



Confederated Tribes and Bands
of the Yakama Nation

Established by the
Treaty of June 9, 1855

April 24, 2020

300561

Electronically Filed (<https://prod.stb.gov/proceedings-actions/e-filing/>)

Cynthia T. Brown
Chief of the Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

ENTERED
Office of Proceedings
April 24, 2020
Part of
Public Record

Re: ASSOCIATION OF AMERICAN RAILROADS – PETITION FOR DECLARATORY ORDER
(DOCKET NO. FD 36369)

Dear Ms. Brown:

I write on behalf of the Confederated Tribes and Bands of the Yakama Nation (“Yakama Nation”) in response to the Surface Transportation Board’s (“STB”) invitation for comments on the Association of American Railroads (“AAR”) November 27, 2019 petition for declaratory order (“Petition”). AAR asks STB to declare that, pursuant to the Interstate Commerce Commission Termination Act (“ICCTA”), “incidental discharges from rail cars in transit” are not subject to the Clean Water Act’s (“CWA”) prohibition on point source discharges. The Yakama Nation strongly urges STB to deny the Petition.

The Yakama Nation is a sovereign and original Native Nation federally-recognized under the Treaty with the Yakamas, U.S. – Yakama Nation, June 9, 1855 (“Treaty of 1855”).¹ The Yakama Nation has Treaty-reserved rights in waterways that are affected by incidental discharges from rail cars. As such, the Yakama Nation has significant interest in STB’s disposition in this matter.

The CWA provides a number of tools to protect water quality and, by extension, the Yakama Nation’s Treaty-reserved rights. Most relevant in this matter is the National Pollutant Discharge Elimination System (“NPDES”) permitting regime. Under the CWA, all discharges of pollutants from a point source into navigable waters are prohibited unless the discharger obtains a NPDES permit. This process is designed to ensure that discharges will comply with tribal, federal, and state water quality standards.

Pursuant to prevailing legal interpretations and decisions, STB does not possess the authority to grant AAR’s request for declaration that the NPDES permitting regime is “preempted” by ICCTA. Rather, it is the role of federal courts, not federal agencies, to determine whether two federal statutes are inconsistent with one another. Likewise, it is

¹ 12 Stat. 951 (June 9, 1855, ratified March 8, 1859, proclaimed April 18, 1859).

the judiciary's role to determine how to harmonize statutes that are apparently inconsistent. In any event, the CWA and ICCTA can and should be harmonized in a manner where both laws are given effect. Accordingly, STB should deny the Petition and refrain from declaring that incidental discharges from moving rail cars are not subject to the CWA's prohibition on point source discharges into navigable waters.

1. The Yakama Nation has significant interest in ensuring that federal water quality laws remain applicable to railroads.

Since time immemorial, the original, free, and independent Native Nations that were later confederated as the Yakama Nation have depended on aquatic resources for cultural, spiritual, and economic wellbeing. In Article III of the Treaty of 1855, the Yakama Nation expressly reserved the right to take fish “in all the streams, where running through or bordering [the Yakama Reservation]” and at “usual and accustomed places” outside of the Yakama Reservation.² The Yakama Nation's treaty negotiators knew that securing this right was crucial to guaranteeing the vitality of their people. For the Yakama Nation, the taking of fish was “not much less necessary...than the atmosphere they breathed.”³

The Yakama Nation's Treaty rights must be “understood as bearing the meaning that the Yakamas understood [them] to have in 1855.”⁴ With respect to taking fish, the Yakamas understood that they “would forever be able to continue the same off-reservation...fishing practices as to time, place, method, species and extent as they had or were exercising.”⁵ Rather than securing a mere “equal opportunity” to catch fish, then, the Treaty of 1855 guarantees to the Yakama Nation a portion of the harvest.⁶ The guarantee to a portion of the harvest is “worthless without harvestable fish.”⁷ Therefore, the Treaty of 1855 prohibits the destruction of salmon runs and habitats caused by manmade despoliation.⁸ The federal government, including STB, has a fiduciary trust obligation to ensure that the Yakama Nation's Treaty rights “are given full effect.”⁹

Railway lines run parallel to two rivers in which the Yakama Nation has Treaty-reserved fishing rights: the Yakima River, which passes through the Yakama Reservation, and the Columbia River, where many of the Yakama Nation's most significant “usual and accustomed places” are located.¹⁰ Freight trains carrying pollutants that are toxic to fish (and the humans that consume them) regularly travel these railway lines. The pollutants at

² *Id.* at 953.

³ *U.S. v. Winans*, 198 U.S. 371, 381 (1905).

