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 Vail

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RAILROAD LAW: A MUNICIPAL PERSPECTIVE

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Syllabus

- The Regulatory Framework
- Local Health Safety Regulation of Railroads
- Condemnation of Railroad Property
- Construction and Modification of Rail Crossings
- Quiet Crossings
- Case Study: City of Aurora
- Case Study: City of Fort Collins
- Lessons Learned

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THE REGULATORY FRAMEWORK


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1887-1970 – The Age of Regulation

- Interstate Commerce Act of 1887
 - Creates Interstate Commerce Commission (ICC)
 - Imposed interstate public utility regulations on railroads:
 - Prohibited discrimination among shippers
 - Required publication of rates
- 1966 - Federal Railroad Administration
 - Took away safety functions of ICC
- State Railroad Regulation
 - Regulation by Public Utility Boards and Commissions
 - Intrastate regulations of rates, safety, and necessity
 - Railroad crossings


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1970-1995 –The Age of Deregulation


- Post-WWII railroads go bankrupt
- Congress attempts to save industry by deregulating
 - 4R Act (1976) – uniform rates
 - Staggers Act (1980) – more deregulation, forced sharing of tracks
- Interstate Commerce Commission Termination Act of 1995 (ICCTA)

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ICCTA of 1995


- Abolishes the ICC
 - Establishes the Surface Transportation Board (STB)
- Preemption Statement - 49 U.S.C. § 10501(b)
 - “The remedies provided under this part with respect to regulation or rail transportation are exclusive and preempt the remedies provided under Federal or State law”
- Uniform Safety Laws - 49 U.S.C. §20106
 - All state and local safety laws preempted unless it can be proven:
 - It “is necessary to eliminate or reduce an essentially local safety or security hazard;”
 - Does not conflict with federal law and does not interfere with interstate commerce



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Humorous Take on Post ICCTA World





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Post-ICCTA Regulatory Framework


STB
(Rates, Operations, Construction, and Abandonment)

FRA
(Safety)

NTSB
(Accident Investigation)

FTA
(Transit Funding)

State PUCs
(Rail Crossings)




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Health and Safety Regulation and Condemnation


THE ICCTA'S EFFECT ON STATE AND LOCAL REGULATION



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ICCTA Preemption Generally


- Categorical Preemption
 - 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 to proceed with activities that the Board has authorized
 - e.g. environmental, land use permitting, preconstruction permitting
 - State or local regulation of matters directly regulated by the STB
 - e.g. construction, operation, abandonment, line acquisitions, mergers, rates and services



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ICCTA Preemption Generally (cont.)

- As Applied Preemption
 - State law is preempted under circumstances where the law “prevents or unreasonably interferes with railroad transportation”
 - e.g. condemnation of ancillary railroad property



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Lac-Mégantic Train Disaster



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ICCTA Effect on Local Health and Safety Regulation

- Limits on rail parking duration preempted - *Norfolk S. Ry Co. v. City Of Alexandria*, 608 F.3d 150 (4th Cir. 2010)
- Local nuisance laws preempted - *Gluckenberg v. Wisc. Central Ltd.* (STB decision)
- State and local environmental laws preempted - *People v. Union Pac. R. Co.*, 141 Cal. App. 4th 1228, 1254 (2006)
- State environmental review preempted - *Friends of the Eel River v. North Coast Rail Authority* (Cal. Supreme Court Case No S222472).
- Local ordinance protecting national security preempted - *CSX Transp., Inc. v. Williams*, 406 F.3d 667, 674 (D.C. Cir. 2005)

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ICCTA Effect on Condemnation

- State Court Condemnation Actions Preempted for a Total Taking of Railroad Property
 - *Wisconsin Central Ltd. V. City of Marshfield* (W.D. Wisc. 2000) 160 F. Supp. 2d 1009
 - *In re Metropolitan Transportation Authority* (2006) 823 N.Y.S.2d 88
- Options
 - Adverse abandonment of railroad property (litigated STB process) followed by state condemnation.
 - Condemnation of ancillary railroad property which does not interfere with railroad operations or pose undue safety concerns. See *District of Columbia v. 109,205.5 Square Feet of Land*, 2005 WL 975745 (2005).

