City of Spokane
City Council

TO: Council President Ben Stuckart
Council Member Breean Beggs

FROM: Brian McClatchey, Policy Advisor

DATE: July 21, 2016

RE: Proposed ban on shipment of oil by rail in prescribed areas of the City of Spokane

Issue.

You have asked me to provide analysis on a proposed ballot measure which would prohibit the shipment of oil by rail through portions of the City of Spokane. The memorandum also addresses the possibility of a pre-election challenge to the ballot measure.

Summary of Conclusions.

The Federal Railroad Safety Act of 1970 ("FRSA") contains broad and express preemptive language, as well as two narrow exceptions. There is likely a very small chance that this proposed ordinance would survive a legal challenge based on the preemption provision of the FRSA.

The Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. § 701 et seq. ("ICCTA"), also likely preempts the proposed ballot measure.

FRSA Preemption.

Generally, courts begin preemption analysis

> "with the assumption that the historic police powers of the States are not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." This assumption applies with "particular force" when Congress legislates in a field traditionally occupied by state law. On the other hand, the assumption applies with less force when Congress legislates in a field with "a history of significant federal presence." "Historically, federal regulation of railroads has been extensive."[1]

[1] *Elam v. Kansas City S. Ry.*, 635 F.3d 796, 803-4 (5th Cir. 2011) (citations omitted).

The responsibility for promulgating federal rail safety regulations was entrusted by Congress to the Federal Railroad Administration under the Federal Railroad Safety Act of 1970 ("FRSA").[2] The FRSA provides that "[l]aws, regulations, and orders related to railroad safety . . . shall be nationally uniform to the extent practicable."[3] The Washington Supreme Court has recognized that "[t]he FRSA preempts local regulations that impact interstate and intrastate railroad safety."[4]

By this language, Congressional intent is to expressly preempt state and local railroad regulations.[5] However, "pre-emption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law."[6] And in order to determine whether a state or local law is preempted, a court's inquiry will not look at the general subject of railroad safety, but will "rather [be] focused on the specific subject matter contained in the federal regulation."[7]

Exceptions to preemption

The FRSA's broad preemption language also contains two exceptions. First, "[a] State[8] may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation . . . prescribes a regulation or issues an order covering the subject matter of the State requirement."[9]

Under the second exception,

> 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.[10]

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[2] 49 U.S.C. § 20101 et seq.
[3] 49 U.S.C. § 20106(a)(1).
[4] *City of Seattle v. Burlington Northern R.R.*, 145 Wn.2d 661, 674 (2003).
[5] *CSX Transportation v. Easterwood*, 507 U.S. 658, 663-4 (1993).
[6] *Id.* at 664.
[7] *So. Pac. Transp. Co. v. Oregon P.U.C.*, 9 F.3d 807, 812-813 (9th Cir. 1993).
[8] As a threshold matter, although the FRSA refers only to state, and not municipal, regulations, courts have concluded that municipal regulations should be treated in the same way with respect to the exceptions from preemption, rather than wholly and categorically preempted. *See City of Seattle v. Burlington Northern Ry. Co.*, 145 Wn.2d 661 (2002); *Burlington Northern R.R. v. City of Connell*, 811 F.Supp. 1429 (E.D.Wa. 1993) ("The mere fact that [FRSA] allows state regulation (while remaining silent regarding municipal authority) does not demonstrate that local governments are expressly precluded from utilizing the power conferred by that section."). The remainder of this memo assumes for purposes of this analysis that municipal regulations are analyzed in identical fashion as are state regulations.
[9] 470 F.Supp.2d at 866-67.
[10] 49 U.S.C. § 20106(a)(2).

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These two exceptions are analyzed in turn.

1. **Has DOT issued regulations or orders covering the subject matter of the proposed ordinance?**

We would have to examine "the specific subject matter contained in the federal regulation" to determine whether the Secretary of Transportation has issued a regulation or order which precludes the use of this exception in the case of the proposed ballot measure. The subject matter of the proposed ordinance is the prohibition on the shipment of oil by rail near sensitive land uses and natural features.

