



SIDLEY AUSTIN LLP  
1501 K STREET, N.W.  
WASHINGTON, D.C. 20005  
(202) 736 8000  
(202) 736 8711 FAX

pmoates@sidley.com  
(202) 736-8175

BEIJING	HONG KONG	SHANGHAI
BOSTON	HOUSTON	SINGAPORE
BRUSSELS	LONDON	SYDNEY
CHICAGO	LOS ANGELES	TOKYO
DALLAS	NEW YORK	WASHINGTON, D.C.
FRANKFURT	PALO ALTO	
GENEVA	SAN FRANCISCO	

FOUNDED 1866

June 3, 2014      236145

**By Hand-Delivery**

Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, D.C. 20423

**ENTERED**  
**Office of Proceedings**  
**June 3, 2014**  
**Part of**  
**Public Record**

Re: CSX Transportation, Inc. – Petition for Declaratory Order  
STB Finance Document No. 35832

Dear Ms. Brown:

Enclosed for filing in the above-referenced matter is an original and ten copies of CSX Transportation, Inc.'s ("CSXT's") Petition for Declaratory Order with our check for \$1,400 for the cost of filing. Also enclosed are three disks containing the Petition in pdf searchable format.

Please date-stamp the extra copy and return it to our messenger. Thank you for your assistance in this matter. If you have any questions, please contact the undersigned.

Sincerely,

G. Paul Moates

**FILED**  
**June 3, 2014**  
**SURFACE**  
**TRANSPORTATION BOARD**

Enclosures



**FEE RECEIVED**  
**June 3, 2014**  
**SURFACE**  
**TRANSPORTATION BOARD**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**Finance Docket No. 35832**

---

**CSX TRANSPORTATION, INC.  
– PETITION FOR DECLARATORY ORDER**

---

**G. Paul Moates  
Hanna M. Chouest  
SIDLEY AUSTIN LLP  
1501 K Street, N.W.  
Washington, D.C. 20005  
(202) 736-8000  
(202) 736-8711 (fax)**

**R. Eric Bilik  
McGuire Woods LLP  
50 N. Laura St., Ste. 3300  
Jacksonville, FL 32203  
904-798-2685**

*Counsel to CSX Transportation, Inc.*

**Dated: June 3, 2014**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**Finance Docket No. 35832**

---

**CSX TRANSPORTATION, INC.  
– PETITION FOR DECLARATORY ORDER**

---

CSX Transportation, Inc. (“CSXT”) hereby requests that the Surface Transportation Board (“Board”) institute a declaratory order proceeding and find that the complaint<sup>1</sup> filed by HAMP, Inc. (“HAMP” or “Plaintiff”) in the Circuit Court of Prince William County, Virginia against CSXT, claiming negligence, nuisance and trespass by virtue of its failure to maintain and increase the size of a culvert, is preempted by the Interstate Commerce Commission Termination Act (“ICCTA”), 49 U.S.C. § 10501(b).

**INTRODUCTION**

This controversy arises from flooding that occurred after Tropical Storm Lee dropped an unprecedented amount of rain on the Mid-Atlantic region in September, 2011. HAMP owns Holly Acres Mobile Home Park, where it rents pad sites to owners of mobile homes on a property next to the Marumsco Creek in Prince William County, Virginia. Compl. ¶¶ 8-9. Since at least 1902, CSXT has maintained a rail line on which it operates trains in this area across a forty-foot tall and 150-foot wide berm that crosses Marumsco Creek. CSXT has a 12-foot concrete arch culvert that permits Marumsco

---

<sup>1</sup> Complaint, *HAMP, Inc. v. CSX Transp., Inc.*, Case No. CL14-1561 (Prince William Cnty. Cir. Ct. Feb. 28, 2014) (“Compl.”) (attached as Exhibit 2).

Creek to flow beneath and through the CSXT right-of-way constructed on the berm. Compl. ¶ 11.

When Tropical Storm Lee moved through the Washington, D.C. area, rain came down so fast for so long that the National Weather Service declared it a “once-in-a-millennium event.”<sup>2</sup> At Fort Belvoir, Virginia, the weather service said, the 3-hour rainfall was “an incredible 7.03 inches.” Weil, *supra*, at n.2. According to the weather service, that kind of rainfall “has less than a 0.1 per cent chance of occurring in any given year.” *Id.* The extremely unlikely event, the service said, is “sometimes called a 1,000-year rainfall.” *Id.* CSXT’s large culvert was never designed to handle a once-in-a-thousand-year event; indeed, it is unclear that any culvert could have handled this meteorological event.

The torrential downpour that accompanied Tropical Storm Lee caused Marumsco Creek to breach its banks and flooded HAMP’s property. According to HAMP, this historic storm caused “cars and a trailer [to be] carried into the Creek and jammed the Culvert, causing water to rise like a sink.” Compl. ¶ 38. HAMP filed suit against CSXT in the Circuit Court of Prince William County, Virginia. The complaint alleges that CSXT failed to “maintain and increase the size of [its] culvert” that resulted in the flooding of Plaintiff’s property following the storm, which HAMP concedes was “a 100-year event.” Compl. at 1 (introductory paragraph); *id.* ¶ 38. Plaintiff seeks relief from CSXT as a result of the damage to its property, and requests that the court order CSXT to “increase the size of the Culvert” and “maintain the Culvert in a reasonable fashion.” Compl. § V, ¶¶1-2.

ICCTA confers jurisdiction over rail transportation on the Board and expressly preempts state law with respect to the “regulation of rail transportation.” 49 U.S.C.

---

<sup>2</sup> See Martin Weil, *D.C. area's recent rainfall might be once-in-a-thousand-years event*, WASH. POST, Sept. 17, 2011, available at [http://www.washingtonpost.com/local/dc-areas-recent-rainfall-might-be-once-in-a-thousand-years-event/2011/09/16/gIQAtU1qYK\\_story.html](http://www.washingtonpost.com/local/dc-areas-recent-rainfall-might-be-once-in-a-thousand-years-event/2011/09/16/gIQAtU1qYK_story.html).

§ 10501(b)(2). “Rail transportation” includes rail infrastructure beneath and supporting railroad tracks, including culverts, bridges, and berms. *See, e.g., A&W Props., Inc. v. Kansas City S. Ry. Co.*, 200 S.W.3d 342, 351 (Tex. Ct. App. 2006) (ICCTA preempted plaintiffs’ state law tort claims for damages and injunctive relief seeking to require railroad to widen culverts). “Rail transportation” also includes a rail carrier’s maintenance activities. *See James Riffin – Pet. for Decl. Order*, STB Docket No. 34997, at 5-6 (S.T.B. served May 2, 2008).

Plaintiff’s complaint therefore asks the state court to regulate directly CSXT’s railroad activities, including the design and operation of its culverts and bridges. Under well-established agency and court precedent, Plaintiff’s state law claims are preempted by Section 10501(b) of ICCTA. Accordingly, CSXT requests that the Board open a declaratory order proceeding and find that the Plaintiff’s claims are preempted.

## **BACKGROUND**

### **A. General ICCTA Preemption**

“The doctrine of preemption—rooted in the Constitution’s Supremacy Clause—permits Congress to expressly displace state or local law in any given field.” *Norfolk S. Ry. Co. v. City of Alexandria*, 608 F.3d 150, 156 (4th Cir. 2010). Congress enacted ICCTA with the express intent of preempting remedies under state law that regulate rail transportation pursuant to the United States Supremacy Clause. The preemption section of ICCTA, Section 10501(b), provides:

(b) The jurisdiction of the Board 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,

*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.*

49 U.S.C. § 10501(b) (emphasis added).

The courts have repeatedly recognized that these provisions broadly preempt state and local laws regulating rail transportation. *See, e.g., City of Auburn v. United States Gov't*, 154 F.3d 1025, 1031 (9th Cir. 1998), *cert. denied*, 527 U.S. 1022 (1999) (describing language of section 10521(b)(2) as “broad” and giving Board “exclusive jurisdiction over construction, acquisition, operation, abandonment, or discontinuance of rail lines”); *CSX Transp., Inc. v. Ga. Pub. Serv. Comm’n*, 944 F.Supp. 1573, 1581 (N.D. Ga. 1996) (“[i]t is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority”).

Because ICCTA “vests in the Board broad jurisdiction over ‘transportation by rail carrier,’” section 10501(b) “is intended to prevent a patchwork of local regulation from unreasonably interfering with interstate commerce.” *Grafton & Upton R.R. Co. – Petition for Declaratory Order*, 2014 STB LEXIS 12, at \*9-10 (S.T.B. served Jan. 27, 2014); *Boston & Maine Corp. & Springfield Terminal Ry. Co. – Petition for Declaratory Order*, STB Fin. Docket No. 35749, slip op. at 3 (S.T.B. served July 19, 2013); *City of Milwaukee – Petition for Declaratory Order*, 2013 STB LEXIS 100, at \*5 (S.T.B. served Mar. 25, 2013).

Section 10501 preempts state and local laws that “may reasonably be said to have the effect of managing or governing rail transportation,” or, even if not preempted on their face, “have the effect of unreasonably burdening or interfering with rail transportation.” *N.Y. Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 252 (3d Cir. 2007); *City of Milwaukee, supra*, at \*5-8 (citations omitted).

A state regulation can be found either facially preempted by ICCTA or preempted as applied. A state regulation is facially preempted where there is a direct conflict between the state law ordinance or claim and railroad operations or where the matter is directly regulated by the Board—including construction, operation, and abandonment of rail lines. *See CSX Transp. Inc. – Petition for Declaratory Order*, STB Docket No. 34662, at 3 (S.T.B. served May 3, 2005); *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 332 (5th Cir. 2008) (reiterating Board test for facially preempted regulations); *see also Union Pac. R.R. Co. v. Chicago Transit Auth.*, 647 F.3d 675, 679 (7th Cir. 2011) (“Categorical preemption occurs when a state or local action is preempted on its face despite its context or rationale.”). As applied ICCTA preemption requires a factual inquiry to determine whether the ordinance “interferes with the railroad’s ability to conduct its operations or otherwise unreasonably burdens interstate commerce.” *City of Cayce v. Norfolk S. Ry. Co.*, 706 S.E.2d 6, 10 (S.C. 2011); *Union Pac.*, 647 F.3d at 679 (explaining that an action “may be preempted ‘as applied’ based on the degree of interference that the particular action has on railroad transportation—this occurs when the facts show that the action ‘would have the effect of preventing or unreasonably interfering with railroad transportation’”).