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COLORADO
Department of
Regulatory Agencies

Filing an Application with the Public Utilities Commission

RAIL CROSSINGS

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PUC Application

- When is an Application Required?
 - Applications are required for any changes required at the crossing that will affect the operation of the crossing, including:
 - Any new crossings (including grade separated ped crossings)
 - Any widening of roadways
 - Any grade separations
 - Any changes to warning circuitry
 - Any new required active warning devices
 - Any upgrades to existing active warning devices
 - Any advance warning sign changes
 - Any temporary or permanent closures

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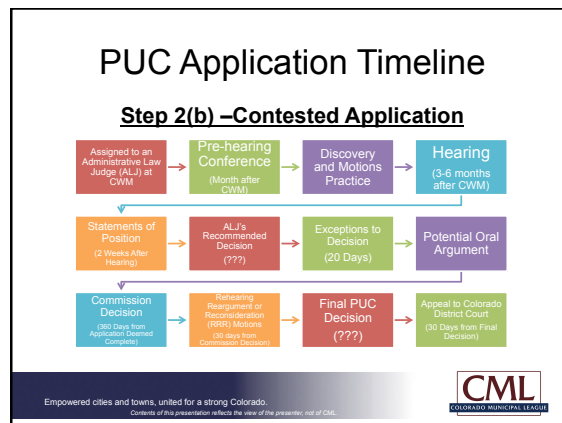
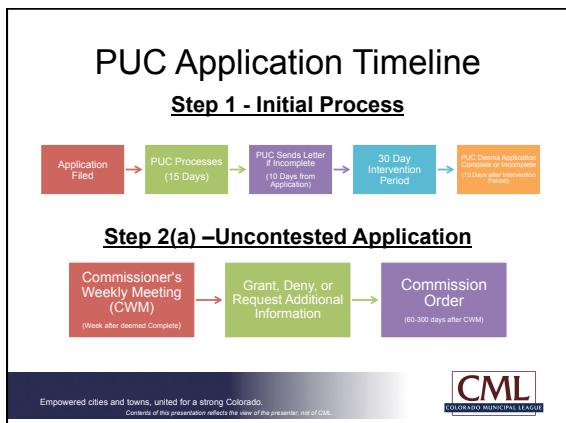
PUC Application (cont.)

- Application requirements for highway-rail crossings are found in Commission Rule 4 Code of Colorado Regulations 723-7-7204
 - Most important part of the application is the statement of need
- PUC can pre-review applications upon request to make sure all required information is included

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PUC Evaluation of Crossing Need

- Crossing Cases are Rarely Litigated
 - *In re Adams County*..., 2015 WL 926413, (Colo. P.U.C. 2015). (RR support; crossing granted)
 - *In re Kipling Ridge Metropolitan District*..., 2009 WL 1196732 (Colo. P.U.C. 2009). (RR opposition...crossing denied)
 - *In re City of Avon*..., 2005 WL 1925863 (Colo. P.U.C. 2005). (RR opposition; crossing granted)
- Legal Standard
 - The crossing installation will "appear reasonable and necessary to the end ... that accidents may be prevented and the safety of the public promoted." C.R.S. § 40-4-106(2)(a) (emphasis added)
- Burden of Proof is on Applicant
 - Convenience is not enough... **needs to be necessary** - *In re Kipling Ridge Metropolitan District*

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QUIET CROSSINGS

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Federal Regulatory Framework

- Congress passes Pub. L. – 103-440 (49 USC§20153) in 1994
 - Requires train horns to be sounded at all at-grade crossings
 - But, allows FRA to create process for establishing quiet crossing zones
 - Preempts all local regulations concerning train noise.

