U.S. Department
of Transportation

**Federal Railroad
Administration**

400 Seventh St., S.W.
Washington, D.C. 20590

MAY - 1 2000

Mr. Lake H. Barrett
Acting Director
Office of Civilian Radioactive
Waste Management
Department of Energy
Washington, D.C. 20585

Dear Mr. Barrett:

Thank you for your letter to Administrator Molitoris concerning the safety inspection authority of States and Indian Tribes over rail shipments. I am sorry for the substantial delay in responding. In your letter, you asked for information on the role and authority of Federal Railroad Administration (FRA) inspectors when dealing with spent nuclear fuel and high-level radioactive waste shipments, as compared to FRA-certified State or Tribal inspectors under FRA's State Participation Program, as well as inspectors employed independently by States and Tribes. You also asked for FRA's position regarding the rights of States and Tribal authorities to stop and inspect rail shipments of spent nuclear fuel and high-level radioactive waste, and to enforce State, Tribal, and/or Federal rail safety regulations.

My staff drafted a legal memorandum on the issues you have raised, and I enclose that memorandum for your review. In summary, we believe that State and Tribal regulations on the rail transportation of radioactive materials would be preempted by the Federal regulations covering that subject matter. Federal regulations set forth railroad inspection requirements for trains and hazardous materials shipments. FRA inspectors do not stop trains for inspections, which could exacerbate any safety risks, but rather inspect trains in rail yards or other points where trains are already stopped for addition of cars, railroad inspection, or other reasons. FRA safety regulations do not require that trains in general or trains containing radioactive or other hazardous materials stop at State or Indian Tribal reservation borders to be inspected. Action taken by a State or Tribe to stop and inspect rail shipments of spent nuclear fuel and high-level radioactive waste would presumably be taken pursuant to a State or Tribal law, and we believe that such a law would be preempted.

For reasons explained in our memorandum, we believe the preemption provision of the Federal railroad safety laws, 49 U.S.C. § 20106, is the controlling authority on these issues. The Research and Special Programs Administration (RSPA) of the Department of Transportation issues hazardous materials regulations, which are enforced by FRA in the rail mode. RSPA has primary authority to construe those regulations and the statute under which they are issued. However, RSPA concurs in the judgment expressed here that section 20106 is the relevant preemption provision on rail safety issues, rather than the preemption provision of the hazardous materials statute, which is found in 49 U.S.C. § 5125.

While we believe that the States and Tribes lack independent authority to stop and inspect trains carrying radioactive materials, we welcome their active participation in ensuring the safety of these shipments. FRA monitors shipments of spent nuclear fuel and high-level radioactive wastes very closely to ensure that the movements are conducted safely. These efforts are guided by FRA's Safety Compliance Oversight Plan (SCOP) for Rail Transportation of High-Level Radioactive Waste and Spent Nuclear Fuel.

The States, of course, may participate directly in railroad safety inspections through FRA's State Participation Program. See 49 C.F.R. Part 212. Our memorandum explains in greater detail how that program works and the extensive involvement States may have in inspecting these shipments if they employ FRA-certified inspectors and coordinate efforts with FRA. Under FRA's SCOP for addressing the safety of these shipments, we are seeking to expand current State efforts and encourage participation by new States. We hope to use the State inspection force along each route to help implement the SCOP.

We would gladly work with affected States and Tribes, and your department, in a partnership effort to assess and address the risks posed by these shipments within their specific jurisdictions. Whether through their direct participation in joint inspections as part of the State program or the less formal cooperative approach, we think the States and Tribes need to be assured that FRA, the railroads, and your department are taking strong and effective measures to address all significant safety issues related to these shipments.

I appreciate your interest in this matter and look forward to working with you on this and other transportation issues of importance to you and your agency.

Sincerely,

S. Mark Lindsey
Chief Counsel

Enclosure

U.S. Department
of Transportation

**Federal Railroad
Administration**

Memorandum

Date: April 26, 2000

Subject: Participation by States and Tribes in Inspection of Rail Shipments of Radioactive Materials, and Authority of States and Tribes to Stop Trains Carrying Such Materials for Safety Inspections

From: Daniel C. Smith
Assistant Chief Counsel for Safety

To: S. Mark Lindsey
Chief Counsel

The Department of Energy (DOE) has asked the Federal Railroad Administration (FRA) about the safety inspection authority of States and Indian Tribes over rail shipments of spent nuclear fuel and high-level radioactive wastes. Specifically, DOE asked for "information on the roles and authority of FRA inspectors when dealing with spent nuclear fuel and high-level waste rail shipments, including information on the authorities of regular FRA inspectors as compared to FRA certified State or Tribal inspectors under [FRA's] State Participation Program, as well as inspectors employed independently by States and Tribes." DOE also asked for FRA's "position regarding the rights of State and Tribal authorities to stop and inspect rail shipments of spent nuclear fuel, and enforce State, Tribal, and/or Federal rail regulations." DOE did not provide any specific State or Tribal laws, either enacted or proposed, for our review.