⁴ *Wash. State Dept. of Licensing v. Cougar Den, Inc.* 139 S. Ct. 1000, 1011 (2019). (citing *Winans*, 198 U.S., at 380-81; *Seufert Brothers Co. v. United States*, 249 U.S. 194, 196-98 (1919); *Tulee v. Washington*, 315 U.S. 681, 683-85; *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 677-78 (1979)).

⁵ See *United States v. Washington*, 384 F. Supp. 312, 381 (W.D. Wash. 1974) (*aff'd*, 520 F.2d 676 (9th Cir. 1975)).

⁶ *Washington State Commercial Passenger Fishing Vessel*, 443 U.S. at 681-82.

⁷ See *United States v. Washington*, 827 F.3d 836, 852 (9th Cir. 2016) (*aff'd by an equally divided court*, *Washington v. United States*, 138 S. Ct. 1832 (2018)).

⁸ See *Id.* at 865.

⁹ See *Northwest Sea Farms v. United States Army Corps of Eng'rs*, 931 F. Supp. 1515, 1520 (W.D. Wash. 1996) (citing *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942)).

¹⁰ See *United States v. Washington*, 384 F. Supp. at 382 (finding that the Yakama Nation's “usual and accustomed” fishing areas include the “Columbia River area”).

issue in *Sierra Club v. BNSF Ry. Co.*, No. 2:13-cv-00967 (W.D. Wash. Sep. 14, 2016), which seems to have prompted the Petition, were coal and petroleum coke. According to a study by Burlington Northern Santa Fe Railroad, each train car carrying coal releases approximately 500 to 2,000 pounds of coal dust per trip.¹¹ Conceivably, much of this release will fall into nearby waterways. A number of studies indicate that coal in particular may be harmful to anadromous fish and other aquatic life.¹² Coal can increase levels of acidity, salinity, trace metals, hydrocarbons, chemical oxygen demand, and macronutrients, all which disrupt the delicate ecosystem that fish rely on.¹³

Pursuant to the Treaty of 1855, the Yakama Nation has legally-protectable rights to viable fish populations and habitat in its Treaty fishing areas. The incidental discharge of pollutants into the Yakima and Columbia Rivers creates a risk of adverse impacts to fish populations and habitats and, consequently, the Yakama Nation's exercise of its Treaty-reserved rights. A ruling that railroad companies may operate free from restrictions placed on all other parties with respect to discharges would exacerbate this risk. Accordingly, the Yakama Nation has a significant interest in ensuring that any STB decision issued in this matter does not ignore or otherwise allow any impermissible interference with the Yakama Nation's Treaty-reserved rights.

2. The CWA protects the Yakama Nation's Treaty-reserved fish resources by prohibiting unpermitted discharges into navigable waters.

By statute, the CWA principal objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."¹⁴ To that end, the CWA prohibits the discharge of *any* pollutant by *any* person except in compliance with applicable permitting regimes, including NPDES.¹⁵ A discharge of a pollutant is defined as "any addition of any pollutant to navigable waters from any point source."¹⁶ A point source is "any discernible, confined and discrete conveyance," including "rolling stock."¹⁷

NPDES permits impose certain restrictions on discharges, including effluent limitations.¹⁸ Effluent limitations ensure that discharges comply with applicable tribal, state, and federal water quality standards.¹⁹ These standards designate particular uses for waterbodies, such as fishing, anadromous fish passage and spawning, and resident fish life.²⁰ Tribal and state governments, as well as the Environmental Protection Agency ("EPA"), then establish criteria in their water quality standards necessary to protect the designated uses.²¹ These

¹¹ *Coal Dust Frequently Asked Questions*, BURLINGTON NORTHERN SANTA FE RAILROAD, <http://www.coaltrainfacts.org/docs/BNSF-Coal-Dust-FAQs1.pdf> (last accessed Apr. 22, 2020).

¹² *Coal Dust Threatens Cascadia's Water and Wildlife*, SIGHTLINE, <https://www.sightline.org/2016/05/12/coal-dust-threatens-cascadia-water-and-wildlife/> (last accessed Apr. 21, 2020). *See also* Coal Dust, *supra*.

¹³ *See Id.*

¹⁴ 33 U.S.C. § 1251(a).

¹⁵ 33 U.S.C. § 1311(a).

¹⁶ 33 U.S.C. § 1362(12).

¹⁷ *Id.* at (14).

¹⁸ ENV'T'L PROT. AGENCY, NPDES PERMIT WRITERS' MANUAL, 3-2 (Sept. 2010).

¹⁹ *See Id.* at 5-1, 6-1.