The DOT (through FRA) has issued numerous regulations or orders concerning the shipment of oil by rail, such as:

FRA Emergency Order No. 30, Notice No. 1 (April 17, 2015) (Establishing a Maximum Operating Speed of 40 mph in High-Threat Urban Areas for Certain Trains Transporting Large Quantities of Class 3 Flammable Liquids;

PHMSA Notice 15-7: Hazardous Materials: Emergency Response Information Requirements;

FRA/PHMSA Safety Advisory on Information Requirements Related to the Transportation of Trains Carrying Specified Volumes of Flammable Liquids;

FRA Safety Advisory 2015-01: Mechanical Inspections and Wheel Impact Detector Standards for Trains Transporting Large Amounts of Class 3 Flammable Liquids;

Draft Final Rule (Fed. 5, 2015), on the safe transportation of flammable liquids (including crude oil) by rail submitted to the Office of Management and Budget for formal review;

Emergency Order OST-2014-0067 (May 13, 2014), concerning coordination between the rail industry, State Emergency Response Commissions and local first responders;

Safety Advisory 2014-01 (May 7, 2014), strongly urging those shipping or offering Bakken crude oil to use tank car designs with the highest level of integrity available in their fleets. In addition, PHMSA and FRA advise offerors and carriers to the extent possible to avoid the use of older legacy DOT Specification 111 or CTC 111 tank cars for the shipment of Bakken crude oil;

Emergency Restriction / Prohibition Order OST-2014-0067 (May 7, 2014), requiring all railroads operating trains containing large amounts of Bakken crude

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oil (1,000,000 gallons or more) to notify State Emergency Response Commissions (SERCs) about the operation of these trains through their states;

Emergency Restriction/Prohibition Order (Feb. 25, 2014), requiring stricter testing, classification and packaging requirements for the transport of crude oil by rail; and

Emergency Order No. 28, (Aug. 2, 2013), requiring railroads to properly secure rolling stock (locomotives and freight cars) to prevent derailment of trains carrying flammable liquid. The Order provides directives about unattended trains, train securement, the use of locks and the reverser on a locomotive, communication between train dispatchers and train crews, recording information, daily job briefings, and notification to railroad employees.

It appears that DOT has issued regulations and orders which "substantially subsume" the hazards which the propose measure seeks to mitigate. Therefore, it does not appear that the first exception from FRSA preemption is available in this case.

2. Does the proposed ordinance come within the second exception to FRSA preemption?

Even if DOT has issued regulations or orders covering the same subject matter as the proposed measure, federal preemption may not apply if the proposed measure (1) is necessary to eliminate or reduce an essentially local safety or security hazard; (2) is not incompatible with a law, regulation, or order of the United States Government; and (3) does not unreasonably burden interstate commerce."[11] Note that failure to meet any of these three elements is fatal to the applicability of the exception.

Is the proposed ordinance necessary to eliminate or reduce an essentially local safety or security hazard?

Assuming that the Council's statements of the purpose for this ordinance are properly focused on eliminating or reducing the hazard, the threshold question is whether the hazards here, namely, the proximity of oil trains to schools, hospitals, the downtown area, and the Spokane River, are "essentially local"?

For courts in the 9th Circuit, "the word 'essentially' requires us to inquire into the nature of the hazard itself to determine whether it is the type of hazard that is properly dealt with on a local level."[12] In the 9th Circuit, an "essentially local

[11] 49 USC 20106(a)(2) (emphasis added).

[12] *Union Pac. R.R. Co. v. Cal. PUC,* 346 F.3d 851, 860 (9th Cir. 2003) (emphasis added) (*citing Burlington N. & Santa Fe Ry. v. Doyle*, 186 F.3d 790, 795 (7th Cir. 1999); *S. Pac. Co. v. Arizona*, 325 U.S. 761, 767 (1945); *Nat'l Ass'n of Regulatory Util. Comm'rs v. Coleman*, 542 F.2d 11, 14-15 (3d Cir. 1976); *Norfolk & W. Ry. v. Pub. Utils. Comm'n*, 926 F.2d 567, 571 (6th Cir. 1991); *Burlington N. R. Co. v. State*, 805 F. Supp. 1522, 1528 (D. Mont. 1992); *Union Pac. R.R. v. Pub. Util. Comm'n*, 723 F.Supp. 526, 530 (D. Or. 1989)).

hazard" is "one which is not 'adequately encompassed within national uniform standards.'"[13]

The facts of *Union Pacific* illustrate the rule's application to conditions which were claimed to be an "essentially local hazard": an abnormally high derailment rate at the site characterized by a combination of a steep grade and a sharp curve. The *Union Pacific* court found nothing "essentially local" about a site with both a steep grade and a sharp curve – those sites occur all over the country, which means that it is the type of hazard which is "adequately encompassed within national uniform standards":

