Washington State Inventory of Rail Safety Oversight

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Introduction

Legislative Background

During the 2021-2022 Session, the Washington State Legislature approved a budget proviso in Substitute Senate Bill 5165 (SSB 5165) for the Washington Utilities and Transportation Commission (UTC) to prepare an inventory of rail safety oversight conducted by agencies in other states, as compared to Washington. The Legislature designated California and New York for inclusion in the inventory and the UTC selected to also include Idaho and Oregon.

SSB 5165, Transportation Budget, Section 102 Budget Proviso

The budget proviso provided in SSB 5165 is the authorization funding for this inventory and contains the specific elements to be examined and inventory requirements. It reads as follows:

> (1) $225,000 of the multimodal transportation account—state appropriation is provided solely for the commission to prepare an inventory of rail safety oversight conducted by state agencies in other states identified for review by program area as compared to the role of state agencies in Washington due September 1, 2022. This inventory must include a comparison of the oversight conducted by state agencies in California and New York, as well as other state agencies selected by the commission that play a broader role in rail safety oversight than state agencies in Washington. In developing its inventory, the commission shall include consideration of the relationship of state efforts to federal law. The inventory must include information related to safety oversight, coordination, communication, and enforcement of state and federal laws and regulations relating to transportation of persons or commodities, or both, of any nature or description by rail.
>
> (2) The commission must host one workshop with interested parties. The purpose of the workshop is to ensure consideration of relevant information in development of an inventory of current efforts in rail safety oversight by other states that can inform the legislature's intended expansion of the role of the commission in rail safety in the state of Washington. The purpose of the workshop is not to foreclose consideration of a specific legislative approach. Interested legislators and legislative staff and staff of the governor's office may participate in the workshop or workshops. Participation in the workshop must include, but is not limited to, representatives of:
>
> (a) Host and tenant railroads;
>
> (b) Rail labor organizations;
>
> (c) The state safety oversight agency for rail fixed guideway public transportation systems;
>
> (d) Operators of, and entities providing financial support for, intercity passenger rail and rail fixed guideway systems;

(e) Local jurisdictions;

(f) Rail advocacy organizations;

(g) State emergency management organizations;

(h) The department of ecology;

(i) The department of labor and industries;

(j) The national transportation safety board;

(k) The federal railroad administration; and

(l) The pipeline and hazardous materials safety administration.

(3) The commission shall review, at a minimum, the report of the national transportation safety board report on the 2017 Amtrak derailment, the joint transportation committee's 2020 rail safety governance study, Engrossed Substitute House Bill No. 1418 (2021), as passed by the house on March 7, 2021, relevant federal laws and rules, and state rail safety plans.

(4) The commission's inventory must include, but is not limited to:

(a) An analysis of expanding the commission's role to match the role of other state agencies examined, including as it relates to oversight of implementation of new and materially changed railroad operations and infrastructure; operator safety management practices; the safety of transportation of crude oil by rail and enforcement of chapter 90.56 RCW; the safety and oversight of rail fixed guideway systems as defined in RCW 81.104.015; annual reporting practices; and rail safety communication and collaboration efforts, including through the use of a rail safety committee;

(b) A review of federal preemption issues and analysis of state rail safety authority in the context of the current rail safety oversight role of other states, as examined in this section;

(c) A review of workshop discussions;

(d) Estimated costs associated with implementation in Washington state of the safety program elements included in the inventory required in this section, itemized by program area and level of oversight performed, including estimated costs of options to improve the safety of transportation of crude oil by rail and enforcement of chapter 90.56 RCW;

(e) A review of revenue sources that support rail safety oversight activities in other states included in the inventory, including federal revenue sources. For each source, the review must also include:

(i) Estimates of revenue generated if imposed in Washington;

(ii) Estimates of how much would be paid by different types of entities; and,

(f) A review of the level of liability protection afforded agencies that perform rail safety oversight under state law in the states examined in the inventory conducted.

To satisfy the requests in the budget proviso, the inventory includes an examination of the rail safety oversight role of other states related to:

- New and materially changed railroad operations and infrastructure
- Operator safety management practices
- The safety of transportation of crude oil by rail and enforcement
- The safety and oversight of rail fixed guideway systems
- Annual reporting practices
- Railroad safety communication and collaboration efforts, including railroad safety committee communications in each state

The UTC, supported by a consultant team, interviewed agencies from California, New York, Oregon, and Idaho to understand railroad safety management practices on each topic. Each state's complex history of railroad oversight policies includes unique current safety management practices for both railroad and fixed guideway systems.

Inventory Structure

The inventory is structured into six sections:

- Section 1: Legislative Background, Inventory Approach, and Rail Safety Oversight in Washington State
- Section 2: Background of States Surveyed for Inventory
- Section 3: Preemption and Liability Issues
- Section 4: State Survey Crosswalk and Analysis
- Section 5: Fiscal Analysis
- Appendices: Additional detailed reference information for the Inventory

In Washington, the UTC has the primary role in overall state rail safety regulation. However, the Washington State Department of Transportation (WSDOT), Department of Labor and Industries (L&I), the Emergency Management Division of the Washington Military Department (EMD), and the Department of Ecology (Ecology) all have some regulatory and/or fiscal responsibility for rail safety. The inventory focuses on those areas outlined in the proviso that fall primarily under the regulatory authority of the UTC and not railroad worker safety.

The inventory also discusses federal preemption issues related to state rail safety regulation and liability protection for the state agencies engaged in rail safety regulation as required by the proviso.

A comprehensive crosswalk in the inventory compares the management practices of railroad safety oversight in California, New York, Oregon, and Idaho and highlights differences between those states and the UTC. The crosswalk also identifies where the UTC's role could be expanded to match railroad safety elements described in the inventoried states, as required by the proviso. Of the states surveyed, two areas emerged that are not currently included in Washington's oversight of rail safety: (1) annual reporting standards to the state legislature as required in California and New York, and (2) a railroad bridge evaluation program to augment the Federal Railroad Administration's (FRA) small staff of bridge inspectors, similar to an existing program in California.

The inventory develops cost and revenue estimates associated with possible implementation of new rail safety oversight practices in Washington. Revenue sources are described for rail safety oversight activities in California, Idaho, Oregon, and New York. Cost estimates for implementing new or increased safety oversight are driven entirely by personnel and associated overhead in creating new staff positions.

Inventory Approach and Methodology Overview

The UTC conducted a competitive procurement to select a consultant to assist with the inventory preparation. A team led by David Evans and Associates was selected, though the UTC retained two key areas of the inventory work to be examined by their legal staff: Federal preemption and liability protection (proviso sections 4 (b) and (f)).

The consultant team developed a four-phase work plan to address the structure and analysis of the inventory in accordance with the budget proviso. The workplan included the following four phases:

1. Scoping
2. Assessment
3. Fiscal Analysis
4. Workshop

Scoping Phase

During the scoping phase, UTC staff and the consultant team developed an approach, schedule, and scope to address the budget proviso requirements. This included identifying additional states to be included in the inventory and conducting a detailed literature review of rail safety regulations, reports, studies, and safety plans in each state. The team also collected background data on key railroad and rail fixed guideway safety focus areas, including the historical context of state and federal laws related to railroad and rail fixed guideway safety. This research effort provided the foundation for the overall inventory framework and is included in Section 2 of the inventory.

The consultant team then focused on stakeholder outreach to California, New York, Oregon, and Idaho, consistent with requirements in Section 1 of the proviso. Using the key provisions in Section 4 (a) and (e), the team developed an interview plan, schedule, and specific interview questions that

provided a consistent framework for the data collection. UTC staff sent letters of introduction to the states to encourage participation in the inventory and streamline data collection.

The consultant team held interviews in April and May 2022 via online video platforms. The team sent a supplemental questionnaire to collect basic agency and state data as a follow-up after the initial interviews, requesting data on specific information such as the number of inspectors, program revenue and budget data, and railroad/transit system data. A thorough description of how each of the four states addresses items in Section 4 (a) of the proviso is provided in Section 3 of the inventory. Additional information on the interview process is contained in Appendix E.

The consultant team also interviewed WSDOT's Public Transportation Division and Ecology. These interviews focused on the safety of rail fixed guideway systems and transportation of crude oil by rail, respectively.

Assessment Phase

During the assessment phase, the consultant team developed a tool to compare state agency responses to the key questions asked during the interviews. This tool enabled the team to identify areas where the UTC's role could potentially be expanded to match railroad safety elements described in the inventoried states, as required in the proviso. Section 4 of the inventory contains a crosswalk comparing safety oversight activities of each state and identifies any significant differences.

Fiscal Analysis Phase

Following the scoping and assessment phases, the consultant team conducted a fiscal analysis examining costs and revenues as specified in Sections 4 (d) and (e) of the proviso. The team estimated costs associated with the potential expansion of rail safety oversight by program area, utilizing job classification data from the Washington State Office of Financial Management. The fiscal analysis phase included development of estimates of potential revenues to support rail safety using revenue sources identified by other states during the scoping and assessment phases. Section 5 of this inventory contains the analysis of cost estimates and estimated potential revenues.

Workshop Phase

Section 2 of the proviso required at least one workshop to be held with interested parties. The UTC hosted the virtual workshop on July 6, 2022. Each of the organizations listed in the budget proviso was invited to participate in the workshop. A summary of the workshop is provided in Appendix D and a recording is posted in UTC's video archive.[1]

[1] Available on the UTC website under Docket TR-210842.

Preemption Issues and Liability Protection

The staff of the Utilities and Transportation Division of the Attorney General's Office examined the questions posed in proviso Sections 4 (b) and (f). Federal preemption on railroad safety issues is substantial and broad. The liability protection afforded the surveyed states differs for each state. The result of this analysis is contained in Section 3 of the inventory.

Railroad and Rail Fixed Guideway Safety Oversight in Washington

Washington has a long history in railroad regulation. In 1905 the Washington State Legislature created the three-member Railroad Commission, the precursor to the UTC, that had regulatory authority to inspect and evaluate railroad company accounts, set rates, approve time schedules, monitor safety issues, and enforce violations. In 1970 and again in 1980, the United States Congress passed legislation preempting states in all areas pertaining to economic regulation of railroads and limiting the scope of state jurisdiction regarding safety.[2] Various federal agencies assumed more oversight[3] in some railroad regulatory areas (e.g., FRA and the Surface Transportation Board). Section 2 provides additional background on the safety responsibilities of FRA, and Section 4 discusses federal preemption.

Today, several state agencies in Washington have some regulatory and/or fiscal responsibility for rail safety. While the UTC has the primary role in overall state rail safety regulation, other agencies with key roles in railroad and rail fixed guideway safety include WSDOT, L&I, EMD, and Ecology.

Washington Utilities and Transportation Commission

The UTC is a three-member commission, whose members are appointed by the Governor and confirmed by the Washington State Senate. The UTC mission is to protect the people of Washington by ensuring that investor-owned utility and transportation services are safe, available, reliable, equitable, and fairly priced.

The UTC regulates the rates and services of the state's investor-owned electric and gas utilities, landline telecommunications companies, and private water companies, solid waste collection companies, household-goods movers, charter-bus companies, commercial ferries, marine pilots, and a low-level radioactive waste repository. The agency also manages the state's pipeline, railroad, and intrastate bus and trucking safety program. The UTC does not regulate broadband or internet services, including those provided by regulated telecommunications companies.

Unlike most state agencies, the UTC often functions as a quasi-judicial body, meaning that, like a court of law, it rules on cases brought before it. At the UTC, these cases are usually requests from companies for increased revenue, permission to build new plant, or changes in service levels or

[2] The Federal Railroad Safety and Hazardous Materials Transportation Control Act of 1970, the Interstate Commerce Commission Termination Act (ICCTA) and the Staggers Rail Act of 1980.
[3] https://www.nap.edu/read/22093/chapter/36

policies. Like a court of law, the UTC cannot simply rule out of hand. It must base its decisions on the evidence it collects, including expert testimony, company records or data, statements from the public, and other information. Cases are heard in a formal, legal setting, with the commission hearing evidence from all sides before issuing a decision. The UTC's decisions are reviewable by courts of law.

Titles 80 and 81 of the Revised Code of Washington establish the UTC and define its powers and authority regarding utility and transportation regulations. The focus of Title 80 RCW is primarily on utility regulation, and Title 81 RCW covers a variety of transportation laws for Washington. Titles 80 and 81 also empower the UTC to develop regulations under the Washington Administrative Code necessary to carry out its responsibilities under these laws. RCW 81.36 through RCW 81.61 contain railroad-specific laws.

The UTC has adopted regulations to carry out its duties related to railroad safety under Title 81 RCW. Specifically, WAC 480-60 governs railroad clearances and walkways; WAC 480-62 governs railroad operations; and WAC 480-66 governs sanitation.

In addition to its participation in the FRA's State Safety Participation Program, the UTC's jurisdiction over railroad safety and the mission of the agency's railroad safety program is focused on a few key areas that are not preempted by federal law. Those areas include opening, closing, and reconfiguring highway-rail crossings, enforcing crossing safety at public crossings and private crossings on crude oil routes, ensuring railroad employee safety, administering the state Grade Crossing Protective Fund (GCPF), educating the public and promoting awareness, responding to citizens' complaints, and providing technical assistance. The UTC's highway-rail crossing jurisdiction is not operative within the limits of first-class cities.

UTC Rail Safety Program

The UTC's Rail Safety program works to protect the public and railroad employees by ensuring that railroad companies meet established state and federal safety standards and educating the public about the dangers of traveling on or near railroad tracks.

The UTC partners with the FRA and participates in Title 49 of the Code of Federal Regulations (CFR), Part 212, State Safety Participation Regulations. The UTC has 12 FRA-certified inspector positions throughout the state that cover all five FRA disciplines (e.g., signal and train control equipment, track, motive power and equipment, railroad operating practices, and grade crossing). These UTC field resources significantly increase inspection activity throughout the state, and inspectors also partner with other border state programs in Idaho and Oregon for joint inspections. The UTC's FRA-certified inspectors also investigate complaints, respond to accidents, and provide on-the-job training for new inspectors.

UTC staff inspect all railroad crossings in the state every three years and railroad crossings located on crude oil routes every 18 months, tracking railroad grade crossing inventory information, and documenting trespassing and incident data. UTC staff also investigate incidents and work with road

authorities and railroads on crossing improvements including construction and widening of public crossings, installation of signals and gates, and closures.

UTC staff act as the state highway-rail crossing inventory manager. The UTC maintains its own state inventory of highway-rail crossings and inspection data. UTC staff also submits updates to the FRA's USDOT crossing inventory system.

UTC staff work with citizens, local governments, and companies to resolve complaints related to issues such as poor crossing surface conditions, drivers circumventing crossing gates, train noise levels, blocked crossings, and trespassing on railroad rights-of-way.

UTC staff also enforce railroad employee safety regulations. Because L&I and the UTC have some overlap in jurisdiction related to these regulations, an interagency agreement between L&I and the UTC avoids duplication of effort.

The UTC funds projects to improve public safety at crossings and to limit pedestrian access to railroad rights-of-way through the GCPF.

In its efforts to educate the public and promote public awareness of railroad safety, the UTC is actively engaged in Washington Operation Lifesaver (WAOL), a free public service education program dedicated to preventing and reducing fatalities and injuries at highway-rail grade crossings and along railroad rights-of-way. Through its participation in the WAOL, the UTC coordinates presentations to the public on grade crossing safety and provides vital information about the dangers people encounter on railroad property.

Washington State Department of Transportation

WSDOT is charged with planning, funding, implementing, constructing, and maintaining the multimodal transportation system in the state. Rail is an integral part of the statewide multimodal transportation system that keeps people and businesses moving. Serving freight and passengers, the rail system provides efficient transportation critical to maintaining our economy, environment, and quality of life.

WSDOT is responsible for managing and directing the state's freight and passenger rail capital and operating programs. WSDOT sponsors the Amtrak Cascades intercity passenger rail service in conjunction with the Oregon Department of Transportation. WSDOT also owns and manages the Palouse River and Coulee City Railroad system, which comprises three short line railroads in eastern Washington leased to private operators.

WSDOT acts as the statewide administrator of Federal Highway Administration Section 130 grade crossing safety program funding, which is housed in the WSDOT Local Programs Division Highway Safety Improvement Program. As such, WSDOT has been responsible for managing project selection and administration for the Section 130 program funding in the state.

WSDOT State Safety Oversight Program

In 1997 Governor Gary Locke designated WSDOT as the State Safety Oversight Authority for the State of Washington to comply with Federal Transit Administration regulations in 49 CFR Part 659 regarding State Safety Oversight of rail fixed guideway systems.[4] FTA's specific rules and regulations are discussed in detail in Section 2. Washington established the WSDOT's authority to implement SSO in statute[5] and rule, specifically WAC Chapter 468-550[6] Safety Oversight of Rail Fixed Guideway Systems. In 2018, FTA certified SSO as compliant with a revised and expanded SSO program under 49 CFR Part 674. The program is currently housed in the WSDOT Public Transportation Division.

To carry out its safety oversight responsibilities for these systems, the SSO program publishes the Washington State Rail Safety Oversight Program Standard,[7] which establishes safety requirements for rail fixed guideway public transportation systems. The program uses reviews, inspections, and investigations of the systems to ensure compliance with the program standard, as well as state and federal laws and rules. The program has safety oversight over Sound Transit Link Light Rail and Tacoma Link, the City of Seattle Streetcar network, and Seattle Center Monorail.

Department of Labor and Industries

L&I is dedicated to the safety and health of Washington's workforce. In that role, L&I, through the Division of Occupational Safety and Health, develops and enforces safety and health rules by inspecting worksites for unsafe working conditions. L&I is the administrator of the state's workers' compensation system administrator, providing medical and limited wage-replacement coverage to workers who suffer job-related injuries and illness. It also ensures workers are properly paid, children and teenagers are not overworked, and the public is protected from unsafe and unsound building practices.

The Washington Industrial Safety and Health Act gives broad jurisdiction to L&I to regulate and enforce employee occupational health and safety matters. In this capacity, L&I has authority over railroad walkways and clearances in private rail yards and plants, including logging railroad yards, mill yards, and sorting yards. The UTC also enforces some rail employee safety regulations.

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[4] FTA defines rail fixed guideway public transportation systems as any fixed guideway system that:

- Uses rail.
- Operates for public transportation.
- Is within the jurisdiction of a state.
- Is not under the jurisdiction of the Federal Railroad Administration.

Rail fixed guideway public transportation systems include rapid rail, heavy rail, light rail, monorail, trolley, inclined plane, funicular, and automated guideway. The systems exclude Amtrak passenger rail and fixed guideway public transportation that is not on rail, such as ferry service.

[5] This includes: RCW 35.21.228, RCW 35A.21.300, RCW 36.01.210, RCW 36.57.120, RCW 36.57A.170, RCW 81.104.115, and RCW 81.112.180

[6] https://app.leg.wa.gov/wac/default.aspx?cite=468-550&full=true

[7] https://wsdot.wa.gov/engineering-standards/all-manuals-and-standards/manuals/rail-safety-oversight-program-standard

Emergency Management Division of the State Military Department

The mission of the Washington Military Department's EMD is to minimize the impact of emergencies and disasters on the people, property, environment, and economy. The EMD notifies and alerts state agencies and local governments of impending emergencies and disasters. During state emergencies, the EMD manages the State Emergency Operations Center (EOC) in Camp Murray and coordinates the response to ensure help is provided quickly and effectively. The EOC is designated as the central location for information gathering, disaster analysis, and response coordination.

The EOC is the UTC's designee for railroad accident reports. UTC regulations[8] require railroad companies to provide detailed reports for any event connected to the operation of the railroad that results in an accident involving:

- Release of a hazardous material (i.e., materials that are corrosive, flammable, explosive, reactive with other materials, or toxic).
- Death of any person.
- Injury to any person involved in a highway-rail crossing accident requiring medical treatment in addition to first aid.
- Property damage amounting to $50,000 or more.

EOC uses the information gathered to make decisions concerning emergency actions and to identify and prioritize the use of state resources needed to respond to the emergency. The EOC may issue emergency warnings or disseminate critical information and instructions to government personnel and the public, who may need to take emergency protective actions.

[8] WAC 480-62-310

Washington State Department of Ecology

Ecology is charged with oversight to increase the spill preparedness and response requirements of companies that move oil by rail. Specifically, Ecology requires rail companies to:

- Enhance readiness requirements for non-floating oils – to address response measures for oils that may degrade and sink when spilled. This type of oil is a challenge to traditional cleanup plans designed to respond to floating oils.
- Establish requirements for spill and wildlife response teams – Spill Management Teams are the groups of people who respond to oil spills. Wildlife response service providers locate and care for oiled animals during a spill.
- Conduct new oil spill preparedness drills – Drills help companies and their partners (e.g., local governments, tribes, and state and federal agencies) know what to do when an oil spill occurs. Companies must test their plans and staff, depending on the size of their operation and the type of oil they transport.
- Streamline plans for smaller rail lines – Some short line railroads haul non-crude oils, such as lube and vegetable oils, as cargo. Though these small railroad companies do not carry crude oil and serve small communities, oil of any kind is an environmental toxin and planning for spills is important. Ecology rules streamline planning requirements for smaller rail companies, depending on the type and volume of non-crude oil carried.

Section 2: Background of States Surveyed for Inventory

Background

This section provides an overview of federal laws, regulations and agencies responsible for railroad and rail fixed guideway oversight. It also provides comprehensive summaries of the rail oversight programs in California, New York, Oregon, and Idaho, focusing on the responsibilities delineated in Section 4 of the proviso:

(1) railroad operations and infrastructure,

(2) railroad safety management practices,

(3) the safety of transportation of crude oil by rail,

(4) safety and oversight of rail fixed guideway systems,

(5) annual reporting practices, and

(6) communication and collaboration efforts including railroad safety committees.

This overview focuses on both railroad safety and rail transit oversight. The inventory does not include a summary discussion regarding specific work related to railroad crossing safety in each state.

Overview of Federal Laws and Regulations That Affect Railroad and Rail Fixed Guideway Safety Oversight

Two federal agencies provide railroad and fixed guideway safety oversight in the United States: The Federal Railroad Administration and the Federal Transit Administration.

Federal Railroad Administration

The FRA was one of several modal administrations established as part of the Department of Transportation Act of 1966,[9] which formed the U.S. Department of Transportation. It was not until 1970, however, that the Federal Railroad Safety Act was enacted.[10] The FRSA's declared purpose was to promote safety in all areas of railroad operations and reduce railroad-related accidents, deaths and injuries to persons and damage to property caused by accidents involving any carrier of hazardous materials. The Act established the structure, authority, and regulatory responsibilities of the FRA. These authorities cover any area of railroad safety and established the FRA's responsibility for investigating and prosecuting all railroad issues. Since the FRSA was enacted, the FRA has used the authorization established by the Administrative Procedure Act of 1946[11] to establish regulations through the federal rulemaking process.

[9] Public Law 89-670-Oct 15, 1966
[10] https://www.congress.gov/91/statute/STATUTE-84/STATUTE-84-Pg971.pdf
[11] Pub. L. No. 404, 60 Stat. 237, Ch. 324, §§1-12 (1946).

The FRA provides railroad safety oversight throughout the country's railroad industry. The FRA's 400 special agents and inspectors specialize in the compliance and enforcement of six technical disciplines: Grade Crossings, Hazardous Materials, Motive Power and Equipment, Operating Practices, Signal and Train Control, and Track.