²⁰ *See* CONFEDERATED TRIBES OF THE WARM SPRINGS INDIAN RESERVATION OF OREGON, WATER QUALITY STANDARDS BENEFICIAL USES, AND TREATMENT CRITERIA, 26, (Sept. 28, 2001).

²¹ ENV'T'L PROT. AGENCY, WATER QUALITY STANDARDS HANDBOOK CHAPTER 3: WATER QUALITY CRITERIA, 1 (2017).

criteria prescribe the maximum level of a particular pollutant that may be present in the waterbody for the designated use to remain safe.²² For designated uses involving resident and anadromous fish, the criteria ensure that these aquatic species are both viable and safe to consume.²³

These tools operate together to protect water quality and aquatic species. This extends to critically important natural and cultural resources, e.g., waterbodies and fish stocks, the protection of which the United States guaranteed under the Treaty of 1855. As such, the Yakama Nation generally supports a broad application of the CWA and its permitting requirements. A determination that incidental discharges of coal and other toxic pollutants are not subject to the NPDES permitting requirements would significantly weaken the CWA's protection of Treaty-reserved resources.

3. Federal courts, not agencies, are the proper body to determine whether two federal statutes must be reconciled.

In *Epic Sys. Corp. v. Lewis*, the U.S. Supreme Court considered the level of deference owed to an opinion from a federal agency's general counsel that one federal statute displaced another.²⁴ The Court ultimately refused to grant the opinion any deference because the agency did not administer the purportedly displaced statute.²⁵ In reaching its conclusion, the Court noted that reconciliation of "distinct statutory regimes" is "a matter for the courts," not federal agencies.²⁶

A federal agency "eager to advance its statutory mission, but without any particular interest or expertise with a second statute, might...seek to diminish the second statute's scope in favor of a more expansive interpretation of its own—effectively 'bootstrap[ing] itself into an arena which it has no jurisdiction.'" ²⁷ The agency's interpretation of the second statute would potentially run counter to Congressional intent.²⁸ Therefore, "courts must exercise independent interpretive judgment" in reconciling two federal statutes.²⁹

The determination AAR requests, that ICCTA displaces the CWA's NPDES permitting scheme, is outside of STB's authority. Although the Petition does not implicate agency deference, the Court's logic in *Epic Sys. Corp.* is still applicable. ICCTA and the CWA are two distinct statutory regimes. STB is an agency "charged with the economic regulation of various modes of surface transportation" and administers statutes pertaining to interstate transportation, such as ICCTA.³⁰ The CWA, a statute intended to preserve water quality and administered by the EPA and the Army Corps of Engineers, is entirely outside of STB's purview.³¹ Therefore, reconciliation of ICCTA and the CWA, as mandated by the Court's

²² *Id.*

²³ *Id.* at 1-2.

²⁴ 138 S. Ct. 1612, 1629 (2018).

²⁵ *Id.*

²⁶ *Id.* (quoting *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 685-86 (1975)).

²⁷ *Id.* (quoting *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990)).

²⁸ *Id.*

²⁹ *Id.* (citing *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002)) (emphasis added).

³⁰ See *About STB*, SURFACE TRANSP. BD., <https://prod.stb.gov/about-stb/> (last accessed Apr. 21, 2020).

³¹ See 33 U.S.C. § 1251 *et seq.*

Epic Sys. Corp. decision, is a matter exclusively for federal courts to exercise their independent interpretive judgment over.

4. ICCTA and the CWA must be harmonized with one another to where both laws are given effect.

Federal statutes do not “preempt” one another.³² Instead, where a potential conflict exists “between two statutory schemes created by Congress for different reasons and at different times,” the question is whether the subsequent statute *repealed* the prior one.³³ Therefore, what AAR actually seeks is a determination from STB that ICCTA repealed the CWA. STB is not the appropriate body to make such a determination, as described above. However, a federal court considering this issue would not find that ICCTA repealed the CWA.

