

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No.:

ROCK & RAIL LLC, a Colorado limited
liability company

Plaintiff,

v.

MOTHERLOVE HERBAL COMPANY, a
Colorado corporation, INDIANHEAD
WEST HOMEOWNERS ASSOCIATION,
INC., a Colorado nonprofit corporation,
ROCKIN S RANCH LLC, a Colorado
limited liability company, JOHN
CUMMINGS, an individual, DAVID
KISKER, an individual, GARY OPLINGER,
an individual, WOLFGANG DIRKS, an
individual, and JAMES PIRAINO, an
individual,

Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiff Rock & Rail LLC (“Plaintiff” or “Rock & Rail”), through its undersigned counsel, hereby submits its Complaint for Declaratory Judgment against Defendants Motherlove Herbal Company, a Colorado corporation, Indianhead West Homeowners Association, Inc., a Colorado nonprofit corporation, Rockin S Ranch LLC, a Colorado limited liability company, John Cummings, an individual, David Kisker, an individual, Gary Oplinger, an individual, Wolfgang Dirks, an individual, and James Piraino, an individual (collectively, “Defendants”), and alleges as follows:

I. NATURE OF THE CASE

1. This is a federal preemption case based on the supremacy of federal regulation of the interstate transportation of materials by a railroad. Rock & Rail now leases and intends to operate a \$70 million intermodal rail facility for the delivery, storage, and transloading of construction aggregate from a quarry in Wyoming to Weld County, Colorado (the “Facility”). The Facility includes, among other things, a rail loop and unloading station to allow sand, gravel, cement and other materials to be transported to the site by interstate rail. These materials are then transferred to stockpiles and storage silos for subsequent distribution by other modes, mainly trucks. Materials from the site will supply a wide variety of building projects throughout Colorado’s Northern Front Range. The Facility may also be used to deliver, store and transload other goods and materials to supply a wide variety of customers. The entire Facility, together with tens of millions of dollars of off-site road and rail crossing improvements, has already been constructed.

2. Defendants have stated that the Facility must be torn down, the improvements removed, and the land restored to its previous condition because the Facility does not have a valid Use by Special Review (“USR”) permit issued by the Weld County Board of County Commissioners (“BOCC”). Further, in litigation against Rock & Rail’s predecessor, Defendants have sought an order from a state court directing that the Weld County Zoning Ordinance be applied to the Facility.

3. Rock & Rail is a rail carrier licensed by the Surface Transportation Board (“STB”). As a result, the construction and operation of tracks, yards, and other rail-related activities, such as transload operations, by Rock & Rail falls under the exclusive jurisdiction of

the STB. The purpose of this Complaint is to obtain a judgment declaring that, under federal law, Rock & Rail's construction and operation of the Facility is not subject to land use regulation by Weld County, including through its USR permitting process. The basis for this assertion is that the federal Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. § 10501(b), grants exclusive jurisdiction to the STB, and categorically preempts the application of local government land use permit requirements for the Facility. Rock & Rail therefore does not need to obtain a Weld County USR permit to lawfully operate the Facility. To avoid the threat of regulation by a state court, the disruption of its operations and the uncertainty created by Defendants' actions, Rock & Rail requires a declaration that it has the right under ICCTA to construct and operate the Facility without a USR permit or any other land use authorization from Weld County.

II. JURISDICTION AND VENUE

4. Jurisdiction is proper under 28 U.S.C. § 1331 because this action arises under the laws of the United States, and this Court has the power to grant the declaratory judgment requested herein under Fed. R. Civ. P. 57 and 28 U.S.C. § 2201.

5. Venue is proper under 28 U.S.C. § 1391(b)(1) and (2), because all of the actions, events or omissions giving rise to Plaintiff's claim occurred in this judicial district and the Defendants reside here.

III. PARTIES

6. Plaintiff Rock & Rail is a Colorado limited liability company with its principal office located at 2710 Wycliff Road, Raleigh North, North Carolina 27607.

7. Defendant Motherlove Herbal Company is a Colorado corporation with its principal office located at 1420 Riverside Avenue, Suite 114, Fort Collins, Colorado 80524.

8. Defendant Rockin S Ranch is a Colorado limited liability company with its principal office located at 16740 Rd. G, Antonito, Colorado 81120.