The FRA's purpose is to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents.[12] According to the FRA's website,[13] its purpose is to promulgate and enforce rail safety regulations, administer railroad assistance programs, conduct research and development in support of improved railroad safety and national rail transportation policy and provide for the rehabilitation of Northeast Corridor rail passenger service and consolidate government support of rail transportation activities.[14]

State participation in enforcing federal railroad-related regulations can be found in 49 Code of Federal Regulations Part 212. These regulations include investigative and surveillance activities that are authorized for a state to provide oversight regarding railroad safety. According to 49 CFR §212.103, a state agency with jurisdiction under state law may participate in investigative and surveillance activities concerning federal railroad safety laws and regulations by entering into an agreement under 49 CFR §212.105 for the exercise of specified authority. Further, the federal rule provides that a state agency with jurisdiction under state law may participate in investigative and surveillance activities with particular rules, regulations, orders or standards issued under the regulatory authority of the Federal Railroad Safety Act of 1970 by filing an annual certification under §212.107.

Each state with an approved and certified Railroad Safety State Participation Agreement that complies with 49 U.S.C. §20105 and employs inspectors is eligible for funding from the grant program. The rail safety oversight programs in California, New York, Idaho, Oregon, and Washington are all eligible to receive grant money. For fiscal year 2021, the FRA awarded $100,000 in grant funds across the United States. Table 1 identifies these states and corresponding total award amounts.

[12] 49 United States Code §20101.
[13] https://railroads.dot.gov/about-fra/about-fra
[14] See 49 U.S.C. Chapter 201 – General, specifically §20101 through §20121, which incorporate these areas of purpose for the FRA.

Table 1: Railroad Safety State Participation Grant Program Fiscal Year 2021 Funding Recipients[15]

State	Grantee	Total Award
AZ	Arizona Corporation Commission	$9,983
NC	North Carolina Department of Transportation	$1,891
ND	North Dakota Public Service Commission	$2,000
NJ	New Jersey Department of Transportation	$9,100
OR	Oregon Department of Transportation	$23,147
TX	Texas Department of Transportation	$5,673
	Total	$52,601

The UTC received $87,737 in grant funding in 2018 (and spent $36,778 of those funds), $28,115 in FY 2019, and $18,003 in FY 2020. The UTC did not request funding in 2021 because FRA-scheduled training and travel have been limited due to the pandemic. The UTC is still spending down existing FY 2019/FY 2020 grant funds. As its existing FRA grant funds can only be used for training and travel costs, the UTC applied for supplemental funding in FY 2022 to fund the replacement of inspector laptops.

Federal Railroad Safety Regulations (49 CFR)

Based on the language in 49 CFR §209, which focuses on railroad safety enforcement procedures, there are "certain procedures employed by the FRA in its enforcement of statutes and regulations related to railroad safety." These procedures cover issues that affect service, as well as requests for admission, subpoenas, and witness fees for those entities that have enforcement actions against them.

FRA's Motive Power and Equipment regulations are found in the following sections of the Code of Federal Regulations:

- 49 CFR §215 – Freight car safety standards.
- 49 CFR §218 – Railroad track, locomotive and equipment.
- 49 CFR §218 – Railroad operating practices.
- 49 CFR §221 – Rear end marking device.
- 49 CFR §223 – Safety glazing standards.
- 49 CFR §224 – Reflectorization of rail freight rolling stock.
- 49 CFR §229 – Locomotive safety standards.
- 49 CFR §230 – Steam locomotive standards.
- 49 CFR §231 – Safety appliance standards.
- 49 CFR §232 – Brake system safety standards (freight).

[15] https://railroads.dot.gov/elibrary/railroad-safety-state-participation-grant-program-fy-21-funding-recipients.
[16] The FRA awarded a total of $51,794 to six states, but FRA shows the total provided in the table as $52,601.

- 49 CFR §238 – Passenger equipment safety standards.
- 49 CFR §239 – Passenger train emergency preparedness.

Operating Practices examine railroad carrier operating rules, employee qualification guidelines, and carrier training and testing programs to determine compliance with the Railroad Safety Act. These regulations are found in:

- 49 CFR §217 – Railroad operating rules.
- 49 CFR §218 – Railroad operating practices.
- 49 CFR §219 – Control of alcohol and drug use.
- 49 CFR §220 – Railroad communications.
- 49 CFR §221 – Rear end marking device-passenger, commuter and freight trains.
- 49 CFR §222 – Use of locomotive horns at public highway-rail grade crossings.
- 49 CFR §225 – Railroad accidents/incidents: Reports, classification and investigations.
- 49 CFR §228 – Hours of service of railroad employees.
- 49 CFR §239 – Passenger train emergency preparedness.
- 49 CFR §240 – Qualification and certification of locomotive engineers.
- 49 CFR §242 – Qualification and certification of conductors.
- 49 CFR §270 – System Safety Programs.

Signal and Train Control regulations are found in four parts of 49 CFR: Part 233 (Signal Systems Reporting Requirements), Part 234 (Grade Crossing Signal System Safety and State Action Plans), Part 235 (Instructions Governing Applications for Approval of a Discontinuance or Material Modification of a Signal System or Relief from the Requirements of Part 236), and Part 236 (Rules, Standards, and Instructions Governing the Installation, Inspection, Maintenance, and Repair of Signal and Train Control Systems, Devices, and Appliances). However, signal and train control regulations also affect oversight of compliance with requirements for Roadway Worker Protection, Bridge Worker Safety, and Roadway Maintenance Machines, which are found in Part 214 of the regulations, and the limitations and requirements of the Hours-of-Service Act, which relate to Signal Covered Service and the associated recordkeeping and reporting requirements of Part 228.

Track and Rail and Infrastructure regulations are found in 49 CFR Part 213. The scope of the regulations prescribes "minimum safety requirements for railroad track that is part of the general railroad system of transportation." The regulations "apply to specific track conditions existing in isolation." The regulations also state that, "a combination of track conditions, none of which individually amounts to a deviation from the requirements in this part, may require remedial action to provide for safe operations over that track. This part does not restrict a railroad from adopting and enforcing additional or more stringent requirements not inconsistent with this part." Additional safety regulations that affect infrastructure are in Part 237, which incorporates bridge safety standards.

Hazardous Materials (Crude Oil) Transportation

The Pipeline and Hazardous Materials Safety Administration, which is part of USDOT, promulgates, implements and administers the federal hazardous materials transportation safety laws and regulations. The FRA is delegated responsibility to enforce hazardous materials regulations that govern hazardous materials transported by railroads.

The hazardous materials regulations in 49 CFR Parts 171 through 180 impose regulatory requirements on persons who: (1) perform functions in advance of transportation to prepare hazardous materials for transportation ("pre-transportation functions"); (2) perform "transportation" (that is movement and incidental loading, unloading, and storage functions); or (3) design, manufacture, inspect or maintain packages that are represented or sold as qualified for use in the transportation of hazardous materials in commerce.

The hazardous materials regulations define "transportation" generally as the "movement of property and loading, unloading, or storage incidental to that movement."[17] The hazardous materials regulations provide that transportation in commerce begins when a carrier takes physical possession of hazardous materials to transport them and continues until the hazardous materials are delivered to the destination indicated on a shipping paper.[18] According to the FRA, there is one exception to this general rule and it applies to rail transportation. Specifically, a railcar transporting hazardous materials is considered "in transportation" for purposes of the hazardous materials regulations until it is delivered to a "private track or siding."[19] According to the FRA, this is also true even if the railcar is delivered to the final destination indicated on its shipping paper.

The FRA ensures that crude oil transported via railroad is done in accordance with the hazardous materials regulations as well as with all railroad safety regulations discussed above. The proper shipping name for crude oil that is shipped in bulk is "Petroleum Crude Oil" and has a hazard class of 3 and a United Nations number of UN1267. However, if the crude oil emits hydrogen sulfide vapors in accordance with 49 CFR §172.327 - Petroleum sour crude oil in bulk packaging, the packaging must meet the requirements in 49 CFR §172.327.

According to 49 CFR §172.327, bulk packaging used to transport petroleum sour crude oil in sufficient concentration that vapors may present an inhalation hazard must include a marking, label, tag, or sign to warn of the toxic hazard.

Railroad Safety Advisory Committee

As recently as November 2021, the FRA renewed the charter of the Railroad Safety Advisory Committee (RSAC) for an additional two-year period. Originally established in March 1996, the RSAC has met the criteria and was initiated under Section 10(a)(2) of the Federal Advisory

[17] 49 C.F.R. § 171.8; 49 U.S.C. § 5102(13). See also 49 C.F.R. § 171.8 for definitions of "storage incidental to movement" and "unloading incidental to movement."
[18] 49 C.F.R. § 171.1(c).
[19] See 49 C.F.R. § 171.8 for definition of "private track" or "private siding."

Committee Act[20] to provide advice and recommendations to the FRA on railroad safety matters. According to the FRA, the RSAC is a formally chartered and structured Federal Advisory Committee and provides a forum for collaborative rulemaking and program development. The RSAC includes representatives from the agency's major stakeholder groups, including railroads, labor organizations, suppliers and manufacturers, and other interested parties.

When appropriate, the FRA assigns a task to RSAC, and after consideration and debate, the RSAC may accept or reject the task. If a task is accepted, the RSAC will establish a working group with the appropriate expertise and representation of interests to develop consensus recommendations to the FRA Administrator for action. Since its establishment in 1996, the RSAC has addressed 58 tasks and conducted almost 600 full committee, working group and task force meetings on critical safety issues affecting passenger and freight rail safety.

Federal Transit Administration

The FTA is the agency within the USDOT that provides financial assistance to public transit systems, such as rail fixed guideway systems. The agency also oversees the safety criteria and the development of regulations that must be followed by operating facilities in the U.S.

In 2012, the U.S. Congress passed the Moving Ahead for Progress in the 21st Century Act, also referred to as MAP-21,[21] which directed FTA to implement new authorities and statutory mandates designed to strengthen the State Safety Oversight program. The new regulations aimed to strengthen State Safety Oversight Authorities to investigate and enforce the operations of transit facilities within their state. The regulations enabled a SSO authority to acquire the financial and personnel resources needed to effectively oversee the safety of each rail fixed guideway system. The drafting of MAP-21 recognized several critical weaknesses in the existing state oversight of rail transit safety as implemented through 49 CFR Part 659 including:

- The lack of adequate and consistent safety practices across the rail transit industry.
- The lack of regulatory, oversight and enforcement authority for state agencies.
- The depletion of SSO program funding, staff, training and other resources.
- The lack of State Safety Oversight Agency (SSOA) financial and legal independence from the rail transit agencies the SSOA oversees.

On March 16, 2016, the FTA completed its rulemaking process on the issues identified above and issued final rule 49 CFR Part 674, which replaced 49 CFR Part 659. This new rule directed states to strengthen their authority to oversee and enforce safety requirements. This more comprehensive oversight of rail fixed guideway system operations is intended to prevent and mitigate accidents and incidents in jurisdictions.

[20] Pub. L. 92-463.
[21] Pub. L. 112-141, July 6, 2012.

The FTA also initiated the following additional activities and rulemakings to comply with congressional mandates found in MAP-21:

Safety Certification Training Program, set forth in 49 CFR Part 672, requires safety-related uniform training for specific FTA, SSO, and rail transit agency staff responsible for safety and oversight. According to 49 CFR §672.1(b), the purpose of this regulation is not to preempt any safety certification training requirements required by a state for public transportation agencies within its jurisdiction.

National Public Transportation Safety Plan, published in 2017, introduced the use of the transit-specific Safety Management System framework, safety performance management, and concepts of proactively managing risks and assuring safety performance at transit agencies. This plan introduced FTA's intended requirements for safety performance criteria that transit agencies would use in documenting safety performance measures, targets, and improvements in their agency safety plans.

Agency Safety Plans, set forth in 29 CFR Part 673, require using the FTA's transit-specific Safety Management System approach through the development of Public Transportation Agency Safety Plans. Rail transit agencies are required to have approved agency safety plans. Before the FTA adopted these regulations, rail transit agencies were guided by their System Safety Program Plan, as required by former 49 CFR Part 659.

Specific definitions within 49 CFR §673.5 directly impact how FTA, SSOAs, and rail transit agencies operate and approach specific requirements found throughout the FTA regulations for safety oversight. Some of these definitions are included in Appendix G.

Public Transportation Safety Program, created through 49 CFR Part 670, gives the FTA authority to take over audits and inspections for a SSOA. Part 670 includes the FTA's authority to issue Special Directives to a specific state or rail transit agency.

According to 49 CFR §670.31, which covers the purpose and contents of the National Public Transportation Safety Plan, the FTA will periodically issue a National Public Transportation Safety Plan that will "improve the safety of all public transportation systems that receive funding under 49 U.S.C. Chapter 53." Further, this regulation "establishes substantive and procedural rules for FTA's administration of the Public Transportation Safety Program." The Plan's topical areas are contained in Appendix H.

Transit Asset Management regulations are in 49 CFR Part 625, and the National Transit Database requirements are in 49 CFR Part 630. The TAM process includes State of Good Repair, data collection, prioritization and delivery to the National Transit Database requirements. The requirements in 49 CFR §630.5 state that failure to report the required data may result in the noncompliant reporting entity being ineligible to receive any funding under 49 U.S.C. Chapter 53, directly or indirectly, until such time as a report is filed. The FTA's requirements for implementing a TAM Plan are in Appendix I.

State Safety Oversight program certification regulations are found in 49 CFR Part 674 and based on 49 U.S.C. Section 5329. According to 49 CFR 674.5, an SSOA must have sufficient authority, resources, and qualified personnel to oversee the number, size, and complexity of rail fixed guideway public transportation systems operating within a state.

State Implementation of Railroad and Fixed Guideway Safety Oversight

Rail safety oversight programs in California, New York, Idaho, and Oregon vary in size, complexity and authority. Railroad operations in each state also have notable differences in comparison to Washington. Some of the more readily defined differences between the states are: (1) the number of operating railroads, (2) the total freight miles, (3) the originated rail tons, (4) the terminated rail tons, (5) the number of originated rail carloads, 6) the number of terminated rail carloads, and (7) freight rail employment. This data allows for an apples-to-apples comparison of the freight railroad industries operating in the states surveyed. In summary, the data shows significant differences between the surveyed states, as evidenced by research compiled by the Association of American Railroads displayed below in Table 2.

Table 2: State Railroad Freight Data

States	California	Idaho	New York	Oregon	Washington
Number of railroads operating in 2020	27	10	40	22	30
Total freight miles in 2020	4,971	1,638	3,685	2,308	2,891
Originated rail tons (millions) in 2019	64.0	8.4	10.4	10.5	20.8
Terminated rail tons (millions) in 2019	94.9	9.4	17.8	21.9	65.8
Originated rail carloads in 2019	3,405,045	86,713	201,046	256,576	986,890
Number of terminated rail carloads in 2019	3,099,467	97,355	314,857	490,586	986,830
Freight rail employment in 2019	8,270	1,343	2,645[22]	1,781	4,435

State of California

The California Public Utilities Commission (CPUC) has sole regulatory authority for safety oversight of the railroad industry and the fixed guideway infrastructure operations in the state.

The CPUC regulates railroads, passenger and freight operations and rail transit activities, including rail fixed guideway operations. The CPUC was established by Constitutional Amendment in 1911

[22] According to the National Railroad Passenger Corporation, doing business as Amtrak, in fiscal year 2019, it employed 1,578 New York residents. Amtrak employees may commute for free on Amtrak trains, there is a high likelihood that Amtrak employees who work within New York would commute from as far away as Pennsylvania or Delaware, therefore skewing the number of employees that work in New York.

but was called the Railroad Commission. The following year, the California Legislature passed the "Public Utilities Act," which went into effect on March 23, 1912. The law expanded the Railroad Commission's authority by including regulation and oversight of natural gas, electric, telephone and water companies in addition to railroad operations. The Railroad Commission was renamed in 1946 as the California Public Utilities Commission. The CPUC has five commissioners who have six-year staggered terms. The governor must appoint each commissioner, and the commissioners must be confirmed by the state Senate.

The CPUC is organized into divisions that provide oversight of the industries they regulate. The Rail Safety Division is charged with providing safety oversight of railroads, rail transit systems such as fixed guideways, and highway-railroad grade crossings. The Rail Safety Division is structured as three separate branches: Rail Crossings and Engineering covering rail crossing safety: Railroad Operations and Safety covering rail safety oversight; and Rail Transit Safety covering rail transit safety. The literature review on the CPUC Rail Safety Division focused on railroad safety and rail transit oversight; therefore, the inventory does not include a summary discussion regarding the work of the Rail Crossings and Engineering branch.

Railroad Operations and Infrastructure and Railroad Safety Management Practices

Railroad Operations and Safety Branch

The Railroad Operations and Safety Branch ensures that communities and railroad employees are protected from unsafe practices on passenger and freight railroads by enforcing California and federal railroad safety rules, regulations, and inspection efforts; and by proactively conducting assessments of potential risks before they create dangerous conditions.[23] The branch's rail safety inspectors inspect the railroad, investigate rail accidents and safety-related complaints, and recommend safety improvements to the CPUC, railroads, and the federal government as appropriate.

Under California Public Utilities Codes, CPUC rail safety inspectors are federally certified to enforce both state and federal laws, regulations, orders, and directives related to railroad transportation.

A group of 45 rail safety inspectors completes investigations and inspections, classified as surveillance activities, to ensure that regulated railroads operating in California comply with FRA regulations. Inspectors check for compliance in five technical FRA disciplines (Motive Power and Equipment, Operating Practices, Signal and Train Control, Track, and Hazardous Materials), consistent with federal regulations. When inspectors find violations of the federal rail safety regulations, they recommend civil penalties and noncompliance actions to the FRA.

In recent years, RSD inspectors have been addressing two new safety oversight responsibilities: Positive Train Control (PTC) and high-speed rail (HSR). RSD inspectors monitor PTC systems in use

[23] https://www.cpuc.ca.gov/industries-and-topics/rail-safety/railroad-operations-and-safety.

around the state. HSR planning and construction is progressing throughout California, and CPUC has been involved in safety oversight during these phases. Additional information on these activities is contained in Appendix J.

The primary railroad safety laws and regulations that RSD inspectors enforce are CPUC General Orders and the Public Utilities Code sections applicable to railroads. Appendix A provides a list of these General Orders and Public Utilities Codes.

Railroad Bridge Evaluation Program, developed by the Rail Safety Division, is the first state-run Railroad Bridge Evaluation Program[24] to ensure compliant active railroad bridges in California and supplement the work of the FRA in this area. The FRA has a bridge inspection discipline consisting of approximately six bridge inspectors to cover the 80,000 railroad bridges on the national railroad network. The two state inspectors focus on performing railroad bridge observations statewide and evaluating for structural damage and other potential failure factors that can result from corrosion, steel components, silt build-up around supports, excessive loads, and other conditions creating potentially dangerous situations.

The state program prioritizes bridge inspections based on factors including the proximity of the bridge to local safety hazard sites or saltwater bodies that can potentially cause bridge corrosion. FRA requires railroad bridge owners[25] to develop a bridge management program, perform annual bridge inspections, and calculate load capacities based on the regulations found in 49 CFR Part §237. The CPUC's Rail Safety Division works with the FRA to ensure that railroad track owners comply with and complete their FRA bridge management programs. Both agencies are committed to ensuring that bridge inspections are a priority by conducting joint railroad bridge observations each year.[26]

Safety of Transportation of Crude Oil by Rail

The Rail Safety Division established the Crude Oil Reconnaissance Team (CORT) in 2013. This team incorporates five FRA railroad disciplines (not including the Grade Crossing discipline). The CORT team obtains information from California refineries, such as planned crude oil unit train shipment routes and arrival dates. Unit trains are freight trains that typically operate between the point of origin and destination without being split up, and normally consist of a single commodity. A crude oil unit train carries only crude oil. The CORT team looks for unit trains and may track 100 individual tank cars to verify the origin of crude oil shipments, and particularly whether the shipments contain Bakken crude, which is more volatile than most other types of crude oil. According to the Rail

[24] https://www.cpuc.ca.gov/industries-and-topics/rail-safety/railroad-operations-and-safety.
[25] The bridge owner is the entity that would receive a violation of federal regulations, CPUC codes or General Orders from the RSD bridge inspector.
[26] https://www.cpuc.ca.gov/industries-and-topics/rail-safety/railroad-operations-and-safety/annual-reports.

Safety Division, the CORT team monitors crude oil unit trains to inform RSD management if Bakken crude enters the state and to determine if any actions must be taken.[27]

During fiscal year 2021, according to the Rail Safety Division, 22 crude oil unit trains entered two facilities in California. Each unit train carried approximately 100 tank cars. This information, developed and then confirmed by the CORT team, enabled the division management to facilitate inspections of the facilities based on unloading transportation conditions and regulations. The team also inspects crude oil transfer facilities and related infrastructure to verify compliance with state and federal railroad regulations, as well as CPUC railroad-related General Orders. The team uses the results of these inspections to prepare actual and expected monthly train counts, which are used to prepare a monthly CORT report on crude oil shipments coming into the state.

Although most of the crude oil entering California by rail arrives in unit trains, it also enters in individual tank cars that are part of trains carrying mixed cargos. Once crude oil tank cars reach rail yards, railroad yardmasters can inform the division about the contents of the various tank cars within their facilities as well as their final destinations.

Safety and Oversight of Rail Fixed Guideway Systems

Rail Transit Safety Branch

The Rail Transit Safety Branch has safety and security regulatory authority over all rail transit and other public transit fixed guideway systems regulated by Public Utilities Code 99152 as well as other state statutes. Rail Transit Safety Branch staff inspect and provide safety oversight of the rail transit agencies throughout California. The division and staff work with the FTA as well as the rail transit agencies to ensure that the California State Safety Oversight plan is implemented and that the rail transit agencies are appropriately complying with the plan. The CPUC approved the State Safety Oversight plan and then submitted it for approval and certification to the FTA for consideration under the requirements of the Public Transportation Safety Program in 49 U.S.C. §5329, as well as regulations in 49 CFR §674.

The Rail Transit Safety Branch provides oversight and verifies compliance with System Safety Program Plans, Public Transportation Agency Safety Plans, System Security Plans and Safety Certification Plans that must be implemented and complied with by every rail transit agency operating statewide. The rail transit agencies must ensure that each of these plans complies with all CPUC rules as well as federal rules and regulations. Rail transit agencies must also ensure that Rail Transit Safety Branch inspectors verify these plans are being effectively implemented and that individual rail transit agencies have adopted policies and procedures consistent with those plans.

According to the Rail Transit Safety Branch, its engineers and analysts provide oversight by continuously reviewing the design and construction of capital projects, operations, emergency

[27] https://www.cpuc.ca.gov/-/media/cpuc-website/divisions/rail-safety-division/documents/annual-reports/arsr-to-the-csl-rnc-final-11-30-2021.pdf.

response, accident reporting, and incident investigations. The Branch's inspectors focus their inspections on infrastructure, vehicles, operations, and evaluating facility maintenance practices, as well as other activities to identify noncompliance, safety concerns, and unsafe conditions.

Based on the CPUC's 2021 report to the California Legislature,[28] the Rail Transit Safety Branch had 33 authorized staff positions located in San Francisco, Los Angeles, Sacramento, and San Diego, as well as home-based inspectors and other staff to provide California with effective safety oversight of the rail transit and other fixed guideway systems under the CPUC's jurisdiction. The branch is divided into two sections, which consist of the Rail Transit Safety Section (staff engineers and analysts) and the Rail Transit Operations Safety Section (field inspectors).

The Rail Transit Safety Branch also submits its written program standard (procedures manual) as well as any revisions made to the manual as part of the annual report, in accordance with 49 CFR §674.27. This document identifies staff positions, describes the practices to be followed while implementing the state safety oversight program, and provides the program's processes and procedures.

The branch's state safety oversight responsibilities include:

(1) System safety and security program management and oversight of the design, construction, safety certification, internal safety and security audits, operation and maintenance of rail fixed guideway transportation systems;

(2) Review and approval of the rail transit agency's Public Transportation Agency Safety Plan (previously referred to as the System Safety Program Plan), System Security Plan, Safety Certification Plans, accident investigation procedures, accident investigation reports, annual internal safety and security audit reports, hazard management program, and corrective action plans and schedules;

(3) Reporting and investigation of events (including accidents) and hazards; and,

(4) Performance of triennial audits, inspections, hazardous safety management, handling formal and informal complaints and taking appropriate enforcement actions.

