

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 36041

**PETITION OF TESORO REFINING & MARKETING COMPANY, LLC
FOR DECLARATORY ORDER**

**SPECIAL SUBMISSION BY THE SWINOMISH INDIAN TRIBAL COMMUNITY
OF DOCUMENTS FILED IN
*SWINOMISH INDIAN TRIBAL COMMUNITY V. BNSF RAILWAY CO.***

Swinomish Indian Tribal Community (the “Tribe”), a Federally-recognized tribe organized pursuant to Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. § 476, hereby submits complete copies of the documents identified below in order that the Surface Transportation Board (Board) will have a more complete and accurate record of the past and pending proceedings in *Swinomish Indian Tribal Community v. BNSF Railway Co.*, No. 2:15-cv-00543-RSL (United States District Court for the Western District of Washington).

The Tribe is not a party to the present proceeding before the Board and provides the submitted pleadings and exhibit documentation from the pending District Court litigation only in a capacity akin to of an *amicus* or friend of the Board. The Tribe does not waive, but again expressly reaffirms, its sovereign immunity from unconsented suit, *see Wilbur v. Locke*, 423 F.3d 1101, 1114 (9th Cir. 2005), *abrogated on other grounds, Levin v. Commerce Energy, Inc.*, ___ U.S. ___, 130 S.Ct. 2323 (2010), and to the extent it may be necessary the Tribe expressly reserves the right to maintain in the United States District Court positions, including

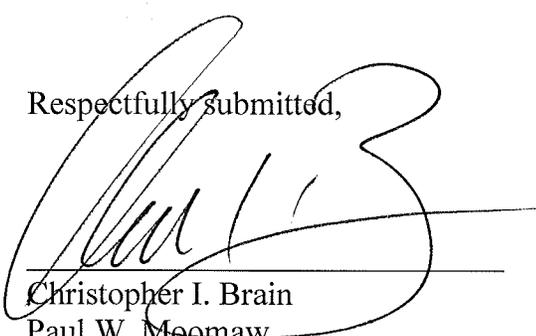
those set forth in the documents being submitted to the Board, as to the proper and most appropriate forum for resolution of issues that are the subject of the Petitions and Motions pending before the Board, and to contend that the Tribe could not, as a result of its sovereign immunity, be joined in the Board proceedings that are the subject of those Petitions and Motions.

The Tribe does not now seek to intervene, request relief from the Board or otherwise substantively participate in Board proceedings concerning the issues that the Board has been requested to address by the Petition of Tesoro Refining & Marketing Company, LLC for Declaratory Order, by the Motion to Intervene as Petitioner and Petition for Declaratory Order of Equilon Enterprises LLC d/b/a Shell Oil Products US, or by the Motion to Intervene in Support of Petitions for Declaratory Order of BNSF Railway Company, which issues are currently pending in *Swinomish Indian Tribal Community v. BNSF Railway Co.* Specifically, the Tribe submits the following pleadings and exhibit documentation to fully supplement the record that set forth the legal and factual positions of the Tribe and BNSF, and a ruling of the Court, relating to these issues:

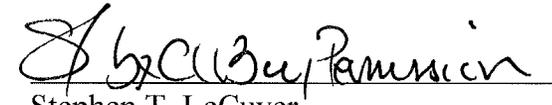
1. Defendant BNSF Railway Company's Motion to Dismiss or Stay.
2. Declaration of James Obermiller in support of Defendant BNSF Railway Company's Motion to Dismiss or Stay.
3. Opposition to Defendant BNSF Railway Company's Motion to Dismiss or Stay.
4. Reply in Support of Defendant BNSF Railway Company's Motion to Dismiss or Stay
5. Statement of Supplemental Authority in Support of Defendant BNSF Railway Company's Motion to Dismiss or Stay.

6. Statement of Supplemental Authority in Support of Opposition to Defendant BNSF Railway Company's Motion to Dismiss or Stay.
7. Order Denying Defendant's Motion to Dismiss or Stay.
8. Declaration of Allan Olson In Support Of Motion for Summary Judgment.
9. Declaration of Christopher I. Brain In Support Of Plaintiff's Motion for Summary Judgment and exhibits 1-38 attached thereto.
10. Praecipe Regarding Declaration of Christopher I. Brain In Support Of Plaintiff's Motion for Summary Judgment and exhibit 31(a) attached thereto.
11. Praecipe Regarding Declaration of Allan Olson In Support Of Plaintiff's Motion for Summary Judgment and Praecipe Attachment for Declaration of Allan Olson In Support Of Motion for Summary Judgment.
12. Joint Motion to Strike Trial Date and Related Dates and Set a Briefing Schedule on the Parties' Cross-Motions for Summary Judgment.

Respectfully submitted,



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Dated: July 13, 2016

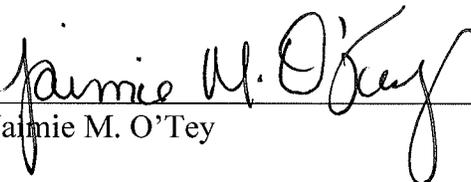
CERTIFICATE OF SERVICE

I hereby certify that this 13th day of July, 2016, I have caused a copy of the foregoing, and attached documents, to be served by first class mail or by more expeditious means upon the following:

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EXHIBIT No. 1

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON, AT SEATTLE

SWINOMISH INDIAN TRIBAL
COMMUNITY, a federally recognized
Indian tribe,

Plaintiff,

v.

BNSF RAILWAY COMPANY, a
Delaware corporation,

Defendant.

No. 2:15-cv-00543-RSL

**DEFENDANT BNSF RAILWAY
COMPANY'S MOTION TO
DISMISS OR STAY**

**NOTE ON MOTION CALENDAR:
Friday, June 5, 2015**

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1 Defendant BNSF Railway Company (“BNSF”) respectfully moves pursuant to Fed. R.
2 Civ. P. 12(b)(3) and 12(b)(6) for an order dismissing the Complaint without prejudice. The
3 Complaint seeks damages and other relief because of recent increases in the traffic that BNSF
4 handles over a rail line that crosses Plaintiff’s land. The Court should dismiss the Complaint
5 without prejudice under Rule 12(b)(6) because Plaintiff’s claims implicate the primary
6 jurisdiction of the federal agency that regulates BNSF’s operations – the Surface Transportation
7 Board (“STB”). To avoid subjecting BNSF to conflicting obligations, the Court should permit
8 the STB to address the threshold issues falling within the STB’s jurisdiction before allowing
9 any claims to proceed. In addition, the Court should dismiss Plaintiff’s damages claims
10 without prejudice under Rule 12(b)(3) because Plaintiff agreed to arbitrate disputes relating to
11 compensation that Plaintiff should receive as a result of increases in BNSF’s traffic flows.

12 INTRODUCTION

13 For more than a century, BNSF has been serving western Skagit County with rail
14 service over a rail line that extends across a portion of the Swinomish Tribal lands to Fidalgo
15 Island and Anacortes. The line is referred to as the Anacortes Branch. The Anacortes Branch
16 serves a Tesoro oil refinery located at March Point near Anacortes. A Shell Oil Products
17 refinery is also located at March Point.

18 In 1991, BNSF and the Swinomish Tribe entered into a Right-of-Way Easement
19 (“Easement”) for the rail line in settlement of litigation. The Easement recognizes BNSF’s
20 right to conduct rail operations over the line in exchange for an annual payment that is subject
21 to adjustment based on changes in economic conditions, property values and the number of
22 trains and cars, among other things. The Easement mandates arbitration of disputes over the
23 compensation due to the Tribe from BNSF. The Easement was entered into pursuant to a
24 Settlement Agreement reached in 1990.¹

25 _____
26 ¹ The Settlement Agreement (“Settlement”) and Easement are explicitly referenced in the
Complaint and therefore can be considered in deciding this motion. *See Knievel v. ESPN*, 393
F.3d 1068, 1076–77 (9th Cir. 2005) (“the ‘incorporation by reference’ doctrine ... permits us to

1 The Anacortes Branch is part of BNSF's common carrier rail network. Operations on
2 the line are therefore subject to the STB's exclusive jurisdiction over "transportation by rail
3 carriers." 49 U.S.C. § 10501(b). As a common carrier, BNSF has a statutory obligation to
4 provide transportation service upon reasonable request by a shipper. *Id.* at § 11101(a). Under
5 established case law, common carriers cannot decline to provide service for commodities that
6 are considered hazardous, and they must use reasonable efforts to provide transportation in the
7 volumes requested by shippers. Common-carrier obligations cannot be suspended on a rail line
8 without the STB's abandonment approval. *Id.* at §10903.