When a subsequent statute does not expressly repeal a prior statute (which, with respect to the CWA, ICCTA does not), courts consider whether the subsequent statute implicitly repealed the prior statute.³⁴ Implicit repeals are disfavored.³⁵ Congressional intent to repeal the prior statute “must be clear and manifest.”³⁶ Without such clear and manifest language, an implicit repeal will be found only “when the earlier and later statutes are irreconcilable.”³⁷ In the absence of an irreconcilable conflict, courts harmonize the two statutes, “giving effect to both laws if possible.”³⁸

Federal courts analyzing potential conflicts between ICCTA and federal environmental laws have employed this approach to harmonize the statutes. In *United States v. St. Mary’s Ry. W., LLC*, the District Court for the Southern District of Georgia considered whether ICCTA’s preemption provision foreclosed a state enforcement action under Section 404 of the CWA.³⁹ The court noted that the CWA’s prohibition against discharges is non-discriminatory and “meant merely to ‘protect[] the quality of our Nation’s waters for esthetic, health, recreational, and environmental uses.’”⁴⁰ Therefore, neither the CWA nor its prohibition on discharges creates “any conflict with ICCTA’s separate purpose in simplifying the regulatory regime over the railroad industry.”⁴¹ Accordingly, the court harmonized ICCTA and the CWA and held that the enforcement action could proceed.⁴²

In *Ass’n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, the Ninth Circuit Court of Appeals evaluated whether ICCTA preempted an air quality management district’s emissions rule as applied to operators of idling trains.⁴³ The court concluded that the rule did not have the force of federal law because the district had not yet submitted the rule to the EPA for

³² *Swinomish Indian Tribal Cmty. v. BNSF Ry Co.*, 951 F.3d 1142, 1153 (9th Cir. 2020).

³³ *Id.* (citing *Ray v. Spirit Airlines, Inc.*, 767 F.3d 1220, 1224 (11th Cir. 2014)).

³⁴ *Id.* at 1156.

³⁵ *Id.*

³⁶ *Id.* (quoting *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)).

³⁷ *Id.* (quoting *Morton v. Mancari*, 417 U.S. 535, 550 (1974)).

³⁸ *Id.* (quoting *BNSF Ry. Co. v. Cal. Dep’t of Tax & Fee Admin.*, 904 F.3d 755, 761 (9th Cir. 2018)).

³⁹ 989 F. Supp. 2d 1357, 1360-61 (S.D. Ga. 2013).

⁴⁰ *Id.* at 1362 (quoting *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 175 (2001)).

⁴¹ *Id.*

⁴² *Id.* at 1363.

⁴³ 622 F.3d 1094, 1096 (9th Cir. 2010).

approval under the Clean Air Act.⁴⁴ Accordingly, the court held that ICCTA preempted the district's rule.⁴⁵ However, the court noted that "to the extent that state and local agencies promulgate EPA-approved statewide plans under federal environmental laws...ICCTA generally does not preempt those regulations because it is possible to harmonize the ICCTA with those federally recognized regulations."⁴⁶ In other words, ICCTA does not preempt federal environmental laws, such as the CWA, even where those laws are administered by Native Nations and states.

These cases demonstrate that ICCTA does not "preempt" or otherwise repeal the CWA; rather, the two statutes must be harmonized with one another. No conflict exists between the purposes of ICCTA and the CWA and therefore a federal court may give effect to both statutes. In this context, that means that railroads are subject to both ICCTA's regulatory effect of streamlining rail operation *and* the CWA's requirement that incidental discharges require a NPDES permit.

5. STB should deny the Petition and reject the AAR's attempt to sidestep the requirements of the CWA.

The Yakama Nation is grateful for the opportunity to comment on this matter. STB's response to the Petition has the potential to affect Treaty-reserved resources and a federal law that serves to protect these resources. As such, the concerns described in these comments are of great importance to the Yakama Nation.

Accordingly, the Yakama Nation requests that STB deny the Petition because, as discussed above, a determination of whether ICCTA displaces the CWA's NPDES permitting requirement is exclusively within the purview of federal courts. Moreover, if a federal court were to decide this issue, ICCTA and the CWA must be harmonized in such a way that gives effect to both statutes. Railroads cannot rely on ICCTA to evade a federal law that every other person and corporation is subject to.

Sincerely,



DELANO SALUSKIN, CHAIRMAN
YAKAMA NATION TRIBAL COUNCIL

⁴⁴ *Id.* at 1098.

⁴⁵ *Id.*

⁴⁶ *Id.*

Certificate of Service

I, Marcus Shirzad, hereby certify that on April 24, 2020, a true and correct copy of the comment letter from the Confederated Tribes and Bands of the Yakama Nation directed to the Surface Transportation Board regarding the Petition for Declaratory Order in Finance Docket No. 36369 was served on all Parties of Record listed on the Service List available at <https://prod.stb.gov/proceedings-actions/dockets-and-service-lists/>.



Marcus Shirzad, Senior Attorney
Yakama Nation Office of Legal Counsel
P.O. Box 151, 401 Fort Rd.
Toppenish, WA 98948
Phone: (509) 865-7268
E-mail: marcus@yakamanation-olc.org

*Attorney for the Confederated Tribes
and Bands of the Yakama Nation*