> First, the high derailment rate is, itself, unremarkable: all steep grades and sharp curves increase the risk for derailment. . . . Moreover, although a high derailment rate may be evidence of an existing hazard, it says nothing about the nature of the hazard itself. . . . There are many curves in the United States that share the same characteristics as the one at issue here; there is nothing "fundamentally" local about the steep grade/sharp curve combination.[14]

Notably, however, the *Union Pacific* court expressly declined to consider whether environmental factors could play a stronger role in the determination of whether a hazard is "essentially local":

> We decline to determine whether environmental consequences can ever be considered in determining whether a condition is an "essentially local safety hazard" because in this case they clearly cannot be. As the United States argues in its brief, considering environmental consequences without looking to the hazard itself would allow a state to regulate the track strength or any other potential concern in tunnels and on bridges in every population center. This broad definition would effectively prohibit the FRA from ever being able to preempt state law, contrary to Congress's stated goal of uniformity in railroad safety to the extent practicable. To preserve Congress's express intention, we thus conclude that the external concerns must also be fundamentally local in nature.[15]

In other words, environmental concerns must also be of the type which are not "adequately encompassed within national uniform standards." Applying that standard, the *Union Pacific* court addressed the specific environmental concern:

> The external risk in this case is the chance of severe environmental damage to the Sacramento River in the event of a derailment.

[13] *Id.*
[14] *Id.* at 860-861.
[15] *Id.* at 861-62.

> While undoubtedly the damage is local in that the consequences of a derailment will affect only those dependent upon the river, the risk is not one that is fundamentally different from those of other locales. Indeed, the Railroads note that more than 10,000 miles of track are adjacent to waterways in North America: individuals dependent on their local waterway in every case would be devastated should an accident occur.[16]

The City could argue that the combination of factors of a sensitive nature which are unique to the City of Spokane are, when viewed together, an "essentially local hazard" under the second exception to FRSA preemption. However, there may be little chance of success on that argument, because arguably the potential for the devastation of hospitals, schools, the downtown business district, and the Spokane River due to a derailment is "adequately encompassed within national uniform standards" as these types of hazards are found all over the state and all over the country, and can therefore be addressed by the use of a national uniform standard.

Although the danger of the contamination of the Spokane Valley-Rathdrum Prairie Aquifer, particularly due to its strong hydrologic connection with the Spokane River, could be seen as an "essentially local hazard," as the *Union Pacific* court pointed out "more than 10,000 miles of track are adjacent to waterways in North America: individuals dependent on their local waterway in every case would be devastated should an accident occur."[17] In addition, the fact that the aquifer stretches across parts of north Idaho and eastern Washington could be used to point to the greater utility of a "uniform national standard" to protect the region's water quality rather than local regulations. All that said, the aquifer does exist in only one location, and the threat of its contamination from oil spills, particularly in combination with the rail line's proximity to other essential facilities and our downtown core, may be an "essentially local hazard" for purposes of an exception from FRSA preemption.

Cases outside the 9th Circuit have found that a combination of factors can, in the aggregate, constitute an "essentially local hazard." For example, the City of Orr, Minnesota claimed that the combination of the following constituted an "essentially local hazard": (1) the track's proximity to a lake could cause contamination from spillage in case of a derailment; (2) the swampy soil upon which the track is built could be a problem for restructuring and rebuilding track in the future; (3) the close proximity of propane tanks close to the tracks created a risk of explosion; (4) churches and businesses were dangerously located between 67 and 278 feet from tracks; and (5) the extreme seasonal temperature changes in northern Minnesota limited possible alternatives to speed regulation such as relocation of tracks.[18]

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[16] *Id.* at 862.
[17] *Id.*
[18] *Duluth Winnipeg & Pac. Ry. Co. v. City of Orr*, 529 F.3d 794 (8th Cir. 2008)

While the district court upheld the city's train speed regulation because the factors listed above together constituted an "essentially local hazard," the 8th Circuit Court of Appeals disagreed, holding that the City of Orr's train speed regulations were preempted by the FRSA. The court found insufficient evidence to "support a conclusion that this combination of conditions could not exist in other places in the state or elsewhere in the country."[19] Also, each of the five factors on which the local regulation was focused were adequately addressed by the FRSA. In the 8th Circuit, as in the 9th, "essentially local safety hazards" are "local situations which are not statewide in character and not capable of being adequately encompassed within national uniform standards."[20]

A Minnesota state court of appeals case concluded that a combination of factors met the "essentially local hazard" exception to FRSA preemption. There, the court found that a segment of rail line which ran down the middle of a street in downtown Shakopee, Minnesota was an "essentially local hazard" which justified more stringent local regulation of train speed, even though train speed regulations are contained within the FRSA.[21] This was because the rail segment in question: ran down the middle of a city street with parallel lanes of traffic on both sides and a high volume of pedestrian and vehicular traffic; contained ten grade crossings within one mile; had trains running in close proximity to traffic and buildings; and is the only place in Minnesota exhibiting this unique combination of factors.[22] The *Shakopee* court agreed that this combination of factors made that one-mile stretch of track an "essentially local" hazard.