9 The Settlement and Easement did not limit BNSF's ability to satisfy common-carrier
10 obligations on the line. In apparent recognition of the primacy of BNSF's common-carrier
11 obligations, the Settlement specifically states that nothing in the Settlement or Easement "shall
12 supersede any federal law or regulation as they now exist or as they may be amended or
13 changed from time to time." Settlement, ¶12. There is no carve-out from that broad embrace
14 of BNSF's common-carrier duties. The Easement does not give the Tribe power to dictate the
15 commodities that BNSF can handle over the line, which would have conflicted with BNSF's
16 common-carrier obligations. Moreover, while the Easement identified a baseline number of
17 trains and cars that would move over the line based on existing shipper needs (in 1991), the
18 Easement, ¶7(c), also expressly provides for an increase in future number of trains and number

19
20 take into account documents whose contents are alleged in a complaint and whose authenticity
21 no party questions, but which are not physically attached to the [plaintiff's] pleading. We have
22 extended the 'incorporation by reference' doctrine to situations in which the plaintiff's claim
23 depends on the contents of a document, the defendant attaches the document to its motion to
24 dismiss, and the parties do not dispute the authenticity of the document") (internal quotations
25 omitted); *Abarquez v. Onewest Bank, FSB*, No. C11-0029RSL, 2011 WL 1459458, at *1 (W.D.
26 Wash. Apr. 15, 2011) (on a motion to dismiss, "the Court may consider documents whose
contents are alleged in a complaint and whose authenticity no party questions, but which are
not physically attached to the [complaint].") (internal quotations omitted); *In re Wet Seal, Inc.*
Sec. Litig., 518 F. Supp. 2d 1148, 1157 (C.D. Cal. 2007) ("In a motion to dismiss, a Court may
take judicial notice of documents attached to or referenced in the complaint without converting
the motion into one [for] summary judgment where the authenticity of the documents are not in
dispute.") (emphasis omitted; citation omitted); *see also* Fed. R. Evid. 201. The Settlement and
Easement are attached to the accompanying Declaration of James Obermiller.

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1 of cars if “required by shipper needs,” consistent with BNSF’s common-carrier obligations.
2 The Easement, ¶¶3(b)(iii) and 7(c), provides that any disagreement over the amount of
3 compensation due as a result of traffic increases must be arbitrated under the procedures and
4 standards set out in the Easement.

5 The Complaint alleges that BNSF breached the Easement by increasing crude oil traffic
6 on the line without the Tribe’s permission. There are two fundamental problems with the
7 Tribe’s Complaint. First, the Tribe seeks to make an end run around the arbitration provision
8 of the Easement by asking the Court to award damages resulting from changes in BNSF’s
9 traffic flows instead of seeking an adjustment to the Tribe’s compensation through arbitration.
10 The Easement establishes standards and procedures for determining the Tribe’s compensation
11 in light of economic changes and increases in traffic flows. The Easement also specifically
12 states that disputes over compensation must be arbitrated: “[I]f the number of crossings or the
13 number of cars is increased, the annual rental will be subject to adjustment in accordance with
14 paragraph 3(b)iii [the arbitration provision].” Easement, ¶7(c). This Court is therefore an
15 improper venue to hear the Tribe’s damages claims, and those claims should be dismissed
16 without prejudice under Rule 12(b)(3).

17 The second problem with the Complaint is more fundamental. The Complaint seeks
18 relief – directly through an injunction and indirectly through damages and a declaratory order –
19 that would restrict BNSF’s ability to satisfy its common-carrier obligations. The Complaint
20 asks the Court to use the Easement as a vehicle for regulating the type and volume of traffic
21 that BNSF can handle on a rail line that is subject to the STB’s regulatory authority. BNSF
22 believes that the Complaint is fatally flawed as a result. However, the STB administers the
23 statutory regime governing common carriers and the STB is therefore in the best position to
24 determine whether the relief requested by the Tribe would impermissibly conflict with the
25 statutes and regulations governing rail obligations, and if so, how the conflict should be
26

1 resolved. Courts routinely defer to the STB's expertise under the doctrine of primary
2 jurisdiction to resolve disputes that involve common-carrier statutes and regulations.

3 The STB's guidance should therefore be sought under the doctrine of primary
4 jurisdiction on three threshold questions before any further proceedings are undertaken in this
5 matter:

6 1. Is the Tribe asking for relief that would conflict with the statutes and regulations
7 that govern operations on a rail line that is part of BNSF's common-carrier rail network by
8 seeking to restrict BNSF's ability to respond to the needs of shippers on the Anacortes Branch?

9 2. Should the conflict between the statutes and regulations administered by the
10 STB and the Tribe's claims result in complete or partial preemption of those claims under 49
11 U.S.C. §10501(b), which preempts all state and federal claims for relief that seek to regulate
12 rail operations?

13 3. If any claims survive preemption, what is the scope and meaning of the federal
14 law requirements referred to in the Settlement and Easement that the Court will need to
15 consider in interpreting the Easement's terms?

16 Under the doctrine of primary jurisdiction, once a court determines that referral to an
17 agency is merited, the court may dismiss a complaint without prejudice, leaving the parties to
18 present threshold issues to the relevant agency. *See Reiter v. Cooper*, 507 U.S. 258, 268-69
19 (1993) (district court "has discretion . . . if the parties would not be unfairly disadvantaged, to
20 dismiss the case without prejudice"); *Rymes Heating Oils, Inc. v. Springfield Terminal Ry. Co.*,
21 358 F.3d 82, 91 n.9 (1st Cir. 2004) (same). A motion to dismiss under the doctrine of primary
22 jurisdiction can be brought under Rule 12(b)(6). *Davel Commc'ns, Inc. v. Qwest Corp.*, 460
23 F.3d 1075, 1087-88 (9th Cir. 2006).

24 Dismissal of the Complaint without prejudice is appropriate here. The STB's responses
25 to the questions set out above could indicate that no further action will be appropriate in court,
26 or that the scope of any further proceedings should be substantially narrowed. Dismissal

1 without prejudice will also allow the Tribe to pursue its compensation claim in arbitration, as it
2 is required to do. Alternatively, even if the Court does not dismiss the Complaint outright,
3 BNSF respectfully requests that the proceedings be stayed until the STB can employ its
4 expertise to render a decision on the unique federal regulatory questions underlying the
5 Complaint and while the Tribe's AAA arbitration proceeds.

6 BACKGROUND

7 The freight railroad industry has operated for decades under a uniform and consistent
8 set of federal regulatory controls. This is necessary because freight trains cross multiple state
9 boundaries on their way to destinations. A fact of daily life for freight railroads like BNSF is
10 the oversight by federal agencies, including the STB, over various aspects of their operations.
11 A brief summary of the principal elements of the common-carrier regulatory regime
12 administered by the STB is set out below.

13 A. The ICC Termination Act

14 For over a century, the federal statutory scheme regulating railroads has been “among
15 the most pervasive and comprehensive of federal regulatory schemes.” *Chicago & Nw. Transp.*
16 *Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981). The current statutory regime was
17 adopted in 1996 in the ICC Termination Act (“ICCTA”), set out in 49 U.S.C. §§ 10101-11908.