Before providing a complete analysis of the issues raised by DOE, I will summarize my conclusions.[1] Federal regulations cover all major aspects of the transportation of spent nuclear fuel or high level radioactive wastes, including the condition of the track, signal system, equipment, and grade crossing devices as well as operating practices and appropriate documentation of hazardous contents. FRA monitors shipments of spent nuclear fuel and high level radioactive wastes very closely to ensure that these movements are conducted safely. States that participate in FRA's State Participation Program are, of course, authorized to conduct inspections for compliance with Federal

[1] This memorandum is largely the work of Trial Attorney Nancy Friedman, who had almost completed it before leaving for her six months at the United States Attorney's Office.

regulations in the same manner as FRA inspectors. FRA-certified State inspectors can participate in FRA's monitoring of the radioactive shipments and determine the railroad's level of compliance with FRA's rules and recommend enforcement action where violations are detected. The statutory authority for FRA's State program does not include Tribes, but members of Tribes are certainly capable of becoming certified State inspectors. FRA does not literally stop trains to inspect them, but instead inspects them at locations such as assembly yards where they are already stopped. In an extreme emergency, FRA would have the authority to stop a train through the issuance of an emergency safety order by the FRA Administrator, but that authority is not shared by the States. State or Tribal laws or enforcement actions that would stop trains or order that they be stopped for inspections would be preempted by the Federal railroad safety laws, specifically the regulations that cover safety inspection of trains and rail cars. The following discussion explains the basis for these conclusions.

I. State Participation

A. Explanation of FRA's State Participation Program

The Federal Railroad Safety Act of 1970, Pub. L. No. 91-458 (now codified, along with other railroad safety statutes, at 49 U.S.C. Chapters 201-213), gave FRA (as the delegate of the powers granted to the Secretary of Transportation under that law) authority over "every area of railroad safety" (49 U.S.C. § 20103). The statute also declared that laws related to railroad safety shall be "nationally uniform to the extent practicable" and that a State requirement related to railroad safety shall generally be preempted when the Secretary has issued a rule or order "covering the subject matter of the State requirement" (49 U.S.C. § 20106). As part of the grand compromise leading to enactment of the 1970 act, the statute also permitted States, in return for their loss of direct authority to regulate almost any subject FRA has regulated, to participate in investigative activities under the Federal safety laws through either an annual certification or agreement and to recommend enforcement action under those laws. 49 U.S.C. § 20105. In addition, the statute permitted participating States that recommend that FRA seek injunctive relief or impose civil penalties for violations of the safety laws to seek those remedies themselves if FRA has not taken action within specified periods. 49 U.S.C. § 20113.

FRA has issued rules concerning its State Safety Participation Program (SSPP) at 49 C.F.R. Part 212. Those rules explain the basic principles of the program, discuss joint planning of inspection activities, and establish qualification requirements for State inspectors in the areas of track, signal and train control, motive power and equipment, operating practices, hazardous materials, and highway-rail grade crossings. Thus, every State has the opportunity to employ rail safety inspectors in all of the areas of railroad safety in which FRA has inspectors and, through its inspectors, to participate directly in inspection activity and enforcement of the Federal railroad safety regulations. States that are not certified participants in the Federal program for State participation may not cite a railroad or shipper for violations of Federal regulations. At present, 32 States participate in the program and employ 150 inspectors. These State inspectors are funded entirely by

their respective State governments, and may be given other duties and assignments as their agencies deem necessary.

FRA-certified State inspectors usually conduct planned routine compliance inspections and also may conduct additional investigative and surveillance activities that are consistent with the overall program. In most ways, an FRA-certified State inspector has the same role and authority as a certified Federal inspector. In the area of their certification, they may inspect railroads and hazardous materials shippers and issue FRA inspection reports noting defects. They may cite violations of the railroad safety regulations using the same forms as FRA inspectors, submit those violation reports for technical and legal review in the same manner, and participate in civil penalty negotiating sessions led by FRA attorneys (or, in the event of litigation, serve as witnesses) just as FRA inspectors do. However, State inspectors have authority only to the extent provided by their respective State statute or charter. For example, if a State does not authorize its inspectors to go on shipper property but only on railroad property, that particular State's inspectors may not conduct hazardous materials inspections of shippers. Likewise, a State-certified inspector may not conduct inspections in any other State. Moreover, State inspectors do not have authority that exceeds that of FRA inspectors. While both have the authority (depending upon their areas of expertise) to issue special notices for repair (see 49 C.F.R. Part 216) requiring railroads to remove a particular freight car or locomotive from service due to safety defects or to reduce the speed of trains over defective track, neither has the authority to stop a train. Only the FRA Administrator, acting through the extraordinary tool of the emergency safety order (49 U.S.C. § 20104) has such authority.

