FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BNSF RAILWAY COMPANY,
Plaintiff-Appellee,

v.

CLARK COUNTY, Washington; MITCH NICKOLDS, in his official capacity as Director of Community Development of Clark County; KEVIN A. PRIDEMORE, in his official capacity as Code Enforcement Coordinator of Clark County; RICHARD DAVIAU, in his official capacity as County Planner of Clark County,
Defendants,

COLUMBIA RIVER GORGE COMMISSION,
Intervenor-Defendant,

and

FRIENDS OF THE COLUMBIA GORGE, INC.,
Intervenor-Defendant-Appellant.

No. 20-35205

D.C. No.
3:18-cv-05926-BHS

BNSF RAILWAY COMPANY,
Plaintiff-Appellee,

v.

CLARK COUNTY, Washington; MITCH NICKOLDS, in his official capacity as Director of Community Development of Clark County; KEVIN A. PRIDEMORE, in his official capacity as Code Enforcement Coordinator of Clark County; RICHARD DAVIAU, in his official capacity as County Planner of Clark County,
Defendants,

FRIENDS OF THE COLUMBIA GORGE, INC.,
Intervenor-Defendant,

and

COLUMBIA RIVER GORGE COMMISSION,
Intervenor-Defendant-Appellant.

No. 20-35390

D.C. No. 3:18-cv-05926-BHS

OPINION

Appeal from the United States District Court
for the Western District of Washington
Benjamin H. Settle, District Judge, Presiding

Argued and Submitted March 4, 2021
Seattle, Washington

Filed August 24, 2021

Before: Johnnie B. Rawlinson and Jay S. Bybee, Circuit Judges, and Morrison C. England, Jr.,[*] District Judge.

Opinion by Judge Bybee

SUMMARY[**]

Interstate Commerce Commission Termination Act / Preemption

The panel affirmed the district court's summary judgment in favor of BNSF Railway Company, in BNSF's action seeking a declaration that the Interstate Commerce Commission Termination Act of 1995 ("ICCTA") preempts Clark County, Washington's permitting process.

Clark County asserted that BNSF needed to obtain a permit pursuant to the Clark County Code for a project to upgrade an existing track and construct a second track in the Columbia River Gorge. BNSF filed the complaint against Clark County and three named officials. The Columbia River

[*] The Honorable Morrison C. England, Jr., Senior United States District Judge for the Eastern District of California, sitting by designation.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Gorge Commission and the Friends of the Columbia River Gorge (collectively, "Appellants") intervened as defendants.

Under the ICCTA, the Surface Transportation Board ("STB") has exclusive jurisdiction over transportation of rail carriers and track construction, and except as otherwise provided in the statute, the remedies provided preempt the remedies provided under federal or state law. Appellants rested their argument on an exception this court has identified to the ICCTA's broad preemption provision: if an apparent conflict exists between the ICCTA and a federal law, then the courts must strive to harmonize the two laws, giving effect to both laws if possible.

Appellants first argued that the Columbia River Gorge National Scenic Area Act ("Gorge Act") is a federal environmental statute. The panel rejected this argument. The panel explained that the Gorge Act does not establish national environmental standards similar to those that states must implement through EPA-approved plans; it provides a framework for a commission of state-appointed officials to adopt a management plan and implement it through county land use ordinances. Critically, the Columbia River Gorge Commission retains final say over the approval and enforcement of the management plan and local county ordinances, and enforcement actions may be brought in state court. Because the Gorge Act is not comparable to the federal environmental laws referenced in *Town of Ayer, MA*, 5 S.T.B. 500, 2001 WL 458685 (2001), and nothing in the Gorge Act indicates that the local ordinances otherwise have the force and effect of federal law, the panel concluded that the Clark County Code is not exempt from preemption under the ICCTA.

Appellants also argued that even if the Gorge Act is not itself a federal environmental law, it is a federal law that authorizes the Clark County permitting process and must therefore be harmonized with the ICCTA. Rejecting this argument, the panel observed that nothing in either the Gorge Act's text or history supports reading the Gorge Act to shield the Clark County Code from ICCTA preemption.

COUNSEL

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Marcus Shirzad, Yakama Nation Office of Legal Counsel, Toppenish, Washington, for Amici Curiae Confederate Tribes and Bands of the Yakama Nation, Confederated Tribes of Warm Springs, and Confederate Tribes of the Umatilla Indian Reservation.