18 One of the key provisions in ICCTA (and prior iterations of the statute) is the
19 requirement that rail carriers “subject to the jurisdiction of the Board under this part shall
20 provide the transportation or service on reasonable request.” 49 U.S.C. § 11101(a). The STB
21 and its predecessor agency have found that this statutory requirement limits a railroad's ability
22 to refuse to handle hazardous materials or restrict the volume of its hazardous materials traffic,
23 so long as safety standards are in place. *See, e.g., Radioactive Materials, Missouri-Kansas-*
24 *Texas R.R. Co.*, 357 I.C.C. 458, 465 (1977) (radioactive materials); *Union Pac. R.R. Co.—*
25 *Petition for Declaratory Order*, FD 35219, 2009 STB LEXIS 242 (Served June 11, 2009)
26 (chlorine) (“UP”).

1 Another key ICCTA provision gives the STB exclusive control over railroads' ability to
2 eliminate their common-carrier obligations through abandonment of rail lines. Once a rail
3 carrier has been authorized to provide service over a rail line, "the common carrier obligation
4 continues . . . unless and until the Board grants the appropriate discontinuance or abandonment
5 authority" under 49 U.S.C. § 10903. *Juniata Valley R.R.—Operation Exemption—SEDA-COG*
6 *Joint Rail Auth.*, FD 35469, 2011 STB LEXIS 104 at n.1 (Served Mar. 11, 2011). A railroad
7 may not relinquish its common-carrier obligations through contract, "as doing so would amount
8 to an unauthorized abandonment or discontinuance under federal law." *Allied Erecting and*
9 *Dismantling, Inc. and Allied Indus. Dev. Corp. Petition for Declaratory Order Rail Easements*
10 *in Mahoning County, Ohio*, FD 35316, 2013 STB LEXIS 407 at *39 (Served Dec. 20, 2013).
11 Even when an easement or agreement has terminated, common-carrier obligations remain in
12 effect until a line abandonment has been approved by the STB. *See Thompson v. Tex. Mexican*
13 *Ry.*, 328 U.S. 134, 144-45 (1946).

14 **B. ICCTA's Preclusion of State and Federal Law Remedies**

15 Section 10501(b) of ICCTA provides that "the jurisdiction of the [STB] over . . . the
16 transportation by rail carriers . . . is exclusive." 49 U.S.C. § 10501(b). Rail "transportation" is
17 broadly defined to include equipment and services related to the movement of property. 49
18 U.S.C. § 10102(9). The statute further states that "the remedies provided under this part [49
19 U.S.C. §§10101-11908] with respect to regulation of rail transportation are exclusive and
20 preempt the remedies provided under Federal or State law." 49 U.S.C. §10501(b).

21 ICCTA preempts remedies under state and federal law that seek directly to regulate rail
22 operations. *See, e.g., Ass'n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094,
23 1098 (9th Cir. 2010) (local government rules regulating locomotive idling preempted). Section
24 10501(b) also preempts state and federal laws of general application, like environmental laws,
25 that have the effect of regulating rail transportation. *See, e.g., Green Mountain R.R. v.*
26 *Vermont*, 404 F.3d 638, 643 (2d Cir. 2005) (enforcement of Vermont's environmental land use

1 statute preempted in connection with a railroad’s construction of a transloading facility);
2 *Grafton & Upton R.R. Co.—Petition for Declaratory Order*, FD 35779, 2014 STB LEXIS 12 at
3 *15 (Served Jan. 27, 2014) (federal environmental law would be preempted if the “federal
4 environmental laws are being used to regulate rail operations”).

5 “Every court that has examined the statutory language has concluded that the
6 preemptive effect of section 10501(b) is broad and sweeping.” *City of Creede, Co.—Petition*
7 *for Declaratory Order*, FD 34376, 2014 STB LEXIS 486 at *10 (Served May 3, 2005).
8 Accordingly, ICCTA preemption applies not just to direct regulation of rail operations, but also
9 to tort claims where such claims would have the effect of managing or governing rail
10 transportation. *See, e.g., Thomas Tubbs—Petition for Declaratory Order*, FD 35792, 2014
11 STB LEXIS 265 at *10 (Served Oct. 31, 2014) (“damages awarded under state tort laws can
12 manage or regulate a railroad as effectively as the application of any other type of state statute
13 or regulation”) (“*Tubbs*”). Trespass claims have specifically been found to be preempted when
14 they relate to routine rail construction or operations. *Id.* A trespass suit is preempted under
15 ICCTA whether plaintiffs seek immediate possession of the railroad property or redress for an
16 alleged harm arising from the railroad’s operations. *See Mark Lange – Petition for Declaratory*
17 *Order*, FD 35037, 2008 STB LEXIS 45, at *3 (Served Jan. 28, 2008).

18 Requests for injunctive relief are similarly preempted where the relief sought would
19 interfere with interstate commerce or railroad operations. *See, e.g., Blanchard Sec. Co. v.*
20 *Rahway Valley R.R. Co.*, No. 04-3040, 2004 U.S. Dist. LEXIS 25647, *18-20 (D.N.J. Dec. 22,
21 2004) *aff’d* 191 F. App’x 98, 100 (3d Cir. June 30, 2006) (dismissing injunctive relief claim
22 that would restrict the railroad’s use of the rail line to three round trips per week because such
23 relief was within the exclusive capacity of the STB); *Guild v. Kan. City S. Ry. Co.*, 541 F.
24 App’x. 362, 2013 U.S. App. LEXIS 18730 (5th Cir. 2013) (attempt to compel railroad to add a
25 switch seeks to regulate rail conduct and is preempted).

26

1 ICCTA preemption also extends to breach of contract claims where such claims would
2 unreasonably interfere with rail transportation or interstate commerce. As the STB recently
3 noted, “a railroad’s agreements with state or local entities may be preempted by § 10501(b) if
4 the agreement unreasonably interferes with interstate commerce or railroad operations.” *In re*
5 *California High-Speed Rail Authority*, FD 35861, 2014 STB LEXIS 311, at *28 (Served Dec.
6 12, 2014). *See also Township of Woodbridge v. Consolidated Rail Corp.*, FD 42053, 2000 STB
7 LEXIS 709 (Served Dec. 1, 2000), *clarified*, 2001 STB LEXIS 299, at *5 (Served Mar. 23,
8 2001) (noting the possibility that a breach of contract claim would be preempted if it is based
9 on an interpretation of the contract that resulted in an “unreasonable interference with interstate
10 commerce”).

11 **C. The Swinomish-BNSF Easement.**

12 The BNSF track across the Swinomish property (“Right-of-Way”) is part of BNSF’s
13 Anacortes Branch line that terminates at the Tesoro refinery at March Point. BNSF and its
14 predecessors have been operating a rail line on the Right-of-Way since the 1890s. Complaint,
15 ¶3.8. The parties’ recognition of BNSF’s right to use the Right-of-Way was documented
16 through an easement over the Right-of-Way described in a 1990 settlement of litigation with
17 the Tribe over use of the Right-of-Way to provide rail services. *Swinomish Tribal Community*
18 *v. Burlington Northern Railroad*, United States District Court for the Western District of
19 Washington, Case No. C76-550V. The Settlement Agreement set forth the basic terms to be
20 included in the Easement, which are discussed below. The Settlement Agreement also
21 provides:

22 Nothing in this Settlement Agreement or the associated Right-of-
23 Way Easement shall supersede any federal law or regulation as
24 they now exist or as they may be amended or changed from time
25 to time.

26 Settlement, ¶12.

1 Under the 1991 Easement, BNSF is entitled to use the Right-of-Way for an initial 40-
2 year term, with two 20-year option periods. Easement Recitals at D. BNSF pays an annual fee
3 for its use of the Right-of-Way. The amount of that payment is subject to annual consumer
4 price index adjustments, as well as periodic adjustments based on the value of the property
5 burdened by the Right-of-Way and remainder/severance damage to adjacent Tribal lands.
6 Easement, ¶3(b)(ii). The Easement Agreement also provides that the Tribe may seek additional
7 payments based on increases in BNSF's traffic volumes. *Id.*, ¶3(b)(iii) (providing for
8 procedure and specifically referring to "adjustment under paragraph 7.c" – which addresses
9 payment adjustments for increases in "the number of crossings or the number of cars"). The
10 Easement provides that disputes over the amount due to the Tribe for use of the Right-of-Way
11 must be resolved in binding arbitration. *Id.*, ¶3(b)(iii).