The Rail Transit Safety Branch inspectors focus specifically on rail transit disciplines to complete their field inspections. These technical areas include experience in conducting facility, equipment, and operations inspections.

Revenue Sources Supporting Rail Safety Oversight

The California Public Utilities Code, Section 309.7, requires that the fees paid by railroad corporations support the activities of CPUC that relate to safe operation of common carrier

[28] https://www.cpuc.ca.gov/-/media/cpuc-website/divisions/rail-safety-division/rtsb/cpuc-ssoa-annual-report_cy2021.pdf.

railroads, other than those relating to grade crossing protection. The CPUC is also required to report annually if there is any impact on competition by the assessment of these regulatory fees.[29]

The California Legislature appropriated $11.2 million from the CPUC Transportation Reimbursement Account during the fiscal year 2020 to pay for the CPUC's Rail Safety Oversight Program. The fees paid by the railroad corporations are deposited into a dedicated subaccount within the CPUC Transportation Reimbursement Account and are the sole funding source for the Railroad Operations and Safety Branch program. The fees do not fund any other CPUC programs.

According to gross intrastate revenue data provided to CPUC, revenues reported by Union Pacific Railroad and BNSF Railway Company for calendar year 2020 were $1.65 billion and $1.47 billion, respectively. Figure 1 provides a graphical representation of the gross revenues for these Class I railroads that operate in California. Based on user fees, each railroad was invoiced for 0.36% of their combined revenues.

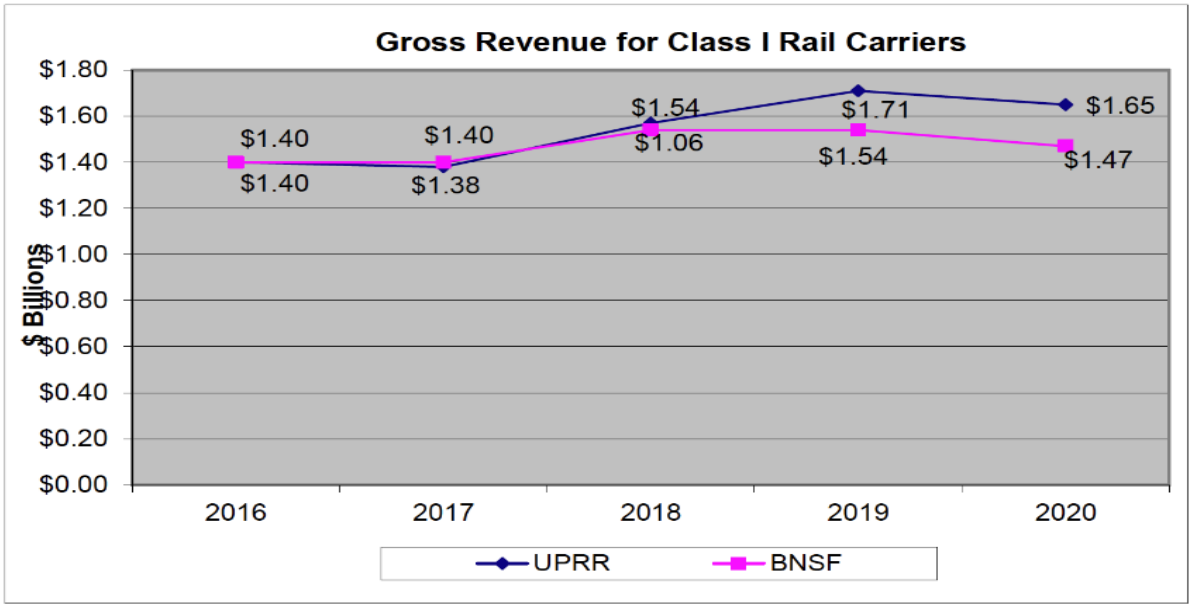

Figure 1: Gross Revenue for Class I Rail Carriers in the State of California, 2016-2020

The railroads report their revenues to CPUC annually to determine the user fees that fund the Railroad Operations and Safety Branch. According to the CPUC's Annual Safety Report to the California State Legislature, any impacts to railroads' profits and competition was insignificant.[30]

Annual Reporting Practices

The CPUC has several annual reports that it must produce under both State and Federal Laws.

[29] https://www.lawserver.com/law/state/california/codes/california_public_utilities_code_916-3.
[30] https://www.cpuc.ca.gov/-/media/cpuc-website/divisions/rail-safety-division/rtsb/cpuc-ssoa-annual-report_cy2021.pdf.

The Rail Safety Division is required to produce the "Annual Railroad Safety Report" for the California State Legislature by Nov. 30 of each year, for the proceeding state fiscal year pursuant to the Public Utilities Code. The CPUC must report on its rail safety activities, the impact (if any) on competition from the regulatory fees that the Commission assessed on railroad corporations, the results of investigations of certain incidents and the causes of the incidents, any actions taken by the Commission in response to those incidents, and the sites the Commission finds to be hazardous.[31]

The Rail Transit Safety Branch submits an annual report to the FTA to ensure the agency keeps its certification. The annual report shows that the branch has qualified staff to conduct the rail transit safety oversight activities and provides a minimum-level initial and refresher staff training pursuant to 49 CFR Part 672. In addition, the annual report provides FTA with the branch's Technical Training Plan and any changes to the plan that would require notification in the latest version of the Technical Training Plan.

Communication and Collaboration Efforts

The Rail Safety Division communicates and collaborates with the Governor's Office of Emergency Services (Emergency Services) regarding potential rail issues under Emergency Services' purview. When an accident or a derailment occurs, the Rail Safety Division is notified by telephone, then communicates by email to Emergency Services. Upon notification, all appropriate agencies within the state are notified of accidents, hazardous materials spills, and other incidents that may affect their agencies' missions. Since the reorganization within the FRA in 2020, the Rail Safety Division began scheduling a district call with the FRA rail specialists and the new staff directors. The Division also schedules a quarterly call with the FRA to maintain communication throughout the district. In addition, the Division has invited the other two states in their district - Nevada and Arizona - to join the call with the FRA to ensure all states within the district are fully aware of safety issues and anomalies that have been found during inspections.

State of New York

The New York State Department of Transportation (NYSDOT) has sole regulatory authority for safety oversight over the railroad industry and rail fixed guideway infrastructure operations.

The NYSDOT Office of Safety & Security Services provides railroad and rail fixed guideway safety oversight. A division of the Office of Safety & Security Services, the Rail Safety Bureau, supports three critical safety program areas: the Rail Safety Inspection Section, the Public Transportation Safety Board, and the Grade Crossing and Regulation Section. Because this state survey does not include grade crossings, this subsection regarding New York state does not address grade crossing issues or summaries of the state's actions on that topic.

[31] https://california.public.law/codes/ca_pub_util_code_section_916.

Rail Safety Inspection Section

Since 1910, New York State has completed railroad safety inspections and provided safety oversight of the operations of railroad freight carriers and intercity passenger rail service. The program has partnered with the FRA since the establishment of the FRSA to ensure the agency provides railroad safety monitoring and the reporting of railroad compliance consistent with federal and state regulations and laws.

Because the NYSDOT's railroad oversight authority has been approved by the FRA through a State Rail Safety Participation Agreement, consistent with 49 CFR Part 212, the New York state rail inspectors are certified in four of the FRA disciplines (Track, Motive Power and Equipment, Hazardous Materials, and Operating Practices).

Safety of Transportation of Crude Oil by Rail

After a 2013 crude oil train derailment resulting in 47 fatalities in nearby Québec, Canada, New York focused on several actions to prevent similar derailments and ensure that the state is prepared to respond to crude oil accidents and spills. Additional staff were hired to focus on the transport of crude oil via rail operations, which allowed NYSDOT to increase its capacity to perform rail safety inspections across the state. Additional employees were also hired in the state's Department of Environmental Conservation and the Office of Fire Protection and Control. These employees were dedicated to oil spill planning, training and response. New York also took additional action including:

- Urging federal authorities to revise design specifications and expedite the phase-out of older, unsafe railcars.
- Implementing more stringent standards to test crude oil.
- Reviewing the routing of crude oil to ensure the most appropriate routes would be used.
- Issuing fines to companies that fail to comply with state regulations related to derailments.
- Calling on federal authorities to expedite and strengthen rail safety standards and increase inspections.

State and emergency response officials also participated in dozens of training exercises to better prepare communities for potential crude oil disasters.

The governor increased fees for oil transported through New York from 12.25 cents per barrel to 13.75 cents per barrel for oil imported into the state, and 1.5 cents per barrel for transshipped oil, irrespective of whether the oil remains in New York or is transferred on to another state.

Safety and Oversight of Rail Fixed Guideway Systems

Public Transportation Safety Board

The New York Legislature created the Public Transportation Safety Board in 1984. PTSB is responsible for the safety oversight of all public transportation systems operating in New York state that receive State Transit Operating Assistance. It mirrors the National Transportation Safety Board (NTSB); however, the mission of the PTSB is specifically focused on reducing the number, rate and severity of public transportation accidents. For more information about the history and background of the PTSB, see Appendix K.

The PTSB's SSO program complies with the requirements of 49 CFR Part 674 and guidance provided by the FTA. The SSO program applies to rail transit agencies operating in New York and that are not regulated by the FRA.

The PTSB's SSO program implements safety oversight of all New York rail transit agencies and provides the expectations and requirements with which all rail transit agencies' safety programs must comply, with respect to federal and state regulations and laws.

The board's SSO program complies with all FTA regulations and requirements for the establishment, certification and oversight associated with implementing the state safety oversight program in New York.[32] The PTSB, as the SSOA, requires that the rail transit agencies comply with all relevant state and federal laws and regulations. See Appendix C for a full list of the state laws and regulations.

The state safety oversight program and the PTSB, as SSOA, have the necessary authority to implement the required FTA program elements sufficient to:

- Promulgate and enforce state rules and regulations, including establishing enforcement and investigative authorities.
- Enforce federal rules and regulations.
- Establish and carry out legal and financial obligations independent of the rail transit agencies in the state.
- Hire and develop staff and contract support, as needed and required.
- Manage federal and state grant programs.
- Implement a robust and active oversight program that meets the safety oversight needs of the rail transit agencies in the state.

State Safety Oversight Program Staff and Responsibilities include professional staff as well as contractors that serve as an extension of the PTSB staff. During interactions with rail transit agencies and the FTA, the contractor staff report to the board's SSO program manager for anything

[32] These requirements are provided in 49 CFR Parts 625, 630, 670, 672, 673 and 674.

that requires PTSB approval and act on behalf of the board's state safety oversight program as well as state and federal laws and regulations.

According to reference material from 2018, the PTSB state safety oversight program is staffed with approximately 13 full-time equivalent staff, which includes contractor staff.

State Safety Oversight Risk Monitoring of Rail Transit Agencies requires that agencies regulated by the PTSB prepare and submit a System Safety Program Plan to the state safety oversight program. The PTSB reviews and gives its written approval based on the plan's compliance with the PTSB Rail Transit State Safety Oversight Program Standards and 49 CFR §659.19. In addition, each rail transit agency must consider updating its System Safety Program Plan at least annually.

Revenue Sources Supporting Rail Safety Oversight

In 1991, the New York Legislature enacted a rail safety fee in Section 135, Chapter 61-A Transportation, Article 5 (Transportation), Consolidated Laws of New York.[33]

In describing the rail safety fee, Section 135 states, in part:

> Rail safety fee. 1. For the fiscal year commencing on April 1, 1991, and for each fiscal year thereafter, the expenses of the administration and enforcement of the department's railroad safety functions shall be assessed in the form of a fee.
>
> 2. The annual fee referred to in subdivision one of this section shall be established and levied by the commissioner, subject to the approval of the director of the division of the budget, in an amount that is sufficient to raise funds to defray the expenses of the department in administering and enforcing its railroad safety and related duties pursuant to the provisions of this chapter and the railroad law. Such *expenses shall consist of the direct costs in the department's rail safety program of personal service, the cost of maintenance and operation, retirement contributions, workers' compensation premiums, and health and dental premiums which are paid by the state for or on account of personnel involved in the department's railroad safety program and any other indirect costs involved in administering and enforcing rail safety as deemed appropriate by the commissioner, provided, however, that such indirect costs shall not exceed 20 percent of total direct costs.[Emphasis added]*
>
> 3. The fee shall be assessed against all railroads operating in the state of New York and shall be based on railroad gross operating revenues derived or earned from operations within the state in the preceding calendar year. In instances where railroad gross operating revenues are reported on a system basis and its operations cross state lines, the revenues derived or earned from operations within the state *shall be the ratio of revenue freight ton miles operated within the state to total revenue freight ton miles times the total railroad gross operating revenues for freight operations and the ratio of passenger miles travelled within the state to total system passenger miles of routes operating through the state times*

[33] The Universal Citation for this law is: NY Transp L § 135.

the total gross operating revenues for passenger operations. [*Emphasis added]*

4. All revenues collected pursuant to this section shall be deposited by the comptroller into the special obligation reserve and payment account of the dedicated highway and bridge trust fund established pursuant to section 89-b of the state finance law for the purposes established in this section. Fees will be based on revenues from the preceding calendar year and shall be assessed on or before July 1 and are payable by September 1 of each year. On or before January 1 of each year following assessment of fees pursuant to this section, the commissioner shall report to the railroad companies annual costs associated with this assessment.

5. The department shall annually submit a report by February 1 of each year to the chairmen of the senate finance and assembly ways and means committees which provides: a listing of department positions funded in part or whole by the rail safety fee established pursuant to this section; for the current state fiscal year and the next state fiscal year, the dollar amount of total direct costs and the dollar amount of total indirect costs funded or anticipated to be funded by said rail safety fee; and a listing by railroad of the total annual fee assessed, the total annual fee collected to date and the total annual fee anticipated to be collected by the end of the current state fiscal year and during the next state fiscal year. In addition, the commissioner shall include within this report any plans to increase or decrease said rail safety fee and provide an explanation for, and description of the impact of, such increase or decrease in fee amount.

Grant Funding and the Part 674 State Safety Oversight Program, as described in 49 CFR §674.17, provides for the use of federal financial assistance to the states through the FTA's grant funding process for states that are eligible through the state safety oversight certification process. Table 3 summarizes the PTSB state safety oversight program grant funding from FTA and the 20% state match for fiscal years 2013 through 2018.

Table 3: State Safety Oversight Program Grant Funding Allocations for New York, 2013 through 2018

Fiscal Year	Federal 80%	State 20%
2013	$ 2,309,521	$ 577,380
2014	$ 2,345,914	$ 586,479
2015	$ 2,345,915	$ 586,479
2016	$ 2,388,143	$ 597,036
2017	$ 2,427,940	$ 606,985
2018	$ 2,466,477	$ 616,619

Annual Reporting Practices

Public Transportation Safety Board Reporting Requirements

The PTSB is required to comply with federal and state reporting requirements. The board submits the following materials to ensure it is fully compliant:

1. SSOA Annual Report to the FTA.
2. SSOA Annual Safety Report to the governor and the board of directors of each rail transit agency.
3. SSOA Agency Requirements for RTA Reporting to the SSOA and the FTA.
4. SSOA Agency Requirements for Access to the rail transit agencies.

Rail Transit Agency Annual Reports

According to the PTSB, each year, every rail transit agency that is regulated is required to submit a report to the SSO program. This annual report documents the rail transit agencies' process for addressing internal safety review and audit findings. According to the board:

> The RTA annual report must be accompanied by a formal certification signed by the chief executive of the RTA, indicating that the RTA is in compliance with its safety program. This annual report and certification also coincide with the annual update of the safety program document (SSPP/interim ASP). If the RTA determines that findings from its internal safety audits indicate that the RTA is not in compliance with its safety program, the chief executive must identify the activities the RTA will take to achieve compliance. The PTSB SSO program is required to review the annual report within thirty (30) days and issue a written response either approving or disapproving the annual report. A meeting to review and discuss the response to the annual report may be convened at the request of either the PTSB SSO program or the RTA.

Communication and Collaboration Efforts

SSOA and RTA Communication and Coordination

The PTSB maintains and ensures ongoing communication with the rail transit agencies under its jurisdiction through various means, including teleconferences held with RTA personnel, monitoring RTA executive-level safety-related or risk-related meetings (often through minutes of those meetings and copies of handouts), holding quarterly meetings with program participants, and monthly status reports for all CAPs related to the PTSB SSO program.

State of Oregon

The Oregon Department of Transportation (ODOT) has regulatory authority for safety oversight of the railroad industry and the rail fixed guideway infrastructure operations in the state. The following sections discuss ODOT's oversight responsibilities and actions.

The Commerce and Compliance Division of ODOT oversees the railroad and rail fixed guideway operations in the state. This division oversees railroad operations to ensure the structural safety of railroad cars, equipment, track, crossings and signals and to maintain a safe environment for railroad employees. The division also monitors and oversees the safety compliance of light rail (fixed rail guideway), streetcar and trolley service facilities and their operations.

Railroad Operations and Infrastructure and Railroad Safety Management Practices

Railroad Oversight Program

ODOT's Commerce and Compliance Division has been approved to partner with FRA on railroad safety through a State Rail Safety Participation Agreement, consistent with 49 CFR Part 212. Under FRA's State Rail Safety Participation Program, ODOT has 18 railroad inspectors that are trained and certified as agents for the FRA in five of the FRA disciplines (Track, Motive Power and Equipment, Signal and Train control, Hazardous Materials and Operating Practices). The division submits findings of noncompliance into the FRA reporting system and documents the areas covered in each inspection. In addition, division staff regulate the clearances between railroad tracks and structures to ensure the safety of railroad employees.

The Commerce and Compliance Division also manages approximately 155 miles of state-owned railroad right-of-way along the Astoria Line and the Oregon Electric Line.

Safety of Transportation of Crude Oil by Rail

ODOT Commerce and Compliance Division does not have a program that specifically examines the movement of crude oil by rail. The division conducts hazardous materials inspections as part of its overall duties through its FRA-certified inspectors.

Safety and Oversight of Rail Fixed Guideway Systems

ODOT's Commerce and Compliance Division has oversight responsibility for rail fixed guideways, streetcars and trolly systems in Oregon and is classified as the SSOA. Oregon began its oversight of RTAs in 1997, before the FTA had developed a formal oversight program. The program has four staff members.

As the SSOA, the division provides oversight of the rail transit agencies in Oregon by enforcing FTA regulations found in 49 CFR Parts 670, 672, 673 and 674, as well as Oregon Revised Statutes (for example, ORS 824.045) and Oregon Administrative Rules, Division 741, Chapter 60. Appendix L – Oregon State Railroad Safety Laws and Regulations references the specific language of each related state regulation or law. The division provides oversight through inspections, audits, investigations and document reviews. The division oversees federal and state regulations and laws for the two rail transit agencies in Oregon that receive federal funds: the Tri-County Metropolitan Transportation District of Oregon (known as TriMet) light rail system, commonly referred to as MAX, and the Portland Streetcar. There are two additional rail transit agencies in Oregon that do not receive federal funding – the Astoria Riverfront Trolley and the Willamette Shore Trolley; for those, the Commerce and Compliance Division, as the SSOA, provides oversight only for state regulations and laws. The Rail Fixed Guideway Program currently has three full-time rail transit compliance specialists.

Revenue Sources Supporting Rail Safety Oversight

According to Oregon Vehicle Code Chapter 824, subsection 010, each year every railroad operating in the state must pay ODOT "such fee as the department finds and determines to be necessary." These fees are to defray the costs of performing the duties imposed by law upon the department with respect to such railroads and to pay amounts "as may be necessary to obtain matching funds to implement the program referred to in ORS 824.058."

ODOT must determine the previous years' gross operating revenues within the state for each Class I railroad as well as regional and short line railroads. However, there are limitations placed by the Oregon Legislature, including:

"(a) The total of the fees payable by Class I railroads shall not exceed thirty-five hundredths of one percent of the combined gross operating revenues of Class I railroads derived within this state. The fee paid by each Class I railroad shall bear the same proportion to the total fees paid by Class I railroads as such railroad's share of highway-rail crossings, track miles and gross operating revenues derived within the state, weighted equally, bears to the total amount of Class I highway-rail crossings within the state, track miles within the state and gross operating revenues derived within the state.

(b) The fees payable by other railroads shall not exceed thirty-five hundredths of one percent of any such railroad's gross operating revenues."

Annual Reporting Practices

The Railroad Oversight Program submits annual reports to the FRA regarding all actions taken by the division in its oversight of the state's railroad safety program. These annual reports certify that each inspector meets the regulatory requirements FRA has established. The SSOA program also provides an annual report about its activities from the previous year and submits it to the FTA, the governor, and the boards of the rail transit agencies that they regulate.

Communication and Collaboration Efforts

The State of Oregon established a Rail Advisory Committee (RAC) in 2005 to advise ODOT, the Oregon Transportation Commission, and the Oregon Legislature on issues, projects, funding needs, and priorities to improve railroad infrastructure. The RAC also advocates for a commercially viable, efficient, and safe railroad network that supports Oregon's economic strength. The RAC consists of up to 20 members from rail freight, rail passenger, shippers, businesses, ports, rail labor, local governments, and other interested parties. The primary focus of the RAC has been to prioritize rail projects involved in the Connect Oregon funding program, examine state and federal legislation that impacts railroads and provide advice, and provide guidance on the Oregon State Rail Plan Implementation Plan. While not solely a rail safety committee, its purview does include safety - rail safety topics such as grade crossing safety and Oregon Operation Lifesaver are frequently on the RAC agenda. The current list of RAC members and the committee charter are in Appendix F.

As the SSOA, the division communicates with other SSOA states in addition to communicating with the FTA. The division also collaborates with city infrastructure project managers across the state.

State of Idaho

The Idaho Public Utilities Commission (IPUC) is the sole state agency with regulatory authority for safety oversight of the railroad industry in the state. The IPUC also is responsible for maintaining, coordinating, and administering the planning of railroad infrastructure. IPUC's role includes assisting in the preservation of essential rail lines through planning and coordination with private railroad owners and addressing potential safety hazards at railroad grade crossings.

Idaho Public Utilities Commission

The Idaho Legislature established the IPUC in May of 1913 and gave it the statutory authorities detailed in Titles 61 and 62 of Idaho Code. The IPUC oversees the intrastate operation of investor-owned electric, gas, water, and telecommunications utilities, as well as rail and pipeline safety programs.

Railroad Operations and Infrastructure and Railroad Safety Management Practices

Rail Safety

The IPUC has responsibility for ensuring that all rail services operating in Idaho do so in a safe and efficient manner, and its rail inspectors investigate highway-railroad crossing issues and railroad

operations and safety throughout the state. These safety inspectors are also responsible for inspection of rail cars carrying hazardous materials in and through Idaho, and enforce federal hazardous materials regulations, which the state of Idaho has adopted.

The railroad oversight program has a small office whose staff completes inspections and reports their findings to the FRA. As of the date of this report, Idaho has one railroad inspector covering the entire state.

Safety of Transportation of Crude Oil by Rail

The State of Idaho does not currently have any specific regulations that cover the safety of transportation of crude oil by rail. Idaho relies upon federal regulations to address this safety issue.

Safety and Oversight of Rail Fixed Guideway Systems

The State of Idaho does not currently have any rail fixed guideway systems in operation that meet FTA requirements. There are no state regulations covering fixed rail guideway systems.