State “regulation” that is preempted by ICCTA includes local ordinances. For example, nuisance ordinances requiring maintenance are preempted by ICCTA where enforcement of such nuisance ordinances would impact railroad operations by requiring a railroad to expend significant sums of money across its network. *See City of Cayce*, 706 S.E.2d at 6 (town nuisance ordinance requiring railroad to paint over graffiti on its bridge was preempted by ICCTA). In *Cayce*, Norfolk Southern demonstrated that the cost of re-painting the bridge at issue could amount to \$250,000. The court held that ICCTA preempts enforcement of the ordinance because “bridges are expressly considered part of the railroad’s operations under the definitional section of the ICCTA and the enforcement of the City’s ordinance against Norfolk will have an effect on its

railroad operations that falls within the scope of the ICCTA.” *Id.*, 706 S.E.2d at 11. In particular, the court noted that allowing this particular ordinance to stand would unreasonably burden interstate commerce. There are over 100,000 railroad bridges in the United States. The court emphasized that “the need for uniformity [in regulation] is readily apparent based on the number of bridges throughout the United States and the diversity of ownership.” *Id.*, 706 S.E.2d at 12. Therefore, the court properly held the ordinance to be preempted by ICCTA.

Legal damages under state common law also constitute state “regulation” that can be preempted by ICCTA. As one court explained, “a state may regulate through an award of damages under a common law claim as effectively as it may regulate by some form of preventative relief, and thus a state common law cause of action qualifies as ‘regulation’ for purposes of section 10501(b).” *Maynard v. CSX Transp., Inc.*, 360 F. Supp.2d 836, 840 (E.D. Ky. 2004). Remedies that require payment to complainants can unreasonably burden interstate commerce. *See A&W Props.*, 200 S.W.3d at 349 (finding the cost of payment of damages constitutes regulation of the railroad); *see also Pere Marquette Hotel Partners, LLC v. United States*, Cv. No. 09-5921, 2010 WL 925297, at \*5 (E.D. La. Mar. 10, 2010) (“The application of state law negligence principles to assess and evaluate the suitability of the design and construction of a railroad crossing, railroad tracks, and roadbed for railroad tracks qualifies as an attempt at state law ‘regulation’ in respect to rail transportation.”).

As the case law illustrates, ICCTA preemption is broad, and encompasses the plaintiff’s claims.

## **B. ICCTA Preemption in Flooding Cases**

Applying these general ICCTA preemption principles, courts have found preempted claims for damages caused by flooding. *See A&W Props.*, 200 S.W.3d at 342 (finding preempted state law claims against railroad for failing to design culvert to

contain a creek in the event of a 100 year flood); *Maynard*, 360 F.Supp.2d at 843 (plaintiff's state law complaints regarding drainage under tracks and at crossings were caused by construction and maintenance of tracks and crossings themselves, and were preempted); *Griffioen v. Cedar Rapids & Iowa City Ry. Co.*, No. C13-0066, 2013 U.S. Dist. LEXIS 135958 (N.D. Iowa Sept. 18, 2013) (ICCTA completely preempted state law claims aimed at collapsed railroad bridges that purportedly caused flooding on plaintiffs' property); *Hutchinson v. CSXT* – Trial Court Order, No. 06-C-160-0 (Circuit Court of Logan Cnty., W. Va. Aug. 23 2007) (ICCTA preempted nuisance claims aimed at CSXT's purported negligent design and construction of "various embankments, culverts, overpasses, bridges and related structures . . .") (attached as Exhibit 3).

Similarly, it is well-settled that "the design and construction of a railroad crossing, roadbed, and railroad tracks, is integrally related to 'transportation'" and claims regarding the manner of such design and construction are preempted. *See Pere Marquette Hotel Partners*, 2010 WL 925297 at \*6; *Tex. Cent. Bus. Lines Corp. v. City of Midlothian*, 669 F.3d 525, 533 (5th Cir. 2012) (holding that regulations regarding the design and construction of railroad embankments are preempted); *Maynard*, 360 F. Supp.2d at 843 (negligence claims related to the construction and maintenance of a track that allegedly caused water to drain onto adjacent property were preempted).<sup>3</sup>

---

<sup>3</sup> Not all flooding claims are facially preempted. However, decisions such as *Emerson v. Kan. City S. Ry. Co.*, 503 F.3d 1126 (10th Cir. 2007), *Rushing v. Kansas City Southern Railway Co.*, 194 F. Supp. 2d 493 (S.D. Miss. 2001) and *Buddy and Holley Hatcher – Petition for Declaratory Order*, FD 35581 (STB served Sept. 21, 2012) are factually inapposite. Those cases involved flooding caused by non-rail transportation activities ancillary to – or far removed from – mainline railroad operations; they did not involve, as here, claims seeking to recover damages purportedly resulting from CSXT's design and operation of its track-support structures. *See, e.g., Pere Marquette*, 2010 U.S. Dist. LEXIS 36413, at \*16-18 (distinguishing *Rushing* and *Emerson*); *A&W Props.*, 200 S.W.3d at 350 (distinguishing *Rushing*).

### C. The Current State Court Controversy

This Petition stems from a complaint filed by HAMP against CSXT in the Circuit Court of Prince William County, Virginia. HAMP's complaint arises as a direct result of flooding that occurred in September 2011. According to Plaintiff, more than half of the Holly Acres Mobile Home Park site "sits below a 100 year, or 1% 'base flood' level." Compl. ¶ 23. The flooding—a result of the devastating 100-year event, Tropical Storm Lee—resulted in damage to approximately 67 mobile homes and much of HAMP's infrastructure at Holly Acres. *Id.* ¶¶ 35-40. HAMP claims that the flooding rose to the level of a 100-year flood because of CSXT's Culvert. HAMP alleges that the CSXT berm forms a man-made barrier or dam, and "impounding structure" to the natural flow of the Creek. *Id.* ¶ 14. Changes to the surrounding area—including new development over the last 100 years—have increased the water flow through the creek and have resulted in flooding, which HAMP asserts occurred "directly as a result of the Culvert." *Id.* ¶¶ 17-18. The complaint alleges that CSXT was aware of the flooding and did not take any "action to widen or improve the Culvert." *Id.* ¶ 19. The existence of the flood zone allegedly "substantially reduces the utility and [] value of the property." *Id.* ¶ 25. As a result, HAMP seeks to recover from CSXT for the damage caused to its property following Tropical Storm Lee.

HAMP's complaint is based on causes of action for negligence, trespass, nuisance, various sections of the Virginia Code, and inverse condemnation. HAMP theorizes that CSXT failed to live up to its duty to "maintain and to adjust to the natural flow of the Creek through the Culvert" and that but for the size and level of maintenance performed on the CSXT culvert, Tropical Storm Lee would not have caused the severity of flooding that resulted in damages to Holly Acres. *Id.* ¶¶ 47, 50-57. According to HAMP, CSXT also failed to abide by a provision of the Virginia Code that imposes permitting restrictions on the construction of impounding structures. *Id.* ¶¶ 48, 84-96. HAMP claims that CSXT's failure to enlarge the Culvert resulted in a trespass on

HAMP's property via the flood. *Id.* ¶ 68. HAMP also alleges that CSXT's use of its own property is "unreasonable and has created hazardous conditions" to the detriment of HAMP and has thereby created a nuisance "for which damages and remedies should flow as swiftly as the water in the Creek." *Id.* ¶¶ 80-81. Finally, HAMP claims that CSXT's actions have resulted in inverse condemnation, under Virginia State law. *Id.* ¶¶ 97-107.

In its state court filings, CSXT has informed the court and HAMP that it intends to seek a declaratory judgment from the Board on this matter. *See* Defendant's Motion to Stay Pending a Decision by the Surface Transportation Board on CSXT's Petition for Declaratory Order, *HAMP, Inc. v. CSX Transp. Inc.*, Case No. CL14-1561 (Prince William Cnty. Cir. Ct. Apr. 21, 2014). CSXT has requested that the court stay the litigation pending a decision by the Board. The Court has not yet ruled on that request.

## DISCUSSION

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 to begin a declaratory order proceeding to eliminate a controversy or remove uncertainty. *See CSX Transp., Inc. – Petition for Declaratory Order*, STB Docket No. 34662 at 5 (S.T.B. served Mar. 14, 2005). There is plainly a controversy for the Board to resolve here. HAMP claims that CSXT is required by state law to maintain its culvert – including through costly resizing – to attempt to prevent flooding. CSXT maintains that such state regulation of the design and construction of CSXT's culverts is preempted by ICCTA. An order by the court favorable to HAMP would impact not only CSXT, but also the broader railroad industry, opening the door to parties demanding that railroads across the country modify the sizing and construction of culverts and bridges that abut their property. The resulting patchwork of state regulation would create havoc in the rail industry.

CSXT therefore respectfully requests that the Board begin a proceeding to resolve this controversy and declare that the state law claims are preempted by ICCTA. As discussed below, HAMP's claims are facially preempted as a direct attempt to regulate the design and maintenance of railroad facilities used to provide interstate rail service. Indeed, HAMP goes so far as to claim that CSXT was required to obtain permits from the state, a claim that is preempted by black-letter ICCTA preemption principles. Moreover, this attempt to regulate the construction and design of its culverts will impose an unreasonable burden on CSXT and interstate commerce. Finally, CSXT proposes a procedural schedule for the prompt resolution of this controversy.<sup>4</sup>

**A. The State Claims are Facially Preempted by ICCTA.**

Under § 10501(b), two broad types of state regulation of transportation by rail carriers are categorically preempted: (1) permitting or preclearance requirements that, by their nature, could be used to deny a railroad the right to conduct rail operations or proceed with activities the Board has authorized; and (2) attempts to regulate matters that are regulated by the Board (such as, for example, the construction, operation, and abandonment of rail lines). *See, e.g., CSX Transp., Inc. – Petition for Declaratory Order*, STB Docket No. 34662 at 3 (S.T.B. served May 3, 2005).