12 The Easement also provides that, unless otherwise agreed in writing, only one east-
13 bound train and one west-bound train (of 25 cars or less) are to cross the Reservation each day.
14 Easement, ¶7(c). For over 20 years, that traffic limitation presented no impediment to BNSF
15 satisfying shipper needs. The Easement contemplates that the number of cars and trains will
16 increase in the future if required to meet shipper needs:

17 The number of trains and cars shall not be increased unless
18 required by shipper needs. The Tribe agrees not to arbitrarily
19 withhold permission to increase the number of trains or cars when
20 necessary to meet shipper needs.

19 *Id.* The Easement provides that "if the number of crossings or the number of cars is increased,
20 the annual rent will be subject to adjustment" under the payment adjustment and arbitration
21 provisions of the Easement. *Id.*

22 **D. The Complaint**

23 The Tribe's Complaint alleges that:

- 24 • BNSF's transportation of crude oil across the Right-of-Way in six 100-car trains per
25 week violates the easement (Complaint, ¶3.16);

- 1 • “The substantial increase in train traffic across the Right-of-Way is the result of BNSF’s
- 2 decision to transport large quantities of crude oil to the Tesoro refinery at March Point
- 3 (and, in the future, to the Shell refinery described in paragraph 3.17)” (*Id.* ¶3.18);
- 4 • “The Tribe has never granted BNSF permission to exceed the express limitations
- 5 contained in Paragraph 7(c) of the Easement Agreement” (*Id.* at ¶3.14); and
- 6 • “Crude oil is a notoriously dangerous cargo to ship by rail” (*Id.* ¶3.20).

7 The Complaint asks the Court to declare that BNSF is in breach of the Easement, to

8 enjoin BNSF from transporting Bakken crude oil across the Right-of-Way, to enjoin BNSF

9 from moving more than the number of cars and trains specified in 1991 as the limit on traffic

10 volumes, and to award the Tribe damages for the alleged breach of the Easement and for an

11 alleged trespass that occurred when BNSF exceeded the train and car limits in the Easement.

12 Complaint, ¶¶5-13.

13 ARGUMENT

14 The Complaint directly challenges BNSF’s obligations arising under statutes

15 administered by the STB. The Tribe seeks to regulate BNSF’s transportation of crude oil,

16 which is subject to the STB’s exclusive regulatory jurisdiction. Absent referral to the STB,

17 BNSF could be subjected to conflicting and contradictory directions from this Court and the

18 federal agency over the same operations and shipments. At a minimum, the STB’s views will

19 materially aid the outcome of this litigation and promote uniformity in rail transportation

20 policies. This is precisely the kind of case in which certain threshold issues relating to the

21 scope of a regulatory regime should be decided initially by the agency that administers that

22 regime.

23 The Complaint also circumvents the dispute resolution provisions of the Easement by

24 asking the Court to award damages as compensation for increases in traffic that BNSF handles

25 over the Right-of-Way. The Tribe’s damages claims belong in arbitration.

26 Dismissal without prejudice of the Complaint under the doctrine of primary jurisdiction

will therefore allow the parties to seek the STB’s guidance on the validity of the Tribe’s claims

in light of the STB’s jurisdiction over rail transportation, and it will also allow the Tribe to

1 pursue its claims for compensation in the forum that the parties agreed to use – arbitration – to
 2 resolve disputes over payments.

3 **I. The Doctrine of Primary Jurisdiction – the Four-Factor Test**

4 The doctrine of primary jurisdiction has been fashioned precisely to avoid the problem
 5 of conflicting directions from a court and an agency:

6 Whether the agency happens to be expert or not, a court should not act
 7 upon subject matter that is peculiarly within the agency’s specialized
 8 field without taking into account what the agency has to offer, for
 otherwise parties who are subject to the agency’s continuous
 regulation may become the victims of uncoordinated and conflicting
 requirements.

9 4 Davis, Administrative Law at ¶22.1, p. 81 (1983). *Accord Oasis Petroleum Corp. v. Dep’t of*
 10 *Energy*, 718 F.2d 1558, 1563, 1567 (Temp. Emer. Ct. App. 1983).

11 The doctrine of primary jurisdiction also recognizes that the expertise of the regulatory
 12 agencies should be made available to the court, “thereby aid[ing] the court by laying a
 13 foundation for a more intelligent disposition of the question” *Weidberg v. American*
 14 *Airlines, Inc.*, 336 F. Supp. 407, 409 (N.D. Ill. 1972). *Accord Ricci v. Chicago Mercantile*
 15 *Exchange*, 409 U.S. 289, 305-06 (1973). Such a determination is particularly appropriate
 16 where issues “have been placed within the special competence of an administrative body.”
 17 *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 64 (1956) (“*W. Pac. R.R.*”). Indeed, Congress
 18 has given statutory authority to the district courts to refer cases to the STB in order to avail
 19 themselves of the STB’s primary jurisdiction. 28 U.S.C. § 1336(b).

20 Primary jurisdiction also promotes uniformity in the application of federal policies. The
 21 Supreme Court has stated that “issues of transportation policy . . . ought to be considered by the
 22 Commission in the interests of a uniform and expert administration of the regulatory scheme
 23 laid down by that Act.” *W. Pac. R.R.*, 352 U.S. at 65. *See also DeBruce Grain Inc. v. Union*
 24 *Pac. R.R.*, 149 F.3d 787, 789-90 (8th Cir. 1998).

25 In assessing a primary jurisdiction argument, the Ninth Circuit examines four factors:
 26 “(1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of

1 an administrative body having regulatory authority (3) pursuant to a statute that subjects an
2 industry or activity to a comprehensive regulatory authority that (4) requires expertise or
3 uniformity in administration.” *Syntek Semiconductor Co., Ltd. v. Microchip Tech., Inc.*, 307
4 F.3d 775, 781 (9th Cir. 2002) (citation omitted). Each of the four prongs is easily satisfied
5 here, thus establishing “the desirability of applying the doctrine of primary jurisdiction.” *Id.* at
6 781.

7 **II. All Four Factors of the Primary Jurisdiction Test Are Squarely Met Here**

8 **A. The Complaint Raises Issues Within the Special Competence of the STB**

9 The first factor in the Ninth Circuit’s four-part test is the need to resolve an issue within
10 the special competence of an agency. In this case, there are three issues that must be addressed
11 to determine whether the Tribe is entitled to pursue relief that would have the effect of
12 regulating rail transportation.

13 The first issue is whether the Tribe is asking for relief which, if granted, would conflict
14 with common-carrier obligations on the rail line. The Tribe claims that limits on BNSF’s
15 operations are appropriate because the Tribe is “justifiably . . . concerned” about the
16 transportation of crude oil across the Right-of-Way in increased volumes. Complaint, ¶3.31.
17 But the STB has dismissed this concern in other circumstances as the basis for suspending
18 common-carrier obligations. *See, e.g., CSX Transp., Inc.—Petition for Declaratory Order*, FD
19 34662, 2005 STB LEXIS 675 (Served May 3, 2005) (rejecting limits on transportation of
20 chlorine in close proximity to the U.S. Capitol building) (“CSX”).

21 Second, the Complaint directly implicates the scope of the statute conferring exclusive
22 jurisdiction to the STB over rail transportation because it asks the Court to regulate BNSF’s
23 operations. Any order from the Court limiting BNSF’s ability to respond to reasonable
24 requests for service on the line would be preempted under 49 U.S.C. §10501(b). The STB has
25 found consistently that regulation of rail conduct through relief provided under other state and
26 federal laws is preempted under the plain language of Section 10501(b). If the Tribe’s claims

1 are not precluded in their entirety by ICCTA, it will be necessary to determine whether some
2 claims (such as the request for injunctive relief) must be dismissed because they directly
3 regulate rail conduct.