OPINION

BYBEE, Circuit Judge:

The question in this case is whether the Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (ICCTA) preempts Clark County's permitting process as applied to railroad construction in the Columbia River Gorge. For the reasons that follow, we conclude that it does. We affirm.

I. BACKGROUND

We begin with a brief overview of the relevant statutes before turning to the facts.

A. *Statutes*

1. ICCTA

"The Interstate Commerce Act [was] among the most pervasive and comprehensive of federal regulatory schemes." *Chicago & N.W. Transp. Co. v. Kalo Brick and Tile Co.*, 450 U.S. 311, 318 (1981); *see also City of Auburn v. United States*, 154 F.3d 1025, 1029 (9th Cir. 1998). Since the act's passage at the end of the nineteenth century, federal courts have "frequently invalidated . . . . many forms [of state regulation]." *Chicago & N.W. Transp. Co.*, 450 U.S. at 318.

In 1995, with the passage of the ICCTA , "Congress abolished the [Interstate Commerce Commission], revised the Interstate Commerce Act, and transferred regulatory functions under that Act to the [Surface Transportation Board]." *DHX, Inc. v. Surface Transp. Bd.*, 501 F.3d

1080,1082 (9th Cir. 2007). The changes made in the ICCTA continued "to reflect the direct and complete pre-emption of State economic regulation of railroads." H.R. Rep. No. 104-311 at 95 (1995). Under the ICCTA, the STB retains primary jurisdiction over:

> (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
>
> (2) 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). Such jurisdiction "is exclusive. Except as otherwise provided in this part, 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." *Id.*

2. The Columbia River Gorge National Scenic Area Act

The Columbia River is one of the most scenic rivers in North America, and comprises "a uniquely beautiful and rich area." *Columbia River Gorge United-Protecting People and Property v. Yeutter*, 960 F.2d 110, 111 (9th Cir. 1992). Forming much of the border between Oregon and Washington, the river is critical to the Indigenous Peoples of

the Northwest and essential to farming, logging, and other commercial interests; hydroelectric generation; and recreation. *See generally* Bowen Blair, Jr., *The Columbia River Gorge National Scenic Act: The Act, Its Genesis, and Legislative History*, 17 Envtl. L. 863, 868–74 (1987). The striking Columbia River Gorge Scenic Area (Scenic Area) spans some eighty miles of the river.

In 1986, to facilitate cooperative regional administration of the Scenic Area, and in accordance with the Constitution's Compact Clause, U.S. Const. art. I, § 10, cl. 3, Congress consented to creation of the Columbia River Gorge Compact (Gorge Compact) between the State of Oregon and the State of Washington. Columbia River Gorge National Scenic Area Act, Pub. L. No. 99-663, 100 Stat. 4274 (1986), codified at 16 U.S.C. §§ 544–544p (Gorge Act). The purposes of the Gorge Act are: "(1) to establish a national scenic area to protect and provide for the enhancement of the scenic, cultural, recreational, and natural resources of the Columbia River Gorge; and (2) to protect and support the economy of the Columbia River Gorge area by encouraging growth to occur in existing urban areas and by allowing future economic development in a manner that is consistent with paragraph (1)." 16 U.S.C. § 544a.

As a condition of its consent, Congress required the inclusion of a number of provisions in the Gorge Compact, four of which are relevant here. *Id.* §§ 554c(a)(1)(A); 554*o*(d)). First, Congress required Oregon and Washington to "establish by way of an interstate agreement a regional agency known as the Columbia River Gorge Commission . . . . The Commission shall carry out its functions and responsibilities in accordance with the provisions of the interstate agreement . . . and shall not be considered an

agency or instrumentality of the United States for the purpose of any Federal law." *Id.* § 554c(a)(1)(A); *see also* § 544c(b) ("No contract, obligation, or other action of the Commission shall be an obligation of the United States or an obligation secured by the full faith and credit of the United States."). Second, Oregon and Washington were required to "provide to the Commission, State agencies, and the counties under State law the authority to carry out their respective functions and responsibilities." *Id.* § 554c(a)(1)(B). Third, Congress directed Oregon and Washington to appoint voting members of the Commission. *Id.* § 554c(a)(1)(C).[1] Fourth, the Commission was directed to adopt a management plan, *id.* § 544d(c), and, in turn, each county in the Scenic Area was required to "adopt a land use ordinance consistent with the management plan" and subject to the Commission's approval. *Id.* §§ 544e(b); 544f(h).[2]