Revenue Sources Supporting Rail Safety Oversight

Idaho state law authorizes the IPUC to assess regulatory fees on railroad companies. Idaho Code §§ 61-1001, which can be found in Title 61 – Public Utility Regulation, Chapter 10, provides the following language for consideration:

> 61-1001. ANNUAL FEES PAYABLE TO COMMISSION BY PUBLIC UTILITIES — PURPOSE. Each public utility and each railroad corporation, subject to the jurisdiction of the commission, and subject to the provisions of this act, shall pay to the commission in each year, a special regulatory fee in such amount as the commission shall find and determine to be necessary, together with the amount of all other fees paid or payable to the commission by each such public utility and railroad corporation in the current calendar year, to defray the amount to be expended by the commission for expenses in supervising and regulating the public utilities and railroad corporations subject to its jurisdiction.

Each year the IPUC determines the amount of regulatory fees assessed against railroad companies. In 2022, the IPUC entered Order No. 35371 titled "In the matter of the assessment of railroad corporations for the special regulatory fees payable to the Commission for Fiscal Year 2023," which states:

> In March 2022, the Idaho Legislature passed, and the Governor signed SB 1393 and SB 1417, appropriating a total of $6,996,200 to the Commission for Fiscal Year 2023 (July 1, 2022 to June 30, 2023). The total appropriation includes $6,418,000 from fees assessed on public utilities and railroads; $358,400 for federal grants; and $219,300 for indirect funds. This Order assesses the railroads their share of the total appropriation.
>
> For FY 2021, there was a one-time carry-over balance of $49,100 for railroads. The calculated assessment is $162,085 for FY 2023 railroad operations.

The reported gross operating revenues from railroad operations in Idaho is $24,722,300 for calendar year 2021. This is an increase of approximately $769,000 (3.2%) from the prior year. Accordingly, the proportionate share for each railroad's fee is to be assessed at 0.6556%. In no case shall the proportionate share of each railroad's assessed regulatory fee be less than $50.00. Idaho Code § 61-1004(4).

Pursuant to Idaho Code §§61-1001 et seq. and Idaho Code 62-611, the Commission is authorized to assess $162,085 for supervising and regulating railroads subject to our jurisdiction.

The total reported Idaho gross operating revenues derived from all intrastate railroad business for the 2021 calendar year is $24,722,300. The proportionate assessment for each railroad corporation is 0.6556% of its Idaho gross operating revenue derived from intrastate railroad business for the 2021 calendar year. In no case shall the calculated regulatory fee be less than $50.00 per railroad.

Annual Reporting Practices

The IPUC provides an annual report to the governor in accordance with Idaho Code 61-214.[34] This report covers the activities of the entire IPUC, including electric, water, telecommunications, natural gas utilities, pipelines, and railroads. The railroad section of the report provides a summary of the IPUC's role and activities. The IPUC also submits an annual report to the FRA regarding all actions taken by the IPUC's railroad safety program.

According to IPUC personnel, besides the annual report to both the governor and to the legislature, the PUC submits information to the FRA through its inspection databases on completed inspections and other safety functions.

Communication and Collaboration Efforts

The IPUC does not currently have specific communication and collaboration efforts, such as rail safety committees. However, it does collaborate with the Operation Lifesaver program to deliver rail safety information to the public to reduce the number of trespassing injuries and fatalities that occur within the state.

[34] https://puc.idaho.gov/Fileroom/PublicFiles/annualreports/ar2021/Section%20I%202021%20Annual%20Report.pdf

Section 3: Preemption and Liability

This section was prepared by Utilities and Transportation Commission Staff with assistance from the Utilities and Transportation Division of the Attorney General's Office.

Preemption

Introduction

The following section provides a brief review of federal preemption analysis and considers some specific sources of federal law that may invalidate or preempt state regulation or claims pertaining to railroad activities and practices. Specifically, this section contains a high-level discussion of the Commerce Clause and dormant Commerce Clause, the Federal Railroad Safety Act, and the Interstate Commerce Commission Termination Act.

The material below should be interpreted as an overview of the subjects discussed and should not be construed as opining on any past, present, or pending regulation, beyond those discussed in the cases cited. In almost every case, the determination of whether a state regulation pertaining or as applied to railroads is invalidated or preempted by federal law is a highly contextual inquiry. That is, the preemption inquiry may include, but is not limited to, the subject matter of the challenged state regulation, the presence or absence of federal regulation on the same subject matter, whether the challenged regulation addresses statewide or local concerns, the challenged regulation's effect on interstate commerce, and the burden the challenged regulation places on rail transportation.

General Principles Regarding Federal Preemption[35]

In the context of federal-state preemption, the United States Constitution provides the cornerstone of authority for federal law to displace state law. The Supremacy Clause of the United States Constitution provides that the laws of the United States "shall be the supreme Law of the Land . . . any Thing in the Constitution or the Laws of any State to the Contrary notwithstanding."[36] As explained by the United States Supreme Court, "[t]his means that when federal and state law conflict, federal law prevails and state law is preempted."[37] Insofar as the Supremacy Clause concerns the relationship of the "Laws of the United States" to the "Laws of any State," the application of federal preemption to state law is uniform across the individual states.

In general, there are three types of federal preemption: (1) express preemption; (2) field preemption; and (3) conflict preemption. As summarized by the Washington State Supreme Court:

[35] For additional information regarding the general principles of federal preemption, *see* Congressional Research Service, *Federal Preemption: A Legal Primer* (July 23, 2019), attached as Appendix M.
[36] U.S. Const. art. VI, cl. 2.
[37] *Knox v. Brnovich*, 907 F.3d 1167, 1173 (2018)(citing *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S.Ct. 1461, 1476 (2018)).

> Congress may preempt local law by explicitly defining the extent to which its enactments preempt laws (express preemption). Preemption may also occur where the federal government intends to exclusively occupy a field (field preemption) and where it is impossible to comply with both state and federal law (conflict preemption).[38]

As further explained by the United States Supreme Court:

> There is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an **express preemption** provision.
>
> State law must also give way to federal law in at least two other circumstances. First, the States are precluded from regulating conduct in a **field** that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance. The intent to displace state law altogether can be inferred from a framework of regulation "so pervasive . . . that Congress left no room for the States to supplement it" or where there is a "federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."
>
> Second, state laws are preempted when they **conflict** with federal law. This includes cases where "compliance with both federal and state regulations is a physical impossibility, and those instances where the challenged state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. In preemption analysis, courts should assume that the historic police powers of the States are not superseded unless that was the clear and manifest purpose of Congress."[39]

[38] *Veit, ex rel. Nelson v. Burlington Northern Santa Fe Corp.*, 171 Wn.2d 88, 99-100 (2011)(citing *Campbell v. Dep't. of Soc. & Health Servs.*, 150 Wn.2d 881, 897 (2004)).
[39] *Arizona v. U.S.*, 567 U.S. 387, 399-400 (2012)(internal quotation and citation omitted)(emphasis added).

In additional to federal statutes, regulations promulgated by a federal agency may also preempt state law.[40] In some instances, a federal agency's decision to not regulate a specific subject may result in "negative" or implied preemption of state laws. As explained by the Ninth Circuit, "[w]hen a federal agency pursues a policy of non-regulation . . . the Supreme Court has recognized that the agency can preempt the states from exercising regulatory authority only when the agency has chosen not to exercise its full authority."[41]

Commerce Clause and Statutory Sources of Preemption Regarding Railroad Safety Regulation

With respect to rail safety regulation by states, there are at least three major sources of federal law that can potentially invalidate or preempt state regulations pertaining to railroad regulation and safety.

First, the Commerce Clause and dormant Commerce Clause will generally invalidate a state regulation that unreasonably burdens interstate commerce, discriminates between interstate and intrastate commerce, has improper extraterritorial effects, or regulates activity that is inherently national or requires a nationally uniform system of regulation.

Second, the Federal Railroad Safety Act (the FRSA) preempts state regulation of rail safety to the extent that the state regulation covers the same subject matter that has been addressed by an order or rule promulgated by the Federal Railroad Administration (FRA), unless the state regulation is necessary to address an essentially local safety hazard.

Third, the Interstate Commerce Commission Termination Act of 1995 (the ICCTA) will preempt state regulation of transportation by rail carrier (as defined by the ICCTA) or rail operations, even if the tracks or facilities regulated are located in one state, so long as the tracks or facilities are part of the interstate rail system. Although the ICCTA does not encompass rail safety issues (which are addressed by the FRSA), a court will apply the ICCTA's preemption analysis to a state regulation or claim related to public safety that affects rail operations or burdens rail transportation. That is, if a state regulation or cause of action concerns rail safety, the FRSA's preemption analysis will apply, whereas the ICCTA's preemption analysis will apply to state

[40] *Fidelity Federal Sav. and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982)("Federal regulations have no less [preemptive] effect than federal statutes."); *Goodwin v. Bacon*, 127 Wn.2d 50, 57 (1995)("Federal regulations possess an equally preemptive effect as federal statutes.").

[41] *ACA Connects v. Bonta*, 24 F.4th 1233, 1241 (9th 2022)(citing *Ray v. Atlantic Richfield Co*., 435 U.S. 151, 178 (1978)("The Court has previously recognized that 'where failure of . . . federal official affirmative to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute,' States are not permitted to use their policy power to enact such a regulation.")). *See also Union Pacific R. Co. v. California Public Utilities Comm'n*, 346 F.3d 851, 868 (9th Cir. 2003)("Because the [Federal Railroad Administration (FRA)] merely deferred a rulemaking, rather than determining that no regulation was necessary, the state can legitimately seek to fill this gap."); *Tyrrell v. Norfolk S. Ry.*, 248 F.3d 517, 525 (6th Cir. 2001)("[N]o evidence in this case demonstrates that the FRA considered track clearance requirements and explicitly decided that no regulation in the area was necessary.")).

regulations or claims that affect railroad operations or economics or otherwise burden rail transportation, including regulations pertaining to public safety or railroad workplace safety.[42]

Commerce Clause and Dormant Commerce Clause

The Commerce Clause of the United States Constitution empowers Congress to "regulate Commerce . . . among the several States."[43] Where Congress has exercised its power under the Commerce Clause, inconsistent state legislation that affects commerce will be invalidated.[44] Although the text of the Commerce Clause reflects an affirmative grant of authority to Congress, the United States Supreme Court has held that the Commerce Clause is self-executing.[45] Thus, even in the absence of legislation, the Commerce Clause bars state legislation and regulation that unduly burdens interstate commerce. The Commerce Clause "affords one protection from state legislation inimical to the national commerce, and . . . where Congress has not acted, [the United States Supreme Court], and not the state legislature, is under the commerce clause, the final arbiter of competing demands of state and national interests."[46] This self-executing limitation on state power to regulate commerce has been referred to as the dormant Commerce Clause.[47]

Modern dormant Commerce Clause jurisprudence is primarily driven by concerns about economic protectionism, meaning legislation or regulation designed to benefit in-state economic interests by burdening out-of-state competitors.[48] The principal objects of dormant Commerce Clause scrutiny or analysis are statutes that discriminate against interstate commerce.[49] The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, because these are the "laws that

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[42] *See BNSF Railway Company v. Hiett*, 22 F.4th 1190, 1195-96 (10th Cir. 2022)("[T]he Blocked Crossing Statute concerns *public* safety, not rail safety, and regulations railroad operations. Thus, the district court properly analyzed whether the ICCTA, and not the FRSA, preempts it."), ("While emergency responders' delayed ability to reach people on the other side of a blocked crossing and risky road-blockage-induced behaviors pose legitimate safety issues, they do not concern any hazards to the railroad system or its participants. Rather, they are local public safety issues-not rail safety issues.")(internal citations and quotations omitted); *Elam v. Kansas City Southern Ry. Co.*, 635 F.3d 796, 807 (5th Cir. 2011)(holding that an antiblocking statute was properly analyzed under the ICCTA's preemption analysis and reasoning "focusing on the Elams' particular reason for enforcing Mississippi's antiblocking statute misses the point. Regardless of why the Elams brought their negligence per se claim, the effect of the claim is to economically regulate KCSR's switching operations."); *Tyrell v. Norfolk Southern Ry. Co.*, 248 F.3d 517, 523 (6th Cir. 2001)("Congress vested the FRA with primary authority over national rail safety policy and assigned the [Surface Transportation Board (STB)] the duty to encourage safe and suitable working conditions for railway employees through its assessments of individual railroad proposals subject to its authority.")(internal quotation omitted).

[43] U.S. Const., art. 1, § 8, cl. 3.

[44] *Burlington Northern R. Co. v. State of Neb.*, 802 F.2d 994, 999 (8th Cir. 1986).

[45] *Burlington Northern R. Co. v. State of Neb.*, 802 F.2d 994, 999 (8th Cir. 1986) (citing *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945)).

[46] *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945).

[47] *National Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1147 (9th Cir. 2012).

[48] *National Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1147 (9th Cir. 2012).

[49] *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 87 (1987).

would excite those jealousies and retaliatory measures the Constitution was designed to prevent."[50]

The United States Supreme Court has adopted a two-tiered test to analyze whether a state regulation violates the Commerce Clause:

> [(1)] When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, [the Court has] generally struck down the statute without further inquiry. [(2)] When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, [the Court has] examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.[51]

This two-part analysis is subject to exceptions and variations.[52] For example, a state law may violate the dormant commerce clause when the law has extraterritorial effects or regulates activities that are inherently national or require a uniform system of regulation.[53]

To illustrate, in *Union Pacific R. Co. v. California Public Utilities Comm'n*, the Ninth Circuit considered whether the California Public Utility Commission's (CPUC) regulations requiring railroads to cooperate in the development and implementation of performance-based train make-up standards[54] violated the dormant Commerce Clause.[55] The Court explained:

> The Railroads argue that the indirect effects of CPUC's regulations will burden interstate commerce. The CPUC regulations are afforded a presumption of constitutionality, and the Railroads must meet this rather stringent test: When a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. To prevail, the Railroads must demonstrate that the CPUC's regulations impede substantially the free flow of commerce from state to state or that train configuration, because of the need of national uniformity[,] can only be regulated by the national government.[56]

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[50] *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994).
[51] *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 578-79 (1986).
[52] *South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080, 2090-91 (2018).
[53] *Association des Eleveurs de Canards et d'Oies du Quebec v. Bonta*, 2022 WL 1436840 at 7* (9th Cir. 2022)(holding in part that an in-state sales ban was not unconstitutionally extraterritorial, "even if it influences out-of-state producer's conduct.").
[54] Train make-up rules are a listing of acceptable individual technical provisions for the train at each location. *Union Pacific R. Co. v. California Public Utilities Comm'n*, 346 F.3d 851, 871 (9th Cir. 2003).
[55] *Union Pacific R. Co. v. California Public Utilities Comm'n*, 346 F.3d 851 (9th Cir. 2003).
[56] *Union Pacific R. Co. v. California Public Utilities Comm'n*, 346 F.3d 851, 870 (9th Cir. 2003)(internal quotations and citations omitted).

Applying the above test, the Court held that the CPUC's regulations regarding performance-based train make-up standards violated the dormant Commerce Clause. The Court explained that allowing California to regulate a train's make-up would allow all other states to adopt their own regulations regarding train make-up with no guarantee of similarity, resulting in a patch-work of regulation that would impose immense burden on the railroads.[57] The Court further noted that the CPUC's performance-based standards did not result in greater safety, but rather made the railroad's make-up rules easier to apply.[58] The Court concluded that "[California's] interest in easing the administrative burden of applying the Railroads' more technical rules pales in comparison to the burden to requiring potentially conflicting state standards," and held that the regulations were clearly excessive in relation to the putative local benefits, thereby violating the Commerce Clause.[59]

However, in the same case, the Ninth Circuit determined that the CPUC's regulations that allowed the CPUC to impose civil fines on railroads for failing to comply with the railroads' own train make-up rules did not violate the Commerce Clause. The Court reasoned that the state had a legitimate interest in decreasing train derailments and that there was no dispute that trains configured according to the railroads' rules decreased the risk of derailment.[60] While the Court acknowledged that the possibility of additional civil fines placed some burden on the railroads, it observed that "presumably the Railroads follow their own rules during all transports, so the enforcement of these rules should add little, if any, extra burden."[61] The court further noted that the CPUC's regulation did not threaten the goal of national uniformity because the CPUC was applying the railroads' own internal rules, which are subject to the railroads' control. Therefore, the regulation did not violate the Commerce Clause because it furthered a legitimate state interest, the burden on the railroad was relatively minor, and did not interfere with the goal of national uniformity.[62]

Federal Railroad Safety Act

In 1970, Congress enacted the FRSA "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents."[63] The FRSA contains an express preemption provision regarding railroad safety regulation:

> (1) Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable.

[57] *Union Pacific R. Co. v. California Public Utilities Comm'n*, 346 F.3d 851, 871 (9th Cir. 2003).
[58] *Union Pacific R. Co. v. California Public Utilities Comm'n*, 346 F.3d 851, 871-72 (9th Cir. 2003).
[59] *Union Pacific R. Co. v. California Public Utilities Comm'n*, 346 F.3d 851, 872 (9th Cir. 2003).
[60] *Union Pacific R. Co. v. California Public Utilities Comm'n*, 346 F.3d 851, 872 (9th Cir. 2003).
[61] *Union Pacific R. Co. v. California Public Utilities Comm'n*, 346 F.3d 851, 872 (9th Cir. 2003).
[62] *Union Pacific R. Co. v. California Public Utilities Comm'n*, 346 F.3d 851, 872-73 (9th Cir. 2003).
[63] *Norfolk Southern Ry. Co. v. Shanklin*, 529 U.S. 344, 347 (2000)(quoting 49 USC §20101).

(2) A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order-

(A) is necessary to eliminate or reduce an essentially local safety or security hazard;

(B) is not incompatible with a law, regulation, or order of the United States Government; and

(C) does not unreasonably burden interstate commerce.

(b) (1) Nothing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party-

(A) has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section;

(B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or

(C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).

(2) This subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002.[64]

Federal laws governing railroads in Title 49 of the US Code, Subtitle V (Railroads), Part A (Safety), of which 49 U.S.C. § 20106 is a part, contain chapters pertaining to safety appliances,[65] signal systems,[66] locomotives,[67] accidents and incidents,[68] hours of service,[69] and penalties.[70] The Secretary of Transportation has delegated authority to the FRA to prescribe regulations and issue orders pursuant to the Secretary's authority under 49 U.S.C. Subtitle V, Part A.[71] As such,

[64] 49 U.S.C. § 20106.
[65] 49 U.S.C., Subt. V, Pt. A, Ch. 203.
[66] 49 U.S.C., Subt. V, Pt. A, Ch. 205.
[67] 49 U.S.C., Subt. V, Pt. A, Ch. 207.
[68] 49 U.S.C., Subt. V, Pt. A, Ch. 209.
[69] 49 U.S.C., Subt. V, Pt. A, Ch. 211.
[70] 49 U.S.C., Subt. V, Pt. A, Ch. 213.
[71] 49 C.F.R. § 1.89(a).

the FRA's regulations and orders pertaining to railroad safety have the same preemptive effect as though they had been issued by the Secretary of Transportation.[72]

a. Covered Subject Matter

Based on the preemption language above, the FRSA only preempts state regulation of railroad safety matters if the Secretary of Transportation prescribes a regulation or issues an order "covering" the subject matter of the state requirement or cause of action.[73] In general, a state regulation "covers the same subject matter as an FRA regulation if it addresses the same safety concerns as the FRA regulation."[74] However, a party arguing that federal orders or regulations "cover" the same subject matter as a state regulation "must establish more than that [the federal regulations or orders] 'touch upon' or 'relate to' that subject matter[,] for 'covering' is a more restrictive term which indicates that [preemption] will lie only if the federal regulations [or orders] substantially subsume the subject matter of the relevant state law."[75] When considering whether a federal order or regulation "covers" the same subject matter, a reviewing court may also consider "related safety regulations adopted by the Secretary [of Transportation]," as well as "the context of the overall structure of the regulations."[76] Furthermore, "[t]he term 'covering' is in turn employed within a provision that displays considerable solicitude for state law in that its express [preemption] clause is both prefaced and succeeded by express saving clauses."[77]

For example, in *CSX Transp. Inc. v. Easterwood*, the United States Supreme Court considered whether the plaintiff's claims that a railroad was negligent for failing to maintain adequate warning devices at a grade crossing and for operating trains at excessive speeds were preempted under the FRSA.[78] With respect to the warning devices claim, the Court reasoned that while the Secretary of Transportation had promulgated regulations regarding issuance of federal funds for grade crossings and standards for warning devices, the regulations either did not "cover" the subject matter of the tort law of grade crossings or did not apply to the crossing at issue, and therefore did not preempt the grade crossing claim.[79]

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[72] *See generally* 49 C.F.R. Subt. B, Ch. II.

[73] 49 U.S.C. § 20106. *See also CSX Transp., Inc., v. Easterwood*, 507 U.S. 658, 664 (1993) ("According to § 434 [(recodified at 49 U.S.C. § 20106)], applicable federal regulations may [preempt] any state 'law, rule, order, or standard related to railroad safety.' Legal duties imposed on railroads by the common law fall within the scope of these broad phrases. Cf. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 522 [] (1992) (federal statute barring additional "'requirement[s]' . . . 'imposed under State law'" [preempts] common-law claims).").

[74] *Burlington Northern R. Co. v. State of Mont.*, 880 F.2d 1104, 1105-06 (9th Cir. 1989) (internal quotation omitted).

[75] *CSX Transp., Inc., v. Easterwood*, 507 U.S. 658, 664 (1993) (internal citation omitted).

[76] *CSX Transp., Inc., v. Easterwood*, 507 U.S. 658, 674 (1993).

[77] *CSX Transp., Inc., v. Easterwood*, 507 U.S. 658, 665 (1993). *See also id*. at 668 ("In light of the relatively stringent standard set by the language of §434 [recodified as 49 U.S.C. § 20106] and the presumption against [preemption], and given the regulations provide no affirmative indication of their effect on negligence law, we are not prepared to find [preemption] solely on the strength of the general mandates of 23 C.F.R. pt. 924.").

[78] *CSX Transp., Inc., v. Easterwood*, 507 U.S. 658, 661 (1993).

[79] *CSX Transp., Inc., v. Easterwood*, 507 U.S. 658, 665-73 (1993).

However, with respect to the plaintiff's excessive speed claim, which alleged that despite the fact that the train was travelling within the FRA's maximum speed limit for the class of track the train was on, the railroad breached its common law duty to operate its train at a moderate and safe rate of speed, the Court stated:

> On their face, the provisions of [49 C.F.R.] § 213.9 address only the maximum speeds at which trains are permitted to travel given the nature of the track on which they operate. Nevertheless, related safety regulations adopted by the Secretary reveal that the limits were adopted only after the hazards posed by track conditions were taken into account. Understood in the context of the overall structure of the regulations, the speed limits must be read as not only establishing a ceiling, but also precluding additional state regulation of the sort that [the plaintiff] seeks to impose on [the railroad].[80]

The Court held that "§213.9(a) should be understood as covering the subject matter of train speed with respect to track conditions, including the conditions posed by grade crossings," and consequently, the plaintiff's "excessive speed claim cannot stand in light of the Secretary's adopting of the regulations in § 213.9."[81]

b. Essentially Local Safety Hazard and Specific Individual Hazard

Even if the FRA has adopted a regulation or issued an order covering a particular subject matter, a state may adopt or enforce an additional or more stringent law, regulation, or order related to railroad safety if such law, regulation, or order is "necessary to eliminate or reduce an essentially local safety hazard."[82] For example, in *Union Pacific R. Co. v. California Public Utilities Comm'n*, the Ninth Circuit considered whether a state regulation regarding track strength for a specific segment of track fell within the "essentially local safety hazard" savings clause to preemption under the FRSA.[83] As a threshold issue, the Court considered how the phrase "essentially local safety hazard" should be interpreted:

> Our sister circuits, which have plumbed the statutory history of the FRSA, have come to a similar conclusion and have created a workable definition of an "essentially local safety hazard," defining it as one which is not "adequately encompassed within national uniform standards." *See, e.g., Nat'l Ass'n of Regulatory Util. Comm'rs v. Coleman*, 542 F.2d 11, 14-15 (3rd Cir. 1976) ("The exception was designed instead to enable the states to respond to local situations which are not statewide in character and not capable of being adequately encompassed within national uniform standards."); *Norfolk & W. Ry.*

[80] *CSX Transp., Inc., v. Easterwood*, 507 U.S. 658, 674 (1993).
[81] *CSX Transp., Inc., v. Easterwood*, 507 U.S. 658, 675 (1993). *See also Veit, ex rel. Nelson v. Burlington Northern Santa Fe Corp.*, 171 Wn.2d 88, 106-08 (2011)(holding in part that the FRSA preempting plaintiff's negligence claim against the railroad where the railroad operated a train in excess of its internal speed limit, but within the speed limit set by the FRA, because the FRA's regulations covered the area of train speed).
[82] 49 U.S.C. § 20106(a)(2)(A).
[83] *Union Pacific R. Co. v. California Public Utilities Comm'n*, 346 F.3d 851, 858-59 (9th Cir. 2003).