9. Defendant Indianhead West Homeowners Association, Inc. is a Colorado nonprofit corporation organized for the governance of the Indianhead Estates Subdivision, located in unincorporated Weld County with its principal office located at 27660 Hopi Trail, Loveland, Colorado 80534.

10. Defendant John Cummings is an individual who owns real property located in unincorporated Weld County.

11. Defendant David Kisker is an individual who owns real property located in the Indianhead Estates Subdivision at 6681 Apache Road in unincorporated Weld County.

12. Defendant Gary Oplinger is an individual who serves as a trustee of the Oplinger Gary L. Trust, which owns real property located in the Indianhead Estates Subdivision at 27687 Hopi Trail in unincorporated Weld County.

13. Defendant Wolfgang Dirks is an individual who serves as a trustee of the Dirks Family Trust, which owns real property located in the Indianhead Estates Subdivision at 6825 Apache Road in unincorporated Weld County.

14. Defendant James Piraino is an individual who serves as a trustee for the Piraino Family Trust, which owns real property located in the Indianhead Estates Subdivision at 27660 Hopi Trail in unincorporated Weld County.

IV. GENERAL ALLEGATIONS

A. ICCTA Preempts State and Local Government Land Use Permitting of Rock & Rail's Highway 34 Facility.

15. Rock & Rail is a Class III rail carrier licensed by the STB. Rock & Rail leases the Facility for its rail operations and has full control over the management and operation of the Facility. Rock & Rail has interchange agreements with other railroads for the interstate movement of goods and materials by rail.

16. Under ICCTA, the STB has exclusive jurisdiction over railroad operations. 49 U.S.C. § 10501(b) provides in relevant part as follows:

The jurisdiction of the [Surface Transportation Board] over - (1) transportation by rail carriers...and practices, routes, services, and facilities of such carriers; and (2) the construction, acquisition, operation...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, 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.

17. To fall under the exclusive jurisdiction of this statute, the activity for which a party is claiming preemption must be performed by a rail carrier and constitute transportation.

See N.Y. & Atl. Rwy. Co. v. STB, 635 F.3d 66 (2nd Cir. 2011). Transportation is broadly defined to include:

(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and

(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.

49 U.S.C. § 10102(9).

18. There are many cases, both state and federal, as well as STB opinions, addressing the scope of ICCTA’s preemption of state and local regulation of rail carriers engaging in transportation. In general, if the state or local law attempts to regulate the operations, practices, routes, services, or facilities of a rail carrier, such state or local law is preempted. “State and local law that permits a non-federal entity to restrict or prohibit the operation of a rail carrier is preempted under the ICCTA.” *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439, 444 (5th Cir. 2001) (“*Friberg*”); *Norfolk S. Ry. Co. v. City of Alexandria*, 608 F.3d 150, 158 (4th Cir. 2010) (“*Norfolk Southern*”) (same) (citing *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 643 (2nd Cir. 2005) (“*Green Mountain*”); *Padgett v. STB*, 804 F.3d 103, 105 (1st Cir. 2015) (“*Padgett*”) (ICCTA preempts state law governing “regulation of rail transportation”). “Under the ICCTA, the [STB] has jurisdiction over ‘transportation by rail carrier.’ . . . Where the [STB] has such jurisdiction, it is exclusive. Whether or not the [STB] is exercising its regulatory authority over the transportation, state and local laws governing such permitting are generally preempted.” *Del Grosso v. STB*, 804 F.3d 110, 113-14 (1st Cir. 2015) (“*Del Grosso*”).

19. ICCTA “shields railroad operations that are subject to the [STB’s] jurisdiction from the application of many state and local laws, including local zoning and permitting laws and laws that have the effect of managing or governing rail transportation.” *City of Alexandria, VA – Pet. for Decl. Order*, STB Fin. Docket No. 35157, 2009 STB LEXIS 3, n.2 (Feb. 17, 2009). Courts and the STB have recognized that ICCTA categorically preempts “any form of state or local permitting or preclearance that, by its nature could be used to deny a railroad the ability to conduct some part of its operations or proceed with activities that the [STB] has authorized.” *CSX Transp., Inc.*, STB Fin. Docket No. 34662, 2005 WL 1024490, at *2 (STB May 3, 2005).

These categories of state and local regulation constitute “per se unreasonable interference with interstate commerce.” *Id.* at *3.