Under the Gorge Act, the Secretary of Agriculture has specified responsibilities with respect to the Commission's management plan. The Secretary reviews the management plan for consistency with the Gorge Act, *id.* § 544d(f), and

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[1] The Gorge Act instructs the states to appoint one member from each of the six counties in the Scenic Area, three members from Oregon, and three members from Washington. *Id.* § 554c(a)(1)(C)(i)–(iii). The Secretary of Agriculture appoints "one ex officio, nonvoting member who shall be an employee of the Forest Service." *Id.* § 554c(a)(1)(C)(iv). "Except for the ex-officio member . . . the members and officers and employees of the Commission shall not be officers or employees of the United States for any purpose." *Id.* § 544c(a)(5).

[2] To provide a uniform system of laws, the Commission was to adopt regulations "consistent with the more restrictive statutory provisions of either State." *Id.* § 544c(b). Prior to the Gorge Compact, "Oregon and Washington . . . [had] very dissimilar land use and environmental policies." Blair, 17 Envtl. L. at 872.

local land use ordinances for consistency with the management plan, *id.* § 544f(i)–(j). The Secretary also creates "land use designations" for certain "special management areas," *id.* §§ 554d(c)(4); 544f(e)–(f), which may include both federal and non-federal land, *id.* § 544f(a)(1), (f)(1). The Commission must "incorporate without change" the Secretary's land use designations for federal lands. *Id.* § 544d(c)(4). It may, however, reject the Secretary's suggested modifications to the management plan for non-federal land so long as it does so by a two-thirds vote. *Id.* §§ 544d(f)(3); 544f(k). If the Commission overrides the Secretary's objections to a county's land use ordinance in a special management area, the county may be denied access to certain federal funds. *Id.* §§ 544f(n), 544n(c). In general, the Commission's management plan must protect agricultural lands, forest lands, open spaces, and recreational resources and must prohibit "major development actions," industrial development outside urban areas, and commercial and residential developments that "adversely affect[] the scenic, cultural, recreation or natural resources of the scenic area." *Id*. § 544d(d)(1)–(9).

3. Gorge Compact, Management Plan, and County Ordinances

Oregon and Washington ratified the Compact in accordance with Congress's conditions as set forth in the Gorge Act and appointed members of the Commission. *See* Wash. Rev. Code § 43.97.015; Or. Rev. Stat. § 196.150. In turn, the Commission developed, and has updated, a detailed

management plan for the Scenic Area.[3] Clark County accordingly enacted land use ordinances consistent with the management plan for portions of the Scenic area within Clark County, Washington. *See* Clark Cnty. Code ch. 40.240. Relevant here, the Clark County Code requires a developer to submit a permit application for its approval "[p]rior to initiating any use or development." *Id*. §§ 40.240.050(A)(2); 40.240.010(B).

B. *Facts and Procedural History*

The material facts are not in dispute. BNSF Railway Company (BNSF) and its predecessors have operated in the Columbia River Gorge for more than 100 years. In June 2018, BNSF began to upgrade an existing mainline track and construct a second mainline track between Washougal, Washington and Mount Pleasant, Washington, a distance of about two-and-a-half miles. All construction took place within the Scenic Area on land that BNSF owns and for which it has a right-of-way. In August 2018, Clark County officials informed BNSF that it needed to obtain a permit for the project pursuant to the Clark County Code. BNSF disagreed and responded, through counsel, that federal law preempted the permitting process. Although BNSF indicated its willingness to work with Clark County informally, the County insisted that BNSF had to obtain a permit.

With the parties at an impasse, BNSF filed a complaint against Clark County and three named officials seeking a

[3] The Commission's 2016 management plan can be found at http://www.gorgecommission.org/images/uploads/amendments/Management_Plan_(as_revised_through_2016).pdf. The Commission recently approved a revised management plan that is not relevant to this appeal.

declaration that the ICCTA preempts Clark County's permitting process. Appellants Columbia River Gorge Commission and Friends of the Columbia River Gorge (collectively, Appellants) intervened, and all parties filed cross-motions for summary judgment. The district court granted summary judgment in favor of BNSF, concluding that the Clark County Code was preempted by the ICCTA because it is (1) a local ordinance that does not implement "the type of nationwide environmental statute" that is exempt from ICCTA preemption; and, (2) not a law of general applicability with only an incidental effect on rail transportation. This appeal followed.