In this case, HAMP raises several state-law claims that can be bundled into three categories: (1) negligence, trespass, and nuisance claims; (2) an inverse condemnation

---

<sup>4</sup> The legal issues presented here are similar to those raised in STB Finance Docket No. 35792, *Thomas Tubbs et. al – Petition for Declaratory Order* (filed Dec. 9, 2013). That pending controversy involves claims seeking damages for flooding allegedly caused by BNSF in connection with the design and construction of its mainline in Missouri, and BNSF's efforts to maintain rail transportation during a historic flood event. In that proceeding, BNSF argues that the Board need not initiate a declaratory proceeding because the law is clear that state law claims seeking damages based on the manner in which a railroad has designed, constructed and maintained its rail line are preempted by ICCTA. If the Board should find in that case that federal preemption law is clear, then the Board can similarly resolve this dispute by issuing a decision explaining that existing preemption precedent establishes that HAMP's claims are preempted by ICCTA.

claim and (3) claims of a failure to obtain required state permits for an “impounding structure.”<sup>5</sup> The Board can summarily resolve the permit claim. Any regulation requiring CSXT to “register” or “obtain a permit” for the operation of its right-of-way over the Culvert is categorically preempted.<sup>6</sup>

At the heart of HAMP’s complaint lies the charge that the Culvert is “undersized” and improperly designed and constructed. *See* Compl. at 1 (introductory paragraph); *id.* ¶¶ 16, 19, 20, 24, 38, 51, 55, 57, 64, 67, 101, 103, 115, 120; *id.* § V, ¶ 2. HAMP seeks an order from the state court that would force CSXT to “fix[] the problems of the Creek and the Culvert,” which may require, among other things, “improvements to and reconstruction of the Culvert” and the “slopes, and bridges” supporting CSXT’s tracks. *Id.* ¶ 26. HAMP also seeks an affirmative injunction that would “force” CSXT to “increase” and “expand” the size of the Culvert and “take whatever measures are necessary to prohibit further flooding of the HAMP property.” *Id.* at ¶¶ 119-20. However, this attempt to regulate interstate rail transportation is facially preempted by ICCTA. *A&W Props*, 200 S.W.3d at 342; *Maynard*, 360 F.Supp.2d at 843.

---

<sup>5</sup> HAMP asserts that CSXT has violated Virginia law because the Culvert falls under the definition of an “impounding structure” under the Virginia Code. HAMP asserts that CSXT failed to register the Culvert or obtain a permit for its operation. HAMP also claims that CSXT has violated the Flood Protection and Dam Safety Act, Va. Code Ann. § 10.1-604 *et seq.*, which requires that an owner of an “impounding structure” must file an application with the Virginia Soil and Water Conservation Board providing certain information regarding the structure. HAMP asserts that “CSX has failed to meet any of the requirements” of the Act. Compl. ¶ 94.

<sup>6</sup> *See CSXT – Petition for Declaratory Order*, STB Docket No. 34662 at 8 (S.T.B. served Mar. 14, 2005) (“the courts have made clear that state or local permitting or preclearance requirements of any kind that would affect rail operations (including building permits, zoning ordinances, and environmental and land use permitting requirements) are preempted”); *see also City of Auburn*, 154 F.3d 1025 (state and local environmental and land use regulation preempted); *Soo Line R.R. Co. v. City of Minneapolis*, 38 F. Supp.2d 1096 (D. Minn. 1998) (local permitting regulation regarding the demolition of railroad buildings preempted); *Norfolk S. Ry. Co. v. City of Austell*, No. 1:97-cv-1018-RLV, 1997 U.S. Dist. LEXIS 17236 (N.D. Ga. 1997) (local zoning and land use regulations preempted).

*A&W Properties, Inc. v. Kansas City Southern Railway Co.* is particularly analogous to the complaint here. In *A&W*, the complainant alleged that KCS's culvert, located adjacent to property recently purchased by A&W, was "too narrow to contain the creek in the event of a 100-year flood." *Id.*, 200 S.W.3d at 343. As a result, A&W was unable to obtain building permits for its planned development. *Id.* A&W brought suit against KCS, pleading breach of statutory duty, nuisance, negligence, trespass, and a request for injunctive relief or actual and exemplary damages. *Id.*, 200 S.W.3d at 343-44. The railroad demonstrated that the improvements to the culvert demanded by the plaintiff would cost over \$500,000. The court rejected all of A&W's claims, finding that "the cost [of improving the culvert] to the Railroad would constitute regulation of the Railroad just as payment of damages would." *Id.*, S.W.3d at 349. In issuing its ruling, the court noted that the \$500,000 cost of repair was significant and that any ruling requiring such a repair would open the flood gates to an "unknown number of landowners to recover a half million dollars each from that railroad for a diminution in the value of their land purportedly caused by its proximity to the railroad." *Id.*, S.W.3d at 350. The court properly concluded that A&W's remedies involved "regulation of rail transportation" and were thus facially preempted. *Id.*, S.W.3d at 351. The Board should reach the same result here.

Finally, HAMP's inverse condemnation claim is also preempted by ICCTA. The Board explained recently that it would not permit parties to make an "end run" around well-settled federal preemption laws by applying inverse condemnation statutes to property that has suffered some damage from adjacent rail operations. *Norfolk S. Ry. Co. – Petition for Declaratory Order*, STB Fin. Docket No. 35701 (S.T.B. served Nov. 4, 2013). Examining the "true nature" of HAMP's inverse condemnation claim, it is clear that HAMP is simply seeking damages due to the design and construction of a culvert on CSXT property. Given the true nature of this claim, the Board should "find that these claims are preempted regardless of whether they are brought as nuisance claims or

under a ‘property damage’ provision contained in Virginia’s inverse condemnation clause, because such claims unreasonably burden interstate commerce and unreasonably interfere with railroad operations.” *Id.* at 6. Therefore, even assuming this inverse condemnation claim is valid – and it is not – it is facially preempted by ICCTA.

**B. Permitting States to Regulate CSXT Design and Operation of its Culverts and Bridges to Prevent 100-year Flooding Would Balkanize the Rail Industry and Impose an Unreasonable Burden on Interstate Commerce.**

If the Board declines to find these state law claims categorically preempted, CSXT will demonstrate that the claims should be preempted “as applied” because they would have the effect of unreasonably burdening or interfering with rail transportation. *See Franks Inv. Co. v. Union Pac. R.R. Co.*, 593 F.3d 404, 414 (5th Cir. 2010) (en banc). CSXT submits that these claims can also be found preempted as applied for three reasons.

*First*, it would be tremendously expensive for CSXT to redesign its culverts to accommodate a meteorological event like Tropical Storm Lee. This storm was rightly called a “once-in-a-millennium event.” According to HAMP, during this tremendous storm, “cars and a trailer were carried into the Creek and jammed the Culvert, causing water to rise like a sink.” Compl. ¶ 38. It is unclear that any redesign of the culvert could have prevented the widespread flooding that impacted the entire Mid-Atlantic region or prevented cars and a trailer from becoming lodged in the Culvert. Assuming it were possible, it would require CSXT to expend significant financial and other resources that are unnecessary to CSXT’s current and anticipated railroad operations and rail transportation needs. Exhibit 1 (Sparks V.S. ¶ 17). Although the precise scope of HAMP’s requested relief is unclear, any redesign of the Culvert or installation of additional drainage structures on or underneath the rail line would require additional engineering and hydraulic analysis, pre-engineering and permitting activity, and

ultimately the construction and installation of additional drainage structures under or through the rail line. *Id.* CSXT estimates that the cost of redesigning or expanding the Culvert would be at least several hundred thousand dollars, and more likely would exceed \$1 million. *Id.* ¶ 19. Indeed, even Plaintiff alleges that the “estimated costs for fixing the problems of the Creek and the Culvert range anywhere from \$2,000,000 to \$15,000,000 . . . .” Compl. at ¶ 26. This economic impact on CSXT and interstate commerce is plainly significant. State actions seeking to regulate rail operations that would impose an economic impact on a railroad of this magnitude are preempted by ICCTA. *See, e.g., Anderson v. BNSF Ry. Co.*, 291 S.W.3d 586, 592 (Ark. 2009) (holding that jurisdiction of ICCTA was exclusive over state action that impacts transportation by rail and has an economic impact on the railroad).

*Second*, there is no operational reason for CSXT to enlarge the Culvert. The particular culvert at issue here was constructed by CSXT in 1905. The culvert—a 12-foot concrete arch<sup>7</sup>—was constructed to meet CSXT’s railroad operational needs. Exhibit 1 (Sparks V.S. ¶¶ 15, 19). To this day, the Culvert is in excellent structural condition and fully meets all of CSXT’s rail transportation requirements. CSXT anticipates that it will continue to meet CSXT’s needs for the next century. *See id.*

*Third*, the costs and burden on CSXT would increase exponentially if even a fraction of the landowners adjacent to CSXT’s approximately 75,000 bridges and culverts sought similar relief. *See* Exhibit 1 (Sparks V.S.). Indeed, complainants acknowledge that “living below a 100 year base flood level is not unusual in Virginia or the United States.” Compl. ¶ 25. Thus, it is to be expected that if the court were to determine that anyone living below a 100-year base flood level were entitled to seek

---

<sup>7</sup> Technically, this 12-foot culvert would fall under CSXT’s definition of a “railroad bridge.” Consistent with the Federal Railroad Administration’s (“FRA”) “Bridge Safety Standards” regulations, 49 CFR § 237.1, *et. seq.*, CSXT defines a “railroad bridge” as a structure with a 10-foot or greater cumulative span.

damages from a railroad operating nearby, landowners would seize upon the opportunity. Any such ruling would encourage others to claim that railroad operations reduce the utility or value of their property in some other way. The end result would be a burdensome patchwork of local regulations governing the design and construction of railroad facilities – the precise outcome Congress designed ICCTA preemption to prevent. *Grafton & Upton R.R. Co.*, 2014 STB LEXIS at \*9-10.

In sum, ICCTA preemption is intended to prevent railroads from having to react to the whim of local state legislators and judges in every jurisdiction in which they operate. As courts have recognized, “the enactment of differing standards and requirements would inevitably be detrimental to the orderly functioning of the industry as a whole.” *City of Cayce*, 706 S.E.2d at 11; *see also id.*, 706 S.E.2d at 12 (“The need for uniformity is readily apparent based on the number of bridges throughout the United States and the diversity of ownership.”); *cf. Miller v. SEPTA*, 65 A.3d 1006, 1008 (Pa. Commw. Ct. 2013) (“Allowing a jury to decide on a case-by-case basis what constitutes proper bridge maintenance would allow lay people to take over the job of qualified inspectors. The resulting piecemeal rulings would directly undermine the stated goal of the Railroad Safety Act to achieve a national and uniform system of railroad regulation. 49 U.S.C. §20106(a)”) (applying FRSA preemption). HAMP’s attempt to have a Virginia court dictate how CSXT is required to maintain and operate its facilities goes to the heart of these regulatory uniformity concerns and should be deemed preempted.