> *v. Pub. Utils. Comm'n*, 926 F.2d 567, 571 (6th Cir. 1991) ("[T]he second exception . . . permits state regulation only when local situations are 'not capable of being adequately encompassed within uniform national standards.'"); *see also, e.g., Burlington N. R.R. v. Montana*, 805 F.Supp. 1522, 1528 (D.Mont.1992) (adopting definition from *Nat'l Ass'n of Regulatory Util. Comm'rs*, 542 F.2d at 14-15); *Union Pac. R.R. v. Pub. Util. Comm'n,* 723 F.Supp. 526, 530 (D.Or.1989)("PUCO's permanent regulations do not address essentially local safety hazards because the permanent regulations are statewide in character and capable of being addressed adequately in uniform national standards."). Such definition provides an accurate inquiry, and we adopt it.[84]

Applying the above standard, the Court reasoned that "[t]he character of the grade/curve combination at issue here does not meet the definition of an 'essentially local safety hazard.' There are many curves in the United States that share the same characteristics as the one at issue here; there is nothing 'fundamentally' local about the steep grade/sharp curve combination."[85] The court further explained that while the environmental hazard sought to be addressed by the challenged regulation was potentially severe, the "external concerns" that a regulation seeks to address "must also be fundamentally local in nature."[86] That is, although a train derailment could cause environmental damage to a nearby river, "the risk is not one that is fundamentally different from those of other locales. . . . [M]ore than 10,000 miles of track are adjacent to waterways in North America: individuals dependent on their local waterway in every case would be devastated should an accident occur."[87] Based on this analysis, the Court held that "[b]ecause the steep grade/sharp curve combination can be adequately addressed by national standards, we conclude that [the challenged regulation] fails to meet the FRSA's definition of an 'essentially local safety hazard.'"[88]

Furthermore, a common law negligence claim based on the operation of a train at an excessive speed will not be preempted if the claim was based on a specific individual hazard. In *Veit, ex rel. Nelson v. Burlington Northern Santa Fe Corp.*, the plaintiff alleged that the railroad was negligent for operating its train in excess of the railroads self-imposed speed limit, but within the FRA's maximum speed limit for the class of track the train was operating on.[89] After ruling that the FRSA preempted the plaintiff's excessive speed claim, the Washington State Supreme Court considered whether the plaintiff's negligence claim fell within an exception to preemption under the FRSA because the claim was based on a specific individual hazard.[90] The Court defined a "specific individual hazard" as:

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[84] *Union Pacific R. Co. v. California Public Utilities Comm'n*, 346 F.3d 851, 860 (9th Cir. 2003)(alteration in original).
[85] *Union Pacific R. Co. v. California Public Utilities Comm'n*, 346 F.3d 851, 861 (9th Cir. 2003).
[86] *Union Pacific R. Co. v. California Public Utilities Comm'n*, 346 F.3d 851, 861-62 (9th Cir. 2003).
[87] *Union Pacific R. Co. v. California Public Utilities Comm'n*, 346 F.3d 851, 862 (9th Cir. 2003).
[88] *Union Pacific R. Co. v. California Public Utilities Comm'n*, 346 F.3d 851, 862 (9th Cir. 2003).
[89] *Veit, ex rel. Nelson v. Burlington Northern Santa Fe Corp.*, 171 Wn.2d 88, 94-95 (2011).
[90] *Veit, ex rel. Nelson v. Burlington Northern Santa Fe Corp.*, 171 Wn.2d 88, 108, 110 (2011).

> [A] person, vehicle, obstruction, object, or event which is not a fixed condition or feature of the crossing and which is not capable of being taken into account by the Secretary of Transportation in the promulgation of uniform, national speed regulations. In short, a specific individual hazard refers to a unique occurrence which could lead to a specific and imminent collision and not to allegedly dangerous conditions at a particular crossing.[91]

Based on this standard, the Court determined that the plaintiff's "excessive speed claim does not fall within the narrow exception for specific individual hazards," because the "features that allegedly made the [crossing] hazardous were permanent features of the crossing."[92]

Interstate Commerce Commission Termination Act

In addition to the FRSA, another major source of state railroad regulation preemption is the ICCTA.[93] Enacted in 1995, the ICCTA abolished the former Interstate Commerce Commission (ICC), revised the Interstate Commerce Act, and transferred the prior regulatory functions of the ICC to the Surface Transportation Board (STB).[94] The ICCTA contains an express preemption provision with respect to interstate rail carrier transportation:

The jurisdiction of the [Surface Transportation] 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 discontinuation 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.[95]

[91] *Veit, ex rel. Nelson v. Burlington Northern Santa Fe Corp.*, 171 Wn.2d 88, 110 (2011).
[92] *Veit, ex rel. Nelson v. Burlington Northern Santa Fe Corp.*, 171 Wn.2d 88, 111 (2011).
[93] For additional legislative history regarding the ICCTA, *see* H.R. Rep. 104-311 (1995) (ICCTA House Report) and S. Rep. No. 104-176 (1995)(ICCTA Senate Report).
[94] *Swinomish Indian Tribal Community v. BSNF Railway Company*, 951 F.3d 1142, 1152 (9th Cir. 2020). *See also* 49 U.S.C. § 1302.
[95] 49 U.S.C. § 10501(b).

As part of its analysis of the ICCTA's preemptive scope, a court is likely to afford deference to the STB's interpretation of ICCTA preemption as the agency charged with administering the ICCTA.[96]

In *City of Auburn v. U.S. Government*, the Ninth Circuit considered whether the ICCTA preempted state and local environmental review laws related to the approval of the reopening of a railroad line.[97] On appeal, the City of Auburn argued that the STB erred by finding that ICCTA preempted state and local environmental permitting laws because the Congress intended the ICCTA to only prohibit economic regulation of rail transportation, rather than environmental regulation.[98] As part of its analysis, the Court briefly noted the history of federal regulation regarding interstate rail transportation:

> We begin by first noting that Congress and the courts long have recognized the need to regulate railroad operations at the federal level. Congress' authority under the Commerce Clause to regulate the railroads is well established, *see, e.g., Houston, E. & W. Tex. Ry. V. United States*, 234 U.S. 342, 350-52[. . .] (1914); *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives Ass'n*, 491 U.S. 490, 510 [. . .] (1989), and the Supreme Court repeatedly has recognized the preclusive effect of federal legislation in this area. *See, e.g.*, *Colorado v. United States*, 271 U.S. 153, 165-66 [. . .] (1926)(ICC abandonment authority is plenary and exclusive); *Transit Comm'n v. United States*, 289 U.S. 121, 127-28 [. . .](1933)(ICC authority over interstate rail construction is exclusive); *City of Chicago v. Atchison, T. & S.F. Ry.*, 357 U.S. 77, 88-89 [. . .] (1958)(local authorities have no power to regulate interstate rail passengers). The Interstate Commerce Act, ch. 104, 24 State. 379 (1887), which, as amended, still governs federal regulation of railroads, has been recognized as "among the most pervasive and comprehensive of federal regulatory schemes." *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 [. . .] (1981).[99]

After reviewing the statute, the Court held that "the plain language of two sections of the ICCTA explicitly grant the STB exclusive jurisdiction over railway projects" like the one at issue in the case.[100] Turning to the City of Auburn's argument, the Court acknowledged that although courts have declined to preempt state environmental regulation in some contexts, with respect to ICCTA preemption "the pivotal question is not the nature of the state regulation, but the

[96] *BNSF Railway Company v. California Department of Tax and Fee Administration*, 904 F.3d 755, 762 (9th Cir. 2018) ("We owe *Chevron* deference to the STB's guidance on the scope of ICCTA preemption.")(internal quotation and citation omitted); *Emerson v. Kansas City Southern Ry. Co.*, 503 F.3d 1126, 1130 (10th Cir. 2007) ("As the agency authorized to administer the [ICCTA], the [Surface] Transportation Board is uniquely qualified to determine whether state law should be preempted by the [ICCTA].")(citation omitted).
[97] 154 F.3d 1025 (9th Cir. 1998)
[98] *City of Auburn v. U.S. Government*, 154 F.3d 1025, 1029 (9th Cir. 1998).
[99] *City of Auburn v. U.S. Government*, 154 F.3d 1025, 1029 (9th Cir. 1998).
[100] *City of Auburn v. U.S. Government*, 154 F.3d 1025, 1030 (9th Cir. 1998)

language and congressional intent of the specific federal statute."[101] After reviewing the ICCTA, the Court concluded that "there is no evidence that Congress intended any such [active] state role under the ICCTA to regulate the railroads."[102] The Court further reasoned:

> Additionally, given the broad language of § 10501(b)(2), (granting the STB exclusive jurisdiction over construction, acquisition, operation, abandonment, or discontinuance of rail lines) the distinction between "economic" and "environmental" regulations begins to blur. For if local authorities have the ability to impose "environmental" permitting regulations on the railroad, such power will in fact amount to "economic regulation" if the carrier is prevented from constructing, acquiring, operating, or discontinuing a line.[103]

Based on this analysis, the Court held that the state and local environmental permitting regulations were preempted by the ICCTA.[104]

However, it is important to note that "[g]enerally speaking, [the] ICCTA does not preempt state or local laws if they are laws of general applicability that do not unreasonably interfere with interstate commerce."[105] For example, the ICCTA would likely not preempt local laws that prohibit the dumping of harmful substances or wastes, because such a generally applicable regulation would not constitute an unreasonable burden on interstate commerce.[106] Stated another way, "[the] ICCTA preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation. What matters is the degree to which the challenged regulation burdens rail transportation."[107] Consequently, the ICCTA generally will not preempt (1) state or local regulations that implement federal environmental statutes, or (2) generally applicable regulations insofar as those regulations do not unreasonably burden railroad activity.[108]

As mentioned above, the ICCTA preempts not only the regulation of rail transportation, but also the remedies related to the regulation of rail transportation.[109] For example, in *Neighbors v.*

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[101] *City of Auburn v. U.S. Government*, 154 F.3d 1025, 1031 (9th Cir. 1998).
[102] *City of Auburn v. U.S. Government*, 154 F.3d 1025, 1031 (9th Cir. 1998).
[103] *City of Auburn v. U.S. Government*, 154 F.3d 1025, 1031 (9th Cir. 1998).
[104] *City of Auburn v. U.S. Government*, 154 F.3d 1025, 1031 (9th Cir. 1998).
[105] *Association of American Railroads v. South Coast Air Quality Management Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010).
[106] *Association of American Railroads v. South Coast Air Quality Management Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010).
[107] *Association of American Railroads v. South Coast Air Quality Management Dist.*, 622 F.3d 1094, 1097-98 (9th Cir. 2010).
[108] *Association of American Railroads v. South Coast Air Quality Management Dist*., 622 F.3d 1094, 1098 (9th Cir. 2010). *But see BNSF Railway Company v. Clark County, Washington*, 11 F.4th 961, 970 (9th Cir. 2021) (holding that the Columbia River Gorge Nation Scenic Area Act, while federally authorizing a multi-state commission to oversee the Columbia River Gorge, was not required to be harmonized with the ICCTA, and that permitting regulations promulgated by the commission were preempted by the ICCTA).
[109] 49 U.S.C. § 10501(b).

King County, the Washington State Court of Appeals held that the ICCTA preempted an adverse possession claim regarding a part of a railroad corridor that was on the plaintiffs' property, explaining that "the [STB] and federal courts have explicitly ruled that the ICCTA preempts claims under Washington's adverse possession statutes against railroads."[110] Similarly, in *City of Seattle v. Ballard Terminal Railroad Company, L.L.C.*, the Washington State Court of Appeals considered whether the City of Seattle could enforce a provision of a franchise agreement between the city and Ballard Terminal Railroad Company, LLC that would require the railroad to relocate its track at the City's request.[111] As part of its analysis, the Court explained:

> The ICCTA provides that the STB's jurisdiction over (1) transportation by rail 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. This section expressly preempts any state law remedies with respect to the routes and services of Board-regulated carriers. Because such remedies by a state or local body would directly conflict with exclusive federal regulation of railroads, . . . the preemption analysis is addressed not to the reasonableness of the particular state or local action, but rather to the act of regulation itself. However, Congress narrowly tailored the ICCTA preemption provision to displace only regulation, i.e., those state laws that may be reasonably said to have the effect of managing or governing rail transportation while permitting the continued application of laws having a more remote or incidental effect on rail transportation.[112]

The Court held that insofar as Seattle's franchise ordinance "requires [the railroad] to reroute its tracks upon notice from Seattle," the franchise ordinance "is a local law remedy with respect to the routes and services of a Board-regulated rail carrier, and is accordingly preempted by the ICCTA."[113]

Conclusion

As discussed above, federal law is the supreme law of the land, and state attempts to regulate railroad safety and practices may be vulnerable to challenge and invalidation from several sources of federal law. The Commerce Clause and dormant Commerce Clause will invalidate state laws that directly regulate or impose an unreasonable burden on interstate commerce, of which railroad transportation is a major component. Furthermore, federal statutes such as the

[110] *Neighbors v. King County*, 15 Wn.App.2d 71, 84-85 (2020).
[111] *City of Seattle v. Ballard Terminal Railroad Company, L.L.C.*, 2022 WL 1535692.
[112] *City of Seattle v. Ballard Terminal Railroad Company, L.L.C.*, at *3 2022 WL 1535692 (internal quotation and citation omitted). *But see City of Seattle v. Burlington Northern R. Co.*, 145 Wn.2d 661, 669 (2002)("The City's arguments in favor of a narrow interpretation of the ICCTA are unpersuasive. The language of the ICCTA is unambiguous. Congress gave the ICCTA broad preemptive power to enable uniform regulation of interstate rail operations. . . [.]").
[113] *City of Seattle v. Ballard Terminal Railroad Company, L.L.C.*, at *4 2022 WL 1535692 (internal quotation and citation omitted).

FRSA and the ICCTA will preempt state regulations that are "covered" by an FRA regulation or order and not necessary to address an essentially local safety hazard, with respect to the FRSA, or intrude onto the exclusive jurisdiction of the STB, with respect to the ICCTA. Finally, there may be additional federal statutes, actions taken by the FRA under its rail safety authority, or subsequent congressional amendments that further impact the preemption analysis applied to state railroad regulation.

Liability Protection

The following provides a brief overview of the waiver of sovereign immunity, an example of governmental immunity notwithstanding the waiver of sovereign immunity, and an example of a limitation on a governmental actor's duty, which affects a governmental actor's liability in a similar but distinct manner to immunity.

The concept of sovereign immunity is derived from English common law and relates to the inability to bring suit against a sovereign entity:

> The doctrine of sovereign immunity is well-rooted in the common law. Its absolute bar to actions against and liability of the sovereign was a universal and logical response to feudal times. Two British common law fictions gave substance to the concept of the absolute immunity of the sovereign. Each existed as a separate rationale to preclude any culpability of the sovereign. The first was that, even when the sovereign had in fact invaded or violated a private right, the sovereign was presumed to have been deceived into doing so. Because the act was treated as fraudulent in the procurement, no remedy could be had against the sovereign.
>
> The second fiction depends on the premise that the sovereign, having conquered or otherwise acquired by primogeniture or the like absolute rule over the domain, was both omnipotent and the source of all law. As a consequence, the sovereign as the source of law could not think, let alone commit, any illegal act.[114]

[114] 15 N.Y.Prac., New York Law of Torts § 17:2 (2022).

In California, Idaho, New York, Oregon, and Washington, each state has waived its sovereign immunity and consented to claims being filed against the state based on the tortious conduct of state officers and employees. For example, in Washington:

> The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.[115]

After conducting research into the laws of California, Idaho, New York, and Oregon, the Utilities and Transportation Commission staff did not identify any statutory liability protections in those states that specifically apply to agencies that perform rail safety oversight under state law similar to Washington. In Washington:

> The department [of transportation] and its employees shall have no liability for any actions taken pursuant to this chapter arising from: The adoption of rules; the review of or concurrence in a system safety program plan and a system security and emergency preparedness plan; the separate, independent investigation of any reportable incident, accident, security breach, hazard, or security vulnerability; and the review of or concurrence in a corrective action plan for any reportable incident, accident, security breach, hazard, or security vulnerability.[116]

Therefore, agencies with rail safety oversight under state law (including Washington, subject to the above quoted statute) will generally be liable for their tortious conduct to the extent that their actions are subject to the particular state's tort liability regime due to the respective state's waiver of sovereign immunity.

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[115] RCW 4.92.090. *See also* Cal. Gov't Code § 815.2(a) ("A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative."), Cal. Gov't Code § 820(a)(" Except as otherwise provided by statute (including Section 820.2), a public employee is liable for injury caused by his act or omission to the same extent as a private person.")(California); I.C. § 6-903(1)(stating in part "Except as otherwise provided in this act, every governmental entity is subject to liability for money damages arising out of its negligent or otherwise wrongful acts or omissions and those of its employees acting within the course and scope of their employment or duties, whether arising out of a governmental or proprietary function, where the governmental entity if a private person or entity would be liable for money damages under the laws of the state of Idaho, provided that the governmental entity is subject to liability only for the pro rata share of the total damages awarded in favor of a claimant which is attributable to the negligent or otherwise wrongful acts or omissions of the governmental entity or its employees.")(Idaho); Court of Claims Act § 8 (providing in part "The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations, provided the claimant complies with the limitations of this article.")(New York); ORS § 30.265(1) ("Subject to the limitations of ORS 30.260 to 30.300, every public body is subject to civil action for its torts and those of its officers, employees and agents acting within the scope of their employment or duties, whether arising out of a governmental or proprietary function or while operating a motor vehicle in a ridesharing arrangement authorized under ORS 276.598.")(Oregon).

[116] RCW 81.104.115(8).

However, the wavier of sovereign immunity by each state is not absolute, and is subject to various additional requirements or immunities created by either statute or judicial precedent.

For example, state actors are generally afforded immunity against tort claims that relate to the exercise of governmental discretion. In *McClusky v. Handorff-Sherman*, the Washington State Supreme Court discussed the application of discretionary governmental immunity:

> It is true that in 1961 the Legislature waived sovereign immunity[.] This court has observed, however, that this waiver is not as broad as it could have been written. Under RCW 4.92.090, state government is rendered liable for damages only when the official conduct is tortious and analogous to the chargeable misconduct and liability of a private person or corporation. The State is not liable for every harm that may flow from governmental action. Negligent conduct must be present. Under *Evangelical Church*, therefore, a narrow category of discretionary governmental immunity exists as a court-created exception to the general rule of governmental tort liability. Its applicability is limited to high-level discretionary acts exercised at a truly executive level.
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> Thus, it is necessary to determine where, in the area of governmental processes, orthodox tort liability stops and the protected act of governing begins. This court has set out four basic questions to help determine whether an act is a discretionary governmental process and therefore nontortious:
>
> > (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective? (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy . . . as opposed to one which would not change the course or direction of the policy, program, or objective? (3) Does the act . . . require the exercise of basic policy evaluation, judgment, and expertise on the part of the government agency involved? (4) Does the governmental agency involved possess the requisite . . . authority . . .?
>
> In addition, the action or decision at issue must actually have been considered and reasoned in order to be entitled to immunity.[117]

[117] *McClusky v. Handorff-Sherman*, 125 Wn.2d 1, 11-12 (1994)(internal citations omitted).

California, Idaho, New York, and Oregon also recognize different forms of immunity for discretionary governmental acts based on the statutes authorizing or judicial opinions acknowledging such immunity.[118] The application of discretionary governmental immunity will depend on the particular facts involved and the scope of the immunity as interpreted by the courts of the relevant jurisdiction.

In addition to different forms of state tort immunity, some states have also adopted statutes or policy protections that effectively limit the liability of state actors. Critically, these statutes or policy protections are distinct from immunity, in that the statutes or policy protections typically affect whether the state has a duty, one of the required elements to support a negligence action, rather than immunizing the state from liability in the event that negligence is established.[119] One example, referred to as the "public duty doctrine" in Washington, affects whether a state actor has a duty with respect to a negligence claim. In *Washburn v. City of Federal Way*, the Washington State Supreme Court explained the application of the public duty doctrine:

> Because governments, unlike private persons, are tasked with duties that are not legal duties within the meaning of tort law, we carefully analyze the threshold element of duty in negligence claims against governmental entities. We employ the public duty doctrine as a focusing tool to determine whether a duty is actually owed to an individual claimant rather than the public at large. Where the plaintiff claims the governmental entity has breached a duty owed to the public in general, he or she may not recover in tort for lack of an actionable legal duty.
>
> The public duty doctrine has exceptions. Saying an exception applies is simply shorthand for saying the governmental entity owes a duty to the plaintiff. As with any defendant, the true question in a negligence suit against a

[118] *See, e.g.*, Cal. Gov't Code § 820.2 ("Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused.")(California); I.C. § 6-904 ("A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim which: (1) . . . [is] based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused.")(Idaho); *Haddock v. City of New York*, 75 N.Y.2d 478, 484 (1990)("Governmental immunity under the decisional law of this State does not attach to every act, but when official action involves the exercise of discretion or expert judgment in policy matters, and is not exclusively ministerial, a municipal defendant is generally not answerable in damages for the injurious consequences of that action.")(internal citation omitted)(New York); ORS § 30.265(6)(c)("Every public body and its officers, employees and agents acting within the scope of their employment or duties, or while operating a motor vehicle in a ridesharing arrangement authorized under ORS 276.598, are immune from liability for: . . . (c) Any claim based upon the performance of or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused.") (Oregon).

[119] *See Washington State Dept. of Transp. v. Mullen Trucking 2005, Ltd.*, 194 Wn.2d 526, 533-35 (2019)(reasoning that RCW 64.44.020 did not grant the State immunity, but rather limited the State's duty to the public and holding that comparative fault could not be apportioned to the State in the absence of a duty).

> governmental entity is whether the entity owed a duty to the plaintiff, not whether an exception to the public duty doctrine applies it.[120]

In *Bailey v. Town of Forks*, the Washington State Supreme Court discussed several "exceptions" to the public duty doctrine, as well as circumstances where the doctrine would not apply:

> Thus far, we have identified four situations in which a governmental agency acquires a special duty of care owed to a particular plaintiff or a limited class of potential plaintiffs, rather than a general duty of care owed to the public at large. These exceptions include: (1) when the terms of a legislative enactment evidence an intent to identify and protect a particular and circumscribed class of persons (legislative intent)[;] (2) where governmental agents responsible for enforcing statutory requirements possess actual knowledge of a statutory violation, fail to take corrective action despite a statutory duty to do so, and the plaintiff is within the class the statute intended to protect (failure to enforce)[;] (3) when government agents fail to exercise reasonable care after assuming a duty to warn or come to the aid of a particular plaintiff (rescue doctrine)[;] or (4) where a relationship exists between the governmental agent and any reasonably foreseeable plaintiff, setting the injured plaintiff off from the general public and the plaintiff relies on explicit assurances given by the agent or assurances inherent in a duty vested in a governmental entity (special relationship)[.]
>
> In addition to these exceptions, we have not applied the public duty doctrine where the state engages in a proprietary function such as providing medical or psychiatric care. As the New York Court of Appeals has observed, in the proprietary context the state is held to the same duty of care as private individuals or institutions engaging in the same activity.[121]

[120] *Washburn v. City of Federal Way*, 178 Wn.2d 732, 753-754 (2013).
[121] *Bailey v. Town of Forks*, 108 Wn.2d 262, 268-69 (1987)(internal citations omitted).