II. STANDARD OF REVIEW

Our review is "governed by the same standard used by the trial court under Federal Rule of Civil Procedure 56." *Gordon v. Virtumundo, Inc*., 575 F.3d 1040, 1047 (9th Cir. 2009) (citing *Adcock v. Chrysler Corp.*, 166 F.3d 1290, 1292 (9th Cir. 1999)). We thus review the district court's grant of summary judgment de novo and "may affirm on any basis supported by the record." *Id.* (citing *Burrell v. McIlroy*, 464 F.3d 853, 855 (9th Cir. 2006)). "Viewing the evidence in the light most favorable to the nonmoving party, we must determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Id.* (quoting *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001) (en banc)).

III. DISCUSSION

The ICCTA broadly exempts laws affecting "transportation by rail carriers" and "the construction, acquisition, operation, abandonment, or discontinuance of

spur, industrial, team, switching, or side tracks, or facilities." 49 U.S.C. § 10501(b). The STB has primary jurisdiction over such matters, and the remedies afforded by the ICCTA are "exclusive and preempt the remedies provided under Federal or State law." *Id.*; *see Ass'n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist. (AAR)*, 622 F.3d 1094, 1097 (9th Cir. 2010) (§ 10501(b) "preempt[s] a wide range of state and local regulation of rail activity"); *City of Auburn v. U.S. Gov't*, 154 F.3d 1025, 1030 (9th Cir. 1998) (the ICCTA "grant[s] . . . exclusive jurisdiction over almost all matters of rail regulation to the STB" (citation omitted)). As BNSF proposed constructing a second track and upgrading existing track, any attempt by a state or county to regulate BNSF's project easily comes within the ICCTA's preemption provision. Even without express STB authorization for BNSF's project, the preemption provisions are "self-executing in their application." *Chicago v. Atchison, T. & S.F. Ry. Co.*, 357 U.S. 77, 87 (1958). Because "[n]ational rather [than] local control of interstate railroad transportation has long been the policy of Congress," BNSF may proceed "without leave from local authorities." *Id.*; *see also Cities of Auburn & Kent, WA (Stampede Pass)*, 2 S.T.B. 330, 1997 WL 362017, at *5 (1997) ("[A] state or local permitting process implies the power to deny authorization, which could frustrate the activity that is subject to federal control.").

Appellants do not dispute these general principles. Rather, they rest their argument on an exception we have identified to the ICCTA's broad preemption provision: "If an apparent conflict exists between the ICCTA and a *federal law*, then the courts must strive to harmonize the two laws, giving effect to both laws if possible." *AAR*, 622 F.3d at 1097. Our principal example of federal laws that should be harmonized with the ICCTA, if possible, is environmental

laws. As the STB has explained, "nothing in section 10501(b) is intended to interfere with the role of state and local agencies in *implementing Federal environmental statutes*, such as the Clean Air Act, the CWA, and the SDWA." *Boston & Maine Corp. & Town of Ayer, MA*, 5 S.T.B. 500, 2001 WL 458685, at *5 (2001) (emphasis added).[4] We have added that "[t]his system preserves a role for state and local agencies in the environmental regulation of railroads . . . ." *AAR*, 622 F.3d at 1098.[5]

Appellants press two points. First, they argue that the Gorge Act is a federal environmental statute and that we must harmonize the Gorge Act with the ICCTA. Second, they argue that even if the Gorge Act is not itself a federal environmental law, it is a federal law that authorizes the Clark County permitting process and must, therefore, be harmonized with the ICCTA. *See BNSF Ry. Co. v. Cal. Dep't of Tax and Fee Admin.*, 904 F.3d 755 (9th Cir. 2018) (holding that a California fee scheme for shipping hazardous materials was authorized by the federal Hazardous Materials Transportation Act).

[4] We owe *Chevron* deference to the STB's guidance on the scope of the ICCTA's preemption. *See Orange Coast Scenic R.R., LLC v. Or. Dep't of St. Lands*, 841 F.3d 1069, 1073–74 (9th Cir. 2016).