FRA monitors shipments of spent nuclear fuel and high level radioactive wastes very closely to ensure that these movements are conducted safely, and plans to continue its close surveillance as these shipments increase in frequency in the near future. To serve as a blueprint for that effort, FRA has developed its Safety Compliance Oversight Plan (SCOP) for Rail Transportation of High-Level Radioactive Waste and Spent Nuclear Fuel. FRA intends to include certified State inspectors in its planned monitoring of these shipments. In fact, a specific provision of the SCOP provides that FRA will promote participation in the SSPP for States that are not currently participating and encourage expanded participation for States that currently participate. The provision also states that, where possible, FRA will use the available State inspector force in each State affected by the rail route to help implement other provisions of the SCOP.

In the specific context of trains carrying radioactive materials, FRA-certified State inspectors may exercise ample authority. Certified equipment inspectors may examine freight cars, including those containing radioactive materials, for compliance with the freight car safety, safety appliance, and power brake standards. Certified track inspectors may inspect the track over which the train will operate, and signal inspectors may inspect the signals on that line. Certified hazardous materials inspectors can inspect the packaging and paperwork of the radioactive shipments. Operating practice inspectors can examine the fitness of the crew in terms of hours of service and alcohol and drug testing compliance, and grade crossing inspectors can determine compliance with pertinent regulations. Of course, such State inspection activity has to be coordinated with Federal inspection activity. See 49 C.F.R. §§ 212.109-111.

Accordingly, States that participate in the SSPP have every opportunity to address any safety hazards that may be presented by the movement of radioactive materials in trains. Subject to FRA's overall management of the Federal safety program, those States can, within their own borders, participate in the inspection of those trains and the right-of-way over which they will travel and can recommend appropriate enforcement action. Of course, a State can participate in these activities only to the extent that it has inspectors certified by FRA in the relevant subject matters.

B. Participation by Indian Tribes

The statutory authority (§ 20105) for the SSPP refers to participation only by a "State." The plain meaning of "State" does not encompass "Tribe." Furthermore, there is nothing in the legislative history to suggest that Congress intended Tribes to be able to have FRA-certified inspection programs under the SSPP. Accordingly, a Tribe may not become a State participant in FRA's SSPP unless Congress amends the SSPP statute to expressly allow such Tribal participation. However, nothing in the State Participation program would preclude a member of a Tribe from becoming FRA-certified as a State inspector within a particular State. The Tribe member would simply have to be a bona fide employee of the State agency and meet the other requirements in his or her particular area of expertise (see 49 C.F.R. § 212.201 for those requirements).

II. Preemption of State and Tribal Laws Restricting Rail Shipments of Radioactive Materials

A. State Authority to Stop and Inspect Trains Carrying Spent Nuclear Fuel or High-level Radioactive Waste

Synopsis: Under 49 U.S.C. § 20106, State requirements relating to railroad safety are generally preempted when the Secretary of Transportation has issued a rule or order covering the subject matter of the State requirement. DOT has issued rules covering the subject matter of train inspections and inspection of hazardous materials shipments that would preempt state requirements imposing additional inspection requirements or requiring that trains be stopped for additional State inspections.

1. Preemption of State law under the Federal Railroad Safety Laws

The express preemption provision of the Federal railroad safety laws[2] is 49 U.S.C. § 20106,

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[2] The laws that predated the Federal Railroad Safety Act of 1970 are now codified at 49 U.S.C. chapters 203-211. They do not contain express preemption provisions. However, in most of the areas covered by these statutes, they have been held to preempt the entire fields to which they pertain (safety appliances on rail cars, power brakes, locomotive inspection, and employee hours of service). See, e.g., Napier v. Atlantic Coast Line R.R., 272 U.S. 605 (1926), concerning field preemption in the area of locomotives. Accordingly, to the extent State laws requiring that

which sets out the following framework for determining when State requirements related to railroad safety are preempted:

> A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order–
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> (1) is necessary to eliminate or reduce an essentially local safety hazard;
> (2) is not incompatible with a law, regulation, or order of the United States Government; and
> (3) does not unreasonably burden interstate commerce.

(Emphasis added).

This framework establishes two levels of inquiry. First, upon identification of the "subject matter" of the State rule, the question is whether the Secretary (ordinarily, acting through FRA) has taken affirmative or negative action "covering" that subject matter (i.e., whether FRA has occupied it, in whole or in part, either (i) by issuing a rule or order, or (ii) by an agency decision, such as a policy statement or termination of a proposed rulemaking proceeding, that for a particular subject matter no rule or restriction is appropriate or necessary as a matter of rail safety). See CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993); Ray v. Atlantic Richfield Co., 435 U.S. 151, 178 (1977); Napier v. Atlantic Coast Line R.R., 272 U.S. 605 (1926).

The Supreme Court has held that the term "covering the subject matter" requires the establishment of more than that the Federal rule "touch upon" or relate to the subject matter of the State requirement. The Court held that preemption will lie only if Federal regulations "substantially subsume" the subject matter of the relevant State law. See Easterwood, 507 U.S. at 664-665 (1993). If FRA has not so acted and if the State rule does not unduly burden interstate commerce, there is no further inquiry, and the State rule stands until FRA does so act to cover the subject matter.

