pacific typically moves 20 to 30 trains a day on the Portland/Hermiston mainline. The largest percentage of freight carried on the mainline consists of intermodal containers – containers that can be transported by ship, truck, or train, and have become one of the most common ways to move goods worldwide. Union Pacific's intermodal customers include expedited package delivery carriers, big box retailers, home improvement stores, and automobile manufacturers. Other types of freight traffic passing through this area include agricultural products, industrial products, and chemicals.

15. Trains move in both directions on the mainline track from Portland to Hermiston. When a train traveling in one direction needs to meet a train traveling in the opposite direction on a single track, one train must pull off onto a sidetrack or use a second mainline track to allow the other to pass. Sidetracks allow trains traveling in opposite directions to meet by holding one train on the sidetrack while one or more trains pass on the mainline track. Sidetracks are also commonly referred to as "sidings."

Bottleneck Traffic in the Columbia River Gorge

16. The track through the Columbia River Gorge area was originally built over a hundred years ago as a single track with a limited number of passing sidetracks. While sidetracks allow trains to meet and pass one another, typically one of the trains is required to stop and wait. The presence of two mainline railroad tracks allows for simultaneous two-way traffic movement.

17. Union Pacific owns and operates a sidetrack located east of Mosier. The sidetrack is connected to the mainline track and runs adjacent to the mainline track.

18. The Mosier sidetrack is about 6,388 feet – sufficient to accommodate only shorter freight trains. The standard train length in the Portland Subdivision is 9,500 feet. The Mosier sidetrack cannot accommodate the lengths of about 40% of the trains that operate on the Portland/Hermiston mainline track.

19. Trains exceeding the length of the Mosier sidetrack have to be held at distant locations – either the sidetrack near Hood River or the double track in The Dalles – until the train moving in the opposite direction passes. This creates a 22.2 mile gap where roughly 40% trains using the route in this area have no passing location.

20. The result is a bottleneck as trains sit and idle at these locations for extended periods of time, waiting until a train passing the other way gets through on the mainline track. As the trains backup, the bottleneck effect radiates outward on Union Pacific's interstate rail network.

21. When a train is short enough to fit in the Mosier sidetrack, that train pulls into the sidetrack, comes to a complete halt, and idles while the other train passes.

22. Union Pacific has identified the rail corridor from Portland to Hermiston as the most significant choke point for Union Pacific freight traffic traveling in the Columbia River Gorge and the Pacific Northwest.

Union Pacific's Track Expansion Project

23. Union Pacific developed a plan to address the bottleneck and congestion problems. The plan is to extend the existing Mosier sidetrack to the east and to the west, creating a total of 4.02 additional miles of second mainline track through the area. Once completed, the total length of the double track will be about 5.37 miles. The second track will be constructed exclusively on Union Pacific's property.

24. This proposed second mainline will allow trains to keep moving through the Mosier area rather than being required to stop and wait for other trains to go by. The second track will increase operational efficiency for bidirectional rail traffic and also reduce the number of idling trains in Mosier and other Gorge communities.

25. This project will include related improvements needed to support the second track. For example, two new bridges will be constructed at Mosier Creek and Rock Creek. Union Pacific will also build a new embankment within its right of way as part of the second track. The project will require some limited filling in of wetland to support the expanded line segment.

26. Union Pacific is investing approximately \$42 million to complete this project. Up to this date, Union Pacific has spent about \$5,300,000 on permitting, engineering and property acquisition.

27. Union Pacific will solicit bids for the construction work in January 2017. The project will require approximately 12 to 15 months of construction activity to complete.

28. This track expansion project is important to the national rail system. It will help improve efficiency and fluidity of the nation's freight shipments on the Portland/Hermiston mainline, a critical piece of the western region corridor. Shippers in the region and elsewhere, including Oregon Rail Users' League, are supporters of this project.

Clean Water Act Permit Application

29. Union Pacific filed an application with the U.S. Army Corps of Engineers for a nationwide and regional general permit pursuant to Section 404 of the Clean Water Act, 33 U.S.C. § 1344, and Section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403 (hereafter "Nationwide Permit" or NWP). Union Pacific's application was complete on November 24, 2014.

30. As a federal agency, the U.S. Army Corps of Engineers has a fiduciary duty to consider and confer with Indian tribes in making a regulatory determination that could affect treaty-protected rights.

31. After Union Pacific filed the application, the U.S. Army Corps of Engineers consulted with the Oregon State Historic Preservation Office and the following Tribes: Burns Paiute Tribe, Cowlitz Indian Tribe, Nez Perce Tribe, Confederated Tribes of the Umatilla Indian Reservation, Confederated Tribes of Warm Springs Reservation, Confederated Tribes of the Grand Ronde, and the Yakama Nation.

