THE
NATIONAL LAW REVIEW

Faceoff with Federal Government Possibly Looming Following California Supreme Court CEQA Ruling; Cal High Speed Rail Project Also Vulnerable

Tuesday, August 22, 2017

Article By
Whitney Hodges
Sheppard, Mullin, Richter & Hampton LLP
Real Estate, Land Use & Environmental Law Blog
Litigation / Trial Practice
Utilities & Transport
Real Estate
California

In July 2017, the California Supreme Court determined the federal Interstate Commerce Commission Termination Act of 1995 (49 U.S.C. § 10101 *et seq*.) ("ICCTA") does not preempt the application of the California Environmental Quality Act of 1970 (Pub. Res. Code § 21000 *et seq*.) ("CEQA"), a state statute, to a state public entity railroad project on a rail line owned by that same entity, the North Coast Rail Authority ("NCRA"). *Friends of the Eel River* resolves a split among the California Courts of Appeal.[1] However, the decision may conflict with federal precedent and could eventually reach the Supreme Court. As the majority opinion and the dissent both emphasize, the decision creates a direct conflict with the federal Surface Transportation Board's ("STB") determination that ICCTA preempts any application of CEQA to California's state-owned, high-speed rail project.[2] Thus, the dispute over CEQA's application to High-Speed Rail may need to be resolved by the U.S. Supreme Court. Additionally, *Friends of the Eel River* introduces more legal complications for the planned $64 billion bullet train between Los Angeles and San Francisco, as it appears to require that project to comply with CEQA, which could lead to additional litigation.

The court ruled ICCTA's regulatory scheme, which preempts a state's imposition of "environmental preclearance requirements" that have the effect of preventing or delaying the operation of a privately-owned railroad project, does not apply to the governance of subdivisions of a sovereign state, here the NCRA. As applied to the NCRA, CEQA compliance is not a preempted state regulation at all, but a permissible act of self-governance on the part of the state.

Beginning its opinion with extensive federal preemption analysis, the court acknowledged the "national system of railroads is of peculiarly federal, not state concern" and that the goals of ICCTA would be diluted "if states could compel the rail industry to comply with the regulation of railroads that conflicted with federal law, or even to comply with supplementary regulation of railroads on a state-by-state basis." The court also recognized that "in the ordinary regulatory setting, in which a state seeks to govern private economic conduct, applying CEQA to condition state permission to go forward with railroad operations would be preempted." Nevertheless, distinguishing the facts before it, the court's decision hinged on the "presumption that, in the absence of unmistakably clear language, Congress does not intend to deprive the state of sovereignty over its own subdivisions to the point of upsetting the usual constitutional balance of state and federal powers."

Notably, the decision finds that "[p]reempting the state's ability, through its laws, to adopt general precepts governing its own development schemes in the sphere in which private owners would have freedom of action would leave the state, as owner, without the tools necessary to govern its own subdivision," and that "such preemption could deprive the state of the ability to make decisions that would carry out the goals the state embraced concerning development projects, including undertaking environmental mitigation or deciding not to undertake a project at all because of its environmental hazards."

The court then reasoned that the state, acting in accord with CEQA, is operating within "a sphere of regulatory freedom enjoyed by owners" permitted under ICCTA. Therefore, the state was free to voluntarily subject itself to self-governance, comparable to a private owner following its "internal corporate rules and bylaws" in guiding its

"market-based decisions." The court found that the federal law must allow "the state as owner [to] make its decisions based on its own guidelines rather than some anarchic absence of rules of decision."

Although the court overturned the appellate court's determination that ICCTA "categorically" preempts CEQA from applying to the state and its subdivisions, the court did uphold the First Appellate District's holding limiting the remedies available to petitioners under CEQA. Specifically, petitioners could not use CEQA to seek injunctive relief to directly enjoin Northwestern Pacific Railroad Co., the private freight operator, from conducting its freight operations because this "would not involve simply the state's autonomy and control over its subdivisions, but would constitute use of state law to restrict operations by a private rail carrier – a classic example of state regulation." The opinion also acknowledged that other CEQA remedies might also be pre-empted to the extent they impose "unreasonable burdens."

This case also determined the "market participant doctrine" exception to preemption was not fully on point, but was informative to the extent "CEQA can be seen as an expression of how the state, as proprietor, directs that a state enterprise will be run – an expression that can be analogized to private corporate bylaws and guidelines governing corporate subsidiaries."

Justice Leondra Kruger also signed the majority opinion, but then authored a separate concurrence, stressing it remains an open issue as to whether "particular CEQA remedies might be preempted by the ICCTA to the extent the remedy is one that unreasonably interferes with the jurisdiction of the [federal] Surface Transportation Board ("STB"), which has authorized service over the rail line in question."

Justice Carol Corrigan dissented, stating that finding "a law of general application" like CEQA to "be considered a 'regulation' of private activity, but not of public activity in the same sphere, appears to be unsupported by precedent" and it unfairly "forces the state to undertake a burden no private railroad owner must bear." Justice Corrigan concluded her dissent by calling into question the majority's "wisdom" in issuing a decision that created a "direct conflict with the state views of STB."

Practical Points

Friends of the Eel River has consequences far beyond court's utilization of the principle of strict statutory construction when determining federal preemption. As alluded to above, this decision creates a conflict with federal precedent that could lead to a faceoff with the federal government. As the majority opinion and Justice Corrigan's dissent both emphasize, the decision creates a direct conflict with STB's own determination that ICCTA preempts any application of CEQA to California's state-owned, high-speed rail project.[3] Thus, the dispute over CEQA's application to High-Speed Rail may need to be resolved by the U.S. Supreme Court – the only court with the authority to issue an opinion contrary to and binding upon the California Supreme Court.

Additionally, *Friends of the Eel River* introduces more legal complications for the planned $64 billion bullet train between Los Angeles and San Francisco, as it appears to require compliance with CEQA and makes the project vulnerable to additional litigation.

---

[1] See *Town of Atherton v. Cal. High-Speed Rail Authority* (2014) 228 Cal.App.4th 314.

[2] California High-Speed Rail Authority – Petition for Declaratory Order, FD 35861, 2014 WL 7149612, at *7 (Dec. 12, 2014). A three-judge panel of the U.S. Court of Appeals for the Ninth Circuit recently denied rail opponents' petition for review of the STB's decision (*Kings City v. Surface Transportation Bd.*, No. 15-71780, 2017 WL 3278918, at *1 (9th Cir. Aug. 2, 2017), unpublished),

[3] California High-Speed Rail Authority – Petition for Declaratory Order, FD 35861, 2014 WL 7149612, at *7 (Dec. 12, 2014). A three-judge panel of the U.S. Court of Appeals for the Ninth Circuit recently denied rail opponents' petition for review of the STB's decision (*Kings City v. Surface Transportation Bd.*, No. 15-71780, 2017 WL 3278918, at *1 (9th Cir. Aug. 2, 2017), unpublished)