**C. CSXT Proposes a Procedural Schedule to Resolve Quickly This Controversy.**

The state litigation has already been pending for three months. Both parties have an interest in resolving this controversy quickly. CSXT therefore proposes the following procedural schedule, which would afford both parties sufficient time to develop and fully present their positions:

Day 0 – Board Institutes Declaratory Proceeding

Day 30 – CSXT Opening Evidence Due

Day 60 – HAMP Reply Evidence Due

Day 75 – CSXT Rebuttal Evidence Due

While the Board does permit discovery for certain kinds of declaratory orders,<sup>8</sup> it does not ordinarily provide for discovery in preemption cases. Preemption cases present legal issues, for which discovery is not necessary. *CSX Transp., Inc. – Petition for Declaratory Order*, STB Docket No. 34662 at 6 (S.T.B. served Mar. 14, 2005); *see also Consolidated Rail Corp. – Declaratory Order Proceeding*, STB Fin. Docket No. 34319 at 7 (S.T.B. served Oct. 10, 2003); *United States Environmental Protection Agency – Petition for Declaratory Order*, STB Fin. Docket No. 35803 (S.T.B. served Feb. 6, 2014) (establishing procedural schedule for proceeding without providing for discovery).

There is no need for discovery in this matter as the state claims are facially preempted by ICCTA. Even under the alternative theory – that the state regulation of the design and construction of this culvert is preempted as applied because it would impose an unreasonable burden on interstate commerce – the issues can be examined without expensive and time-consuming discovery. CSXT, as the party with the burden of proof, will present its case on opening, which will include more robust legal arguments and verified statements by CSXT witnesses regarding the cost of expanding the culvert to accommodate 100-year flooding, as well as the burden if similar state requirements were imposed on roughly 75,000 other culverts and bridges on the CSXT system. HAMP or other interested parties can submit their own opposition evidence, and CSXT will reply.

---

<sup>8</sup> See *Arkansas Elec. Coop. Corp. – Petition for Declaratory Order*, STB Docket No. 35305 (S.T.B. served Dec. 1, 2009) (ordering discovery in a proceeding regarding coal dust emission standards).

## CONCLUSION

For the reasons discussed herein, CSXT respectfully requests that the Board begin a proceeding to resolve the controversy over whether HAMP's state law claims are preempted by ICCTA.

Respectfully submitted,



G. Paul Moates  
Hanna M. Chouest  
SIDLEY AUSTIN LLP  
1501 K Street, N.W.  
Washington, D.C. 20005  
(202) 736-8000  
(202) 736-8711 (fax)

R. Eric Bilik  
McGuire Woods LLP  
50 N. Laura St., Ste. 3300  
Jacksonville, FL 32203  
904-798-2685

*Counsel to CSX Transportation, Inc.*

Dated: June 3, 2014

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**Finance Docket No. 35832**

---

**CSX TRANSPORTATION, INC  
– PETITION FOR DECLARATORY ORDER**

---

**DECLARATION OF EDWARD D. SPARKS II**

1. My name is Edward D. Sparks II. I am an adult individual over the age of eighteen years and am competent to make this Declaration. Unless stated otherwise, the facts set forth herein are from my own personal knowledge or from my review of business records kept in the ordinary course of business by CSX Transportation, Inc. (“CSXT”).

2. I am currently the Assistant Chief Engineer of Structures for CSXT. I have held this position since 2012. Prior to my current position I was the Division Engineer on the Chicago Division. I have been employed with CSXT for 20 years. I am also a member of the American Railway Engineering and Maintenance-of-Way Association (“AREMA”). In 1993, I obtained a Bachelor of Science degree in Civil Engineering from the University of Kentucky.

3. CSXT is one of the largest rail transportation companies in the United States. CSXT is incorporated under the laws of the Commonwealth of Virginia and maintains its principal place of business in Jacksonville, Florida. CSXT provides

common carrier rail transportation services across a rail network consisting of approximately 21,000 railroad route miles linking communities and commercial markets in 23 states (including the Commonwealth of Virginia), the District of Columbia, and two Canadian provinces (the "CSXT Rail Network"). CSXT is a Class I railroad as defined by the Surface Transportation Board.

4. As Assistant Chief Engineer of Structures, I am responsible for the design and oversight of all repairs, modifications, or improvements to CSXT's bridges, culverts, and tunnels throughout CSXT's Rail Network.

5. As part of my job duties, I am also familiar with: (i) CSXT's published specifications for inspections of structures supporting CSXT's railroad operations, including bridges, culverts and tunnels; and (ii) the Federal Railroad Administration's ("FRA") "Bridge Safety Standards" regulations, codified at 49 C.F.R. § 237.1, *et. seq.*

6. Pursuant to those specifications and regulations, CSXT conducts annual inspections of bridges, culverts, and tunnels. In my prior position as Division Engineer, I was responsible for overseeing CSXT Maintenance of Way employees who conducted these inspections on culverts on the Chicago Division, and I worked closely with the Engineer of Bridge Inspections who was responsible for bridge inspections.<sup>1</sup>

7. Across its Rail Network, CSXT owns and maintains approximately 15,000 bridges and 60,000 culverts. The majority of these bridges and culverts directly support CSXT's operating railroad right-of-way and track infrastructure, including the rail, ties and ballast, and thus constitute integral parts of CSXT's Rail Network.

---

<sup>1</sup> There were no tunnels on the Chicago Division.

8. The CSXT Rail Network includes more than 2,000 railroad route miles in the Commonwealth of Virginia, including the mainline double tracks and railroad right-of-way running through Woodbridge, Prince William County, Virginia at issue here (the "Rail Line"). In my current capacity and based upon my prior experience, I am generally familiar with the Rail Line (including the supporting embankment and culverts), its rail transportation activities, layout, the surrounding area, and the current and potential future railroad operations and uses of the Rail Line.

9. The Rail Line makes up part of CSXT's main rail corridor between Washington, DC and Richmond, Virginia, known as the Richmond, Fredericksburg, and Potomac Subdivision ("RF&P"). Rail traffic on the Subdivision consists of freight trains, as well as passenger and commuter trains for Amtrak and Virginia Railway Express. Approximately 55 freight and passenger trains travel the Rail Lines daily. The Rail Line also falls within CSXT's regulated rail system under the exclusive jurisdiction of the Surface Transportation Board.

10. Based upon a review of CSXT real property and historical records, CSXT's railroad right-of-way in Woodbridge, Prince William County, Virginia is owned by CSXT in fee simple, and has been owned by CSXT and its predecessor since at least 1903.<sup>2</sup> Since then, CSXT and its predecessor railroads have continuously operated the Rail Line in Woodbridge as an active railroad engaged in interstate rail commerce.

11. I am aware that the Plaintiff, HAMP, Inc. ("HAMP"), has filed an action in the Circuit Court of Prince William County, Virginia alleging various claims against

---

<sup>2</sup> A historic railroad "valuation map" dated 1917 shows the Rail Line in existence at its current location.

CSXT based on the construction, operation, and maintenance of CSXT's railroad culvert and embankment supporting the Rail Line over Marumsco Creek in Woodbridge, Virginia (the "Action"). I have reviewed the Complaint filed by HAMP in the Action.

12. The embankment was constructed to provide a base and support for CSXT's Rail Line, including the mainline double tracks, ties and ballast. The culvert (located at CSXT railroad milepost CFP 88.5) was constructed through the embankment to allow drainage from Marumsco Creek to flow underneath the railroad right-of-way (the "Culvert"). The Culvert consists of a 12-foot concrete arch that runs through the entire width of the embankment underneath the mainline double tracks.

13. Because the Culvert has a cumulative span greater than 10-feet, the Culvert constitutes a "railroad bridge" as defined by the FRA's "Bridge Safety Standards" regulations. 49 C.F.R. § 237.5. The Culvert also constitutes a "railroad bridge" under CSXT's published specifications for inspections of structures supporting CSXT's railroad tracks, which define a "railroad bridge" to include "culverts with an individual span length of 10 feet or more or multiple spans totaling 10' or more. . . ." CSXT MWI 1401-03, "Inspection of Bridges, Culverts, and Tunnels" at p. 2.

14. Pursuant to the FRA's "Bridge Safety Standards" regulations and CSXT's internal specifications, the Culvert has been inspected annually, is well-maintained, is in good condition, and is structurally sound. Based on a review of CSXT records, I have not been able to identify any complaints related to the Culvert prior to the flooding caused by Tropical Storm Lee in September 2011.

15. The Culvert as presently designed and maintained fully and adequately serves CSXT's rail transportation needs because it: (i) supports CSXT's railroad right-of-way; and (ii) permits sufficient drainage flow to protect the railroad right-of-way and track structure from water damage. CSXT expects the Culvert, as designed, to continue serving these rail transportation needs for the foreseeable future.

16. I understand that Plaintiff's claims in the Action are premised on the allegation that CSXT has failed to: (i) "increase the size of the Culvert;" and (ii) build "additional tunnels though the CSXT Berm" to support the flow of the creek. *Compl.* at ¶¶ 16, 51, 57, 67, 115, 119. Plaintiff seeks an order in the Action requiring CSXT to "fix the problems of the Creek and the Culvert," which may require, among other things, "improvements to and reconstruction of the Culvert" and the "slopes and bridges" supporting CSXT's tracks. *Id.* at ¶ 26. I also understand that Plaintiff seeks an affirmative injunction that would "force" CSXT to "increase" and "expand" the size of the Culvert and "take whatever measures are necessary to prohibit further flooding of the HAMP property." *Id.* at ¶¶ 119-20.

17. If the Court were to award this requested relief, it would cause and require CSXT to expend significant financial and other resources that are unnecessary to CSXT's current and anticipated railroad operations and rail transportation needs. Although the precise scope of Plaintiff's requested relief is unclear, any redesign of the Culvert and/or installation of additional drainage structures on or underneath the Rail Line will require additional engineering and hydraulic analysis, pre-engineering and

permitting activity, and ultimately the construction and installation of additional drainage structures under or through the Rail Line.

18. CSXT has not at this time undertaken an independent engineering analysis of potential options to redesign and/or to expand the Culvert because there is no current need from a railroad operational and safety perspective. The Culvert is currently in good condition and is more than adequate for CSXT's current and future rail transportation needs.

19. Accordingly, CSXT cannot provide a precise estimate of the cost to comply with Plaintiff's requested relief at this time. CSXT reasonably estimates, however, that the cost of redesigning and/or expanding the Culvert would cost at least several hundred thousand dollars, and more likely will cost in excess of \$1 million. Even Plaintiff alleges that the "estimated costs for fixing the problems of the creek and the Culvert range anywhere from \$2,000,000 to \$15,000,000 . . . ." *Compl.* at ¶ 26.