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FRA Quiet Zone Process

- "Public Authority" Applies
 - agencies "responsible for traffic control or law enforcement" (i.e. cities, counties etc.)
 - Not railroad – but they typically assist
 - Submit application to FRA Associate Administrator, Office of Safety
- Diagnostic with state, railroad, and FRA to determine safety measures
- A New Quiet Zone must have
 - flashing lights and gates in place at each public crossing
 - constant warning time devices where reasonably practical
 - power out indicators
- Decision Based on Risk Calculation
 - Is the Quiet Zone Risk Index (QZRI) less than Nationwide Significant Risk Threshold (NSRT)?

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Quiet Zone Risk Index (QZRI)

- Determined by number of Supplemental Safety Measures (SSMs) and Alternative Safety Measures (ASMs)
 - SSMs
 - Quad Gates
 - Channelization devices (curbs or other barriers)
 - One way street
 - ASMs
 - Requires FRA approval
 - Can use measures that don't qualify as SSMs
 - Education programs
 - Red light cameras
 - Coordinating multiple crossings

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Open Federal Questions

- Who pays for the SSMs and ASMs?
- How is liability distributed for quiet crossings if an accident happens?
- Questions concerning new technologies (RTD PTC and variable warning times)

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CASE STUDY: CITY OF AURORA



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University of Colorado A Line



- Public-Private Partnership (P3)
- Design-build-operate concessionaire
- FRA and PUC oversight
- 2 At-grade crossings within the City of Aurora (Sable; Chambers)
 - Added 2 high speed commuter rail tracks to 2 existing freight tracks each crossing; added new operations to existing traffic signals
- Peoria Crossing grade separation project



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R Line

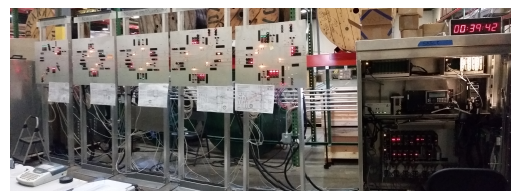


- Design-build
- PUC oversight
- 12 At-grade signalized crossings within the City of Aurora
- Bifurcation of process
 - Approval of civil elements separately from concept of operations
 - Participation with CoA staff, RTD staff, PUC staff

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R Line



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CASE STUDY: CITY OF FORT COLLINS

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Expectations versus Reality

ORIGINAL TIMELINE

- Q1-Q2 2016 PURSUE PROJECT FUNDING
- AUGUST 2016 PUC APPLICATION
- NOVEMBER 2016 PUC APPROVAL
- JANUARY 2017 GWR AGREEMENT
- SUMMER 2017 CONSTRUCTION

ACTUAL TIMELINE

- Q1-Q2 2016 PURSUE PROJECT FUNDING
- AUGUST 2016 PUC APPLICATION
- AUGUST 2016 WITHDREW APPLICATION
- SEPTEMBER 2016 GWR INTERVENTION
- MAY 2017 RE-FILED PUC APPLICATION
- MAY-SEPT. 2017 PUC HEARING PROCESS
- SEPT. 2017-PRESENT NEGOTIATIONS WITH GWR
- ??? CONSTRUCTION

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Lessons Learned

- Do everything in your power to avoid a contested application
 - New crossings only where absolutely necessary (convenience is not enough, need real documented safety issues)
 - Try to solve RR's issues before filing
 - Widening existing crossings much easier to litigate
 - Consider pre-filing testimony with application if you know it will be contentious.
- If the RR is not cooperating take your chances at trial
 - Waiving statutory deadlines can be to your detriment
- Even post-decision there may be issues
 - Need to negotiate Construction and Maintenance Agreement
 - Settlement Agreement issues
- Adjust your timeframe and cost expectations
 - In re City of Avon crossings took 3 years to be fully litigated
 - Fort Collins Sharp Point crossing 1 year and counting
 - Litigation is expensive and RR's increasingly demanding financial offsets in C&M agreements

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Questions?

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