[5] We have identified a second potential exception: The ICCTA generally "does not preempt state or local laws if they are laws of general applicability that do not unreasonably interfere with interstate commerce." *AAR*, 622 F.3d at 1097 (citation omitted). The district court rejected Appellants' argument that Clark County's permitting process was a law of general applicability. Appellants have not challenged that conclusion on appeal.

We will address each issue in turn, but we do not find either argument persuasive.

A. *Whether the Gorge Act is a Federal Environmental Statute*

Appellants rely heavily on the STB's statement in *Town of Ayer* that the ICCTA is not meant to "interfere with the role of state and local agencies in implementing Federal environmental statutes, such as the Clean Air Act, the CWA, and the SDWA." 2001 WL 458685, at *5. Appellants argue that the Clark County Code must be harmonized with the ICCTA because it is "effectively the same as a federally approved state implementation plan pursuant to the Clean Air Act and, thus, must be treated the same."

This argument is not sustainable. As the district court aptly observed, the Gorge Act is not a "nationwide environmental statute . . . . [It] is limited to a specific portion of the country and delegates almost all authority to the state and local ordinances to manage and adopt ordinances." By contrast, the examples cited by the STB—the Clean Air Act (CAA), Clean Water Act (CWA), and the Safe Drinking Water Act (SDWA)—all authorize the Environmental Protection Agency (EPA) to set national standards for air quality, water pollution, and drinking water. *See* 42 U.S.C. § 7409(a) (air quality); 33 U.S.C. § 1252(a) (water pollution); 42 U.S.C. § 300g (drinking water). The Gorge Act plainly does not authorize the EPA to create any national environmental standards for, say, land management; it simply provides a framework for Oregon and Washington to cooperatively manage a shared area of land.

Moreover, unlike the CAA, CWA, and SDWA, implementation of the Gorge Act through the management plan is not subject to final federal approval. *See, e.g.*, *Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1091 (9th Cir. 2007) (explaining that the CAA "establishes a system of State Implementation Plans ('SIPS'), whereby states submit, subject to the [EPA's] review and approval, proposed methods for managing air quality. Once approved by the EPA, these plans have *the force and effect of federal law*." (internal quotation marks omitted) (emphasis added)); *see also* 33 U.S.C. § 1344(g)–(h) (states may administer their own permit programs for the discharge of dredged or fill material under the SDWA *subject to EPA approval*); 42 U.S.C. § 300g-2 (providing states with "primary enforcement responsibility for public water systems during any period *for which the [EPA] Administrator determines . . .* that such State . . . has adopted drinking water regulations that are no less stringent than the national primary drinking water regulations promulgated by the [EPA] Administrator . . . .") (emphasis added).

As our opinion in *AAR* illustrates, it is the EPA's approval of statewide plans that imbues local environmental regulations with the force of federal law. In *AAR*, we were tasked with determining whether a California district's state air quality rules were preempted by the ICCTA. 622 F.3d at 1096. We first considered whether the district's rules, which purported to implement the CAA's regulatory scheme, were exempt from ICCTA preemption as "federally recognized regulations" capable of harmonization with the ICCTA. *Id.* at 1098 (discussing *Town of Ayer*, 2001 WL 458685, at *5). We held that the district's rules did not have the force and effect of federal law because the EPA had not yet approved them. *Id.* ("*[U]ntil approved by the EPA,* state

implementation plans do *not* have the force and effect of federal law.").

Appellants point to no provision of the Gorge Act that, like the CAA, might similarly transform a local county ordinance into a regulation with the force and effect of federal law. To be sure, as required by Article I, Section 10, Clause 3 of the Constitution, Congress consented to the states of Oregon and Washington entering into a compact and to the creation of the Commission, the preparation of a management plan, and the adopting of local land use ordinances. *See* 16 U.S.C. §§ 554c(a)(1)(A), 554d(c), 554e(b). The Compact itself, once approved, is federal law for choice of law purposes. *See Cuyler v. Adams*, 449 U.S. 433, 438 (1981) ("[A]n interstate compact approved by Congress . . . is . . . a federal law subject to federal rather than state construction.").[6] But the Gorge Act did not alter the balance