20. The costs to CSXT would increase exponentially if each landowner adjacent to CSXT's approximately 75,000 bridges and culverts along its Rail Network was permitted to request similar relief through civil lawsuits.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 3<sup>rd</sup>, 2014.



EDWARD D. SPARKS II

57588069\_2

RETURN

COMMONWEALTH OF VIRGINIA



PRINCE WILLIAM CIRCUIT COURT

Civil Division  
9311 LEE AVENUE  
MANASSAS VA 20110  
(703) 792-6029

Proof of Service

Virginia:

In the PRINCE WILLIAM CIRCUIT COURT

Case number: 153CL14001561-00

Service number: 001

Service filed: February 28, 2014

Judge: CDJ

Served by: SPECIAL PROCESS SERVER

Style of case: HAMP INC vs CSX TRANSPORTATION INC

Service on: CSX TRANSPORTATION INC.

SERVE: CORPORATE CREATION  
NETWORK, INC.

4445 CORPORATION LANE

2ND FLOOR

VIRGINIA BEACH VA 23462

Attorney: HARDEN, COURTNEY B

1900 GALLOWS ROAD; STE 700

703-790-1911

VIENNA VA 22182

COMPLAINT/DECLARATORY JUDGMENT

Instructions:

Returns shall be made hereon, showing service of Summons issued Friday, February 28, 2014 with a copy of the Complaint for Declaratory Judgment filed Friday, February 28, 2014 attached.

Hearing date :

Service issued: Friday, February 28, 2014

---

For Sheriff Use Only

**SERVE**

**COMMONWEALTH OF VIRGINIA**



PRINCE WILLIAM CIRCUIT COURT

Civil Division  
9311 LEE AVENUE  
MANASSAS VA 20110  
(703) 792-6029

Summons

To: CSX TRANSPORTATION INC.  
SERVE: CORPORATE CREATIONS  
NETWORK, INC.  
4445 CORPORATION LANE  
2ND FLOOR  
VIRGINIA BEACH VA 23462

Case No. 153CL14001561-00

The party upon whom this summons and the attached complaint are served is hereby notified that unless within 21 days after such service, response is made by filing in the clerk's office of this court a pleading in writing, in proper legal form, the allegations and charges may be taken as admitted and the court may enter an order, judgment, or decree against such party either by default or after hearing evidence.

Appearance in person is not required by this summons.

Done in the name of the Commonwealth of Virginia on, Friday, February 28, 2014

Clerk of Court: MICHELE B MCQUIGG

by Brenda Elford  
(CLERK/DEPUTY CLERK)

Instructions:

COMPLAINT/DECLARATORY JUDGMENT

Hearing Official:

Attorney's name: HARDEN, COURTNEY B  
1900 GALLOWS ROAD; STE 700  
703-790-1911  
VIENNA VA 22182

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

HAMP, INC.  
13721 JEFFERSON DAVIS HWY  
Woodbridge, Virginia 22191

Plaintiff

v.

Case No. CL14- 1561

CSX TRANSPORTATION INC.  
Serve: Corporate Creations Network, Inc.  
4445 Corporation Lane, 2<sup>nd</sup> Floor  
Virginia Beach, VA 23462

Defendant.

**COMPLAINT  
(Jury Trial Demanded)**

Plaintiff, HAMP, Inc. (“HAMP”), by counsel, files this complaint for multiple causes of action, both legal and equitable and all relating to the use of land, against Defendant, CSX Transportation, Inc. (“CSX”), including negligence, nuisance and trespass by virtue of its failure to maintain and increase the size of the culvert to permit the flow of a natural stream; negligently damaging HAMP’s property and negligently endangering the people and the personal property located on HAMP’s property; taking or damaging property under Article I, Section 11 of the Virginia Constitution without compensation; inverse condemnation of property; nuisances, trespasses, and negligence in connection with the actions in the taking and damaging of the property of HAMP.

HAMP seeks monetary damages and permanent injunctive relief.

**I. PARTIES**

1. HAMP is a Virginia corporation, authorized to transact business in Virginia.

2. HAMP is the owner of 10.37 acres of land at 13721 Jefferson Davis Highway, Woodbridge, Virginia 22191, GPIN number of 8392-93-4437, also known as Holly Acres Mobile Home Park (the “Property” or “Holly Acres”), operating as a mobile home rental park with approximately one hundred and six (106) rental pad sites.

3. Henry Ridge (“Ridge”) is the owner and sole shareholder of HAMP.

4. CSX is a common carrier railroad company which provides both passenger and freight services and owns a corridor of property adjacent to HAMP’s property and is actively running trains on that corridor.

## **II. JURISDICTION AND VENUE**

5. This Court has jurisdiction to determine the issues in this matter pursuant to Article I, Section 11 of the Virginia Constitution, Va. Code Ann. §§ 8.01-184 (declaratory relief), 8.01-186 (further relief necessary), 8.01-187 (valuation for taking and damaging under inverse condemnation claim), 8.01-189 (injunctive relief), and 8.01-190 (costs).

6. Venue is proper in this judicial circuit pursuant to Va. Code Ann. § 8.01-261.

7. CSX is a Virginia corporation with its principal office located at 500 Water Street, Jacksonville, FL. CSX is a common carrier railroad which transports both commercial passengers and freight in Virginia. CSX is a public service company pursuant to Va. Code Ann. § 56-1 and has the power of eminent domain pursuant to Va. Code Ann. §§ 56-49 and 56-347.

## **III. FACTUAL EVENTS COMMON TO ALL COUNTS**

### **A. The Property**

8. HAMP and its predecessors have owned and operated Holly Acres in the current B-1 zone as a legal non-conforming mobile home park since the 1950s. The County has continually certified the legal non-conforming status of Holly Acres to the present.

9. HAMP rents “pad sites” to owners of mobile homes. The pad sites contain utilities. The mobile homes are normally anchored, but not permanently fixed to the pad sites. The mobile homes are considered personal property in Virginia.

10. Holly Acres abuts to the south Marumsco Creek (the “Creek”), owned and controlled by Prince William County.

11. In or about 1905 or earlier, CSX (or its predecessors) built a forty (40) foot tall, and approximately 150 foot wide berm (“CSX Berm”) to support railroad tracks. CSX actively runs trains on the rails and right of way over the CSX Berm.

12. In or about the same timeframe as the construction of the CSX Berm in 1905, CSX also constructed a culvert through the CSX Berm to permit the flow of Marumsco Creek (“Culvert”).

13. Neither the design nor the construction of the CSX Berm or the Culvert relate to the manner in which CSX conducts its railroad activities. Any alterations of the Culvert to permit more flow has no effect on the manner in which CSX conducts its railroad activities.

14. The CSX Berm spans Marumsco Creek, forming a man-made barrier or dam, and “impounding structure” pursuant to Va. Code Ann. § 10.1-604, to the natural flow of the Creek. Upon information and belief, the Culvert was originally constructed to approximately fifteen (15) feet in arched height from the base of the stream (at approximately eight (8) to ten (10) feet mean sea level (“MSL”), approximately fifteen (15) feet wide, and it cut through the entire one hundred (100) foot width of the CSX Berm. The downstream side of the CSX Berm flows eastwardly through wetlands for approximately a mile until it reaches the Potomac River.

15. CSX has not maintained the Culvert and it has filled up with no less than three (3) feet of sediment, in addition to rocks and debris. The obvious effect of the sediment is to reduce the

volume of flow through the Culvert during heavy rainstorms to create a dam and impounding structure.

16. In addition to the CSX failure to maintain the Culvert, CSX has not widened the Culvert or built additional tunnels through the CSX Berm to support either the natural flow of the Creek or the increased flow which has occurred over the last 109 years.

17. More flooding has occurred as a result of natural, climactic, or man-made increases of water to the Creek. Since 1905, development near and adjacent to the Creek has occurred, which substantially, dramatically, and critically increased the volumes of water flowing down the watershed through the Creek.

18. Frequent, regularly recurring and continuing flooding of the Creek, directly as a result of the Culvert, has affected Holly Acres, including flooding in 1976, 1985, 1996, 2001, 2006 and 2011.

19. CSX has known about the flooding for years, and has taken no action to widen or improve the Culvert. In fact, CSX has refused even to contribute to the improvement of the Culvert.

20. The Creek is a major and natural conduit for storm water drainage for a substantial area of Prince William County and both undeveloped and developed areas of Woodbridge. The Creek carries water to the low-lying wetlands of the Potomac River. Without the free natural flow, the water is impeded and impounded by the CSX Berm at the Culvert, causing the water to back up and accumulate on the property of Holly Acres. Because of the size, shape, and lack of maintenance of the Culvert, debris accumulates in the Culvert, frequently impeding or blocking it.

21. The flooding of Holly Acres is a foreseeable result of CSX's failure to maintain the Culvert and failure to permit the natural water flow of the Creek to pass through the CSX Berm.

22. The Federal Emergency Management Administration ("FEMA"), which charts flood plains and establishes flood zones and flood maps, has recognized through its flood maps that the Culvert prevents the free flow of water by having established a flood plain approximately 15 feet above the flood level of the Creek (at 28 feet MSL), whereas without the CSX Berm and the Culvert, the flood level would be the same as the downstream side of the Culvert: approximately 13 feet MSL. The FEMA flood map relevant to Holly Acres was published in 1995, decades after HAMP's purchase of Holly Acres.

23. More than half of Holly Acres sits below a 100 year, or 1% "base flood" level established only because of the Culvert — meaning that the high level of flooding should occur only once in 100 years, or has a 1% chance of occurring in any one year. However, frequent flooding has occurred. The "100 year base flood level" for Holly Acres is approximately 28 feet MSL, and the level and frequency of flooding results only because of the inadequate Culvert, and the failure of CSX to maintain and improve the Culvert.

24. The height and conditions of the 100 year base flood level affecting Holly Acres exist only because the CSX Berm without an adequate Culvert acts as a dam and impounding structure during flooding. Were there no CSX Berm, and were there a free flowing Creek without trash and debris, or an adequately sized Culvert, the 100 year base flood level would be 15 feet lower. Holly Acres would not be in any flood zone and Holly Acres would not be continually damaged.

25. Although living below a 100 year base flood level is not unusual in Virginia or the United States, the imposition by CSX of a flood zone on another's property substantially reduces the utility and its value of the property.

26. Estimated costs for fixing the problems of the Creek and the Culvert range anywhere from \$2,000,000 to \$15,000,000 and may include improvements to and reconstruction of the Culvert, the Creek, drainage in and around the Creek, slopes, and bridges. The relocation of the CSX Berm would not be necessary, nor would the repairs relate in any manner to railroad activities.