4 Finally, if any claims are found to survive, and in light of the parties' agreeing that
5 "[n]othing in . . . [the] Right-of-Way Easement shall supersede any federal law or regulation as
6 they now exist or as they may be amended or changed from time to time" (Settlement, ¶12), it
7 will be necessary to consider how to interpret and apply BNSF's common-carrier duties and the
8 purported limitations in the Easement so as to avoid a conflict with the regulatory regime that is
9 administered by the STB. The STB can provide guidance on the scope and meaning of the
10 federal laws and regulations governing common carriers if the Court needs to determine
11 whether it would be "arbitrary," as that term is used in the Easement, for the Tribe to withhold
12 consent for traffic increases that are necessary to meet statutory requirements.

13 **B. The STB Has Regulatory Authority Over the Issues**

14 These vital threshold issues were clearly "placed by Congress within the jurisdiction of
15 an administrative body having regulatory authority," *Syntek*, 307 F.3d at 781 – *i.e.*, the STB.
16 Congress created common-carrier obligations under 49 U.S.C. § 11101 and gave the STB
17 "exclusive" jurisdiction over transportation by rail carriers, including the rules, practices and
18 routes provided by common carriers. 49 U.S.C. § 10501(b). This jurisdiction is sufficient to
19 support a referral. *See Pejepsco Ind. Park, Inc. v. Maine Cent. R.R. Co.*, 215 F.3d 195, 205-06
20 (1st Cir. 2000) (holding that the district court should defer to the STB's primary jurisdiction on
21 the question of whether the railroad violated its common-carrier obligations under § 11101(b));
22 *see also United States v. Gen. Dynamics Corp.*, 828 F.2d 1356, 1365 (9th Cir. 1987)
23 (explaining that the STB's predecessor agency is well-suited for referrals under the doctrine of
24 primary jurisdiction because ICC has "quasi-legislative powers and [is] actively involved in the
25 administration of regulatory statutes."). Thus, the second prong of the four-factor test is
26 satisfied.

1 **C. ICCTA Subjects BNSF to a Comprehensive Regulatory Regime**

2 Congress expressly gave the STB broad regulatory jurisdiction over

3 (1) transportation by rail carriers, and the remedies provided
4 in this part with respect to rates, classifications, rules (including
5 car service, interchange, and other operating rules), practices,
6 routes, services, and facilities of such carriers; and

7 (2) the construction, acquisition, operation, abandonment, or
8 discontinuance of spur, industrial, team, switching, or side tracks,
9 or facilities, even if the tracks are located, or intended to be
10 located, entirely in one State,

11 49 U.S.C. §10501(b). Transportation by rail carriers, over which the STB was given regulatory
12 power under Section 10501(b), is broadly defined in 49 U.S.C. §10102(9) to include equipment
13 related to the movement of freight and services related to that movement. The STB frequently
14 exercises its regulatory authority in areas relating to the scope of railroads' common-carrier
15 obligations, a threshold issue raised by the Complaint.

16 **D. The STB's Expertise and Uniformity Are Essential to Resolution of the
17 Issues**

18 The fourth factor of the primary jurisdiction test is often the most important
19 consideration, and in this case it is easily satisfied as to each of the three issues raised by the
20 Complaint relating to regulation of BNSF's operations.

21 **1. Common Carrier Issues Are Routinely Referred to the STB.**

22 The Tribe is asking for relief which, if granted, would conflict with common-carrier
23 obligations on the rail line. Issues relating to common-carrier obligations under 49 U.S.C. §
24 11101(a) are routinely referred to the STB. As a federal court in the District of Minnesota
25 recently explained, "courts almost invariably defer to the STB's expertise regarding such
26 [section 11101-related] disputes." *Chlorine Institute, Inc. v. Soo Line R.R.*, Case No. 14-CV-
1029 (PJS/SER), 2014 WL 2195180, at *2 (D. Minn. May 27, 2014) (collecting cases). The
Minnesota court explained that such routine referral is "not surprising" given the STB's
expertise and procedural flexibility and the need for uniformity in rail service standards. *Id.*

1 Indeed, the STB has frequently been called on to address the scope of a railroad's
2 obligation for the transportation of materials considered to be hazardous, an issue directly
3 raised by the Complaint here. *See CSX*, FD 34662 (chlorine movements through the District of
4 Columbia); *UP*, FD 35219 (long-distance chlorine movements).

5 The STB has also addressed the scope of a railroad's common-carrier obligations in the
6 context of property disputes. For example, in *Yreka Western R.R. Co. v. Tavares*, No. CIV.
7 2:11-1868 WBS CMK, 2012 WL 2116500 (E.D. Cal. June 4, 2012), the Eastern District of
8 California was presented with the question whether foreclosure under a deed of trust would
9 "interfere with plaintiffs' common carrier obligations." *Id.* at *5. The federal court referred the
10 question to the STB, concluding that "[g]iven the STB's vast and unique experience in dealing
11 with such matters, it is far better suited than any court to uniformly apply national rail policy
12 and determine whether the proposed foreclosure will result in interference with, or
13 abandonment of, plaintiff's railroad operations." *Id.* (citing *Pejepscot Ind. Park*, 215 F.3d at
14 205-06 and *Buffalo Crushed Stone, Inc. v. R.J. Corman R.R. Corp.*, No. 97-CV-0875E(SR),
15 2001 WL 392075, at *4 (W.D.N.Y. Apr.10, 2001)).

16 The STB also has extensive experience applying the statutory regime of rail regulation
17 in the context of Native American land rights and interests. *See, e.g., Alaska Railroad*
18 *Corporation--Construction and Operation Exemption--Rail Line Between North Pole and*
19 *Delta Junction, AK*, FD 34658, 2010 WL 24954 at *36 (STB served Jan. 6, 2010) (adopting a
20 Plan for Tribal Consultation regarding rail construction project); *Six Counties Association of*
21 *Governments Construction and Operation Exemption Rail Line Between Levan and Salina,*
22 *Utah*, FD 34075, 2007 WL 2020032, at *24-25, 154 (Served June 29, 2007) (describing
23 extensive coordination with Tribes in carrying out environmental impact analysis); *Dakota,*
24 *Minnesota & Eastern Railroad Corp.—Construction into the Powder River Basin*, FD 33407,
25 2002 STB LEXIS 74 (Served Jan. 30, 2002) (establishing consultation procedures and
26

1 environmental mitigation conditions relating to Native American lands affected by proposed
2 rail construction).

3 **2. ICCTA Preemption Issues Are Also Regularly Referred to the STB.**

4 The STB is also best positioned to decide in the first instance whether the Tribe's
5 claims fall within the STB's exclusive jurisdiction under 49 U.S.C. § 10501(b) in whole or in
6 part. Courts have long held that the STB (like its predecessor, the ICC) has primary authority
7 to determine the scope of its regulatory authority. *See, e.g., RLTD Ry. Corp. v. Surface Transp.*
8 *Bd.*, 166 F.3d 808, 812 (6th Cir. 1999) ("This court must give considerable weight and due
9 deference to the STB's interpretation of the statutes it administers unless its statutory
10 construction is plainly unreasonable") (citations, quotations, and brackets omitted). *See also B*
11 *& S Holdings, LLC v. BNSF Ry. Co.*, 889 F. Supp. 2d 1252, 1257 (E.D. Wash. 2012) ("As the
12 agency authorized by Congress to administer the ICCTA, the [Surface] Transportation Board is
13 'uniquely qualified to determine whether state law . . . should be preempted') (brackets,
14 quotations, and citations omitted); *Green Mountain*, 404 F.3d at 642-43 (same).