Once FRA is found to have acted so as to cover the subject matter of the State rule, the inquiry passes to the second level: the State rule (which must be "an additional or more stringent" one) is enforceable only if it satisfies a three-pronged test: (i) it is necessary to eliminate or reduce an essentially local safety hazard; (ii) it is not incompatible with any Federal rule; and (iii) it does not unreasonably burden interstate commerce. The legislative history of 49 U.S.C. § 20106 makes it clear that the first prong does not contemplate State-wide laws or rules; an "essentially local safety hazard" is to be read as one peculiar to a particular locality. H.R. Rep. 1194, 91 Cong. 2d Sess. 4104

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trains stop for safety inspections would address any of these areas, these older laws would provide an additional basis for finding that the State laws are preempted.

(1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4116-4117.

DOE has not presented any existing or proposed State laws for our analysis. Instead, the DOE letter asks for FRA's "position regarding the rights of State and Tribal authorities to stop and inspect rail shipments of spent nuclear fuel, and enforce State, Tribal, and/or Federal rail regulations." Presumably, a State would "stop and inspect" a train only pursuant to a State law or regulation authorizing such activity. Perhaps a State might undertake such activity relying only on its inherent police power. We believe the preemption analysis would be the same in any event. The inspection of trains for safety purposes is the subject matter of a state rule requiring railroads to stop trains at State borders or within the State for inspection, and that this is a subject matter already covered by FRA regulations. The fact that the State itself would presumably do the inspection rather than require the railroad to do it would not change this conclusion.[3]

FRA's rules have clearly covered the subject matter of any State rule that would require inspection of trains for safety purposes. FRA's rules completely address the purpose, scope, manner, and location of train inspections. Those rules do not require that trains be stopped for purposes of Federal or State inspections at any point. Federal and FRA-certified State inspectors perform their train inspections at points where railroad inspections are required. Only in the most extraordinary circumstances would FRA exercise its emergency order authority to stop a train at a different point. Absent an emergency situation, stopping a train to inspect it would arguably be in excess of FRA's authority to inspect railroad equipment "at reasonable times and in a reasonable way." 49 U.S.C. § 20107. Stopping a train is not a simple matter mechanically or operationally, and unnecessary stopping can itself create safety hazards and cause substantial delays while the air brake system is recharged. The Federal inspection program recognizes these facts, and a State scheme requiring that trains stop at arbitrary points such as state borders or other points where Federal law does not require inspections would directly contradict the Federal program.

FRA has issued rules covering the inspection of trains and freight cars. FRA's rules on power brakes (49 C.F.R. Part 232) require various types of inspections depending on the operation of a particular train. See 49 C.F.R. §§ 232.12-16. In general, these rules require brake inspections wherever trains are assembled or cars are otherwise added to or removed from a train. FRA has also issued rules requiring inspection of freight cars for mechanical defects other than those related to

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[3] If the subject matter of the State law were determined to be State safety inspection of trains for compliance with Federal railroad safety laws, FRA's rules on State participation (49 C.F.R. Part 212) would clearly cover the subject matter. Those rules contemplate State inspection activities that are in accord with FRA's inspection principles (§ 212.101), and even permit FRA to terminate a State's participation for failure to comply with relevant directives and enforcement manuals (§ 212.113). Stopping trains for inspections at State borders would not be in accordance with FRA's inspection principles. If the subject matter were seen as State safety inspection for compliance with State standards for the safety of trains and radioactive shipments, those standards themselves would be preempted, as discussed *infra*.

power brakes. See 49 C.F.R. § 215.13-15. These rules require inspections wherever a car is added to a train.

The Research and Special Programs (RSPA), another DOT agency, has also issued regulations[4] under 49 U.S.C. Chapter 51 that cover the subject matter of hazardous materials transportation and inspection of shipments by rail. FRA enforces these hazardous materials rules in the rail mode. See 49 C.F.R. § 1.49(s). The rules call for inspection of hazardous materials shipments where they are accepted for transportation or placed in a train, and specifically permit this inspection to be performed in conjunction with the inspections required under FRA's freight car and power brake rules. See 49 C.F.R. § 174.9. The rules set specific requirements for the handling of radioactive materials when shipped by rail. 49 C.F.R. §§ 174.700-750. A person may ship hazardous materials only after ensuring that all relevant requirements have been met (§ 173.22), and, with regard to fissile radioactive materials, the shipper must take extra precautions before offering the shipment (§ 173.22(c)). RSPA's rules contain extensive additional requirements for the packaging and transportation of radioactive materials (§§ 173.401-476), including standards for the movement of certain fissile materials in controlled shipments with escorts (§ 173.459). (These rules do not apply to hazardous materials shipments made by or under the direction of DOE or the Department of Defense for national security purposes and with appropriate escorts (§ 173.7), but we do not believe this is the type of shipment that is the subject of DOE's inquiry.)