**B. CSX Railroad**

28. CSX is authorized to transport passengers and property as a common carrier.

29. CSX is a public service company pursuant to Va. Code Ann. Ann. § 56-1 and has the power of eminent domain pursuant to Va. Code Ann. Ann. §§ 56-49 and 56-347.

30. CSX has not properly maintained the Culvert to accommodate the natural flow of the Creek or the 109 years of development around the Creek. As a result of its failure to maintain and manage the flow of the Creek, CSX has created a dam or impounding structure at the CSX Berm, and has adversely affected the use and value of the Holly Acres property, as well as the safety of the users of the property upstream and downstream.

31. CSX is or should be aware of the dam and impounding structure it has created. Upon information and belief, CSX has remediated other dam or impounding structure situations in the Commonwealth of Virginia, as well as other states, which required similar repairs.

32. CSX is using HAMP's property as an impoundment area and flood control for the dam and CSX Berm.

33. CSX's use of the dam and CSX Berm is for a public purpose.

34. CSX has willfully and wantonly ignored the dam and impounding structure it has created.

**C. The Flood**

35. On September 8 and 9, 2011, Tropical Storm Lee dumped substantial rain in Prince William County, Virginia, particularly the Woodbridge area, causing the Creek to flood (“Flood”). As a result, runoff accumulated in the Creek and flowed toward the CSX Berm.

36. CSX had actual as well as constructive knowledge of the condition of the Creek and the Culvert, prior to the Flood.

37. Approximately 300 men, women and children occupied mobile homes below the “100 year base flood level” of Holly Acres prior to the Flood.

38. Because of the natural flooding, the upstream development, impervious surfaces, trash and debris, and CSX’s intentional refusal and negligent failure to maintain the Culvert, or to increase the size of the Culvert to protect safety, flooding occurred in and around Holly Acres. In the process of downstream flow, cars and a trailer were carried into the Creek and jammed the Culvert, causing water to rise like a sink. The Flood was a “100 year” or “1%” flood.

39. The Flood waters at Holly Acres rose approximately 16 feet to an elevation of 28 feet MSL. The Flood waters made contact with many of the mobile homes in Holly Acres, and lifted a number of the very low elevation mobile homes off their pad sites and damaged or destroyed them.

40. As a result of the Flood, much of HAMP’s infrastructure water and sewer pipes, concrete pad sites as well as approximately 67 mobile homes were damaged or substantially damaged. The costs of demolition and clean up were substantial.

41. Because HAMP’s legal use of the Property as a mobile home park was a grandfathered, non-conforming use under Prince William County and Virginia ordinances and regulations, HAMP has been unable to replace the mobile home units without meeting county, state, and

federal requirements, including FEMA requirements such as a “hydrology and hydraulics” (“H&H”) study. H&H studies normally require 6-12 months to complete. Once an H&H study is completed, HAMP must submit an application to FEMA to demonstrate that its replacement of the mobile homes will not impact the base flood elevation.

42. HAMP will not be able to use at least 50 lots until sometime in 2015 at the earliest.

43. HAMP has lost profits from at least 67 lots from September 9, 2011 until the present.

44. HAMP has incurred costs associated with the damage in the amount of \$1,606,000 million.

45. An award of damages for compensation and correction of the drainage problems resulting from the construction and lack of maintenance of the CSX Berm and Culvert will not implicate the type of economic regulation Congress was attempting to prescribe when it enacted the Interstate Commerce Commission Termination Act.

#### **IV. CAUSES OF ACTION**

##### **COUNT 1.** **NEGLIGENCE**

46. The foregoing paragraphs are incorporated herein by reference.

47. CSX has a common law duty to maintain and to adjust to the natural flow of the Creek through the Culvert in a reasonable manner so as to not to increase or decrease the flow of the Creek or to cause flooding and damage to upstream or downstream properties.

48. CSX has a duty to register and obtain a general permit for an impounding structure under Va. Code Ann. § 10.1-605 *et seq.*

49. CSX has not maintained the Culvert in a reasonable manner nor has it requested or obtained a permit for an impounding structure.

50. CSX is negligent because it has not cleaned the sediment and debris from the “floor” of the Culvert. The silt and debris has built up almost three (3) feet.

51. CSX is negligent because it has not increased the size of the Culvert in 109 years. Nor has CSX made any effort to account for or accommodate the increased flow of water in the Creek over the last 109 years.

52. CSX is aware that the amount of water in the Creek has increased and that the speed at which the water flows has increased.

53. CSX is aware that the Culvert frequently becomes clogged and has caused multiple instances of flooding and damage to upstream properties including, but not limited to HAMP’s Property.

54. The silt and debris clogging the Culvert is an open and obvious condition and it is readily apparent that the result of continued non-maintenance will worsen the frequency of the flooding.

55. The increased volume and flow of water is an open and obvious condition and it is readily apparent that the result of CSX’s continued refusal to increase the size of the Culvert will worsen the frequency of the flooding.

56. CSX is aware that when the Culvert becomes clogged, the flood waters rise so quickly as to endanger and damage the lives and safety of the residents in the mobile homes on HAMP’s Property, the residents’ personal property, and HAMP’s Property.

57. CSX’s actions in failing to maintain the Culvert and failing to increase the size the Culvert have breached its duty to HAMP to protect the public safety and breached its duty to HAMP not to block the natural flow of water.

58. CSX's actions are and have been negligent. In fact, the negligence of CSX has been so consistent and willful and reckless that it amounts to gross negligence justifying punitive damages.

59. CSX's negligent actions and inactions directly and proximately have caused water to back up and flood HAMP's Property, particularly on September 8 and 9, 2011.

60. CSX's negligent actions and inactions directly and proximately caused damage to HAMP's Property and to the life and safety of the residents.

61. As a result of CSX's negligent actions, HAMP has lost \$43,000 per month in damages for the loss of the 67 units; \$1,606,000 in damages to repair and replace the infrastructure; damages to return the Property to its prior legal position and legal entitlements; and \$8,000,000 in damages to the value of the Property.

62. The relief requested will not place any burden on interstate commerce.

WHEREFORE, HAMP demands \$43,000 per month for the ongoing damages it suffers for the loss of use of the 67 mobile home units (from September 8, 2011 to date of judgment), \$1,606,000 for the cost to repair and replace the infrastructure that was destroyed and to put the Property back to its legal condition prior to the Flood, and \$8,000,000 for damage to the property as a result of CSX's negligence. Additionally, HAMP is claiming punitive damages in the amount of \$350,000 for CSX's willful and wanton negligence and disregard for the rights of the public, public safety, HAMP's Property, and the families living in the Holly Acres Mobile Home Park.

**COUNT 2.**  
**TRESPASS**

63. The foregoing paragraphs are incorporated herein by reference.

64. CSX, by its failure to maintain the Culvert, and by failing to expand it, is blocking the natural flow of the Creek with the CSX Berm.

65. CSX has a common law duty to maintain the flow of the Creek through the Culvert in a reasonable manner so as to not cause flooding and damage to upstream or downstream properties.

66. CSX has not maintained the Culvert in a reasonable manner, nor has it properly registered or obtained a general permit.

67. CSX's actions in failing to maintain the Culvert and failing to increase the size the Culvert has directly caused water to back up and flood HAMP's Property.

68. CSX's actions and inactions have caused a trespass to occur on HAMP's Property and interfered with HAMP's exclusive use and enjoyment of the land.

69. HAMP's Property has been damaged as a result of CSX's actions and inactions.

70. As a result of CSX's negligent actions and inactions, HAMP has lost \$43,000 per month in damages for the loss of the 67 units; \$1,606,000 damages to repair and replace the infrastructure and to put the Property back to its prior legal position and legal entitlements; and \$8,000,000 in damages to the value of the Property.

71. The relief requested will not place any burden on interstate commerce.

WHEREFORE, HAMP demands \$43,000 per month for the ongoing damages it suffers for the loss of use of the 67 mobile home units (from September 8, 2011 to date of judgment), \$1,606,000 for the cost to repair and replace the infrastructure that was destroyed and to return the Property to its legal condition prior to the Flood, and \$8,000,000 in damage to the property as a result of CSX's trespass. Additionally, HAMP is claiming punitive damages in the amount of

\$350,000 for CSX's willful and wanton trespass and disregard for the rights of the public, public safety, HAMP's Property, and the families living in the Holly Acres Mobile Home Park.

**COUNT 3.**  
**NUISANCE**

77. The foregoing paragraphs are incorporated herein by reference.

78. The essence of nuisance under Virginia law is "Sic utere tuo ut alienum non laedas," or "Use your own property not to damage another's."

79. By the actions of CSX, it has used its Culvert and its CSX Berm proximately to damage the adjacent property of HAMP by increasing the flood level of the property, by periodically causing flooding on the property of HAMP, and by causing the flooding of the property of HAMP on September 8 and 9, 2011.

80. CSX's use of its own land is unreasonable and has created hazardous conditions which has inhibited HAMP's use and enjoyment of its land.

81. As a result, CSX has created a nuisance for which damages and remedies should flow as swiftly as the water in the Creek.

82. As a result of CSX's unreasonable actions and inactions, HAMP has lost \$43,000 per month in damages for the loss of the 67 units; \$1,606,000 in damages to repair and replace the infrastructure and to return the Property to its prior legal position and legal entitlements; and \$8,000,000 in damages to the value of the Property.

83. The relief requested will not place any burden on interstate commerce.

WHEREFORE, HAMP demands \$43,000 per month for the ongoing damages it suffers for the loss of use of the 67 mobile home units (from September 8, 2011 to date of judgment), \$1,606,000 for the cost to repair and replace the infrastructure that was destroyed and to put the Property back to its legal condition prior to the Flood, and \$8,000,000 in for damage to the

property as a result of CSX's nuisance. Additionally, HAMP is claiming punitive damages in the amount of \$350,000 for CSX's willful and wanton negligence in causing the nuisance and absolute disregard for the rights of the public, public safety, HAMP's Property, and the families living in the Holly Acres Mobile Home Park.

**COUNT 4.**  
**DECLARATORY JUDGMENT VA CODE §§ 8.01-184 AND 187**  
**DAM AND IMPOUNDING STRUCTURE**

84. The foregoing paragraphs are incorporated herein by reference.

85. Va. Code Ann. § 10.1-604 provides that an "Impounding structure" means a man-made structure, whether a dam across a watercourse or other structure outside a watercourse, used ... to retain ... waters ..."