The *Shakopee* court also noted a federal district court decision in West Virginia, in which the court held that a crossing with extremely limited sight lines and a regularly malfunctioning warning signal might constitute an essentially local safety hazard, especially if the road provides motorists with the only means of access to some location.[23] As well, local regulation has escaped FRSA preemption in the case of an unsignalled blind curve at one location in Pennsylvania.[24]

In some cases, a combination of factors can, when viewed cumulatively, be considered an "essentially local hazard" which justified an exception from FRSA preemption. It is simply not clear whether our situation in downtown Spokane would also qualify for this narrowly-applied exception, particularly given the language of *Union Pacific*.

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[19] 529 F.3d at 799.
[20] 529 F.3d at 798 (*citing Nat'l Ass'n of Regulatory Util. Comm'rs v. Coleman*, 542 F.2d 11, 14-15 (3d Cir. 1976); *CSX Transp., Inc. v. Williams*, 406 F.3d 667, 672 (D.C. Cir. 2005) (per curiam); *Norfolk & W. Ry. v. Publ. Utils. Comm'n*, 926 F.2d 567, 571 (6th Cir. 1991); *Union Pac. R.R. Co. v. Cal. PUC*, 346 F.3d 851, 860 (9th Cir. 2003)).
[21] *In re Speed Limit for the U.P. Ry.*, 610 N.W.2d 677 (Ct.App. Minn. 2000).
[22] 610 N.W.2d at 685.
[23] See *Stone v. CSX Transp., Inc.*, 37 F. Supp. 2d 789, 796 (S.D. W. Va. 1999).
[24] See *Monongahela C.R. Co. v. Pennsylvania P.U.C.*, 404 A.2d 1376 (Pa. 1979).

3. *Is the proposed ordinance incompatible with a law, regulation, or order of the United States Government?*

Arguably, the ICCTA is another law, regulation or order of the United States Government, with which the proposed measure is incompatible. It does not appear that this prong of the exception from FRSA preemption is met.

4. *Does the proposed ordinance unreasonably burden interstate commerce?*

In cases where local regulations affect interstate commerce (such as by slowing down trains), courts have dismissed as hypothetical or speculative the railroad's argument that a multiplicity of these local regulations will, when viewed in the totality or in a cumulative fashion, unreasonably burden interstate commerce.

For example, the *Shakopee* court acknowledged that "[t]he potential cumulative effect of relatively insignificant burdens on interstate commerce may be enough to invalidate a state regulation. But a strict application of that rule to every essentially local safety hazard that otherwise meets the requirements of the savings clause would entirely rob the exception of its potency."[25] However, the proposed measure may not impose "relatively insignificant burdens," because of its prohibition on the shipment by rail of certain types of cargo through certain areas of Spokane. A determination of the impacts or burdens on interstate commerce would likely require a court to undertake a fact-intensive inquiry to determine whether this prong of the exception from FRSA preemption is met.

ICCTA Preemption.

Under the ICCTA, the Surface Transportation Board (STB) has exclusive jurisdiction over

> transportation by rail carriers, and the remedies . . . with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
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> 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.[26]

Further, "the remedies provided . . . with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or

[25] *Id.* at 686 (*citing Katzenbach v. McClung*, 379 U.S. 294, 300 (1964)).
[26] 49 U.S.C. § 10501(b) (emphases added).

State law."[27] "Congress gave the ICCTA broad preemptive power to enable uniform regulation of interstate rail operations."[28] The Washington Supreme Court has recognized that "[t]he express language of the ICCTA imparts to the STB broad federal authority over all interstate and intrastate railroad activities and operations."[29]

Because the proposed measure would attempt to regulate rail practices, routes, and operations, it is highly likely that a city ordinance which prohibits the shipment by rail of certain cargo would be preempted by the ICCTA.

Pre-election challenge.