15 Accordingly, courts regularly refer to the STB questions related to the scope and
16 application of section 10501(b) preemption. *See, e.g., Coastal Distribution, LLC v. City of*
17 *Babylon*, 216 F. App'x 97, 103 (2d Cir. 2007) ("we modify the preliminary injunction to allow
18 the parties to petition the STB for a declaratory judgment on the scope of its jurisdiction");
19 *Boston and Me. Corp. v. Town of Ayer*, 191 F. Supp. 2d 257, 261 (D. Mass. 2002) (explaining
20 that the case was referred to the STB under the doctrine of primary jurisdiction to decide
21 ICCTA preemption questions in the first instance); *Grafton and Upton R. Co. v. Town of*
22 *Milford*, 337 F. Supp. 2d 233, 240 (D. Mass. 2004) (staying case pending the STB's ruling on
23 the preemption questions and, "[b]y so doing, the Court upholds the intent of Congress to
24 delegate authority to that agency to adjudicate disputes regarding railroad transportation.");
25 *Tubbs*, FD 35792 (referral from Missouri state court on ICCTA preemption questions); *14500*
26 *Limited LLC – Petition for Declaratory Order*, FD 35788, 2014 STB LEXIS 136 (Served June

1 5, 2014) (referral from U.S. District Court for the Northern District of Ohio); *Eastern Alabama*
2 *Ry. LLC Petition for Declaratory Order*, FD 35583, 2012 STB LEXIS 95 (Served Mar. 8,
3 2012) (referral from U.S. District Court for the Northern District of Alabama); *Norfolk S. Ry.*
4 *Co. & the Alabama Great S. R.R. Co. Petition for Declaratory Order*, FD 35196, 2010 STB
5 LEXIS 635 (Served Feb. 26, 2010) (same); *City of Creede, Co. Petition for Declaratory Order*,
6 FD 34376, 2005 STB LEXIS 486 (Served May 3, 2005) (referral from U.S. District Court for
7 the District of Colorado).

8 Similarly, federal agencies have petitioned the STB for guidance on questions relating
9 to the ICCTA's preclusion of other federal laws. *See U.S. Environmental Protection Agency –*
10 *Petition for Declaratory Order*, FD 35803, 2014 STB LEXIS 48 (Served Feb. 26, 2014) (in
11 response to a petition filed by the EPA, the STB initiates proceedings to provide guidance on
12 whether two local rules concerning locomotive idling would be preempted if they were
13 incorporated into the state's implementation plan pursuant to the federal Clean Air Act); *see*
14 *also U.S. Environmental Protection Agency –Petition for Declaratory Order*, FD 35803, 2014
15 STB LEXIS 335 (Served Dec. 30, 2014) (providing guidance to the EPA on the preemption
16 issue and finding that the proposed local rules are likely preempted under ICCTA).

17 These referrals to the STB have the beneficial effect of promoting uniformity in
18 administering the statutory scheme. *See Tubbs*, FD 35792, at *12 (“The purpose of the
19 § 10501(b) preemption is to prevent a patchwork of state and local regulation from
20 unreasonably interfering with interstate commerce”). Primary jurisdiction referral of
21 preemption questions also permits the development of a consistent national rail policy based on
22 the agency's expert judgment. *See Norfolk S. Ry. Co. Petition for Declaratory Order*, FD
23 35701, 2013 STB LEXIS 338, at *7 (Served Nov. 4, 2013) (“in determining whether an action
24 under a state law, as applied, would unreasonably burden interstate commerce or unreasonably
25 interfere with railroad operations we inherently exercise our policy-based judgment”). The
26 STB can consider the many competing interests at stake and the implications that an

1 interpretation of Section 10501(b) may have on both the national rail network and the public at
2 large.

3 The STB's guidance on questions of ICCTA preemption has helped courts resolve cases
4 in their entirety or in part. *Compare 14500 Limited LLC*, FD 35788 (recommending that the
5 district court dismiss plaintiff's complaint) and *Boston and Me. Corp.*, 191 F. Supp. 2d at 261
6 (granting summary judgment based on the STB's preemption rulings), *with Tubbs*, FD 35792
7 (finding that ICCTA preempts plaintiffs' state law claims except to the extent that plaintiffs
8 allege that the railroad violated the federal regulations). Similarly, an STB ruling could have a
9 range of implications here: preempting the Tribe's claims in their entirety, preempting none of
10 the Tribe's claims, or preempting only certain claims. The STB has the expertise to properly
11 frame the Tribe's request in the first instance. The Court should, therefore, refer the
12 preemption issue to the STB.

13 **3. Courts Have Also Referred Questions Relating to Easement**
14 **Interpretation to the STB**

15 Even if the STB finds that the Tribe's claims are not precluded in their entirety, the STB
16 can provide guidance on the intersection between the laws and regulations administered by the
17 STB and the specific terms of the Settlement and Easement. Many of the key terms in the
18 Settlement Agreement and Easement implicate BNSF's common-carrier obligations. For
19 example, the Easement gives BNSF the right to "operate . . . the existing line of railroad . . . for
20 the transportation of general commodities" Easement, ¶6. Critically, the Settlement
21 Agreement specifies that the Easement will not "supersede any federal law or regulation as they
22 now exist or as they may be amended or changed from time to time." Settlement, ¶12. That
23 important and broad provision requires that the Easement be squared with BNSF's common-
24 carrier obligation that it "shall provide the transportation or service on reasonable request." 49
25 U.S.C. §11101(a). The Easement further provides that the Tribe will not "arbitrarily withhold
26 permission to increase the number of trains or cars when necessary to meet shipper needs."

1 Easement, ¶7(c). If any claims survive preemption, the STB is uniquely suited to explain the
2 statutory and regulatory framework and national policy considerations that will need to be
3 considered by the Court in interpreting the Settlement and Easement.

4 While the STB does not generally resolve pure contract law disputes, the STB has
5 previously provided guidance on the laws and regulations governing common carriers to assist
6 courts in interpreting contractual terms when issues relating to a railroad's common carrier
7 obligations are implicated by a contract. Indeed, the STB has provided such guidance in the
8 context of easements. *See Allied Erecting*, FD 35316, 2013 STB LEXIS 407 at *33-39
9 (explaining the federal law framework for applying easements that allegedly prevented the
10 railroad from stopping, storing or staging railcars).

11 **III. The Tribe's Claims for Monetary Relief Must Be Pursued in Arbitration**

12 The Tribe's request for monetary "damages" resulting from increases in BNSF's train
13 traffic over the Right-of-Way is an end run around the standards and procedures established in
14 the Easement for resolving disputes over the Tribe's compensation. Under the Easement, the
15 Tribe is entitled to pursue an adjustment to compensation in the event of traffic increases over
16 the Right-of-Way. Easement, ¶7(c). However, the Tribe is required to resolve any disputes
17 over such claims for an adjustment to compensation through binding arbitration. *Id.* ¶3(b)(iii).

18 The Easement has specific provisions that govern the compensation that the Tribe is
19 entitled to receive for use of the Right-of-Way. Easement, ¶¶3, 7(c). The standards and
20 procedures for determining compensation and adjustments to compensation are set out in
21 paragraphs 3(b)(iii) and 7(c) of the Easement. In paragraph 7(c), the Easement specifically
22 recognizes that compensation adjustments might be appropriate if the traffic handled by BNSF
23 over the Right-of-Way increases over time. *Id.* ¶7(c). The Easement provides: "It is
24 understood and agreed that if the number of crossings or the number of cars is increased, the
25 annual rental will be subject to adjustment in accordance with paragraph 3(b)(iii) of this Right-
26 of-Way Easement. . . ." *Id.* ¶7(c). The standards and procedures for determining the adjusted

1 compensation are set out in paragraph 3(b)(iii) of the Easement, which expressly gives the
 2 Tribe the right to “initiate an appraisal adjustment under paragraph 7.c of this Right-of-Way
 3 Easement.” *Id.* ¶3(b)(iii). That paragraph of the Easement also provides that disputes over
 4 adjustments to the Tribe’s compensation are to be resolved “in accordance with the
 5 Commercial Arbitration Rules of the American Arbitration Association and the provisions set
 6 forth herein by binding arbitration.”²

7 The Tribe cannot avoid the arbitration provision of the Easement by styling its request
 8 for a compensation adjustment as “damages” for a breach of the Easement. In plain terms, the
 9 Tribe is seeking to be compensated for the fact that traffic volumes have increased over the
 10 Right-of-Way. The Easement provides both the means to obtain such compensation and the
 11 applicable standards, and the Tribe should be required to pursue its compensation claims as
 12 provided in the Easement, including through arbitration.³

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 14
 15 ² The Settlement contains the same provisions to arbitrate increases in train traffic. *See*
 Settlement, ¶2(b)(iii).