86. Further, Va. Code Ann. § 10.1-604 provides that "The term includes: (i) all dams that are twenty-five feet or greater in height and that create an impoundment capacity of fifteen acre-feet or greater ..."

87. Va. Code Ann. § 10.1-604 defines "Owner" as the "owner of the land on which a dam is situated ... and any person or entity agreeing to maintain a dam."

88. The CSX Berm is a man-made structure over twenty-five feet in height used in times of flooding to retain waters, and creates during flooding, including the Flood, an impoundment capacity of more than fifteen acre-feet of water.

89. CSX is the owner of the CSX Berm, which is a dam under the statutory definition.

90. Va. Code Ann. § 10.1-605.3 and the implementing regulations for Va. Code Ann. § 10.1-605 require that the owner register the dam, and obtain a permit for its operation.

91. CSX is required under Va. Code Ann. § 10.1-605.3(B)(3) and its implementing regulations, including but not limited to 4 VAC 50-20-30, to provide, among other things, an emergency preparedness plan.

92. Further, CSX is required to identify its dam as a Class I or Class II dam under 4 VAC 50-20-50, and under 4 VAC 50-20-120 (“Operation and maintenance certificates for existing impounding structure”) to file an application with the Virginia Soil and Water Conservation Board providing, among other things, the description of the impounding structure, the design, construction, repairs, inspections, observations of the conditions of the dam, the reservoir, and upstream and downstream areas, and recommendations for remedial work.

93. Pursuant to 4 VAC 50-20-220(A), “No owner shall have the right to maintain an impounding structure which unreasonably threatens the life or property of another person.”

94. CSX has failed to meet any of the requirements enumerated above, and has maintained an impounding structure which unreasonably has threatened the lives of the residents of Holly Acres and has damaged, and continues to threaten to damage the property of Holly Acres, as well others living upstream of the CSX Berm.

95. An actual controversy exists between HAMP and CSX regarding the interpretation of the Flood Protection and Dam Safety Act, Va. Code Ann. § 10.1-604 *et. seq.* and its applicability to the CSX Berm.

96. The relief requested will not place any burden on interstate commerce.

WHEREFORE, HAMP demands that this Court determine whether the CSX Berm is a dam or impounding structure subject to the Flood Protection and Dam Safety Act; determine whether CSX is legally required to register the CSX Berm with the Soil and Water Conservation Board;

and determine whether CSX is legally required to apply for the appropriate permits and apply for the appropriate approvals for dam and flood control.

**COUNT 5.**  
**INVERSE STATE CONDEMNATION**  
**BY IMPROPER ACTIONS**

97. The foregoing paragraphs are incorporated herein by reference.

98. Va. Code Ann. § 56-347 provides in pertinent part:

In addition to the powers conferred by Title 13.1, every corporation of this Commonwealth organized to conduct a railroad business shall have the power to acquire by the exercise of the right of eminent domain any lands or estates or interests therein, sand, earth, gravel, water or other material, structures, rights-of-way, easements or other interests in lands, including lands under water and riparian rights, of any person, which are deemed necessary for the purposes of construction, reconstruction, alteration, straightening, relocation, operation, maintenance, improvement or repair of its lines, facilities or works including depots, stations, shops, yards, industrial spurs, switches and sidetracks, terminals or additional tracks or facilities, and for all other necessary railroad purposes and purposes incidental thereto, for its use in serving the public, including permanent, temporary, continuous, periodical or future use ...

99. Article I, Section 11 of the Virginia Constitution provides:

[T]he General Assembly shall not pass ... any law whereby private property shall be taken or damaged for public uses, without just compensation, the term “public uses” to be defined by the General Assembly;

99. Va. Code Ann. § 1-219.1 (A) provides in pertinent part:

A. The right to private property being a fundamental right, the General Assembly shall not pass any law whereby private property shall be taken or damaged for public uses without just compensation. The term “public uses” mentioned in Article I, Section 11 ... is hereby defined as to embrace only the acquisition of property where: (i) the property is taken for ... the public ... ; (ii) the property is taken for construction, maintenance, or operation of public facilities ... ; (iii) the property is taken for ... functioning of any ... railroad; ... or (vi) the property taken is in a ... conservation area ...

101. Further, CSX's failure to maintain or expand the Culvert have resulted in the backup of flood waters onto the Holly Acres Property and have constituted "physical invasions."

102. CSX's creation and use of the Berm, including the continuing use of Holly Acres for water impoundment, is the equivalent of a "public use", a public facility, a functioning part of a railroad, and the de facto creation of a conservation area.

103. As a natural and intended result, CSX is using HAMP's property as an impoundment area, flood plain or flood control so that it does not need to increase the size of the Culvert or expand the flow through the CSX Berm, or to allow the Creek to flow in its natural course.

104. CSX has not provided any compensation to HAMP for the taking or damaging of Holly Acres.

105. Due to CSX's failure to maintain the Culvert, or because of its intentional desire to use the property of HAMP as a flood control device and to enhance for its public use and purposes defined under Va. Code Ann. § 1-219.1, it has taken or damaged the property of HAMP without just compensation and has violated Article I, Section 11 of the Virginia Constitution.

106. As a result of CSX's taking and damaging of HAMP's Property, HAMP has lost \$43,000 per month in damages for the loss of the 67 units; \$1,606,000 for damages to repair and replace the infrastructure and to put the Property back to its prior legal position and legal entitlements; and \$8,000,000 in damages to the value of the Property.

107. The relief requested will not place any burden on interstate commerce.

WHEREFORE, HAMP demands \$43,000 per month for the ongoing damages it suffers for the loss of use of the 67 mobile home units (from September 8, 2011 to date of judgment), \$1,606,000 the cost to repair and replace the infrastructure that was destroyed and to return the

Property to its legal condition prior to the Flood, and \$8,000,000 in for damage to the property as a result of CSX's taking and damaging.

**COUNT 6.**  
**INJUNCTION**

112. The foregoing paragraphs are incorporated herein by reference.

113. CSX has a common law duty to maintain the flow of the Creek through the Culvert in such a manner as not to increase or decrease the flow of the Creek or to cause flooding and damage to upstream properties.

114. CSX is blocking the natural flow of the Creek with the CSX Berm.

115. CSX has not increased the size of the Culvert in 109 years. Nor has CSX made any effort to account for or accommodate the increased flow of water in the Creek over the last 109 years.

116. CSX is aware that the amount of water in the Creek has increased and that the speed at which the water flow has increased.

117. CSX is aware that the Culvert has become clogged and caused multiple instances of flooding and damage to upstream properties including, but not limited to HAMP's Property.

118. Further, CSX has failed to comply with its requirements, as enumerated in Count IV above, to register the CSX Berm as a dam or impounding structure, to provide the necessary information for certification, plans and other requirements, or to make changes as necessary, or to obtain a permit.

119. HAMP has no adequate remedy at law to force CSX to maintain the Culvert and increase the size of the Culvert or some other measure to alleviate the continued flooding of HAMP's Property.

120. HAMP requests an injunction to force CSX to (1) to expand and maintain the Culvert and take whatever measures are necessary to prohibit further flooding of the HAMP Property, (2)

register the CSX Berm as a dam or impounding structure, as provided above, and (3) comply with dam safety requirements of Virginia.

121. The relief requested will not place any burden on interstate commerce.

#### **V. REMEDIAL REQUESTS**

HAMP respectfully requests pursuant to the authority cited above, that in each appropriate Count, this Honorable Court:

1. Declare that CSX has a duty to maintain the Culvert in a reasonable fashion.
2. Declare that CSX has a duty to increase the size of the Culvert or flow through the Culvert to maintain a natural flow of water and so as not to dam the Creek with the CSX Berm.
3. Declare that CSX must register its CSX Berm as a dam or impounding structure with all appropriate agencies of the Commonwealth, obtain a permit, and file all plans, and make all inspections and reports.
4. Declare that HAMP has been temporarily damaged as a result of the actions by CSX of \$43,000 per month;
5. Declare that the CSX has caused a trespass on HAMP's Property.
6. Declare that the CSX Culvert, in its current condition, is a nuisance.
7. Declare that CSX is negligent in its failure to maintain the Culvert and failure to repair, replace or retrofit the Culvert so as not to create a damming or impounding effect.
8. Declare that the CSX has taken or damaged Holly Acres, partially or wholly, under Article I, Section 11 of the Virginia Constitution.
9. Declare that HAMP has been damaged in the amount of \$8 million for the taking and damaging of Holly Acres;

COVER SHEET FOR FILING CIVIL ACTIONS  
COMMONWEALTH OF VIRGINIA

Case No. CL14-1561  
(CLERK'S OFFICE USE ONLY)\*

Prince William County

Circuit Court

HAMP, INC

CSX TRANSPORTATION INC.

PLAINTIFF(S)

v./In re:

DEFENDANT(S)

13721 Jefferson Davis Hwy, Woodbridge, VA 22191

4445 Corporatoin Lane, 2nd Fl, Virginia Beach, VA 23462

I, the undersigned [ ] plaintiff [ ] defendant [x] attorney for [x] plaintiff [ ] defendant hereby notify the Clerk of Court that I am filing the following civil action. (Please indicate by checking box that most closely identifies the claim being asserted or relief sought).