32. The Confederated Tribes of the Umatilla Indian Reservation ("Umatilla Tribe") expressed concerns to the U.S. Army Corps of Engineers that the track expansion project may

increase rail traffic on the Columbia River, which may, in turn, impact their treaty fishing rights. The U.S. Army Corps of Engineers requested information from the Umatilla Tribe on multiple occasions to better understand their concerns and the potential impact on the exercise of their treaty fishing rights. On June 28, 2016, representatives from the U.S. Army Corps of Engineers met with the Umatilla Tribe's Fish and Wildlife Commission.

33. After investigating and analyzing the Umatilla Tribe's claim, the U.S. Army Corps of Engineers concluded that the issuance of a permit to Union Pacific for the construction of a second mainline track in Mosier, Oregon is not expected to interfere with the Umatilla Tribe's exercise of its treaty fishing rights. The U.S. Army Corps of Engineers made several findings in support of this conclusion including the following:

- a. "The Corps has no information that the Tribe fishes in the project area;"
- b. "Assuming the Tribe fishes in the area, it is not known how they access their fishing areas (whether via boat or land), whether they access their fishing areas, and whether they must cross the railroad tracks to access their fishing areas."
- c. "The Corps has no information how or why rail traffic would interfere with or delay the Tribe's access to the river in this area of the project given that the highway appears to be the impediment to accessing the river."
- d. The Umatilla Tribe has at least three access points to the river under or over the railroad tracks in the 5.37 mile project area. "Even if one needed to cross the railroad tracks to reach the river while there was rail traffic, there is a railroad bridge at Rock Creek and Mosier Creek that an individual could theoretically use to cross under the railroad tracks to reach the river. Additionally, Highway 30 crosses the railroad tracks in the city of Mosier and provides an additional point of access across the railroad tracks to the river."
- e. "Assuming the Tribe does cross the railroad tracks in the project area to reach their fishing areas, even without the project, there is existing rail traffic. This means that the issues/risks the tribe is concerned about (e.g., delay in accessing their fishing areas, risk of derailments[,] risk of train strikes) exist even without the project."

f. The Umatilla Tribe did not provide any information supporting the view that a second rail line, placed immediately adjacent to an existing mainline, would actually result in increased rail traffic, or that any potential increase in rail traffic may increase the chance of derailments above any existing level of risk with current train traffic levels.

34. The U.S. Army Corps of Engineers considered whether the issuance of the permit was consistent with other federal laws. Specifically, the U.S. Army Corps of Engineers considered whether the U.S. Forest Service is required to review the Corps' permitting action for consistency with the Columbia River Gorge National Scenic Area Act, citing the federal consistency provision at 16 U.S.C. § 544(d). The U.S. Army Corps of Engineers found that such review was not required in this situation because the Corps was undertaking substantially the same review as that under the National Scenic Act. The U.S. Army Corps of Engineers explained: "There is nothing in the Act that indicates a project which requires a federal permit should undergo substantially duplicative reviews at the local and federal level."

35. On November 4, 2016, the U.S. Army Corps of Engineers issued Union Pacific verification that the Mosier Project is authorized under the Nationwide Permit No. 14. In its Memorandum for Record, the Corps states that the "purpose of the project is to provide increased operational efficiency for bidirectional rail traffic between the Meno [Hood River] Siding and the second mainline in The Dalles to relieve ongoing bottleneck within the Portland Subdivision." The Memorandum for Record further states that the "proposed project may actually improve safety in the area as it will eliminate the siding in Mosier, which presents a potential safety hazard to public or vehicles attempting to pass idling or slow moving trains" entering and exiting the siding. The Memorandum for Record concludes that "[t]he project

complies with all terms and conditions of NWP 14 (Linear Transportation Projects) including any applicable regional conditions.”

Wasco County Land Use Ordinance

36. The Columbia River Gorge Compact is a congressionally sanctioned compact between the States of Oregon and Washington. Congress stated that the Gorge Commission and the counties shall carry out their respective functions and responsibilities under the authority of state law. *See* 16 U.S.C. § 544c(a)(1)(B) (“the States of Oregon and Washington shall provide the Commission, State agencies, and counties under State law the authority to carry out [its] respective functions and responsibilities”).

37. Wasco County enacted pursuant to state law a land use ordinance, entitled the “National Scenic Area Land Use and Development Ordinance for Wasco County.”

38. Wasco County has maintained that Union Pacific is required to apply for and obtain a permit under the NSALUDO before construction begins. The Commissioners stated that “the proposed development . . . is subject to compliance with the review and requirements of the NSALUDO.”

39. Union Pacific has maintained that the permitting process under the County Ordinance, as applied to this rail construction project, is preempted by the ICCTA at 49 U.S.C. § 10501(b). However, in the spirit of cooperation, Union Pacific submitted on January 9, 2015 an application to Wasco County for comment. Union Pacific expressly reserved the right to invoke ICCTA preemption.