[6] Appellants point to two state cases where those courts concluded that the Gorge Compact is federal law. In *Columbia River Gorge Comm'n v. Hood River Cnty.*, 152 P.3d 997, 998 (Or. Ct. App. 2007), the Oregon Court of Appeals had before it a challenge to an Oregon ballot measure that required the payment of just compensation to owners if land ordinances restricted development on their land. *Id.* The measure excepted land if the "regulation is required to comply with federal law." ORS § 197.352(3)(c). *Id.* The court concluded that the Gorge Compact was federal law for purposes of the Oregon statute. *Id.* at 700–703. In the second case, *Klickitat Cnty. v. State*, 862 P.2d 629, 634 (Wash. Ct. App. 1993), the Washington Court of Appeals was resolving a suit between Klickitat County and the State of Washington over which entity was responsible for costs in implementing the Gorge Compact, including suits for inverse condemnation. The Washington court concluded that because the Gorge Compact was federal law, not state law, Washington law required the county to assume the costs. *Id.* Neither of these cases stands for the proposition that county land ordinances adopted pursuant to the Gorge Act have the force and effect of federal law.

of state-federal powers. *See*, *e.g.*, 16 U.S.C. § 544d(c)(4) (the Gorge Commission must "incorporate without change" the Secretary's land use designations for federal lands). The Gorge Act provided for how Oregon and Washington would cooperatively manage the area they shared, but Congress did not confer on them substantive powers they could not previously exercise on their respective sides of the Columbia Gorge. *See id.* § 544c(a)(1)(B) (Oregon and Washington "shall provide to the Commission . . . the authority to carry out [its] functions and responsibilities"). Prior to the compact and consistent with the ICCTA, neither state could have regulated rail carriers through their local planning ordinances; such matters relating to the "construction, acquisition, operation, abandonment or discontinuance of spur, industrial, team, switching, or side tracks, or facilities" were within the "exclusive" jurisdiction of the STB. 49 U.S.C. § 10501(b). Nothing in the Gorge Act authorizes the states to regulate rail transportation in ways they could not have done prior to their entering into the Compact.

Nor did Congress confer any federal authority directly to the Commission. Congress was quite clear that nothing in the Compact made the actions of the Commission the actions of the federal government.[7] Under the Gorge Act, the Commission—whose voting members are appointed by Washington and Oregon, 16 U.S.C. § 544c(a)(1)(C)—retains

[7] We are not persuaded by Appellants' reliance on two district court cases holding that ordinances promulgated by the Tahoe Regional Planning Agency are federal law. *See Stephans v. Tahoe Reg'l Planning Agency*, 697 F. Supp. 1149, 1152 (D. Nev. 1988) and *Lake Tahoe Watercraft Recreation Ass'n v. Tahoe Reg'l Planning Agency*, 24 F. Supp. 2d 1062, 1068 (E.D. Cal. 1998)). Both cases involve takings claims, predate *AAR*, and offer little information about the structure of the Tahoe Regional Planning Compact for comparison.

final say in developing the required management plan and reviewing county land use ordinances for consistency with the management plan. But those were previously state functions; the Commission was created to allow a single entity to act on behalf of Oregon and Washington, rather than risking inconsistent regulation of the Scenic Area. Congressional consent was required to permit Oregon and Washington to regulate the area through a joint commission, but that did not make the Commission a federal agency. The Gorge Act is unambiguous on this point: the Commission is not "considered an agency or instrumentality of the United States for the purpose of any Federal law," *id.* § 544c(a)(1)(A), and its obligations are not the obligations of the United States, *id*. § 544c(b). Because the Commission does not enjoy the status of a federal agency such as the EPA, we fail to see how county ordinances adopted to enforce its management plan acquire the status of federal law.

Finally, the Gorge Act's enforcement structure differs from the federal environmental statutes cited in *Town of Ayer*. Those environmental statutes give the EPA concurrent enforcement authority and provide a federal forum for enforcement actions. *See*, *e.g.*, 42 U.S.C. § 7413; 33 U.S.C. § 1319; 42 U.S.C. §§ 300g-3, 300h-2. The Gorge Act does not, however, provide a federal forum for enforcement of the management plan or county ordinances. The Gorge Act contemplates state court jurisdiction over civil actions brought by the Commission. 16 U.S.C. § 544m(b)(6)(B); *see, e.g.*, *Skamania Cnty v. Columbia River Gorge Comm'n*, 26 P.3d 241, 247–54 (Wash. 2001) (en banc). The Gorge Act does contemplate the possibility of federal enforcement, but it is for the Secretary, not the Commission, to request that the Attorney General of the United States "institute a civil action for an injunction or other appropriate order to prevent any

person or entity from utilizing lands within the special management areas in violation of [the Act]." 16 U.S.C. § 544m(b)(1)(A); (5)(A).[8]