Courts in Washington are reluctant to entertain pre-election challenges to ballot measures.[30] Generally, pre-election challenges fall under three types: (1) substantive invalidity; (2) procedural invalidity; and (3) "where the subject matter of the measure was not proper" for legislation.[31] Only the second and third are entertained by Washington courts. For purposes of this memorandum, only the third type will be reviewed, as there would likely be no claim that the proper procedures have not been followed in placing the measure on the ballot.

Pre-election subject matter challenges to ballot measures make the claim that "the subject matter of the measure [is] not proper for []legislation."[32] This "prudential exception" has been used to prevent ballot measures from going forward where the goal or aim of the legislation is clearly beyond the power of the legislative body. For example, a citizens' initiative which sought "'direct democracy' by means of a federal, nationwide initiative process to complement the current congressional system" was found to be beyond the power of the people to enact because it attempted to enact federal law.[33]

Another, more closely analogous, case in which a ballot measure was struck down in a pre-election subject matter challenge involved a citizens' initiative to stop the construction of I-90 over Lake Washington.[34] The Supreme Court stopped the measure from proceeding as it was beyond the legislative authority of the people of the City of Seattle. This is because a city's legislative actions cannot conflict with state law: "'The fundamental proposition which underlies the powers of municipal corporations is the subordination of such bodies to the

[27] *Id.*
[28] *City of Seattle v. Burlington Northern R.R.*, 145 Wn.2d 661, 669 (2003).
[29] 145 Wn.2d at 674.
[30] "It has been a longstanding rule of our jurisprudence that we refrain from inquiring into the validity of a proposed law, including an initiative or referendum, before it has been enacted." *Coppernoll v. Reed*, 155 Wn.2d 290, 297 (2005) (citations omitted).
[31] *Id.* at 297-298.
[32] *Id.* at 299.
[33] *Id.* at 323 (*citing Philadelphia II v. Gregoire*, 128 Wn.2d 707, 710 (1996)).
[34] *See Seattle Building & Constr. Trades Council v. Seattle*, 94 Wn.2d 740 (1980).

supremacy of the legislature.'"[35] The court noted that the freeway was funded with state and federal dollars, and that state law "provides the exclusive method . . . for determining whether a limited access route will be built, and if so, where it will be located."[36] Most closely on point for purpose of the present issue, the court in *Seattle Building & Construction Trades Council* pointed out:

> The obvious intent and thrust of Initiative 21, as the Superior Court noted, is to forbid continuation of that project and all other limited access facilities which might be proposed across Lake Washington. This is not within the power of the City to do. As between state and local governments, the State has plenary control over its limited access facilities, and local governments have only those rights and powers which the legislative has seen fit to accord them.[37]

Simply put, "while the inhabitants of a municipality may enact legislation governing local affairs, they cannot enact legislation which conflicts with state law."[38] This reasoning can be applied, *a fortiori*, to the present situation, in which Congress has reserved for a federal agency sole authority to regulate in the areas of railroad safety and security. After all, if the city's powers must yield to the supremacy of the state legislature, the argument is that, as between a city and a federal government agency which regulates in an area in which Congress has clearly expressed the intent to completely pre-empt state and local regulations, a city ordinance on that same topic is beyond the legislative power of the municipality. This argument verges closely on a substantive challenge, which courts simply do not entertain. However, a pre-election challenge to this ballot measure is possible.

Conclusion.

Because both "the Interstate Commerce Commission Termination Act of 1995 (ICCTA) and the Federal Rail Safety Act of 1970 (FRSA) unambiguously express a clear congressional intent to regulate railroad operations as a matter of federal law"[39], the proposed ballot measure is highly likely to be found to be preempted by federal law should it be enacted by the people.

Although there is strong judicial reluctance to engage in pre-election review of ballot measures, there is an argument that a pre-election subject matter challenge to these proposed rail regulations could succeed to keep the measure off the ballot, on the basis that these proposed regulations are not "legislative

[35] *Id.* at 747 (*quoting* Trautman, "Legislative Control of Municipal Corporations in Washington," 38 WASH.L.REV. 743 (1963)).
[36] *Id.* at 747.
[37] *Id.* at 748.
[38] 185 Wn.2d 97, 108.
[39] 145 Wn.2d at 663.

matters that are within the authority of the city"[40] due to the fact that the proposed measure arguably conflicts with federal law.

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[40] *Spokane Entrepreneurial Center v. Spokane Moves to Amend the Constitution*, 185 Wn.2d 97, 107 (2016)