16 ³ BNSF sees no basis for the Tribe to dispute its obligation to arbitrate its demand for money.
 17 Were the Tribe to challenge arbitrability, this Court would still have to dismiss or stay the
 18 damages claim, because the parties’ arbitrability disputes are allocated to the arbitrator. When
 19 there is purported ambiguity in the scope of an arbitration clause, the question of arbitrability is
 20 to be addressed by the arbitrators in cases such as this where the arbitration provision
 21 incorporates the rules of the American Arbitration Association (“AAA”). This is because “the
 22 favored approach among circuit courts is to interpret incorporation of AAA rules as ‘clear and
 23 unmistakable’ delegation of the question of arbitrability of to the arbitrator.” *Brennan v. Opus*
 24 *Bank*, No. 2:13-cv-00094-RSM, 2013 WL 2445430, *6 (W.D. Wash. June 5, 2013). *See, e.g.,*
 25 *Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1074 (9th Cir. 2013) (“Virtually every
 26 circuit to have considered the issue has determined that incorporation of the American
 Arbitration Association’s (AAA) arbitration rules constitutes clear and unmistakable evidence
 that the parties agreed to arbitrate arbitrability”); *Fadal Machining Centers, LLC v.*
Compumachine, Inc., 461 F. App’x 630, 631-32 (9th Cir. 2011) (affirming district court’s
 conclusion that questions of arbitrability were for the arbitrator due to incorporation of AAA
 Rules); *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009) (“we conclude that the
 arbitration provision’s incorporation of the AAA Rules, like the incorporation of the NASD
 Code in FSC, constitutes a clear and unmistakable expression of the parties’ intent to leave the
 question of arbitrability to an arbitrator.”); *Crook v. Wyndham Vacation Ownership, Inc.*, No.
 13-CV-03669-WHO, 2013 WL 6039399, at *6 (N.D. Cal. Nov. 8, 2013) (parties’ use of AAA
 makes the arbitrator the decision-maker on arbitrability issues). Here, as noted above, the
 Easement incorporates the AAA rules. Easement, ¶3(b)(iii).

1 Motions to dismiss pursuant to an arbitration clause in a contract are to be treated as a
2 motion to dismiss for improper venue under Fed. R. Civ. P. 12(b)(3). *See Argueta v. Banco*
3 *Mexicano, S.A.*, 87 F.3d 320, 324 (9th Cir. 1996); *Brennan*, 2013 WL 2445430, at *8
4 (dismissing pursuant to Rule 12(b)(3) in favor of arbitration). “An agreement to arbitrate
5 before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits
6 not only the situs of suit but also the procedure to be used in resolving the dispute.” *Scherk v.*
7 *Alberto-Culver*, 417 U.S. 506, 519 (1974). Since the Easement provides for arbitration of
8 disputes regarding the amount of compensation to which the Tribe is entitled for increases in
9 traffic over the Right-of-Way, the Tribe’s request for damages resulting from such changes in
10 traffic flows should be dismissed under Rule 12(b)(3).

11 CONCLUSION

12 BNSF respectfully requests that the Court dismiss the Complaint without prejudice
13 under the doctrine of primary jurisdiction so that the parties can present the following three
14 questions to the STB:

15 1. Is the Tribe asking for relief that would conflict with the statutes and regulations
16 that govern operations on a rail line that is part of BNSF’s common carrier rail network by
17 seeking to restrict BNSF’s ability to respond to the needs of shippers on the Anacortes Branch?

18 2. Should the conflict between the statutes and regulations administered by the
19 STB and the Tribe’s claims result in complete or partial preemption of those claims under 49
20 U.S.C. §10501(b), which preempts all state and federal claims for relief that seek to regulate
21 rail operations?

22 3. If any claims survive preemption, what is the scope and meaning of the federal
23 law requirements referred to in the Settlement and Easement that the Court will need to
24 consider in interpreting the Easement’s terms?

1 Dismissal of the Complaint without prejudice is also appropriate because it will allow
2 the Tribe to pursue its claims for alleged “damages” from BNSF’s traffic changes in arbitration
3 under the arbitration provision in the Easement.

4 Alternatively, the Court should stay further proceedings to give the STB an opportunity
5 to address unique federal regulatory questions underlying the Complaint and while the Tribe’s
6 AAA arbitration proceeds.

7 Respectfully submitted this 14th day of May, 2015.

8 *s/ Stelman Keehnel*

9 *s/ Andrew R. Escobar*

10 *s/ Jeffrey B. DeGroot*

11 Stelman Keehnel, WSBA No. 9309

12 Andrew R. Escobar, WSBA No. 42793

13 Jeffrey B. DeGroot, WSBA No. 46839

14 DLA PIPER LLP (US)

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22 Attorneys for defendant BNSF Railway Company

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CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the attorneys of record for the parties.

Dated this 14th day of May, 2015.

s/ *Stellman Keehnel*
Stellman Keehnel, WSBA No. 9309

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THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON, AT SEATTLE

SWINOMISH INDIAN TRIBAL
COMMUNITY, a federally recognized
Indian tribe,

Plaintiff,

v.

BNSF RAILWAY COMPANY, a
Delaware corporation,

Defendant.

No. 2:15-cv-00543-RSL

**[PROPOSED] ORDER GRANTING
DEFENDANT BNSF'S MOTION TO
DISMISS OR STAY**

This matter comes before the Court on Defendant BNSF Railway Company's Motion to Dismiss or Stay the above-referenced matter pursuant to Rules 12(b)(6) and 12(b)(3) of the Federal Rules of Civil Procedure. The Court has considered the arguments of both parties and makes the following rulings:

1. The Court GRANTS defendant's motion to dismiss the Complaint without prejudice under the doctrine of primary jurisdiction so that the parties can present the following three questions to the STB:

1. Is the Tribe asking for relief that would conflict with the statutes and regulations that govern operations on a rail line that is part of BNSF's common-carrier rail network by seeking to restrict BNSF's ability to respond to the needs of shippers on the Anacortes Branch?

2. Should the conflict between the statutes and regulations administered by the STB and the Tribe's claims result in complete or partial preemption of those claims under 49 U.S.C. §10501(b), which preempts all state and federal claims for relief that seek to regulate rail operations?

3. If any claims survive preemption, what is the scope and meaning of the federal law requirements referred to in the Settlement and Easement that the Court will need to consider in interpreting the Easement's terms?

2. The Court FURTHER GRANTS defendant's motion to dismiss plaintiff's claims for monetary relief in favor of the arbitration provision agreed upon by the parties.

DATED this _____ day of _____, 2015.

UNITED STATES DISTRICT JUDGE

Presented by:

s/ Stelman Keehnel
s/ Andrew R. Escobar
s/ Jeffrey B. DeGroot

Stelman Keehnel, WSBA No. 9309
Andrew R. Escobar, WSBA No. 42793
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E-mail: jeff.degroot@dlapiper.com

Attorneys for defendant BNSF Railway Company

WEST258504394.1

EXHIBIT No. 2

HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SWINOMISH INDIAN TRIBAL
COMMUNITY, a federally recognized
Indian tribe,

Plaintiff,

v.

BNSF RAILWAY COMPANY, a
Delaware corporation,

Defendant.