California, Idaho, and New York each recognize a variant of the public duty doctrine or have adopted the same policy rationale to limit the duty of a state actor.[122] Oregon has declined to adopt a version of the public duty doctrine.[123]

To summarize, whether a state actor will be subject to liability will involve review of (1) the extent of a state's waiver of sovereign immunity, (2) any immunities to liability created by statute or judicial precedent, and (3) any limitations on the duties of state actors created by statute or judicial precedent. Furthermore, the above analysis will depend on the particular claims alleged against the state actor, and the specific factual context that supports the allegations against the state. As noted above, states have adopted different interpretations of and qualifications regarding the waiver of sovereign immunity, and the legislatures of each state have the power to further modify and define tort causes of action, including those levied against state actors.[124]

[122] *Walker v. County of Los Angeles*, 192 Cal.App.3d 1393, 1398-99 (1987)("In California, this concern is addressed by requiring a 'special relationship' between the public employee and a specific private citizen before a duty is created. A 'special relationship' exists if and only if an injured person demonstrates the public officer 'assumed a duty toward [him] greater than the duty owed to another member of the public.' In prior cases California courts have found 'special relationships' to arise where (1) public employees 'create a foreseeable peril, not readily discoverable by endangered persons, ...'; or, (2) public employees make a promise, express or implied, they will undertake a special duty toward the plaintiff[;] or, (3) public employees cause an injured person to rely to his detriment in a situation where that plaintiff is dependent on the employees.")(internal citation and emphasis omitted)(California); *Lundgren v. City of McCall*, 120 Idaho 556, 557-58 (1991)("The [Idaho Tort Claims Act] claim revolves around the issue of whether the city owed a legal duty to Lundgren to protect him from illegal fireworks. Municipalities are not liable for the failure to provide police protection in the absence of a special relationship or duty to particular individuals. . . . The respondent's police officers did not have an absolute, all embracing duty to protect the appellant from all types of foreseeable harm. Police officers cannot guarantee the public protection from every potential tortfeasor or criminal.")(Idaho); *Miller v. State of New York*, 62 N.Y.2d 506, 510 (1984)("Public entities remain immune from negligence claims arising out of the performance of their governmental functions, including police protection, unless the injured person establishes a special relationship with the entity, which would create a specific duty to protect that individual, and the individual relied on the performance of that duty.")(New York).

[123] *Brennen v. City of Eugene*, 285 Or. 401, 411 (1979)("We need not undertake an extensive analysis of the positions taken by the various courts and commentators for we conclude, as did the Alaska Supreme Court in Adams v. State, supra, that any distinction between 'public' and 'private' duty is precluded by statute in this state. ORS 30.265(1) provides that '***every public body is liable for its torts and those of its officers, [employees] and agents *** [w]hether arising out of a governmental or proprietary function.' (Emphasis added.) [. . .] In abolishing governmental tort immunity, the Legislature specifically provided for certain exemptions under which immunity would be retained, ORS 30.265(3), and we find no warrant for judicially engrafting an additional exception onto the statute.").

[124] *See, e.g., Morgan v. Johnson*, 137 Wn.2d 887, 896 (1999)("The Legislature enjoys the power to define and change tort law in our state.").

Section 4: State Survey Crosswalk with Analysis

Introduction

The following table provides a summary of both inventory topics and interview questions that were both researched and asked of each of the surveyed states: California, New York, Oregon, and Idaho. Table 4 is organized into columns that provide the inventory topic/interview question, the answer provided by each of the states interviewed, as well as column that focuses on the direct language within the proviso that requires an analysis of expanding the commission's role to match the role of other state agencies examined. The summary analysis provided considers any differences between the four states examined and the UTC. The language further analyzes what is needed to match the role of the state that approaches the inventory topic or interview question differently than the UTC.

The analysis does not provide any recommendations or suggested approach to match these differences for the specific topic or interview question, but instead only identifies what would be needed by the UTC to match the difference.

Table 4: Interview Questions and Summaries

Inventory Topics/ Interview Questions	California	New York	Oregon	Idaho	An analysis of expanding the commission's role to match the role of other state agencies examined
Agencies with jurisdiction for railroad safety and rail fixed guideway operations	The agency that has been granted railroad and rail fixed guideway safety responsibility and oversight is the California Public Utilities Commission (CPUC). The CPUC Rail Safety Division has three branches with providing safety oversight of railroads, rail transit systems such as fixed guideways, and highway-rail grade crossings. The Rail Crossings and Engineering Branch covers rail crossing safety, Railroad Operations and Safety Branch covers rail safety oversight and the Rail Transit Safety Branch covers rail transit safety.	The agency that has been granted railroad and rail fixed guideway safety responsibility and oversight is the New York State Department of Transportation. Within the department, the Office of Safety & Security Services includes the Rail Safety Bureau, which supports three safety program areas: the Rail Safety Inspection Section, the Public Transportation Safety Board, and the Grade Crossing and Regulation Section.	The agency that has been granted regulatory authority for safety oversight of the railroad industry and the rail fixed guideway infrastructure operations is the Oregon Department of Transportation. ODOT's oversight of the railroad and fixed guideway operations are found in the department's Commerce and Compliance Division.	The agency that has been granted railroad safety oversight is the Idaho Public Utilities Commission. There are no operational rail fixed guideways in the state.	Each state included in this inventory has one overall agency that has regulatory oversight for safety of both the railroad industry and rail fixed guideways. In the Washington state, the oversight of railroad operations and rail fixed guideways is separated into two different agencies: UTC and WSDOT.
Supplemental Questions					
Could you provide the statute references, or a copy of the statutes related to and/or rules promulgated pursuant to your agency's safety oversight authority over railroad operations and infrastructure projects in your state?	The CPUC's general authority comes from the California Public Utilities Code Sections 315, 761 and others. The following state laws and CPUC General Orders pertain to CPUC's freight/commuter heavy rail safety program: Public Utilities Code Sections 309.7, 421, 765.5, 768, 916, 916.2, 916.3, 7661, 7662, 7665.2 7665.4, 7665.6, 7665.8, 7673 and 7711.1, and CPUC GOs 22-B, 27-B, 26-D, 72-B, 75-D, 118-A, 126 and 161. The following state laws and CPUC GOs pertain to CPUC's rail fixed guideway state safety oversight (SSO) program: Public Utilities Code Sections 778, 29047, 30646, 99152 and 100168; and CPUC GOs 26-D, 33-B, 95, 127, 118-A, 128, 143-B, 164- E, 172 and 175-A.	New York State Laws and Rules relating to rail transit and the state's Public Transportation Safety Board can be found in the consolidated laws of New York. Article 9-B under Transportation provides authority of the Public Transportation Safety Board and Article 2 provides the powers, duties and jurisdiction of the NYSDOT. Title 17 of the Codes, Rules, and Regulations of the State of New York, Chapter VI, regarding transportation regulations, establishes the NYSDOT.	Oregon's vehicle Code, Chapters 823 and 824 provide sections specifically focused on railroads: Oregon Revised Statutes (ORS) 823 – Carrier Regulation Generally (both railroads and motor carrier) and ORS 824 – Railroads. ORS 824 provides direction on funds, accounts, and fees as well as provides the general provisions to ODOT as to how to proceed regarding railroad oversight criteria. The Code also requires ODOT to establish an SSO program for rail fixed guideway public transportation system, its fees, and its rules. The Code also focuses on the transport of hazardous materials, railroad grade crossings, cost apportionments, employee safety	Title 62 deals with Railroad Authority for the PUC and the rail safety rules can be found in Appendix A. The Idaho Legislature established the Idaho PUC in May 1913 and gave it the statutory authorities detailed in Title 61 and 62 of the Idaho Code. The commission oversees the intrastate operation of investor-owned electric, gas, water, and telecommunications utilities, as well as rail and pipeline safety programs. The commission has responsibility for ensuring that all rail services operating in Idaho do so in a safe and efficient manner, and its rail inspectors investigate highway-railroad crossing issues and railroad operations and safety throughout the state.	Each state in this inventory has both statues and regulations that govern the railroads operating throughout their states and the rail fixed guideways. This is consistent with the State of Washington.

Inventory Topics/ Interview Questions	California	New York	Oregon	Idaho	An analysis of expanding the commission's role to match the role of other state agencies examined
			regulations, passenger rail, and the civil penalties that are able to be enforced by the state. Oregon Administrative Rule 741 - Department of Transportation, Rail Division also applies.	These safety inspectors are also responsible for inspection of rail cars carrying hazardous materials in and through Idaho, and enforce federal hazardous materials regulations, which the State of Idaho has adopted.	
What number of personnel does your agency have on staff that provides oversight into railroad safety operations occurring throughout your state?	41 Federal Railroad Administration certified inspectors and 4 FRA certified supervisors.	11 FRA certified inspectors and 2 FRA certified supervisors.	18 FRA certified inspectors.	One FRA certified inspector (Hazardous Materials).	This information was collected to provide background and context for each safety program.
What number of personnel does your agency have on staff to provide transit (rail fixed guideway) related safety oversight?	34 staff assigned to CPUC's SSO program.	Nine and one half full-time department employees assigned to the Public Transportation Safety Board.	Four staff assigned to the SSO program.	Not applicable	This information was collected to provide background and context for each safety program.
What is the budget each of these oversight organizations per year? Railroad Safety: Rail Fixed Guideway:	Railroad Safety: $11.988 million Rail Fixed Guideway: $13.424 million Rail Crossing Safety: $8.097 million	Railroad Safety: Approximately $1,700,000 Rail Fixed Guideway: Approximately $900,000 Contractors – Transit Safety Oversight: Approximately $1,700,000	Railroad Safety: $14,182,809*, ** Rail Fixed Guideway: $2,790,405* *Budget amounts are based on the 2021-2023 biennium. **Railroad safety includes Oregon's FRA inspection program team, a state statute-based walkway and clearance inspection team, and a crossing safety team.	The total budget for the one inspector for fiscal year 2023 (July 1, 2022 – June 20, 2023) is $211,185.	This information was collected to provide background and context for each safety program.
Please provide information on any revenues, fees, etc., that fund your agency's safety program costs. Please include Federal Transit Administration grants for SSO activities, and other federal or state funding sources.	The railroad operations oversight program receives funding from the state's Transportation Reimbursement Account and Public Transportation Account, and FRA grant. A railroad safety user fee is assessed on Class 1 railroads operating in California and is the primary funding source. Those fees go into the Transportation Reimbursement Account. The California Public Utilities Code, Section 309.7 requires the activities	The revenues, fees and funding come from the freight railroads operating in the state. The law is found Freight Rail NY Transportation Law Section 13. The Section 135 rail safety fee law requires: "The annual fee referred to in subdivision one of this section shall be established and levied by the commissioner, subject to the approval of the director of the division of the budget, in an	In Oregon, the revenues and fees for railroad safety oversight are assessed on freight railroads and determined based on the percentages provided below: Railroad Safety Oversight: 100% Gross Revenue Fee (GRF), currently 0.0035% of annual gross revenues of operating freight railroads. Crossing Safety: 50% GRF, 50% state funds (Grade Crossing Protection Account. This account	The railroad oversight program in Idaho has a small office whose staff completes inspections and then reports their findings to the FRA. Idaho only has one railroad safety inspector for the entire state. Special Regulatory Fee Idaho Code §§ 61-1001, which can be found in Title 61 – Public Utility Regulation, Chapter 10, provides the following language for consideration:	The revenue analysis section (Section 5) analyzes matching the statutory ability of the states inventoried to collect revenues for the oversight of railroad safety operations and rail fixed guideways with the ability of the UTC.

Inventory Topics/ Interview Questions	California	New York	Oregon	Idaho	An analysis of expanding the commission's role to match the role of other state agencies examined
	of CPUC that relate to safe operation of common carriers by railroad, other than those relating to grade crossing protection, to be supported by the fees paid by railroad corporations. The CPUC is also required to report annually on "the impact on competition, if any, of the regulatory fees assessed railroad corporations for the support of CPUC's activities, based on the requirements found in Public Utilities Code Section 916.3." The SSO program receives funding from FTA's SSO grants and the state's Public Transportation Account (part of the State Transportation Fund). The primary sources of revenue for the state's Public Transportation Account are the sales tax on diesel fuel and gasoline.	amount that is sufficient to raise funds to defray the expenses of the department in administering and enforcing its railroad safety and related duties pursuant to the provisions of this chapter and the railroad law. Such expenses shall consist of the direct costs in the department's rail safety program of personal service, the cost of maintenance and operation, retirement contributions, workers' compensation premiums, and health and dental premiums which are paid by the state for or on account of personnel involved in the department's railroad safety program and any other indirect costs involved in administering and enforcing rail safety as deemed appropriate by the commissioner, provided, however, that such indirect costs shall not exceed twenty percent of total direct costs. "The fee shall be assessed against all railroads operating in the state of New York and shall be based on railroad gross operating revenues derived or earned from operations within the state in the preceding calendar year."	is funded with highway funds annually.) For rail fixed guideways, the revenues come from the FTA and state funds. SSO: 80% FTA grant, 20% state funds (Transportation Operating Fund) Clearance and Walkway: 100% GRF	"61-1001. ANNUAL FEES PAYABLE TO COMMISSION BY PUBLIC UTILITIES — PURPOSE. Each public utility and each railroad corporation, subject to the jurisdiction of the commission, and subject to the provisions of this act, shall pay to the commission in each year, a special regulatory fee in such amount as the commission shall find and determine to be necessary, together with the amount of all other fees paid or payable to the commission by each such public utility and railroad corporation in the current calendar year, to defray the amount to be expended by the commission for expenses in supervising and regulating the public utilities and railroad corporations subject to its jurisdiction."	
What is the railroad network size in your state based on track mileage?	Approximately 6,000 track miles.	3,687 Freight Track Miles.	2,308 track miles.	1,710 track miles.	The railroad network size was not considered as part of this analysis, but the data provided by each state allows for an evaluation of the differences between each state.

Inventory Topics/ Interview Questions	California	New York	Oregon	Idaho	An analysis of expanding the commission's role to match the role of other state agencies examined
How many track miles does passenger rail (Amtrak and commuter rail but not transit) operate over in your state?	Not provided.	Amtrak owns about 150 miles of track in New York State. Metro-North and the Long Island Railroad operate more than 775 and 700 miles of track respectively.	Amtrak Cascades: 136.2 track miles Amtrak Long Distance: 372.3 track miles Westside Express Service: 14.7 track miles	119 track miles.	The passenger railroad network size was not considered as part of this analysis, but the data provided by each state allows for an evaluation of the differences between each state.
How many track miles of fixed rail guideway systems are there in your in your state?	Approximately 486 track miles.	Niagara Frontier Transportation Authority: 6.4 miles of double track; Staten Island Railway: 29 miles, New York City Transit: 665 miles of track for passenger service (850 miles total).	80 track miles.	0 track miles.	The rail fixed guideway network size was not considered as part of this analysis, but the data provided by each state allows for an evaluation of the differences between each state.
How many track miles is the railroad network that crude oil is transported on in your state?	Approximately 6,000 track miles.	Approximately 700 miles.	941 miles.	993 miles.	The railroad network size available on which to transport crude oil was not considered as part of this analysis, but the data provided by each state allows for an evaluation of the differences between each state.
Railroad Safety Management Practices					
Railroad Safety Management Practices Overview	The rail safety inspectors employed by the Rail Safety Division complete investigations and inspections that are classified as surveillance activities to ensure that regulated railroads operating in California are in compliance with FRA regulations, Public Utilities Codes and GOs. Because the CPUC's railroad oversight authority has been approved by the FRA through a Safety Participation Program agreement, consistent with 49 Code of Federal Regulations (CFR) Part 212, the division's inspectors check for compliance in five technical disciplines (Motive Power and Equipment, Operating Practices, Signal and Train Control, Track, and Hazardous Materials), consistent with federal regulations. When	The NYSDOT Rail Safety Inspection Program has partnered with FRA since the establishment of the Federal Railroad Safety Act of 1970 to ensure the agency provides railroad safety monitoring and the reporting of railroad compliance consistent with federal and state regulations and laws. NYSDOT complies with FRA 49 CFR §212.105(3), which requires NYSDOT "to provide the capability necessary to assure coverage of facilities, equipment, and operating practices through planned routine compliance inspections for all, or a specified part of, the territory of the State." In	ODOT Commerce and Compliance Division railroad inspectors are trained and certified to inspect track, railroad equipment and cars; signal and train control; hazardous materials; and railroad operating practices and do so as agents for FRA. The division submits findings of noncompliance into the FRA reporting system and documents what areas each inspection covered. The railroad oversight program also submits annual reports to FRA regarding all actions taken by the division regarding the oversight of the state's railroad safety program. These annual reports certify that each inspector meets the requirements that FRA has	The Idaho PUC oversees rail safety programs. The commission has responsibility for ensuring that all rail services operating in Idaho do so in a safe and efficient manner, and its rail inspectors investigate highway-railroad crossing issues and railroad operations and safety throughout the state. These safety inspectors are also responsible for inspection of rail cars carrying hazardous materials in and through Idaho, and enforce federal hazardous materials regulations, which the State of Idaho has adopted. The railroad oversight program has a small office whose staff completes inspections and then reports their findings to FRA.	There is only one agency within each state, including the UTC within Washington, that has regulatory and compliance oversight of the railroad industry. In their duties, each state agency must comply with 49 CFR Part 212 when providing the necessary assurance and coverage of facilities, equipment and operating practices through planned routine compliance inspections for all the operating railroads within its jurisdiction. When state railroad inspectors are hired for a specific discipline, they must be trained to ensure their knowledge is consistent with federal regulations in one or more of the following disciplines: Motive Power and Equipment, Operating

Inventory Topics/ Interview Questions	California	New York	Oregon	Idaho	An analysis of expanding the commission's role to match the role of other state agencies examined
	inspectors find violations of the federal rail safety regulations, they recommend civil penalties and noncompliance actions to the FRA. The primary railroad safety laws and regulations that Rail Safety Division inspectors enforce, however, are CPUC GOs and the Public Utilities Code sections applicable to railroads.	addition, NYSDOT certifies to FRA that all its safety inspectors are trained in their respective disciplines. NYSDOT rail inspectors are certified in the disciplines of Track, Motive Power and Equipment, Hazardous Materials and Operating Practices.	established in 49 CFR. In addition, the division staff regulate the clearances between railroad tracks and structures to ensure the safety of railroad employees. The Commerce and Compliance Division also manages approximately 155 miles of state-owned railroad right-of-way along the Astoria Line and the Oregon Electric Line.		Practices, Signal and Train Control, Track, and Hazardous Materials. When inspectors find violations of the federal rail safety regulations, they recommend civil penalties and noncompliance actions to FRA.
How does the state communicate and enforce state and federal laws and regulations that apply to the railroad industries in your state?	The CPUC conducts regular multi-discipline inspections of railroads operating in California, which are consistent with FRA regulations. The CPUC also conducts inspections focused on requirements found in GOs or state regulations that must be complied with for railroads operating in California. These inspections focus on walkways and flagging issues. In addition, the Rail Safety Division inspectors and management fill out and submit Inspector Activity Reports (IARs). They track these IARs and focus on potential issues and anomalies that have been showing up during their weekly team meetings. The division's external communication consists of visits with communities to encourage safety discussions with the public. The number of CPUC rail inspectors outnumbers FRA inspectors in the state by a significant number. The CPUC has the state divided into four regions to streamline the inspection processes.	The NYSDOT rail program communicates violations to the railroads by using a federal inspection form and by administering a few state laws. The rail program also schedules an annual two- to three-day seminar meeting and outreach to short line railroads. The seminars focus on safety, hands-on field demonstrations and classroom instruction. The meeting ensures that there is a description of federal inspection requirements and processes. Inspectors from FRA are also invited to participate. This annual meeting/seminar has taken place for the last four years and has had over 100 participants. NYSDOT uses the federal inspection form to issue a notice of violation for the department. If a state law is violated regarding issues that are not preempted, such as incident notification calls, clearance issues, a form is completed.	Except for multi-discipline rail safety inspections, which provide ODOT inspectors with a path to both communicate and enforce railroad safety regulations, ODOT holds quarterly meetings with regulated entities such as Union Pacific Railroad and BNSF Railway. In addition, ODOT houses the Oregon Operation Lifesaver program to inform the public, railroads and cities, as well as the trucking industry, about railroad regulations and trespassing risks. The program office is also involved with the Metropolitan Planning Organizations consortium, and the American Association of Highway and Transportation Officials at least quarterly. Also, the office is a member of the Association of State Rail Safety Managers.	The Idaho PUC completes multi-discipline rail safety inspections. If a violation is found and recommended to move forward, the PUC will contact the manager of the railroad terminal the area at the time and let the manager know of the defects or violations. The PUC then communicates with the FRA specialist for the district to notify the or FRA specialist of the violation. The violation is then submitted to FRA through the database system.	The four state railroad oversight agencies complete multi-discipline rail safety inspections that are consistent with federal regulations and their state agreements with FRA. Because the Idaho PUC only has one rail safety inspector and that one inspector is trained in hazardous materials, Idaho relies on FRA to complete inspections of the other safety disciplines. New York has railroad state regulations that the operating railroads are required to comply with. For example, the state law and regulations regarding incident notification calls in New York are not preempted by federal regulations or law. The UTC would need to promulgate similar regulations or have the state Legislature require oversight in these specific areas within railroad operations that occur in Washington for the UTC to match the role of the other states' additional oversight construct.

Inventory Topics/ Interview Questions	California	New York	Oregon	Idaho	An analysis of expanding the commission's role to match the role of other state agencies examined
	CPUC uses FRA's secure site for uploading data/inspection reports. Inspectors spend at least 100 days in the field. The CPUC has its own inspection database that enables the CPUC to look at defect ratios. The commission conducts focused inspections across all railroad disciplines and looks for hot spots. In addition, the railroad safety inspections focus on risk management and compel the railroads to focus on safety.				
What official coordination efforts currently exist within and between federal, state, and local agencies for railroad safety oversight in your state?	In addition to coordinating with other parts of the CPUC, the Rail Safety Division officially coordinates its activities with the Crude Oil Reconnaissance Team. This coordination occurs with the Governor's Office of Emergency Services. The CPUC's rail office also coordinates with the U.S. Coast Guard when inspecting transloading at the Port of Los Angeles and Long Beach, along with U.S. Customs and Border Protection. The division also participate with a Multi-Agency Task Force that works with major security initiatives and with the rest of CPUC (utilities).	NYSDOT Rail Safety Bureau coordinates with the New York State Division of Homeland Security and Emergency Services (fire, emergency first responders) on inspections regarding crude oil routings and High-Hazard Flammable Train routes. Until recently, the Rail Safety Bureau coordinated with both FRA and the Pipeline and Hazardous Materials Safety Administration on inspection blitzes for Class I/crude oil routes. These unannounced random inspections were focused one day a month. Another way the Rail Safety Bureau coordinates with the industry and other agencies is by holding annual meetings with regional and short line railroads, and through less formal discussions with short lines regarding Consolidated Rail Infrastructure and Safety Improvements (CRISI) grants.	ODOT coordinates on rail safety with FRA during the year. ODOT has developed a strong relationship with FRA personnel, and the largest coordination effort is when the staff of both agencies evaluate data gleaned from inspection reports. Although there is a lot of coordination with FRA, ODOT has received no direction from FRA to direct modifications to ODOT's safety inspection programs. FRA has mostly a hands-off approach, but the coordination level between agencies is strong.	The Idaho PUC coordinates inspections with FRA as well as with the Washington UTC. The PUC hazardous materials inspector also works directly with the UPRR hazmat specialist when they complete joint inspections of the UPRR.	The differences between each of the surveyed states and the UTC may be geographic in nature, but overall, there is consistency in the approach UTC takes with coordination at the federal and state levels.

