

Preemptive Rights for Railroads

To provide some background and information for our community about this hot topic, PORA has reviewed a number of historical facts related to the preemptive rights railroad have over local and state laws.

Soon after the U.S. gained its independence there was great concern among our forefathers that interstate barriers and disputes were so common that the Republic was in danger of failing. This resulted in the first attempt at regulating commerce on a national basis without interference from states and cities (Annapolis Convention, 1786 and Continental Convention 1787).

Article VI, Clause 2 of the Constitution is noted as the “Supremacy Clause.” It established that the Constitution is the supreme law of the land, and it ensures that Federal laws preempt and take precedence over state laws.

Later as railroads grew to great importance for the expansion of the country the Interstate Commerce Commission Act of 1887 and later the Interstate Commerce Commission Termination Act of 1995 were enacted. The ICCTA created the Surface Transportation Board (STB) which today has authority over rail service including preemptive power over state and local zoning laws.

Now, according to the BNSF statement during the PORA and BNSF meeting on July 30, 2025, the BNSF railroad will begin construction of the first phase, the Intermodal Phase, for the Wittmann project later this year. This will happen regardless of the zoning decision by the Board of Supervisors. As you can see from the above research, this action is permitted under existing Federal Law. There remain questions about the ability for BNSF to continue with the additional phases of the project without a zoning change. Information about this situation will be presented to the community after additional information becomes available.

References:

The Washington Library – Annapolis Convention.

U.S. Constitution, Article VI, clause 2, the “Supremacy Clause.”

49 U.S.C. paragraph 10501(b).

Penn State Law Review, Railroads Running Roughshod:.... J. Hymes

Connecticut Law Review, Land Use Regulation and the Railroads: Who’s in Charge?

D.W. Whitney

PORA’s Legal Firm (Goodman) draft document.