- Accounting
- Administrative Appeal
- Adoption
- Adoption - Foreign
- Adult Protection
- Aid and Guidance
- Annexation
- Annulment
- Annulment - Counterclaim/ Responsive Pleading
- Appeal Decision of ABC Board
- Appeal Decision of Board of Zoning
- Appeal Decision of Comp Board
- Appeal Decision of Employment Commission
- Appeal Decision of Local Government
- Appeal Decision of Marine Resources Commission
- Appeal Decision of Voter Registration
- Appointment of Church Trustee, Substitute Fiduciaries
- Approval of Right to be Eligible to Vote
- Asbestos Litigation
- Attachment
- Bond Forfeiture Appeal
- Child Abuse and Neglect - Unfounded Complaint
- Civil Contempt
- Claim Impleading Third Party Defendant - Monetary Damages
- Claim Impleading Third Party Defendant - No Monetary Damages
- Complaint - (Miscellaneous)
- Compromise Settlement
- Condemnation

- Confessed Judgment
- Conservator of Peace
- Construe Will
- Contract Action
- Contract Specific Performance
- Correct/Erroneous State/Local Taxes
- Counterclaim - Monetary Damages
- Counterclaim - No Monetary Damages
- Cross Claim
- Custody/Visitation/Support/ Equitable Distribution
- Declaratory Judgment
- Declare Death
- Delinquent Taxes
- Detinue
- Divorce
- Divorce - Counterclaim/ Responsive Pleading
- Ejectment
- Encumber/Sell Real Estate
- Enforce Vendor's Lien
- Escheat
- Establish Boundaries
- Expunge
- Forfeiture of U.S. Currency
- Freedom of Information
- Garnishment
- General Tort Liability (other than motor vehicle)
- Grievance Procedures
- Guardian/Conservator Appointment
- Impress/Declare a Trust
- Injunction
- Interdiction
- Interrogatory
- Intentional Tort
- Judgment Lien-Bill to Enforce

- Judicial Review
- Landlord/Tenant
- Law Enforcement Petition
- Mechanic's Lien
- Medical Malpractice
- Motor Vehicle Tort
- Name Change
- Order to Sever
- Partition
- Petition
- Product Liability
- Quiet Title
- Referendum Elections
- Reformation of Trust
- Reinstatement of Driving Privileges
- Reinstatement (General)
- Removal
- Separate Maintenance
- Separate Maintenance - Counterclaim/Responsive Pleading
- Standby Guardian/ Conservator
- Termination of Mineral Rights
- Unlawful Detainer
- Vehicle Confiscation
- Will Contested
- Writ of Certiorari
- Writ of Habeas Corpus
- Writ of Mandamus
- Writ of Prohibition
- Writ of Quo Warranto
- Wrongful Death
- Other

Damages in the amount of \$ 9,606,000.00 are claimed.

February 27, 2014

DATE

PLAINTIFF

DEFENDANT

ATTORNEY FOR

PLAINTIFF

DEFENDANT

*Courtney B. Harden*

Courtney B. Harden

PRINT NAME

Rees Broome, PC, 1900 Gallows Road, Ste. 700, Tysons Corner, VA 22182

ADDRESS OF SIGNATOR

703-790-1911

TELEPHONE NUMBER

charden@reesbroome.com

EMAIL ADDRESS

IN THE CIRCUIT COURT OF LOGAN COUNTY, WEST VIRGINIA

Patrick M. Hutchinson, et al.,  
Plaintiffs,

v.

CSX Transportation, Inc., et al.,  
Defendant.

Case No. 06-C-160-O

FILED  
JUL 23 2007  
CLERK OF COURT  
LOGAN COUNTY, WEST VIRGINIA

**ORDER GRANTING DEFENDANT CSX TRANSPORTATION, INC.'S MOTION TO DISMISS**

On the 27<sup>th</sup> day of July, 2007, came the Defendant CSX Transportation, Inc. (CSX), by counsel J. David Bolen, Esq., and also came Plaintiffs, by counsel R. Ray Lovejoy, Esq., for a hearing on CSX's Motion to Dismiss Complaint pursuant to Rules 12(b)(1) and/or 12(b)(6) of the *West Virginia Rules of Civil Procedure*. The Court has reviewed the motion, the response, and the reply, heard the arguments of counsel, and reviewed pertinent legal authority. As a result of these deliberations, as more fully set forth in the following FINDINGS OF FACT and CONCLUSIONS OF LAW, the Court has concluded that the Defendant's motion should be granted pursuant to Rule 12(b)(1) and, as such, the Court will not address the contentions in the Defendant's motion related to Rule 12(b)(6).

**FINDINGS OF FACT**

1. The Plaintiffs filed their initial complaint in this action on May 26<sup>th</sup>, 2006, naming CSX Transportation, Inc., as well as several other entities, as Defendants.
2. In the initial complaint, Plaintiffs allege that CSX "designed, constructed, and maintained various embankments, culverts, overpasses, bridges and related structures in the vicinity of plaintiffs' homes or property. The negligent design and/or construction and/or maintenance of these structures caused the obstruction of the natural flow of surface waters and the accumulation and impoundment of surface waters that flooded certain plaintiffs' property, causing damages...." Plaintiffs further allege that once the accumulation of surface waters "broke free," the water and debris rushed downstream and damaged the property of other plaintiffs.

3. Subsequent to the filing of the initial complaint, several Defendants, including CSX, filed motions to dismiss or motions for more definite statements as to Plaintiffs' allegations. Plaintiffs, in order to cure the deficiencies in the initial complaint set forth by the Defendants in their respective motions, requested leave to file an amended complaint.
4. Plaintiffs filed an Amended Complaint, however, by order entered February 27<sup>th</sup>, 2007, the Court ordered that this Complaint remained deficient in certain areas and allowed the Plaintiffs leave to file a Second Amended Complaint. The allegations set forth in the Second Amended Complaint are the subject of the present motion.
5. The crux of the allegations against CSX in the Second Amended Complaint are essentially the same as the allegations in the previously filed complaints, however, the actual structure was identified in the Second Amended Complaint as a "CSX bridge at Monaville [that] was obstructed by sediment in an open and obvious state...."

#### CONCLUSIONS OF LAW

1. CSX contends in its motion that this Court lacks subject matter jurisdiction over the claims and allegations raised in the Plaintiffs' Second Amended Complaint as to CSX as the United States Congress, through the adoption of the Interstate Commerce Commission Termination Act of 1995 (ICCTA), has expressly preempted claims such as those asserted by the Plaintiffs.
2. The preemption doctrine originates in the Supremacy Clause of the United States Constitution which provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *U.S. Const.* art. VI, cl. 2.
3. As noted by the West Virginia Supreme Court of Appeals in *Hartley Marine Corp. v. Mierke*, 196 W.Va. 669, 674, 474 S.E.2d 599, 604 (1996), "preemption is disfavored in the absence of convincing evidence warranting its application." The Court also recognized that there is a presumption that "Congress does not intend to preempt areas of traditional state regulation." *Id.* quoting *FMC Corp. v. Holliday*, 498 U.S. 52, 62, 111 S.Ct. 403, 410 (1990). "This presumption, however, can be rebutted by a clear declaration of legislative intent to preempt state law." *Id.* citing *Hillsborough County, Fla. V. Automated Medical Labs, Inc.*, 471 U.S. 707, 715-716, 105 S.Ct. 2371, 2376 (1985).
4. The focus of any preemption question, therefore, is on congressional intent. Congressional intent may be manifested by express language in a federal statute or implicit in the structure and purpose of the statute.
5. CSX relies on the ICCTA, specifically 49 U.S.C. §§10101—10501, in support of its position that this Court lacks subject matter jurisdiction over the allegations set forth by the Plaintiffs in the current action.

6. 49 U.S.C. §10101, entitled *Rail Transportation Policy*, provides, in pertinent part:

In regulating the railroad industry, it is the policy of the United States Government-

- (8) to operate transportation facilities and equipment without detriment to the public health and safety;

7. 49 U.S.C. §10501, entitled *General Jurisdiction*, provides, in pertinent part:

(a)(1) Subject to this chapter, the Board [Safety Transportation Board] has jurisdiction over transportation by rail carrier that is-

- (A) only by railroad; or
- (B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment

(b) The jurisdiction of the Board 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, routs, 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 (emphasis added),

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 (emphasis added).

8. When examining the above-cited statute, the United States District Court for the Northern District of Georgia, Atlanta Division, made the following observation: "It is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operation. ... [I]t is clear to the Court that Congress intended the preemptive net of the ICCTA to be broad by extending exclusive jurisdiction to the STB over anything included within the general and inclusive term 'transportation by rail carriers.'" *CSX Transp., Inc. v. Georgia Public Service Com'n*, 944 F.Supp. 1573, 1583 (N.D.Ga. 1996).

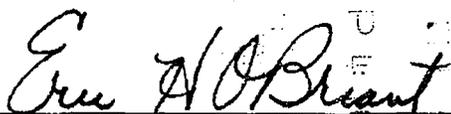
9. "State regulation can be as effectively exerted through an award of damages as through some form of preventative relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521, 112 S.Ct. 2608, 2620 (1992), citing *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247, 79 S.Ct. 773, 780 (1959).

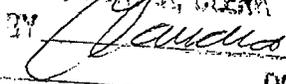
10. The Court believes and finds that the cases cited by the Plaintiffs in their response to the current motion are distinguishable from the present action in that the facts and analysis in those cases centered on aspects of property law, such as servitudes, rather than tort law, as in the present action, or involved structures or operations that were not involved in interstate rail transportation, rather than a bridge holding tracks used for travel, as in the present action. See *Louisiana v. Sprint Communications, Co.*, 892 F.Supp. 145 (M.D.La. 1995) ("there is no indication that the Congress...sought to somehow impair state law property rights pertaining to servitudes [by enacting the ICCTA].” *Id.* at 149); *Flynn v. Burlington Northern Santa Fe Corp.*, 98 F.Supp.2d 1186 (E.D.Wash 2000) (manufacturing activities and other facilities owned by railroads which are not integrally related to the railroad’s provision of interstate rail service, i.e., non-transportation facilities, are not subject to STB jurisdiction or federal preemption.); *Rushing v. Kansas City Southern Railroad Co.*, 194 F.Supp.2d 493 (S.D.Miss. 2001) (no preemption where the facts involved the pooling of rainwater on property owned by Plaintiffs which allegedly resulted from the railroad’s erection of an earthen berm adjacent to the subject property.)
11. The Court believes and finds that the allegations set forth in the Plaintiffs’ Second Amended Complaint against CSX are related to the “construction” and “operations” of “tracks” and “facilities” as contemplated by the ICCTA in that the Plaintiffs allege that the CSX bridge at Monaville was negligently designed, constructed, and/or maintained.
12. The Court believes and finds that the relief requested by the Plaintiffs in this action qualifies as a state “regulation” as contemplated by the ICCTA.
13. The Court believes and finds that the plain language of the ICCTA is a clear declaration of Congress’s intent to expressly preempt state law as it relates to CSX in the present action and bestow upon the Safety Transportation Board exclusive jurisdiction in such an action.

**WHEREFORE**, pursuant to Rule 12(b)(1) of the *West Virginia Rules of Civil Procedure*, it is hereby **ADJUDGED, ORDERED** and **DECREED** that the present action against CSX Transportation, Inc., is **DISMISSED**, without prejudice, in that this Court lacks subject matter jurisdiction over the allegations set forth in the Plaintiffs’ Second Amended Complaint pertaining to CSX Transportation, Inc.

The Circuit Clerk shall forward an attested copy of this Order to all parties’ counsel.

Enter this 23RD day of August, 2007

  
ERIC H. O'BRIANT, CIRCUIT JUDGE

A COPY TESTE:  
ALVIS PORTER, CLERK  
BY   
DEPUTY