Inventory Topics/ Interview Questions	California	New York	Oregon	Idaho	An analysis of expanding the commission's role to match the role of other state agencies examined
What responsibility and authority does the state have for conducting railroad and transit related safety oversight? Does your state have enough tools at your disposal to act when regulations in either of these sectors are not adhered to?	The Safety Participation Program agreement established between the CPUC and FRA provides a close relationship between the state and FRA, and the commitment both entities share toward ensuring rail safety. This agreement was established under 49 CFR §212.1 and provides both responsibility and authority to the state to inspect and enforce railroad safety regulations. Under California Public Utilities Codes, CPUC rail safety inspectors are federally certified to enforce both state and federal laws, regulations, orders and directives related to railroad transportation. The Rail Transit Safety Branch has safety and security regulatory authority over all rail transit and other public transit fixed guideway systems regulated by the Public Utilities Code 99152 as well as other state statutes. Rail Transit Safety Branch staff inspect and provide safety oversight of the rail transit agencies throughout California. The division and staff work with FTA as well as the rail transit agencies to ensure that the California SSO plan is implemented and that the rail transit agencies are appropriately complying with the SSO plan. The CPUC approved the SSO plan and then submitted it for approval and certification to FTA for consideration under the requirements of the Public Transportation Safety Program language found in 49 United States Code (USC) §5329 as well as	The Safety Participation Program agreement established between NYSDOT and FRA provides a close relationship between the state and FRA and the commitment both entities share toward ensuring rail safety. This agreement was established under 49 CFR §212.1 and provides both responsibility and authority to the state to inspect and enforce railroad safety regulations. New York statutory language made the Public Transportation Safety Board responsible for the safety oversight of all public transportation systems operating in New York State that receive State Transit Operating Assistance. This responsibility includes the investigation of accidents involving public transportation operations in commuter rail, subways, rapid transit and buses. The Public Transportation Safety Board has legislatively mandated powers to enable it to fulfill its mission, including: Establishing accident reporting, investigation and analysis procedures. Conducting comprehensive accident investigations. Taking a proactive role in public safety by reviewing, approving and monitoring system safety program plans submitted by each public transportation system.	The Safety Participation Program agreement established between ODOT and FRA provides a close relationship between the state and the FRA and the commitment both entities share toward ensuring rail safety. This agreement was established under 49 CFR §212.1 and provides both responsibility and authority to the state to inspect and enforce railroad safety regulations. Oregon began its oversight of rail transit agencies in 1997, before FTA had developed a formal oversight program. As the SSO Agency, ODOT provides oversight of the rail transit agencies in Oregon by enforcing FTA regulations found in 49 CFR Parts 670, 672, 673 and 674, as well as in Oregon Revised Statutes (for example, ORS 824.045) and OAR Division 741, Chapter 60. Based on the answers to interview questions, in general ODOT seems to have sufficient tools and infrastructure.	The Safety Participation Program agreement established between Idaho PUC and FRA enables the PUC to provide regulatory oversight in the areas that have been certified. This agreement was established with FRA and provides both responsibility and authority to the state to inspect and enforce railroad safety regulations. However, the PUC only has one rail safety inspector, who is trained in hazardous materials, so the PUC must coordinate with the FRA to ensure that all other technical areas that are required to be inspected are completed by FRA.	The authority provided to UTC for oversight of the railroad industry is consistent with three of the states surveyed and exceeds the level of oversight provided in Idaho.

Inventory Topics/ Interview Questions	California	New York	Oregon	Idaho	An analysis of expanding the commission's role to match the role of other state agencies examined
	regulations found in 49 CFR §674 regarding SSO. Based on the answers to interview questions, in general the CPUC seems to have sufficient tools and infrastructure.	Conducting system safety program field audits. Analyzing critical safety issues and concerns. Recommending the establishment of new safety legislation, rules and regulations, and transportation system procedures based on accident investigations, special studies and audits. Based on the answers to interview questions, in general NYSDOT seems to have sufficient tools and infrastructure.			
What tools does your state's inspection personnel have at their disposal to ensure that when violations of safety regulations and laws are discovered appropriate documentation, data and enforcement actions can be taken?	When CPUC inspectors find violations of the federal rail safety regulations, they recommend civil penalties and noncompliance actions to FRA. This process is completed by inputting the violation information into the FRA database and reporting. CPUC uses FRA's secure site for data/inspection reports. CPUC does have its own database and looks at defect ratios. The CPUC conducts focused inspections across all railroad disciplines and looks for hot spots.	When NYSDOT rail safety inspectors find violations of the federal rail safety regulations, they recommend civil penalties and noncompliance actions to FRA. This process is completed by inputting the violation information into the FRA database and reporting. NYSDOT uses FRA's secure site for data/inspection reports. In addition, NYSDOT completes follow-up inspections and notes defects in its reporting and/or mandates that railroads provide proof of repairs.	When ODOT rail safety inspectors find violations of the federal rail safety regulations, they recommend civil penalties and noncompliance actions to FRA. This process is completed by inputting the violation information into the FRA database and reporting. ODOT uses FRA's secure site for data/inspection reports. ODOT only uses the FRA process.	When PUC rail safety inspectors find violations of the federal rail safety regulations, they recommend civil penalties and noncompliance actions to FRA. This process is completed by inputting the violation information into the FRA database and reporting. The PUC uses FRA's secure site for data/inspection reports.	UTC has the same process as all surveyed states for documenting rail safety violations.
Oversight of implementation of new and materially changed railroad operations and infrastructure					
Over the last two years, what initiatives has the state facilitated to improve the operation and infrastructure of operating railroads under your agency's oversight?	Recognizing the increase in oil transport by rail, the CPUC has continued to support the Crude Oil Reconnaissance Team to proactively monitor crude oil projects before they come online by identifying and seeking remediation on all	According to NYSDOT, the last two years have not provided major changes to the approach the agency takes and have not facilitated any improvements or initiatives for railroad operations or infrastructure. The	According to ODOT rail safety division leadership, there have not been many infrastructure improvements that improve operations or railroad infrastructure in Oregon in the past two years.	The Idaho PUC does not consider nor initiate operation and infrastructure of operating railroads. That responsibility is not incorporated into its oversight.	The UTC has, in combination with staff from the Department of Ecology program, the same ability as the CPUC Crude Oil Reconnaissance Team program for oversight of crude oil rail movements in the state.

Inventory Topics/ Interview Questions	California	New York	Oregon	Idaho	An analysis of expanding the commission's role to match the role of other state agencies examined
	regulated and non-regulated potential, perceived and existing risks, and by providing independent safety oversight and guidance to the railroads, crude oil facilities and their respective contractors to mitigate identified risks and non-compliant issues. The CPUC established the first state-run railroad bridge safety program. Currently paralleling federal practices while coordinating with FRA bridge personnel, the state program is also designed to use risk assessment methods to assess bridge safety and address any identified safety issues. The CPUC ensures continuous monitoring of the railroads' implementation of Positive Train Control in California to confirm timely and proper installation of the infrastructure. As the agency that has safety oversight responsibility in the planning, development, construction and operation of the California High-Speed Rail project, CPUC has focused its resources to ensure that the new infrastructure will comply with all federal and state laws and regulations. Because railroad infrastructure projects have represented a decade or more of involvement, CPUC is focused on responding to environmental documents that have an impact on the design and routing as early as possible.	agency has continued conducting the annual railroad safety symposium. Agency personnel indicated that blocked crossings are a big issue in New York, but no initiatives have been established to remedy the issue.	However, one efficiency that provides the agency with better railroad oversight occurred three years ago. At that time, the Rail Safety Division was split from the Public Transportation Division at ODOT. The rail safety side moved into the Commerce and Compliance Division, which dealt solely with motor carrier regulations and enforcement. Before the split, there was turmoil within the rail safety program, because the program had two managers. Now the program has experienced some changes; there is one manager, more stability and more efficient oversight.		For the UTC to implement a state-run railroad bridge safety program, the UTC would need to increase its human capital and hire FRA certified bridge inspection personnel to enable inspection of every railroad bridge in the state, as is analyzed in the fiscal analysis portion of the inventory.

Inventory Topics/ Interview Questions	California	New York	Oregon	Idaho	An analysis of expanding the commission's role to match the role of other state agencies examined
Any new changes that have taken effect within the state's approach to oversight of railroad operations and safety.	The CPUC has focused on derailments that are taking place in the state and has facilitated taking measurements of Head Rail profile and gathering track information at derailment locations.	NYSDOT is conducting random compliance inspections and oversight.	ODOT's Rail Safety realignment to the Commerce and Compliance Division was a big step towards a more efficient ability to administer railroad operations and safety oversight.	No new changes.	The UTC's railroad oversight is generally consistent with the oversight actions of California and New York.
What priorities does the state have for utilizing the funding related to railroad operations, safety and infrastructure?	The CPUC's priority for the funding related to railroad operations, safety and infrastructure would be to utilize it for Railroad User Fees.	The NYSDOT has not received additional funding related to railroad operations and safety and infrastructure.	ODOT has not received anything from the Oregon State Legislature or FRA related to railroad operations, safety or infrastructure.	The Idaho PUC has not received additional funding related to railroad operations and safety and infrastructure.	Because there was no funding related to railroad operations, safety and infrastructure besides railroad user fees approved by the state Legislature, there is no analysis needed to expand the UTC's role in matching the surveyed states.
What state funding has gone into infrastructure projects for operating railroads?	N/A	N/A	ODOT identified grade crossing projects as infrastructure, but this question focuses on railroad operational safety. Grade crossing issues are not being analyzed in this survey.	There is none.	UTC's role is consistent with the states surveyed.
What safety oversight initiatives in railroad operations and infrastructure have been or are being considered with new federal and state funding that has been authorized?	Nothing in particular.	Nothing in particular.	No specific oversight initiatives being considered.	None.	UTC's role is consistent with the states surveyed.

Inventory Topics/ Interview Questions	California	New York	Oregon	Idaho	An analysis of expanding the commission's role to match the role of other state agencies examined
Safety of the transportation of crude oil by rail and enforcement of chapter 90.56 Revised Code of Washington					
What oversight authority does your state have regarding the transportation of crude oil traveling via railroad in your state?	There are only the FRA requirements for safety oversight. These regulations also provide oversight of the loading and unloading of hazardous materials, such as crude oil. The U.S. Department of Transportation considers the loading and unloading of a hazardous material at a stationary facility as being within the definition of transportation. Therefore, the CPUC has conducted audits regarding unloading and has found violations, because the company was not following regulations and guidelines.	There are only the FRA requirements for safety oversight.	There are only the FRA requirements for safety oversight.	There are only the FRA requirements for safety oversight.	UTC's role is consistent with the states surveyed.
Does the state incorporate quantitative and operational scenarios and risk assessments into its oversight of the transportation of crude oil by rail?	The CPUC considers Risk Assessments and Observation of Compliance scenarios when evaluating oversight inspection locations.	NYSDOT is focused only on Class I main line and does not consider risk assessments.	The state incorporates only what FRA directs as part of the inspection program.	The state incorporates only what FRA directs as part of the inspection program.	UTC's role is consistent with the state of California and exceeds that of the other states surveyed. The UTC also establishes the same risk analysis based protocols for each of the technical disciplines and ensures that regulated entities are inspected on a regular basis based on the risks they pose.
Does the state have risk management and quality control programs and what are their associated metrics for providing oversight of the transportation of crude oil by railroad?	The CPUC only receives monthly crude oil reports. There is no risk management and quality control program that is part of the CPUC oversight plan.	NYSDOT uses FRA inspection uploads, marked specifically for crude oil train/route, that NYSDOT accesses through the FRA database to extract that data. However, NYSDOT does not do anything with the data at this time.	There is no risk management and quality control program that is part of the ODOT oversight plan.	There is no risk management and quality control program that is part of the Idaho PUC oversight plan.	UTC's role is consistent with the states surveyed.
What risk assessment tools does your agency utilize to determine severity versus consequence of potential incidents involving the transportation of crude oil via railroad?	There is no risk assessment tool at CPUC.	There is no risk assessment tool at NYSDOT.	There is no risk assessment tool at ODOT.	There is no risk assessment tool at IPUC	UTC's role is consistent with the states surveyed.

Inventory Topics/ Interview Questions	California	New York	Oregon	Idaho	An analysis of expanding the commission's role to match the role of other state agencies examined
What data collection methods are utilized by the state for recording, corrective action, inspections, and overall safety audits for crude oil transportation by railroad?	CPUC utilizes the normal in-house tracking for FRA inspections and the information that FRA files in its reports.	NYSDOT only uses FRA inspection forms; however, whenever inspectors complete an inspection on a crude oil train or track, there is an indication on that report that is related to crude oil. This indication enables NYSDOT to extract that data. In addition, NYSDOT does follow-up inspections and notes defects in its reporting and/or NYSDOT mandates that railroads provide proof of repairs.	ODOT utilizes the normal in-house tracking for FRA inspections and the information that FRA files in its reports.	The Idaho PUC utilizes the normal in-house tracking for FRA inspections and for what FRA files in its reports.	UTC's role is consistent with the states surveyed.
What training has your agency's personnel received to ensure they have the necessary knowledge and oversight capabilities to regulate and manage risks associated with the transport of crude oil by railroads in your state?	FRA Hazmat Certificate Training.	FRA Hazmat Certificate Training.	FRA Hazmat Certificate Training.	FRA Hazmat Certificate Training.	UTC's role is consistent with the states surveyed.
What preventive measures has your agency taken to reduce the overall risk for the transportation of crude oil by rail? For example, does your agency complete risk-based planning inspections or surprise inspections without providing railroads notification prior to showing up on property?	The CPUC established the Crude Oil Reconnaissance Team. In addition, the CPUC has incorporated random testing and inspections	NYSDOT's inspection blitzes are scheduled monthly. The inspection team tries to complete unannounced inspections for hazmat, operating practices or mechanical inspections. For track inspections, there is some notice.	ODOT crude oil inspections are almost always unannounced, occur regularly and are robust, with all five technical disciplines represented at the inspection.	The Idaho PUC inspects hazardous materials tank cars when available, which may not be transporting crude oil.	Matching Washington UTC's role with the roles of the states surveyed would require prioritizing a monthly inspection blitz focusing on the transportation of crude oil through Washington. It is unclear if this change would represent an expansion of the commission's role, or a reapportionment of current efforts.
How does your agency monitor, evaluate and provide oversight of railroad operator's safety management practices pertaining to the transport crude oil?	Only the FRA requirements for safety oversight are used.	NYSDOT rail safety inspectors cannot distinguish a monitoring practice between regular trains and crude oil trains, other than the crude oil "blitz" inspections they conduct monthly.	Only the FRA requirements for safety oversight are used.	Only the FRA requirements for safety oversight are used.	The UTC's role is consistent with the states surveyed.
What actions and coordination does your agency take when a railroad incident occurs which	The agency works with state and local jurisdictions.	First responders would take the lead on incident response and assume command of the scene. NYSDOT rail safety inspectors	First responders would take the lead on incident response and assume command of the scene. ODOT rail safety inspectors would	First responders would take the lead on incident response and assume command of the scene. Idaho PUC rail safety inspectors	The UTC's role is consistent with the states surveyed.

Inventory Topics/ Interview Questions	California	New York	Oregon	Idaho	An analysis of expanding the commission's role to match the role of other state agencies examined
causes the release of crude oil into the environment?		would then support and respond to notification to provide support to the first responders.	then support and notify the Oregon Department of Environmental Quality and other ODOT inspectors, and would assist in the field with incident review.	would then support and would coordinate actions with the Environmental Protection Agency.	
Safety and Oversight of Rail Fixed Guideway Systems					
What actions, approach and oversight programs has your agency taken to ensure rail fixed guideway systems operating in your state have fully developed system safety programs?	The CPUC is the certified state safety oversight agency for California and is required to ensure that all rail fixed guideway transit systems in California have approved public transportation agency safety plans in place. These plans must meet all federal regulations as well as the system safety criteria that was certified by the FTA. The CPUC must conduct triennial audits, which went virtual in 2020 and 2021, because of COVID-19. Due to the pandemic, there were no comprehensive triannual audits conducted and all direct meetings were suspended. All triennial audits have resumed. Certified inspectors conduct capital project oversight through a primary representative at each agency. The CPUC certified inspectors investigate transit-related employee complaints, including a whistle-blower and anonymous complaint line. The CPUC requests that during preliminary planning, each safety plan and certification plan must be approved by the commission. The team also has a safety certification checklist for review. Once approved, it can be updated, and staff can	The NYSDOT's Public Transportation Safety Board is the certified state safety oversight agency for New York and ensures that all regulated rail fixed guideway transit systems in New York have approved public transportation agency safety plans in place. The Public Transportation Safety Board applies the Program Standard that defines the state's annual plan and report to transit agencies. Quarterly meetings with transit agencies and regular communication with FTA are incorporated into the actions and approach the board takes to ensure full compliance with the regulations and to ensure the system safety programs in the state are fully compliant with FTA regulations. Transit agencies must submit Safety Plans to the Public Transportation Safety Board, which administers internal audits and safety plan compliance through monthly spot checks, which are a risk monitoring program. The board completes triennial audits to	ODOT is the certified state safety oversight agency for Oregon and ensures that all regulated rail fixed guideway transit systems in Oregon have approved public transportation agency safety plans in place. Quarterly meetings with transit agencies and regular communication with FTA are incorporated into the actions and approach that ODOT takes to ensure full compliance with the regulations and to ensure the system safety programs in the state are fully compliant with FTA regulations. ODOT has regular meetings with TriMet and Portland Streetcar, and coordination is good. This coordination ensures full compliance with a fully developed system safety program.	N/A	Because the oversight of rail fixed guideways is not part of the UTC's current role, the entire rail fixed guideway system oversight team at WSDOT would need to be integrated into the UTC, an effort that is contemplated by the Multiple Agency Fiscal Note regarding Washington State House Bill 1418.125

[125] Multiple Agency Fiscal Note regarding House Bill 1418, published February 2021: https://fortress.wa.gov/ofm/fnspublic/FNSPublicSearch/GetPDF?packageID=62284.

Inventory Topics/ Interview Questions	California	New York	Oregon	Idaho	An analysis of expanding the commission's role to match the role of other state agencies examined
	review and approve updates without fully reviewing plans. This is the process for “major” projects.” The process for identifying whether a project is “major” is not determined by cost. New technology is of particular interest.	ensure full compliance of the safety plans.			
What coordination efforts take place between your agency and the Federal Transit Administration regarding rail fixed guideway oversight in your state?	The CPUC interacts with FTA on a consistent basis. The CPUC initiates quarterly meetings with the FTA program manager assigned to the SSO Agency. The CPUC actively engages with FTA, because FTA does not like back channel meetings that are not scheduled. The quarterly meeting with transit agencies is used to present concerns about administration issues. This approach ruffles feathers but is highly effective. CPUC’s signature is required for any project completion, so there is leverage to ensure the operations are fully compliant with the regulations.	The Public Transportation Safety Board has quarterly meetings with FTA and its Local Liaison. Because the state has the largest number of rail fixed guideway operations in the US, there is continuous interaction with FTA.	ODOT has two quarterly meetings, one with FTA and the other with the FTA Regional staff.	N/A	WSDOT’s role is consistent with the states surveyed regarding rail fixed guideways.
What strategic oversight does your agency take to ensure rail fixed guideway operators in your state have set aside appropriate moneys for capital improvements to ensure safety is their number one priority?	The CPUC indicates that agencies have their own prerogative to choose projects and find funding. The CPUC exists as part of the framework to complete this process. The CPUC identifies deferred maintenance through the triennial review process. CPUC has enforcement powers. Citations can be submitted to address issues.	The Public Transportation Safety Board has responsibility for safety certification of transit facilities, but there is no requirement or authority to request a transit facility operator to set aside specific monies for capital improvements.	ODOT safety does not review any budget documents as part of oversight.	N/A	WSDOT’s role is consistent with the states surveyed regarding rail fixed guideways.

Inventory Topics/ Interview Questions	California	New York	Oregon	Idaho	An analysis of expanding the commission's role to match the role of other state agencies examined
What is the frequency of safety improvements and infrastructure of rail fixed guideway operators in your state?	The CPUC completes triennial inspections that can initiate safety improvements if violations or safety issues are found at a transit facility. Otherwise, if a safety improvement is necessary, then the facility operator is required to remedy the safety hazard.	The Metropolitan Transit Authority (MTA), which is located within the New York City mayor's administration, conducts a four-year cycle for track maintenance; capital projects are also on a four-year cycle. Other transit agencies in the state, such as Buffalo, have fewer projects, so they are easier to coordinate with.	ODOT and TriMet frequently discuss and focus on flange lubrication improvements at crossovers and thermal misalignment. There is renewed interest in track structure windows for work maintenance. The overhead contact systems (OCSs) on some of the lines are getting old, so there is a renewed interest in their maintenance.	N/A	WSDOT's role is consistent with the states surveyed regarding rail fixed guideways.
What qualitative and quantitative tools are used by your agency for oversight and inspection of rail fixed guideway systems in your state?	The CPUC has several tools at its disposal to document both qualitative and quantitative issues. CPUC staff use test equipment (rolling track gauge under acquisition, for example). Track inspectors conduct their work with tools, but also simply complete walk tests. Other tools used are radar guns to check train speeds, circuit testers and wheel gauges. The CPUC utilizes the RSSIMS, which is a large database that stands for "rail safety and security information management system." This system houses the data for all three rail divisions within the CPUC. The rail transit safety database, which comprises all inspection reports and triennial audits, is also a significant tool. This CPUC is not doing everything it could with data, because using RSSIMS is difficult. Scope When it was being developed, the scope crept in the wrong direction occurred.	The Public Transportation Safety Board has several tools at its disposal to document both qualitative and quantitative issues. The first one consists of the board's inspectors going on-site. The Public Transportation Safety Board has been certified under 49 CFR Section 674 since 2019, and as brought consultants on staff who have helped develop site visits as risk monitoring. Consultants are developing a tool that will summarize site inspection data points (674 reporting points) to focus efforts to identify risks more efficiently.	ODOT utilizes its inspectors' observations and documents issues during the inspection. Discussions are held with the manager of the facility so information can be compiled. In addition, triennial FTA audits are a good data gathering method.	N/A	WSDOT's role is consistent with the states surveyed regarding rail fixed guideways.