In sum, the Gorge Act does not establish national environmental standards similar to those that states must implement through EPA-approved plans. The Gorge Act provides a framework for a commission of state-appointed officials to adopt a management plan and implement it through county land use ordinances. Critically, the Commission retains final say over the approval and enforcement of the management plan and local county ordinances, and enforcement actions may be brought in state

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[8] The Gorge Act grants jurisdiction to federal district courts in Oregon and Washington over:

> (A) any criminal penalty imposed pursuant to section 551 of this title, or any other applicable law for violation of any order, regulation, or other action taken by the Secretary pursuant to sections 544 to 544p of this title;
>
> (B) any civil action brought against the Secretary pursuant to this section; or
>
> (C) any appeal of any order, regulation, or other action of the Secretary taken pursuant to paragraph (4) of this subsection.

16 U.S.C. § 544m(b)(5). Nothing in these provisions creates a new federal cause of action or otherwise authorizes Oregon or Washington to avoid the ICCTA's preemption clause. The Gorge Act provides that "[a]ny person adversely affected" by action by the Commission, a state, or any county as a result of an alleged violation of the Gorge Act may bring an action in *state* court in Oregon or Washington. *Id.* § 544m(b)(2), (6).

court. Because the Gorge Act is not comparable to the federal environmental laws referenced in *Town of Ayer*, and nothing in the Gorge Act indicates that the local ordinances otherwise have the force and effect of federal law, the Clark County Code is not exempt from preemption under the ICCTA.

B. *Whether the Gorge Act Authorizes Clark County to Regulate BNSF's Activities*

Alternatively, Appellants argue that even if the Clark County Code does not have the force of federal law, it has, nevertheless, been authorized by the Gorge Act and that is sufficient to require harmonization with the ICCTA. Appellants look to our decision in *BNSF Railway Co. v. California Department of Tax and Fee Administration* (*CDTFA*), 904 F.3d 755 (9th Cir. 2018), in support of this proposition. In *CDTFA*, the California State Board of Equalization sought to implement California Senate Bill 84 (SB 84), which required railroads to collect fees from customers shipping certain hazardous materials and remit those fees to California. *Id.* at 758. Two railroad companies (including BNSF), sued to enjoin SB 84, arguing, *inter alia*, that it was preempted by the ICCTA. *Id.* at 758–59. We first observed that SB 84 is "neither a law of general applicability, nor a law with only a remote or incidental effect on rail transportation" and that, "[c]onsidered in isolation, the ICCTA would preempt SB 84." *Id.* at 761 (internal quotation marks omitted). But we determined that another statute—the Hazardous Materials Transportation Act (HMTA), which provides that a state "may impose a fee related to transporting hazardous material only if the fee is fair . . ." *id.* (citing 49 U.S.C. § 5125(f)(1))—shielded SB 84 from preemption. *Id.*

In so holding, we emphasized that "[i]f an apparent conflict exists between ICCTA and a *federal* law, then [we] must strive to harmonize the two laws, giving effect to both laws if possible." *Id.* (emphasis in original) (citing *AAR*, 622 F.3d 1097). We explained the HMTA and ICCTA were "easily harmonized by reading § 5125(f)(1) of the HMTA to protect from preemption the fees specifically authorized in that section." *Id*. at 762. Critically, we observed that "[t]here is nothing in the text of the ICCTA, or in its legislative history, to indicate that Congress intended to restrict or overrule the protection from preemption provided by § 5125(f)(1)." *Id.* at 766. We read the HMTA provision to "affirmatively authorize[] a State to charge a fee for transportation of hazardous materials," and cited a House Committee Report that "unambiguously stated that a State's authority to charge fees under § 5125(f)(1) extended to transportation by rail." *Id.* at 763–65.