Even though not issued by FRA under Chapter 201 of Title 49, RSPA's rules have preemptive effect under 49 U.S.C. 20106. Case law holds that, even though issued by RSPA under Chapter 51, hazardous materials rules concerning railroads are railroad safety rules for purposes of preemption under Chapter 201. For example, in CSX Transportation, Inc. v. Public Utilities Comm' of Ohio, 901 F.2d 497 (6th Cir. 1990), cert. denied, 498 U.S. 1066 (1991), the Sixth Circuit held that an Ohio statute authorizing the Public Utilities Commission to adopt and enforce as State

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[4] Chapter 51 directs the Secretary of Transportation to

> designate material (including an explosive, radioactive material, etiologic agent, flammable or combustible liquid or solid, poison, oxidizing or corrosive material, and compressed gas) or a group or class of material as hazardous when the Secretary decides that transporting the material in commerce . . . may pose an unreasonable risk to health and safety or property.

49 U.S.C. § 5103(a).

DOT has established nine classes of hazardous materials; both materials of interest to DOE, spent nuclear fuel and high-level radioactive waste, fall within Class 7, Radioactive materials. (See the Table of Hazardous Materials at 49 C.F.R. § 172.101 and Part 173, Subpart I, "Class 7 (Radioactive) Materials.)

requirements the Federal rules regulating the intermodal transportation of hazardous materials was preempted by Chapter 201, as were the State rules themselves. Having denied review of that decision, the Supreme Court has noted in a different case that Chapter 201's preemption provision is not limited to rules issued under that chapter. Easterwood, supra, 507 U.S. at 664, n. 4.

We believe it is clear, then, that FRA and RSPA have issued rules that entirely cover the subject matter of a State rule requiring safety inspection of rail shipments of radioactive materials and the stopping of trains for such inspections. Those rules are very explicit on where and how trains carrying radioactive materials, cars carrying those shipments, and the packagings enclosing those materials are to be inspected. While the rules are not explicit on whether a government authority may stop trains for inspections, they nevertheless entirely subsume that issue by calling for railroad inspections only at points where trains are assembled initially or cars are added or deleted from trains, i.e., at points where trains are already stopped and changes to the train's composition warrant inspection.

Assuming that a court would concur in the conclusion that Federal regulations have covered the subject matter of a State requirement for safety inspections, the court would then have to determine, according to the limited exception to preemption in 49 U.S.C. § 20106, whether this more stringent State requirement was (1) necessary to eliminate or reduce an essentially local safety hazard; (2) compatible with all Federal laws and regulations; and (3) not an unreasonable burden on interstate commerce. To avoid preemption, the State requirement would have to pass all three tests. FRA believes a State requirement that trains carrying spent nuclear fuel or high level wastes be stopped at arbitrary points for inspection would pass none of the tests for a local safety hazard.

Stopping trains at the border of each State would not be necessary to eliminate or reduce an "essentially local safety hazard" because there is nothing inherently dangerous about State borders that presents any unique safety hazard. A local safety hazard exists only if some unique feature of a location actually causes the hazard. Whatever hazards a shipment of spent nuclear fuel or high level wastes may present, those hazards are not caused by any unique local condition. (Of course, it is theoretically possible for some unique local condition to exacerbate the hazards presented by these shipments, but such a local condition has not been shown to exist.) Moreover, if there were a hazard at every State border, it would not be essentially local. The fact that the hypothetical State rules would presumably apply Statewide wherever such shipments might enter the State is a clear indication of the absence of an essentially local safety hazard.

A regulation requiring trains to stop at State borders would be incompatible with FRA's rules because it would pose an obstacle to their accomplishment. FRA's rules on train and freight car inspections recognize that such inspections are most safely and efficiently done where cars are added to a train or an entire train is assembled or reassemble. Stopping trains unnecessarily at other locations increases the risk of rear-end collisions and delays following trains, which may increase the fatigue of their crews. Conducting inspections at state borders, where railroad repair facilities do not exist, would seem rather pointless, because a defective car would have to be moved for repair beyond that point. The entire Federal inspection scheme is based on the principle of performing

inspections where they will do the most good, i.e., where a car is first placed in a train or where the assembly of a train, the distance it has traveled, or changes to its consist warrant an inspection of the train's air brakes. Stopping trains at arbitrary points like state borders would violate that principle.

Finally, requiring trains to stop at State borders would unreasonably burden interstate commerce by creating major disruption in rail traffic. Requiring trains to stop at State borders is more disruptive than requiring trucks to stop at such borders since, inter alia, trains, unlike trucks, require in some cases more than a mile to stop, and require time consuming air brake tests to restart. Moreover, especially at remote areas like most state borders, rail lines consist of very few tracks, often just two. Stopping a train at the border delays all trains behind it on that track, which could lead to enormous traffic congestion very quickly on a heavily used line.

We believe that the Federal regulations on the inspection of trains and hazardous materials shipments, including the extensive and detailed regulation of radioactive shipments, would preempt State inspection requirements, and that those requirements would not escape preemption under § 20106 because they would not address essentially local safety hazards.

2. Preemption of State Law under Chapter 51

Unlike Chapter 201, which generally preempts regulations in an area that the Secretary has already regulated, under Chapter 51, States are generally free to develop and enforce their own hazardous materials regulatory scheme as long as the regulation is consistent with Federal law and regulations. See 49 U.S.C. § 5125. With regard to certain subjects (e.g., placarding of hazardous materials shipments), a State or Tribal rule is preempted unless it is "substantively the same" as the Federal rule. On other subjects, the State or Tribal rule is preempted only if compliance with both that rule and the Federal rule is not possible or the State or Tribal rule is an obstacle to accomplishing the Federal rule. Id.