20. Courts have applied this principle to find that rail carriers need not comply with state or local permitting required as a condition of construction and operation. *See Padgett*, 804 F.3d at 106-07 (state and local zoning and permitting regulation preempted); *Norfolk Southern*, 608 F.3d at 160 (though city’s ordinance and permit requirements enhance public safety, they unreasonably burden rail transportation); *Green Mountain*, 404 F.3d at 642-43 (state pre-construction permit process is preempted as it unduly interferes with interstate commerce and unduly delays construction of railroad facilities); *City of Auburn v. United States*, 154 F.3d 1025, 1029-31 (9th Cir. 1998) (local environmental regulation of railroad preempted by ICCTA).

21. Similarly, ICCTA preempts local noise ordinances and even nuisance suits by nearby residents to the extent they would prevent, manage, or regulate rail operations. *See Pace v. CSX Transportation, Inc.*, 613 F.3d 1066 (11th Cir. 2010) (ICCTA preempts private nuisance suit claiming operation of side track caused noise and smoke making land virtually unusable); *Delaware v. STB*, 859 F.3d 16, 21 (D.C. Cir. 2017) (state law prohibiting locomotives from idling to reduce noise is categorically preempted as directly regulating rail transportation); *Friberg*, 267 F.3d at 444 (ICCTA unambiguously preempted state negligence claim); *Kiser v. CSX Real Prop.*, 2008 U.S. Dist. LEXIS 90676 (M.D. Fla. Nov. 7, 2008) (ICCTA preempts nuisance claims against intermodal rail operation); *Norfolk S. Ry. Co. v. City of Maple Heights*, 2003 U.S. Dist. LEXIS 28282, * 9 - *15 (N.D. Ohio, May 14, 2003) (ICCTA preempts application of local noise ordinance to intermodal rail facility); *Cannon v. CSX Transp., Inc.*,

2005 Ohio App. LEXIS 77, *P 21 - *P 25 (Ohio App. 2005) (homeowner nuisance suit for noise and vibration preempted).

22. ICCTA preemption is broad and includes the handling, unloading, transloading, processing and subsequent vehicular transportation of goods transported by rail. *See Padgett*, 804 F.3d at 108 (“regulation of railroad transloading facilities is generally preempted by the ICCTA.”); *Green Mountain*, 404 F.3d at 642 (“the plain language [of ICCTA] grants the transportation board wide authority over transloading and storage facilities undertaken by Green Mountain”); *Texas Cent. Bus. Lines Corp. v. City of Midlothian*, 669 F.3d 525, 530 (5th Cir. 2012) (transloading facility that received deliveries of sand by rail and off-loaded that material onto trucks for delivery to natural gas sites constituted rail transportation under ICCTA); *Del Grosso*, 804 F.3d at 118 (processing and bagging of wood pellets at transloading facility not subject to local permitting: “It is well-established that the preemption of state and local regulation under ICCTA generally extends to transloading facilities.”); *Norfolk Southern*, 608 F.3d 159 (city was precluded from regulating truck hauling and truck routes to and from a rail transloading site because it would “necessarily regulate the transloading operation,” which the city was preempted from doing).

23. One of the principal reasons Congress enacted ICCTA was to eliminate the previous dual scheme in which the Federal government and state and local governments all regulated interstate rail transportation, resulting in a patchwork of regulation. ICCTA deregulated railroad operations while preventing a patchwork of local and state regulations that would impose differing prohibitions, regulations, and requirements to the detriment of rail transportation.

B. Martin Marietta's Development of the Highway 34 Facility and Defendants' State Court Challenges to It.

24. In 2015, Rock & Rail's predecessor Martin Marietta began efforts to develop the Facility on approximately 133 acres of property depicted on **Exhibit A**. At the time, Martin Marietta did not own Rock & Rail.

25. To construct the Facility, Rock & Rail's predecessor obtained the issuance of over 30 building, grading, access and drainage permits from Weld County, an access permit from the Colorado Department of Transportation ("CDOT"), approvals from CDOT to construct turn lanes and install new lights and railroad safety crossing devices within State Highway 34 and County Road 13, and air emissions and stormwater permits from the Colorado Department of Public Health and Environment, among others. These are but examples of the massive, multi-year effort to obtain approval for and construct the Facility. The entire Facility, including a railroad track network, has been constructed and is ready to operate.