Appellants contend that the Gorge Act similarly requires harmonization with the ICCTA's preemption provision because the Gorge Act requires the promulgation of county ordinances consistent with the Act. 16 U.S.C. §§ 544e(b)(1); 544f(h)(1). Unlike the HMTA, however, which authorized states to impose fees on transportation of hazardous materials, the Gorge Act contains no provision authorizing Clark County to extend its permitting processes to railroads—the Gorge Act makes no mention of railroad regulation at all. *See CDTFA*, 904 F.3d at 763, 766 (observing that 49 U.S.C. § 5125(f)(1) "*affirmatively authorizes* a State to charge a fee for transportation of hazardous materials," and "protects from preemption *only* fees relating to the transportation of hazardous materials, and does so *only* if those fees are fair" (emphasis added)). With respect to a slightly different argument, Appellants characterize the Gorge Act as "a

specific statute that applies to a specific geographic area." Although it is true that the Gorge Act applies to a specific geographic area, the ICCTA applies to specific subject matter—railroad regulation. Because nothing in the Gorge Act gives the counties general and exclusive jurisdiction over all activities within the Columbia River Gorge area, we must give greater weight to the ICCTA, which governs this historically federal area. There is no apparent conflict between, and thus no reason to harmonize, the Gorge Act and the ICCTA.

Appellants cite to a floor statement during the debate over the Gorge Act in which Washington's U.S. Senator Slade Gorton said that "[r]outine railroad operation and maintenance activities . . . will continue in the scenic area, subject, as relevant, to the applicable standards in the act." 132 Cong. Rec. S16877-01, 1986 WL 788853 (1986). In and of itself this statement is much too general to create an exception for the railroads that does not appear in the legislation. *See Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989) (observing that "mute intermediate legislative maneuvers are not reliable indicators of congressional intent.") (internal quotation marks and citation omitted). But even if we were inclined to give "a single sentence by a single legislator . . . meaningful weight" in construing the Gorge Act, *Graham Cnty. Soil & Water Conserv. Dist. v. U.S. ex rel Wilson*, 559 U.S. 280, 297 (2010), Senator Gorton continued, "it is important to confirm that [the railroads'] continued operation *is not endangered by the provisions of this legislation*." *Id.* (emphasis added). There is no evidence here that Congress intended the Gorge Act to shield Clark County land use ordinances from ICCTA preemption. In short, nothing in either the Gorge Act's text or history supports

reading the Gorge Act to shield the Clark County Code from ICCTA preemption.

Our recent decision in *Swinomish Indian Tribal Community v. BNSF Railway Co*., 951 F.3d 1142 (9th Cir. 2020), is likewise inapposite. There, we held that the ICCTA did not prevent the plaintiff Tribe from enforcing an easement agreement it had acquired under the Indian Right of Way Act (IRWA), which was enacted prior to the ICCTA. *Id.* at 1146. We explained that "nothing in the text of the ICCTA or its legislative history indicates that Congress intended that the ICCTA repeal the Indian Right of Way Act." *Id.* at 1158. Appellants argue that the later-enacted ICCTA similarly does not abrogate the Gorge Act. *Swinomish*, however, does not translate to the instant case: the IRWA contains specific language about tribal rights to grant rights-of-way; federal regulations promulgated under the IRWA expressly provide that it applies to railroads; and, "[w]hen the ICCTA was enacted, federal courts, the Department of the Interior, and the Interstate Commerce Commission—the predecessor to the STB—had applied the [IRWA] to railroads for decades." *Id.* at 1157–59. Importantly, we concluded that the ICCTA contemplated its impact on statutes like the IRWA and sought to minimize any such impact. "Title 49 of the U.S. Code, in which the ICCTA is codified, explicitly provides[:] 'Nothing in this title shall absolve the United States from any responsibility to Indians and Indian tribes' . . . . The [IRWA] is a statutory mechanism by which the United States fulfills some of those responsibilities." *Id.* at 1159 (citing 49 U.S.C. § 102(f)(2)(B)). The Gorge Act lacks similarly specific language.

Nothing in our decisions in *CDTFA* and *Swinomish* requires us to deviate from our general preemption analysis.

Enforcing the Clark County permitting process against the railroads has more than an incidental effect on railroad activity and is thus preempted by the ICCTA. Moreover, contrary to Appellants' arguments, we see no need to remand for further factual development. The statutes, Clark County Code, and the facts as presented are clearly more than sufficient to resolve the question of preemption.

IV. CONCLUSION

The judgment of the district court is **AFFIRMED**.