RSPA issues rules under Chapter 51 and is authorized to render determinations as to whether a State or Tribal requirement is preempted by Chapter 51 and to grant waivers of preemption of such a State or Tribal requirement. 49 U.S.C. § 5125(d) and (e). RSPA procedures for deciding applications for determinations of preemption and waivers of preemption are at 49 C.F.R. §§ 107.201-107.227. However, as discussed above, courts have held that the preemption provision of Chapter 201 applies to all rail safety regulations, even in the hazardous materials area, and even if issued under Chapter 51. The Department of Transportation believes this is the correct reading of the law.

B. Tribal Authority to Stop and Inspect Trains

Synopsis: Chapter 201's preemption provision does not specifically mention Indian Tribes. However, it is a statute of general applicability and there is no basis for concluding that it would not apply to Tribes. The only exception to the provision's general principle of national uniformity on rail safety matters applies to certain State, not Tribal, laws or rules. We believe that a Tribal law

requiring trains to stop at the border of the Indian territory would be preempted by Chapter 201. Given that conclusion, a separate analysis of preemption under Chapter 51 would not be necessary.

1. Applicability of Chapter 201 to Indian Tribes

Section 20106 lays out the framework for preemption of State laws related to railroad safety, but does not expressly mention Indian Tribes. However, as explained below, absent a treaty guaranteeing an Indian Tribe's right to stop a train at Tribal Reservation borders, courts would likely conclude that Chapter 201's preemption provision would preempt an Indian Tribe's authority to stop and inspect trains while traversing their reservations.

When dealing with Native American law, certain important principles deserve discussion at the outset. Statutes must be "construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." Muscogee (Creek) Nation v. Hodel, 271 U.S. App. D.C. 212, (full citation omitted). Nonetheless, the Supreme Court has made clear that, "it is undisputed that Congress may abrogate a tribe's sovereign immunity by statute." Public Service Company of Colorado v. Shoshone-Bannock Tribe, 30 F.3d 1203, 1206 (9th Cir. 1993), citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56-58 (1978). On reservations, Tribes retain "a semi-independent position . . . [n]ot as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they reside." White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980) (internal citations omitted). Tribal sovereignty has diminished through Congressional Acts, the realities of the reservation system, and the status of tribes as domestic dependent nations. See United States v. Wheeler, 435 U.S. 313; Montana v. United States, 450 U.S. 544 (1981); and Strate v. A-1 Contractors, 520 U.S. 438 (1997).

Tribal sovereignty does not extend over the entire area a reservation encompasses. Rather, tribal sovereignty is very limited on alienated lands, or lands within the reservation owned by persons who are not members of the Tribe. Tribes do not have the authority to regulate or exercise civil jurisdiction over the acts of a nonmember on alienated lands within Tribal territory, unless the nonmember (1) enters into a consensual relationship with the Tribe or its members; or (2) the activity concerned directly affects the tribe's political integrity, economic security, health, or welfare. Montana v. United States, 450 U.S. at 563-64 (Tribe may not regulate hunting and fishing activity of nonmembers on the Big Horn River where the state of Montana retained title to the riverbed); and Strate, 520 U.S. at 446 (tribal court could not maintain jurisdiction over a civil action against an allegedly negligent nonmember where an automobile accident occurred on a public highway maintained by the State on a federally granted right-of-way).

Railroad rights-of-way are alienated lands in that they were conveyed to railroad companies. The specific type of property interest, if any, retained by the Tribe in the right-of-way will vary depending on the circumstances surrounding the conveyance of the right-of-way. Compare Alyeska Pipeline Service Company v. Kluti Kaah Native Village of Copper Center, 101 F. 3d 610, 614 (9th Cir. 1996)(Native Alaskan interest in corridor of land designated as a pipeline right-of-way

extinguished because pipeline land grant preceded the formation of the Kluti Kaah property interest in that area under the Alaska Native Claims Settlement Act); and Burlington Northern Railroad Company v. The Blackfeet Tribe, 924 F.2d 899, 903 (9th Cir. 1991)(deed conveying interest in railroad right-of-way made at a time when outright conveyances of Indian land disfavored and contained no express land conveying a fee simple interest, therefore Tribe retained a sufficient property interest to enable it to tax the railway's use of the right-of-way). FRA is not aware, however, of any grant that reserves to a Tribe a gate-keeping right in the railroad right-of way. These easements that lack gate-keeping rights are insufficient to remove railroad rights-of-way from the category of alienated, non-Indian land. Strate, 520 U.S. at 455-456.