40. On September 29, 2016, the Wasco County Planning Commission approved the application with certain conditions.

41. On November 14, 2016, the Wasco County Board of Commissioners filed its written order. The Commissioners reversed the Planning Commission and denied the proposed rail expansion project. The stated basis for the denial was that Union Pacific's "proposal affects treaty rights" Order at p. 10. The Commissioners relied upon a NSALUDO provision, which states: "If the final decision contradicts the comments, recommendations, or concerns of Indian tribal governments, the County must justify how it reached an opposing conclusion." NSALUDO § 14.800(D). Because "three of the four Treaty tribes of the Gorge had voiced concerns that the proposed development would adversely affect Treaty rights," the Commissioners reasoned, "the proposed development must be denied." The Commissioners also added forty-eight (48) conditions to any approval of the proposal. Several conditions directly regulate rail operations. For example, Condition #13 requires that coal cars to be covered. Condition #15 required that Union Pacific stay within the existing 20 to 30 trains per day. Condition #16 required that Union Pacific adhere to safety improvements that Federal Railroad Administration declares are optional.

42. Union Pacific has filed an appeal with Columbia River Gorge Commission. Because federal preemption is "readily apparent," Union Pacific can seek declaratory and injunction relief now in federal court and is not required to wait until the completion of the administrative process. *See Gartrell Const. Inc. v. Aubry*, 940 F.2d 437, 441-42 (9th Cir. 1991).

COUNT I
Declaratory Judgment — ICCTA Preemption

43. Union Pacific realleges and incorporates by reference the allegations set forth in paragraphs 1 – 42, above.

44. The NSALUDO, as applied here, is preempted by federal law.

45. The ICCTA vests with the Surface Transportation Board “exclusive” jurisdiction over the “transportation by rail carriers” and “the construction, acquisition, operation, abandonment of . . . 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). The ICCTA defines “transportation” to include any track, property, equipment, structure, and other property “related to” the movement of property by rail. 49 U.S.C. § 10102(9).

46. The ICCTA further provides that “the remedies provided under this part with respect to the regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” 49 U.S.C. § 10501(b).

47. Here, the proposed activities – including the construction of a double-track within Union Pacific’s right-of-way and railroad operations on that track – fall within the Surface Transportation Board’s exclusive jurisdiction.

48. Subjecting Union Pacific to a permitting or pre-clearance process under the NSALUDO irreconcilably conflicts with the Surface Transportation Board’s exclusive jurisdiction. Such a permitting scheme, as applied here, would have the effect of managing or governing rail transportation.

49. Because Defendants cannot require that Union Pacific obtain a permit or pre-clearance under the NSALUDO, they also cannot require Union Pacific to comply with any specific requirements imposed through that process.

50. If such regulation were permitted, other localities could seek to prohibit or limit these activities to meet their individual objectives, thereby leading to the lack of uniformity of regulation that Congress intended to preclude in 49 U.S.C. § 10501(b).

51. Union Pacific seeks declaratory and injunctive relief finding that the NSALUDO, at least as applied to this double track project, is preempted by federal law.

COUNT II
Declaratory Judgment — Commerce Clause

52. Union Pacific realleges and incorporates by reference the allegations set forth in paragraphs 1 – 51, above.

53. The Commerce Clause of the United States Constitution provides: “The Congress shall have Power *** To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” Art. I, § 8, cl. 3.

54. The NSALUDO, as applied here, imposes burdens on interstate commerce that are impermissible under the Commerce Clause. The NSALUDO burdens interstate freight traffic by preventing Union Pacific from alleviating a bottleneck that is affecting rail traffic throughout the western United States.

55. The NSALUDO imposes a burden on interstate rail traffic that is excessive in relation to the purported local benefits. The purported benefits are illusory or minimal because there is already an existing rail line on the same right-of-way.

56. The denial of a permit is not necessary to protect tribal fishing rights under treaties with the United States. As a federal agency, the U.S. Army Corps of Engineers has a fiduciary duty to take treaty rights into consideration in making its permit decision. The Corps

undertook that consideration here and concluded that construction of a second mainline in Mosier will not interfere with the exercise of treaty fishing rights.

57. Union Pacific thereby seeks declaratory and injunctive relief finding that the NSALUDO, as applied to the double-track project, is unconstitutional under the Commerce Clause of the United States.

PRAYER FOR RELIEF

WHEREFORE, Union Pacific demands judgment against Defendants as follows:

1) a declaration that the ICCTA preempts the permitting requirements under the NSALUDO, as applied to Union Pacific's proposed double track project, and that defendants have no jurisdiction or right to enforce the County Ordinance requirements against Union Pacific or otherwise interfere with this project;

2) a declaration that the permitting requirements under the NSALUDO, as applied to Union Pacific's proposed double track project, are unconstitutional under the Commerce Clause of the United States;

3) an injunction prohibiting the Defendants from enforcing the NSALUDO against Union Pacific's proposed double track project or otherwise interfering with that project;

4) such other and further relief as this Court may deem just and proper.

Dated this 10th day of January, 2017.

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