Inventory Topics/ Interview Questions	California	New York	Oregon	Idaho	An analysis of expanding the commission's role to match the role of other state agencies examined
What reporting requirements does your agency require of the rail fixed guideway operators and how often do they provide the agency information on their operations?	The CPUC has a new accident notifications webform transit safety employees can access in the field. The webform has approximately a dozen fields—agency, date, what occurred, etc. The reporting notification automatically goes to the FTA transportation operations center if appropriate. In addition, federal and state reporting requirements are taken care of at once. However, due to the frailty of the agency server, the webform is not a requirement in California. Currently there is a requirement of a few notifications for collisions at crossings. There is a "serious injury" requirement, which is problematic given the behavior around railroad tracks.	Operators notify the Public Transportation Safety Board daily regarding incident reports. In addition, there are monthly, quarterly and annual reports that are required to be submitted, including trend analysis every six months, hazard data and corrective action plan data.	Operators notify ODOT daily regarding incident reports. In addition, there are monthly, quarterly and annual reports that are required to be submitted, including trend analysis every six months, hazard data and corrective action plan data.	N/A	WSDOT's role is consistent with the states surveyed regarding rail fixed guideways.
Who has the ultimate authority for ensuring that rail fixed guideway systems are maintained, repaired and modernized to ensure operational safety?	The accountable executive at the transit agency has the authority.	The accountable executive at the transit agency has the authority.	The accountable executive at the transit agency has the authority.	N/A	WSDOT's role is consistent with the states surveyed regarding rail fixed guideways.
Annual Reporting Practices					
What are the annual reporting practices and requirements within your agency related to railroad safety and state safety oversight of rail fixed guideway systems and what federal agencies these reports are provided to?	CPUC must provide an annual certification to FRA to ensure that the safety jurisdiction of the state's authority to regulate railroads continues. The CPUC is also required to report annually on the impact on competition, if any, of the regulatory fees assessed railroad corporations for the support of CPUC's activities. The SSO Agency that oversees rail fixed guideway public transportation systems submits an annual report to FTA that	NYSDOT must provide an annual certification to FRA to ensure that the safety jurisdiction of the state's authority to regulate railroads continues. The department submits a report annually, by February 1 each year, to the chairs of the New York State Senate Finance Committee and New York State Assembly Ways and Means Committee that provides a listing of department positions funded in part or whole by the	ODOT must provide an annual certification to FRA to ensure that the safety jurisdiction of the state's authority to regulate railroads continues. The SSO Agency that oversees rail fixed guideway public transportation systems submits an annual report to FTA that summarizes its oversight activities for the preceding 12 months.	The Idaho PUC submits annual reports both to the governor and the legislative branch.	Since providing an annual report to either the governor or the Legislature is not part of the UTC's current role, the agency would need to incorporate additional human capital into the UTC to assist in the development and drafting of either or both of these annual reports, as contemplated in the fiscal analysis portion (Section 5) of this Inventory.

Inventory Topics/ Interview Questions	California	New York	Oregon	Idaho	An analysis of expanding the commission's role to match the role of other state agencies examined
	summarizes its oversight activities for the preceding 12 months. The CPUC submits annual reports both to the governor and the legislative branch.	rail safety fee established pursuant to the section. SSO Agency for rail fixed guideway reports annually to FTA. As part of this reporting, each fixed rail guideway gives NYSDOT an annual report and submits any changes to the Safety Management Plan. NYSDOT submits the annual report to the governor.	ODOT reports quarterly to FRA and FTA and provides the annual SSO report to FTA.		
What is the frequency and coordination levels that take place between your agency and the FRA and FTA?	The CPUC regularly coordinates at several levels within FRA as well as FTA.	NYSDOT coordinates annually with both FRA and FTA.	ODOT coordinates annually and quarterly with both FRA and FTA.	Idaho PUC coordinates with FRA at least four times a week, if not daily, depending on what is going on. Sometimes the coordination occurs multiple times a day.	Both UTC's role (for FRA) and WSDOT's role (for FTA) are consistent with the states surveyed.
How is the efficiency, accuracy and efficacity associated with annual reporting within your agency determined and achieved?	The data that is used and incorporated in the annual report goes through several evaluations and checks before being uploaded into the databases.	Only part of annual reporting has had any issues in sending the annual report to governor (it gets delayed internally within the agency). The accuracy of the report is good.	It's not clear what the annual report to FTA really does for ODOT. It's a unidirectional benefit to FTA but not to ODOT.	According to the Idaho PUC, the annual report is very efficient as well as accurate.	UTC's role is consistent with the states surveyed.
What are the annual reporting requirements for your agency regarding railroad infrastructure and operating criteria? Are these mandates consistent with existing legislation and regulations?	The agency uses databases and data checking.	New York has a State Rail Plan, per FRA requirements.	There are none.	According to the Idaho PUC, the only existing requirement is that each agency submits an annual report to the governor and legislature.	UTC's role is consistent with the states surveyed.

Inventory Topics/ Interview Questions	California	New York	Oregon	Idaho	An analysis of expanding the commission's role to match the role of other state agencies examined
Are the oversight responsibilities and authorization of your agency and current rail safety oversight practices suitable for future services and new rail technologies (e.g., high-speed rail, precision railroading for freight, positive train control, etc.)?	The CPUC is looking forward and developing a post-pandemic plan. Based on the high speed commission's construction of the new line, the CPUC may establish a new high speed rail branch at some point. Regarding new technologies, natural gas transport by rail is a new issue, so there is something to learn before the technology becomes relevant to railroad operations in the state and changes to Positive Train Control.	NYSDOT is trying to keep up with the FRA on Positive Train Control training from feds. Operationally not much has changed. Precision scheduled railroading is there and is up to railroads to operate, but it does not change NYDOT's inspections process/practices.	ODOT believes that its oversight responsibilities and authorization are suitable for future service and new rail technology.	The Idaho PUC is very limited because of having only one hazardous materials inspector.	UTC's role is consistent with the states surveyed.
Communication and Collaboration efforts including Railroad Safety Committees					
What intra and inter-agency coordination processes exist within your agency for communicating with organizations and agencies that have a role in railroad safety oversight, fixed rail guideway operations and the transport of crude oil by rail in your state?	In addition to coordinating with other parts of the CPUC, the Rail Safety Division officially coordinates its activities with the Crude Oil Reconnaissance Team. This coordination occurs with the governor's office of emergency services. The CPUC's rail office also coordinates with the U.S. Coast Guard when inspecting transloading at the Port of Los Angeles and Long Beach, along with U.S. Customs and Border Protection. The railroad safety division also participates with a Multi-Agency Task Force that works on major security initiatives. The division also coordinates with the rest of CPUC (utilities).	Coordination/interstate – NYSDOT on rail fixed guideway has no independent organization to coordinate such as rail and utility managers associations. NYSDOT has an annual meeting with FTA - SSO. The NYSDOT Rail Safety Bureau coordinates with the New York State Division of Homeland Security and Emergency Services (fire, emergency first responders) on inspections regarding crude oil routings and High-Hazard Flammable Train routes. Until recently, the Rail Safety Bureau coordinated with both FRA and the Pipeline and Hazardous Materials Safety Administration on inspection blitzes for Class I/crude oil routes. These unannounced inspections occur one day a month.	ODOT coordinates on rail safety with the FRA during the year. ODOT has developed a strong relationship with FRA personnel, and the largest coordination effort is when the staff of both agencies evaluate data gleaned from inspection reports. Although there is much coordination with FRA, ODOT has received no direction from the agency to direct modifications to ODOT's safety inspection programs. FRA has mostly a hands-off approach, but the coordination level between the agencies is strong. In addition, ODOT is involved with the Oregon Rail Advisory Committee (outside the State Class I as well), and collaborates with the State Rail Safety Managers Association (31 states). The RAC focuses on cold-calling states not involved with State Rail Safety Managers Association (19 states) about crude oil, long trains	The Idaho PUC coordinates inspections with FRA as well as the Washington UTC. The PUC's hazardous materials inspector also works directly with the UPRR hazmat specialist when they complete joint inspections of the UPPR rail. In addition, the PUC coordinates with Idaho's Operation Lifesaver program.	UTC's role is consistent with the states surveyed.

Inventory Topics/ Interview Questions	California	New York	Oregon	Idaho	An analysis of expanding the commission's role to match the role of other state agencies examined
		Another way the Rail Safety Bureau coordinates with the industry and other agencies is by holding annual meetings with regional and short line railroads, and through less formal discussions with short lines regarding CRISI grants.	to get different perspectives, and they coordinate with the MPO consortium (federally required).		
What actions does your agency take to communicate or collaborate with the federal government (FRA, FTA, NTSB, Surface Transportation Board), other state agencies and local agencies that may have oversight responsibilities regarding safety oversight for passenger rail, freight rail, the transportation of crude oil and the operation of rail fixed guideways systems?	The CPUC collaborates with Calfire, Office of Emergency Services because of the fires that have impacted the California forests and vegetation, which can have a direct impact on the operation of freight and passenger rail. The CPUC also collaborates with Metrolink's Task Forces on Incident Reduction to reduce the number of fatality injuries. In addition, the CPUC has been discussing blocked crossings with the STB to see what actions can be taken, if any, to stop the safety impact they have.	NYSDOT coordinates with the National Transportation Safety Board (NTSB) when a railroad or rail fixed guideway incident occurs. If an incident occurs on an Amtrak train, NYSDOT will participate as a member of the investigation. NYSDOT formerly coordinated with the Pipeline and Hazardous Materials Safety Administration on new tank cars' design and policy issues that would affect hazardous materials traveling via railroads within the state. Also, in the past, NYSDOT had meetings with the Department of Homeland Security that included table-top exercises, scenarios, etc., but those meetings have not occurred in some time.	ODOT collaborates with the STB regarding blocked crossings. This communication was elevated by an individual from a corporation that was blocked and that affected industry.	The Idaho PUC collaborates with FRA daily, because there is only one rail safety inspector in the state.	UTC's role is consistent with the states surveyed.
What methods does your agency use for documenting these communications and collaborations with outside agencies?	The agency uses notes, annual reports, monthly internal reports, inspector reports and emails.	The agency uses agendas and meeting notes. No official docket is created.	Meeting notes are typed and filed.	Meeting agendas and notes are typed and filed.	Washington UTC's role is consistent with the states surveyed.

Inventory Topics/ Interview Questions	California	New York	Oregon	Idaho	An analysis of expanding the commission's role to match the role of other state agencies examined
What process, frequency, methodology and type of communication does your agency utilize when communicating questions and processing information with rail safety committees?	The CPUC communicates and coordinates with the Metrolink Task Force. The agency also attends quarterly railroad and transit meetings and quarterly calls with FRA. The agency processes information it receives when the public complains via the consumer advocate at the CPUC. The CPUC also participates in Railroad days in September to communicate with the public about railroad safety issues.	NYSDOT processes information from Commuter Rail /Transit through the Public Transportation Safety Board and retroactively discusses any type of incident in the transit world. NYSDOT staff presents investigation reports to the Public Transportation Safety Board.	ODOT communicates its position while staff attend a union meeting; it depends on who runs the meeting. The discussion is usually recorded in writing. ODOT staff attend the Rail Advisory Committee (RAC); the activities that are addressed (which can include safety, but in practice is not the major focus) in this meeting depends on what is brought forward. For example, the agenda is published, the meeting is recorded, notes are taken, and the minutes are published.	The Idaho PUC does not communicate with any safety committees.	It is unclear whether any gap exists between the surveyed states. All states discuss incidents in detail after they occur. Oregon's RAC is not a safety committee per se, and as such does not seem to fit into the intent of the proviso. Expanding the UTC's role to establish a rail safety committee would require internal action from the agency or through the Legislature.
How does your agency ensure that governing bodies understand the importance of determining the use of rail safety committee work and its benefits to the overall rail safety oversight in your state?	When coordinating with rail safety committee work, the CPUC delivers a message of safety and keeps delivering it. "We say it. We say it again. We keep saying it over and over." The CPUC has opportunities to look at public hearings and commission public hearings. The CPUC conducts a safety presentation or something similar.	The NYSDOT rail staff do not normally attend rail safety committee meetings, but if they did, they would be very direct and request that the committee evaluate a specific technology or safety issue.	Although ODOT has a RAC established, the focus of the committee's charter is broader than safety oversight activities. The committee generally focuses on railroad planning and financial implications of infrastructure.	This is not applicable to the Idaho PUC because it really does not have any role in it.	Washington UTC's role is consistent with the states surveyed.

Section 5: Fiscal Analysis

Fiscal Analysis

Review of Revenue Sources by State

Section (4)(e) of the proviso states:

"4. The commission's Inventory must include, but is not limited to:

e. a review of revenue sources that support rail safety oversight activities in other states included in the inventory, including federal sources. For each item, the review must also include:

i. Estimates of revenue generated if imposed in Washington

ii. Estimates of how much would be paid by different types of entities."

For each state, identified in Tables 5 through 8 are the major revenue sources by name (**Revenue Source**), a brief description of each revenue source (**Description**), and a clarification of the intended area of support (**Use**). The tables then provide the funds generated in the most recent full fiscal year (2021) in the state (**Funds (2021-22)**), followed by the estimated revenue if imposed in Washington state (**Estimate If Adopted in WA**). The final column (**Entities Paying If Adopted in WA**) identifies the type of entity responsible for the funding source.

The survey of California, Idaho, Oregon and New York survey identified the following major types of funding:

- **Gross Revenue Fees:** Every state reviewed assesses a gross revenue fee on railroads related to the railroads' reported revenues in a given fiscal year, as does Washington state. Each Gross Revenue Fee is identified and described in the following tables. The major variance found among Gross Revenue Fees was the effective percentage of each state's fee, which in the case of statutory maximums, informed the following calculation to determine how implementation of that state's legislation might affect the revenues of Washington state.
- **Fuel Taxes:** Two of the four states diverted some portion of their fuel tax revenues to matters of rail safety oversight.
- **General Fund Revenues**: New York receives some of its safety oversight funding from its general fund budget each year.
- **Federal Apportionments:** Every state reviewed receives some federal apportionment for rail fixed guideway safety oversight; all the states reviewed at least receive funding through the Railway-Highway Crossings (Section 130) program of the Federal Highway Administration, and most of the states receive funding through the Federal Transit Administration's State Safety Oversight funding directed at states that have rail fixed guideway transit systems.

To create order-of-magnitude, high-level estimate calculations of outcomes if Washington adopted the reviewed revenue sources as calibrated in the inventoried states (in the "Estimate If Adopted in WA" column), were driven by effective gross revenue rates found in each state where they are set by statute, actual gas and diesel sales in Washington state (in the case of California), and where possible, statutory language that directs clear percentages tied to federal apportionments (as in Oregon). If the revenue source is already being employed or effectively authorized by statute in Washington, the corresponding table entry states: "Already Adopted."

Table 5: California Revenue Sources

California					
Revenue Source	Description	Use	Funds (2021-22)	Estimate If Adopted in WA	Entities Paying If Adopted in WA
Gross Revenue Fee, or Public Utilities Transportation Reimbursement Account	California Public Utilities Code Section 421 authorizes the determination of intrastate gross revenue fees payable by railroads and sets them at rates sufficient to cover program expenses that do not hinder competition. In 2021, this was 0.36% of gross intrastate revenues from Class I carriers, apportioned by amount of infrastructure, and 0.27% of revenues from Class II and Class III rail carriers.	Specifically for railroad operations oversight (state-funded railroad investigation and enforcement activities pertaining to California Public Utilities Code Sections 765.5, 916.2 and 7712)	$11,115,000	$3,294,410	Railroads operating in Washington state
Public Transportation Account[1, 2]	Per Section 99315(f). Major funding source derived from 4.75% sales taxes on diesel fuel.	Public Utilities Commission for its passenger rail safety responsibilities specified in statute on commuter rail, intercity rail, and urban rail transit lines, and for State Safety Oversight funding match	$13,424,000	$3,602,196	Consumers of petroleum products, purchased at the pump
State Highway Account[1, 2]	Major funding source derived from diesel and gasoline sales taxes, including a portion of the state base excise tax of $0.51 per gallon of gasoline and $0.40 per gallon of diesel, and 85% of federal Highway Trust Fund account tax shares.	Rail grade crossings safety oversight program	$8,097,000	$2,245,697	Consumers of petroleum products, purchased at the pump
FHWA Section 130 Grade Crossing Apportionment	Federal Apportionment	Grade crossing safety	$16,722,721	Already Adopted	Federal Apportionment
FTA State Safety Oversight Annual Apportionment	Federal Apportionment	State Safety Oversight	$6,474,892	Already Adopted	Federal Apportionment

[1]Receipts from funds reported based on responses by California State officials in survey.

[2]This funding mechanism is likely prohibited in Washington state due to the 18th Amendment to the state's constitution.

Table 6: Idaho Revenue Sources

Idaho					
Revenue Source	Description	Use	Funds (2021-22)	Estimate If Adopted in WA	Entities Paying If Adopted in WA
Gross Revenue Fee	Per Idaho Statute 61-1001, the Public Utility Commission shall determine a fee "to defray the amount to be expended by the commission for expenses in supervising and regulating the public utilities and railroad corporations subject to its jurisdiction." In 2021, the rate assessed was 0.6556% of gross intrastate railroad revenues per order of the Idaho Public Utilities Commission. However, the statutory language enables the IPUC to set the fee at a rate necessary to fund the program.	100% of Federal Railroad Administration inspection expenses	$162,085	$3,294,410	Railroads operating in Washington state
FHWA Section 130 Grade Crossing Apportionment	Federal Apportionment	Grade crossing safety	$1,957,093	Already Adopted	Federal Apportionment

Table 7: Oregon Revenue Sources

Oregon					
Revenue Source	Description	Use	Funds (2021-22)	Estimate If Adopted in WA	Entities Paying If Adopted in WA
Gross Revenue Fee	This fee is 0.0035% of annual gross railroad revenues per statute.	100% of Federal Railroad Administration inspection expenses (save for $31,500 grant dedicated to training, related travel, and computers), 100% of Clearance and Walkway expenses, 50% of crossing safety inspection program, and 75% of administration	$2,961,361	$639,602	Railroads operating in Washington state
Grade Crossing Protection Account[2]	Per Oregon Revised Statutes (ORS) 824.018, $300,000 plus 50% of the cost of regulatory burden. However, $100,000 is then paid directly to railroads to offset the cost of signal maintenance units on all railroads that have mechanical crossings.	Funds dedicated to Federal Railroad Administration safety, 50% crossing safety inspection, 10% crossing projects, and 25% overhead	$2,100,000	$1,947,205	Portion of state highway funding
Transportation Operating Fund[2]	Per ORS 184.642, fuel purchases eligible for refund under ORS 319.280 for which no refund is claimed is collected in the Transportation Operating Fund in addition to a portion of state identification card fees.[1]	20% of State Safety Oversight Funding	$306,121	$262,513	Non-automotive consumers of petroleum products bought at the pump who fail to file in service of a refund
FHWA Section 130 Grade Crossing Apportionment	Federal Apportionment	Grade crossing safety	$3,266,010	Already Adopted	Federal Apportionment
FTA SSO Annual Apportionment	Federal Apportionment	State Safety Oversight	$1,530,603	Already Adopted	Federal Apportionment

[1]Referred to as the "lawnmower fund" because fuel purchased in containers for tractors and stationary gas engines are eligible for fuel tax refunds.

[2]This funding mechanism is likely prohibited in Washington state due to the 18th Amendment to the state's constitution.

Table 8: New York State Revenue Sources

New York					
Revenue Source	Description	Use	Funds (2021-22)	Estimate If Adopted in WA	Entities Paying If Adopted in WA
Gross Revenue Fee	Per New York State Transportation Law 135, a gross revenue fee may be assessed—with no statutory limitation—other than it sufficiently defray "the direct costs in the department's rail safety program of personal service, the cost of maintenance and operation, retirement contributions, workers' compensation premiums, and health and dental premiums that are paid by the state for or on account of personnel involved in the department's railroad safety program and any other indirect costs involved in administering and enforcing rail safety." Functionally, it is presently set at 0.13% of gross intrastate revenues and pays for the department's 13 Federal Railroad Administration personnel. However, the strict statutory language is broad enough to encompass funding the entirety of a rail safety oversight program.	100% of Federal Railroad Administration inspection expenses	$1,700,000	$3,294,410	Railroads operating in Washington state
General Fund	The state's General Fund receives most state taxes and all income not earmarked for a specified program or activity.[1]	Rail Safety Oversight Program, which ensures public safety along the state's commercial rail corridors	$847,000	Already Adopted	State Government Taxes, Federal Grants-In-Aid, State Revenue Charges and Miscellaneous Revenue, Licenses, Permits, and Fees and Other State Miscellaneous Revenue, and Interest Income.
Section 130 Grade Crossing Apportionment	Federal Apportionment	Grade crossing safety	$6,632,817	Already Adopted	Federal Apportionment
SSO Annual Apportionment	Federal Apportionment	State Safety Oversight (SSO)	$3,016,130	Already Adopted	Federal Apportionment

[1] New York's equivalent of Washington's General Fund authority in RCW 43.79.010.

Cost Estimates of Safety Program Elements

Section (4)(d) of the proviso states:

"4) The commission's inventory must include, but is not limited to:

> d) Estimated costs associated with implementation in Washington state of the safety program elements included in the inventory required in this section, itemized by program area and level of oversight performed, including estimated costs of options to improve the safety of transportation of crude oil by rail and enforcement of chapter 90.56 RCW;"

The consultant team limited estimation of costs to safety program elements not currently implemented in Washington that would represent an expansion over the level of safety oversight performed currently. These estimated safety oversight costs are driven entirely by personnel and associated overhead in creating Full Time Equivalent positions. Table 9 provides detailed cost estimates for each of these positions.

The federal government provides a baseline of railroad safety oversight compliance to which all states follow. Several states exceed that federal standard and conduct additional oversight, including two areas not currently present in Washington:

(1) Annual reporting standards to the state Legislature as required presently in California and New York.

(2) A railroad bridge evaluation program in California to augment the FRA's bridge inspections.

Annual reporting standards are required by states receiving FTA State Safety Oversight monies, and an estimate of incorporating these duties and related costs was last contemplated by the Multiple Agency Fiscal Note regarding Washington State House Bill 1418[126] ("Fiscal Note"). However, programs surveyed in New York and California extend the subject material beyond rail fixed guideway transit systems and into safety oversight activities performed each year across the states' commercial railroad systems.[127] In service of cost estimates, the reporting function as contemplated in the Fiscal Note was updated to reflect expenses as of July 2022. Updated cost estimates are provided both in terms of using the most up-to-date Washington state Office of Financial Management salary numbers regarding the job classification identified

[126] Multiple Agency Fiscal Note regarding HB 1418, published February 2021: https://fortress.wa.gov/ofm/fnspublic/FNSPublicSearch/GetPDF?packageID=62284

[127] As an example, CPUC's annual reports regarding its rail safety program are publicly available here: https://www.cpuc.ca.gov/industries-and-topics/rail-safety/railroad-operations-and-safety/annual-reports

in the Fiscal Note, and alternatively as a simple adjustment for inflation between the period of Fiscal Note publication (February 2021) and July 2022.[128]

The CPUC Railroad Bridge Evaluation Program is an additional state-funded safety program recognizing that the FRA has six dedicated inspectors to cover the 80,000 railroad bridges on the national railroad network. California employs two full-time inspectors focused specifically on performing railroad bridge observations statewide. Expenses are tallied to create one to two Full Time Equivalent (FTE) positions that could establish a Washington state version of the bridge evaluation program.

To add these expanded safety oversight responsibilities would range in cost from approximately $256,500 to $392,000 annually depending on the number of FTEs added. Depending on the job classifications selected, this cost range could change up or down.

[128] Inflation rate calculated as 1.13 per the Bureau of Labor Statistics Calculator, available here: https://www.bls.gov/data/inflation_calculator.htm

Table 9: Cost Estimations

		Safety Program Elements					
Estimate	Cost Elements	Oversight of Implementation - freight and passenger	Operator Safety Management - California Bridge Inspector Program	Transportation of Crude Oil by Rail - Risk Analysis	Rail Fixed Guideway Safety and Oversight	Annual Reporting Practices - Required in NY and CA	Rail Safety Communication
	Transportation Engineer 3 (Range 64)		$ 93,840.00				
	Transportation Planning Specialist 4 (Range 65 - FY22)					$ 96,156	
	Transportation Planning Specialist 4 (Range 65 - FY21)					$ 90,888	
	FTE Position Estimate	No Gaps Identified	1 to 2	No Gaps Identified	No Gaps Identified	1	No Gaps Identified
	% Overhead		35%			35%	
Low	FTE Estimate		$126,684			N/A	
High	FTE Estimate		$253,368			N/A	
	Fiscal Note Estimate		N/A			$122,699	
Low	W/2022 OFM salary		N/A			$129,811	
High	W/2021-2022 Inflation		N/A			$138,650	