Since railroad rights-of-way are alienated lands, a Tribe's authority to regulate rail passage over those lands is limited to matters directly affecting the tribe's political integrity, economic security, health, or welfare. Because the transportation of hazardous materials presents some safety risks, we recognize that Tribes have some interest in ensuring that transportation occurs safely. While Tribes may have some authority to regulate railroads for safety purposes, the important question is whether the exercise of that authority, like similar authority possessed by States, may be preempted under the Federal railroad safety laws.

Tribal reservations are not States and have unique historical origins, therefore, general notions of preemption developed in other areas of law do not control. Id. at 143; Cotton Petroleum Corporation v. New Mexico, 490 U.S. 163, 176 (1989). Tribal preemption questions require a "flexible analysis sensitive to the particular facts and legislation involved." Cotton Petroleum, 490 U.S. at 176. Courts must balance the relevant state, federal and Tribal interests involved. Id.; White Mountain Apache Tribe, 448 U.S. at 145.

In examining the preemptive force of relevant federal legislation, courts must look at the "broad policies that underlie the legislation and the history of the tribal independence in the field at issue." Cotton Petroleum, 490 U.S. at 176. There is no history of Tribal independence in the field of railroad safety. Tribes have no statutory role in the regulation of trains passing through Tribal territory, nor do Tribes presently exercise a role in the inspection of trains under the State Safety Participation Program, as discussed.

Chapter 201 establishes national uniformity of rail safety rules as a central principle. Section 20106 provides in part: "Laws, regulations, and orders shall be nationally uniform to the extent practicable." The provision goes on to state very limited exceptions to the general mandate for uniformity. Those exceptions permit action only by a "State." Congress could certainly have extended similar leeway to Indian Tribes (as it did in Chapter 51), but did not do so. On its face, then, section 20106 seems to preclude regulation of railroad safety by any entity other than FRA or a State.[5] The statute does not seem ambiguous on that score. Courts have supported this literal

[5] The canon of construction *expressio unius est exclusio alterius* (expression of one thing is the exclusion of the other) supports this reading.

reading of the word "State" by holding that section 20106 does not permit local governments to regulate railroad safety under the limited exceptions to preemption applicable to certain State action. CSX v. Plymouth, 86 F.3d 626 (6th Cir. 1996); and Donelon v. New Orleans Terminal Co., 474 F.2d 1108 (5th Cir.), cert. denied, 414 U.S. 855 (1973).

While we believe there is no ambiguity in section 20106's general standard of national uniformity of railroad safety laws that would call into question its applicability to actions by Tribes, analysis of case law determining whether various statutes apply to Tribes provides further support for the conclusion that section 20106 does preclude Tribal action. Whether a statute applies to Indians when the statute in question is silent on the matter is determined by applying various tests. The Supreme Court recently looked at the underlying purpose of the statutory provision for the answer. In El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473; 143 L. Ed. 2d 635 (1999), the Court held that the provision of the Price-Anderson Act that transforms a State court action arising out of a nuclear accident into a Federal action also applies to actions in Tribal courts. The Court reasoned that the "apparent reasons for this congressional policy of immediate access to federal forums are as much applicable to tribal as to state-court litigation," 143 L. Ed. 2d at 646, and that not applying the preemption provision to Tribes "would invite precisely the mischief . . . that the Act sought to avoid." Id. at 647. Under this logic, the basic principle of national uniformity in railroad safety law embodied in § 20106, and the obvious congressional desire to avoid duplicative safety regulation of railroads, support the view that Tribes are covered by that basic principle, and that the statute's silence on Tribes was not intended to signal that they were free to impose duplicative regulation.

Appellate courts have often applied a more elaborate test. For example, in Robert B. Reich v. Mashantucket Sand & Gravel, 95 F.3d.174 (2d Cir. 1996) the court applied a two-part test, borrowed from Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985), in which the court decided, first, whether the Federal statute was a law of general applicability, thus triggering a presumption that it "applied with equal force to Indians on reservations," and, second, whether the statute fell within one of the exceptions to the rule of general applicability. "A federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if: (1) the law touches exclusive rights of self-governance in purely intramural matters; (2) the application of the law to the tribe would abrogate rights guaranteed by Indian treaties; or (3) there is proof by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservation . . . . " Coeur d'Alene, 751 F.2d at 1116.

Applying the Coeur d'Alene test, and accepting that Chapter 201 is a statute of general applicability, there is a presumption that the statute's general principle of national uniformity on rail safety matters applies to Indian tribes. The next question is whether Indian authority to stop and inspect trains falls within one of the three exceptions to general applicability of Chapter 201. The Second Circuit examined the first exception, i.e., the law touches "exclusive rights of self-governance in purely intramural matters" in Mashantucket Sand & Gravel, supra. In that case, the Occupational Safety and Health Administration (OSHA) cited the Mashantucket Pequot Indian Tribe (Mashantucket) for violation of OSHA safety regulations, when Mashantucket Sand & Gravel, a construction business owned and operated by the Mashantucket, allegedly failed to comply with

OSHA safety regulations while constructing the Foxwoods Casino. The Mashantucket argued that based on Tribal sovereignty, OSHA's regulations did not apply to them.