26. On November 22, 2017, more than two years after the BOCC first issued the USR permit, the Colorado Court of Appeals reversed the BOCC, finding there was insufficient evidence in the administrative record that the Facility could meet the noise standard imposed by the BOCC as an operational condition of the USR permit. ICCTA preempts the application of a noise standard to railroad operations. *Norfolk S. Ry. Co. v. City of Maple Heights*, 2003 U.S. Dist. LEXIS 28282, * 9 - *15 (N.D. Ohio, May 14, 2003) (ICCTA preempts application of local noise ordinance to intermodal rail facility).

27. On remand Defendants sought a mandatory injunction and an order of mandamus against the BOCC to enforce its land use regulations against the facility and to require that the Facility be torn down, the rail tracks removed, and the site restored to its condition prior to

construction of the Facility. The trial judge denied Defendants' motion and remanded the matter to the BOCC for further proceedings consistent with the opinion of the Court of Appeals.

28. On June 15, 2018, Defendants appealed the trial court's remand, arguing that the trial court erred in not ordering the BOCC to enforce its land use regulations or ordering Martin Marietta to tear down and remove the Facility and restore the site. That appeal is pending before the Colorado Court of Appeals and interferes with the BOCC taking any further action on Martin Marietta's USR permit, which was first granted in 2015. The appeal may not be resolved for another eighteen months, so that resolution of Martin Marietta's USR application to operate the Facility will have taken at least five years. In addition to the lengthy delay in permitting the Facility, Martin Marietta spent millions of dollars to secure such permits.

29. This history of county permitting and state court litigation epitomizes the rationale supporting ICCTA preemption of state and local regulation of rail transportation.

V. FIRST CLAIM FOR RELIEF
(DECLARATORY JUDGMENT THAT ICCTA PREEMPTS WELD COUNTY
PERMITTING AUTHORITY)

30. Rock & Rail incorporates and realleges the previous allegations of this Complaint as if fully set forth in this Claim for Relief.

31. Rock & Rail is a rail carrier engaged in rail transportation at the Facility under the terms of ICCTA. The STB has exclusive jurisdiction over Rock & Rail's construction and operation of the Facility, and ICCTA preempts local government land use and permitting authority over the Facility. As a rail carrier engaged in transportation, Rock & Rail is not required to obtain a USR permit or any other land use permit, authority or other type of state or local permission to construct and operate the Facility from Weld County.

32. Defendants have asserted that the Facility may not be constructed, operated or maintained without a Weld County USR permit. Therefore, there is a dispute over Rock & Rail's rights under ICCTA, giving rise to a case or controversy over which this Court has jurisdiction.

33. Weld County no longer has an adequate supply of construction aggregate to meet demand. Builders can't get concrete in a timely manner to meet their ongoing demands, and the cost of concrete has skyrocketed due to dwindling supplies and the cost of delivery. Among other reasons, the Facility was constructed so that construction aggregate from a quarry in Wyoming could be brought by rail to the Facility and then processed and/or transloaded for use in the construction of roads, schools, buildings, and homes in Weld County. Transporting construction materials by rail is cheaper than by truck, reduces trucks on local roads, and will help mitigate the increasing cost of supplying construction materials.

34. The Facility has now been constructed and construction aggregate is available in Wyoming for shipment to the Facility. Rock & Rail is ready to provide transportation of that aggregate in interchange with Union Pacific Railroad. Rock & Rail is also prepared to load, unload and offer transload services to any user or purchasers of such aggregate.

35. Defendants have made it clear, however, that they will take every action to stop the use of the Facility and, further, to force it to be torn down.

36. Defendants' actions and litigation have created a cloud of uncertainty surrounding Rock & Rail's right to use the Facility for delivery and transloading of construction aggregate loaded onto cars in Wyoming to its Weld County Facility. Because of the already very long delay in developing the Facility, Rock & Rail needs that uncertainty resolved.

37. Rock & Rail is entitled to a declaratory judgment to resolve this dispute and terminate the uncertainty caused by Defendants' actions.

VI. PRAYER FOR RELIEF

WHEREFORE, Rock & Rail requests that the following judgments and orders be entered against the Defendants:

A. A declaratory judgment that under ICCTA, Rock & Rail is not required to obtain from Weld County a USR permit or any other permit, authority or permission to construct and operate the Facility; and

B. Such additional relief as may be provided by law or the Court may deem just and proper.

Dated: September 26, 2018.

Respectfully submitted,

s/ Mark J. Mathews

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