The Second Circuit rejected this argument, asserting that the construction business's activities were not "exclusive rights of self-governance in purely intramural matters." Rather, "intramural matters" generally consist of "conduct the immediate ramifications of which are felt primarily within the reservation by members of the tribe." Mashantucket Sand & Gravel, 95 F.3d at 179. The court went on to say that intramural activities were in the nature of conditions of Tribal membership, domestic relations, and inheritance rules. The court ruled that a construction business that employed Indians and non-Indians alike and that was building a casino that affected interstate commerce was not an intramural activity. Similarly, stopping and inspecting trains at the border of a reservation would not affect a purely intramural activity because railroading is a nationwide activity. Any hazard related to the rail shipment of hazardous materials would affect Indians and non-Indians alike, would affect interstate commerce, and would have nothing to do with intramural activities like Tribal membership, domestic relations, and inheritance rules.

As for the second exception to the principle that laws of general applicability apply to Tribes, i.e., that "the application of the law to the tribe would abrogate rights guaranteed by Indian treaties," we are aware of no treaties expressly guaranteeing Tribes the right to inspect trains. Moreover, treaties of which we are aware would limit or negate, not guarantee, any such rights. For example, in Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335 (1945), at issue was whether the Treaty of July 30, 1863, with the Northwestern Bands of the Shoshone Indians was a recognition or acknowledgment by the United States of the Indian title to the lands mentioned in the treaty. The need for a treaty arose out of Shoshone interference with travel of new settlers, as well as interference with mail, telegraph, and railroad routes. A commission was appointed to draft a treaty that would not extinguish Indian title, but would "secure freedom from molestation for the routes of travel . . . . " Id. at 339. Part of the treaty stated, "And further it being understood that provision has been made by the Government of the United States for the construction of a railway from the plains west to the Pacific ocean, it is stipulated by said nation that said railway, or its branches, may be located, constructed, and operated, without molestation from them, through any portion of the country claimed by them." Id. at 335 (citing Article II from the Fort Bridger Treaty of July 2, 1863.) Although we do not know the continued validity of, or areas covered by, that particular treaty, the important point is that we are not aware of any treaty specifically granting Tribes the right to stop and inspect trains. As for the third exception to the principle of general applicability, there is no indication that Congress intended Chapter 201 not to apply to Indians on their reservations.

Based on both the plain language of the statute and the tests that courts use to determine whether a statute applies to Tribes, it is likely that courts would find that section 20106's principle of national uniformity applies with full force to Tribes and precludes Tribes from issuing or enforcing rules on railroad safety.

2. Application of Chapter 51 to Indian Tribes

If our analysis on the applicability of Chapter 201 to Indian Tribes is correct, a court would not need to reach preemption issues under Chapter 51, because the rules in question would be preempted under Chapter 201. As discussed, the preemption provision of Chapter 201 prevails, even with regard to hazardous materials rules if they apply to railroads. However, were a court nevertheless to hold that the hazardous materials preemption provision applies instead of the Chapter 201 standard, the court would apply Chapter 51 to the questions raised. The question of how Chapter 51 applies to Tribal requirements is a somewhat easier question to answer than how Chapter 201 applies to such requirements. The hazardous materials preemption provision, 49 U.S.C. § 5125, applies expressly to the laws of Indian tribes. The Eighth Circuit has found that Indian Tribes are expressly subject to Chapter 51 preemption because "every relevant subsection of section 5125 contains the language 'state or political subdivision thereof or Indian tribe.' The Act's plain language indicates that, sovereign immunity notwithstanding, states and Indian tribes are subject to the preemption rules." Northern States Power Company v. The Prairie Island Mdewakanton Sioux Indian Community, 991 F.2d 461 (8th Cir. 1993). Similarly, in Public Service Company of Colorado v. Shoshone-Bannock Tribes, 30 F.3d 1203 (9th Cir. 1994), the Ninth Circuit held that Tribes and Tribal officers can be sued under Chapter 51. That case dealt precisely with the issue of whether Indian Tribes may halt shipments through their territory. The court did not reach that question, holding only that Chapter 51 applies to Indian Tribes. The question of whether section 5125 would preempt the types of Tribal laws at issue here should, we believe, be left to RSPA, which has the primary authority to construe that statute. However, because the Chapter 201 preemption provision is the proper law to consult on railroad safety issues, we also believe that the issue of the possible preemptive effect of section 5125 need not be reached.

III. CONCLUSION

Federal regulations pervasively regulate the rail transportation of radioactive materials, including spent fuel and high level wastes. Those regulations specify where and how railroads are required to conduct inspections of these shipments and the trains that carry them. The Federal railroad safety laws preempt States and Tribes from requiring that trains stop for additional safety inspections. However, under FRA's State Safety Participation Program, any State with FRA-certified inspectors may participate actively in inspecting these shipments for compliance with the Federal regulations at the points where those regulations require railroad inspections. State inspectors, of course, could be members of Tribes. FRA will make sure that its detailed plans for inspecting the growing number of spent fuel and high-level waste shipments include coordination with FRA-certified inspectors from participating States and outreach to affected Tribes to explain to them the precautions that are being taken.