No. 2:15-cv-00543-RSL

**DECLARATION OF JAMES
OBERMILLER IN SUPPORT OF
DEFENDANT BNSF RAILWAY
COMPANY'S MOTION TO DISMISS
OR STAY**

NOTE ON MOTION CALENDAR:
June 5, 2015

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DECLARATION OF JAMES OBERMILLER

I, JAMES OBERMILLER, hereby declare as follows:

1. I am the Director - Compliance & Information Governance for BNSF Railway Company. I have personal knowledge of the facts contained in this declaration, and am competent to testify as to those facts.

2. Attached hereto as Exhibit A is a true and correct copy of a document that is maintained within BNSF Railway Company's records and is entitled Settlement Agreement Swinomish - Burlington Northern.

3. Attached hereto as Exhibit B is a true and correct copy of a document that is maintained within BNSF Railway Company's records and is entitled Right-of-Way Easement - Burlington Northern.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 14th Day of May, 2015, in Fort Worth, Texas.


JAMES OBERMILLER

CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

s/Stellman Keehnel
Stellman Keehnel, WSBA No. 9309

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EXHIBIT A

BN 45722

ORIGINAL

SETTLEMENT AGREEMENT
SWINOMISH - BURLINGTON NORTHERN 122 731

The Swinomish Tribal Community (hereinafter "Tribe") as the duly constituted governing body of the Swinomish Indian Reservation, the United States Department of the Interior, Bureau of Indian Affairs ("the BIA"), and Burlington Northern Railroad Company (hereinafter "Burlington Northern" or "BN"), in order to settle those matters in dispute between the Tribe and BIA and Burlington Northern in the consolidated actions entitled Burlington Northern Railroad Company vs. Swinomish Tribal Community et al., Western District of Washington cause C76-550V, and to resolve other matters between Burlington Northern and the Tribe and BIA, agree as follows:

1. **Application for Easement.** BN will submit to the BIA an application for a right-of-way easement in the form attached hereto as Exhibit "A". The Tribe shall immediately upon execution of this Settlement Agreement advise the BIA in writing of the Tribe's consent to the granting to BN by the BIA of the right-of-way easement attached to said application as Attachment "A". Both BN and the Tribe shall take whatever other steps are reasonably necessary promptly to obtain the approval by the BIA of said right-of-way easement, the approval of the attorney for the United States of this Settlement Agreement and the stipulation referred to in paragraph 3, and the full consummation of this agreement.

2. **Payment.** (a). As partial consideration for this Settlement, BN will deposit with the BIA along with said

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application the sum of \$5,000 in the form of a check payable to the BIA. Upon the BIA's delivery to BN of the approved, executed easement, BN shall immediately deliver to Allan Olson, or his successor as named by the Tribe ("Tribal Attorney"), as attorney for the Tribe, a check payable to the Tribe in the sum of \$120,000. The sum of these checks, \$125,000, shall reflect payment in full for all rent, damages and compensation of any sort, due for past occupancy of the right-of-way from date of construction in 1889 until January 1, 1989. The BIA and the Tribal attorney shall hold said \$125,000, which they are to deliver or return as provided in paragraphs 9 and 10 below.

(b). BN will pay an annual rental ("rental") commencing on the 1st day of January 1989, totaling a minimum of TEN THOUSAND DOLLARS (\$10,000) per year, and a like or adjusted sum on each January 1st thereafter during the term of the Right-of-Way Easement granted under this Agreement.

i. CPI-U Adjustment. On each January 1st after January 1, 1989, the rental shall be increased by a percentage equal to the percentage change in the All Items Consumer Price Index of the United States Department of Labor, Bureau of Labor Statistics for All Urban Consumers in the Seattle-Tacoma, Washington area ("CPI-U") based on the 1982-1984 base = 100 (or, if not available, the most nearly comparable index), from the CPI-U used to calculate the previous year's adjustment to the most recent calculation of the CPI-U. The annual rental

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commencing on January 1, 1989 is based on the CPI-U for the first half of 1988 (CPI-U = 111.9).

ii. Appraisal Adjustment. In addition to the annual CPI-U adjustments, described in subparagraph (b)(i) of this paragraph, the rental shall be increased at five (5) year intervals to reflect changes in property values such as, but not limited to, changes in the real estate market, the acquisition of applicable permits for the development of nearby property, proposed or actual marina construction or other land development near said right-of-way. The rental shall be increased to an amount equal to TWELVE PERCENT (12%) of the sum of the "right-of-way value" which is the value of the property subject to the right-of-way, and the "remainder damage" which is the severance damage to Reservation lands north of State Highway 20 as determined by normal real estate appraisal methods considering the highest and best use of such adjacent lands.

Development proposed for the property north and south of the Railroad is anticipated to include several separate and distinct land uses including a marina boat basin (with approximately 800 boat slips) to the north, upland commercial development to the south, and in the event the "South Lagoon" (adjacent to and south of the Railroad) is developed, an additional marina basin providing additional boat slip moorage facilities. The Railroad right-of-way is located between and adjacent to these land areas and uses. Acreage values used to calculate the right-of-way value shall be based on the use and

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development of lands either to the north or south of the Railroad, whichever has the higher appraised value.

iii. Proposal. Either the Tribe or BN may initiate an appraisal adjustment by a written proposal forwarded by U.S. Mail prior to end of the five (5) year increment or any time thereafter until an appraisal adjustment is made and a new 5 year increment is commenced. The Tribe may initiate an appraisal adjustment at any time after receiving all necessary federal permits for the development of all or part of the Reservation lands north of State Highway 20. The Tribe may also initiate an appraisal adjustment under paragraph 7.c. of the Right-of-Way Easement. If a party chooses to initiate an appraisal adjustment before the last six months of any five (5) year period, a new five (5) year increment will begin when the new rental begins.

If the parties are unable to agree upon a rental adjustment, such adjustment shall be determined in accordance with the Commercial Arbitration Rules of the American Arbitration Association and the provisions set forth herein by binding arbitration. Arbitration shall be initiated when one party, or the other, nominates an arbitrator in writing, and requests that the other party nominate an arbitrator. The other party shall nominate an arbitrator within 20 days of receipt of the written notice. Both arbitrators must be residents of the State of Washington and shall not be subject to disqualification. Thereafter, both arbitrators nominated shall meet and select a neutral third arbitrator. If they are unable to agree, a third

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arbitrator will be selected under applicable rules of the American Arbitration Association. Arbitration proceedings shall be conducted informally with each party presenting evidence as may be appropriate to its proposed annual rental payment. The arbitration award shall not be subject to judicial review or other appeal unless it be determined that the arbitrators have ignored, or failed to enforce, any of the provisions of this Settlement Agreement.

iv. South Lagoon. In the event that the Tribe determines that it would be profitable to construct additional marina facilities in the area described as the South Lagoon on attached Exhibit A, and in the further event the Tribe secures the necessary Federal permits for such construction, the BN shall either provide a fifty (50) foot wide boat access at a location acceptable to the Tribe to said Lagoon with an appropriate bridge, which will admit at tide levels of mean higher high water boats with masts sixty (60) feet high, or as damage to that portion of remaining lands, compensate the Tribe for net income loss attributable to the inability to construct the South Lagoon portion of the marina. Such loss shall be compensated on the basis of expected rental or other income less costs of planning, development, construction, management, and operation.

3. Stipulated Order of Dismissal. At the time of execution of this Settlement Agreement, the Tribe and BN shall cause their attorneys to execute, and shall request that the attorney for the United States execute, a stipulation in the form

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attached hereto as Exhibit "B". The Tribal attorney shall hold said executed stipulation for the Tribe and shall deliver it as provided in paragraph 10 below.

4. Easement. It is the intention of the Tribe and BN that BN be granted a forty (40) year easement covering the operation, maintenance and replacement of BN's existing railroad and all facilities ancillary thereto across all lands within the Swinomish Indian Reservation ("the Reservation") and in which the Tribe or the BIA have or claim to have an ownership or beneficial interest.

BN shall have the option to extend the term of this easement and any additional easements for two successive periods of twenty years each. The manner of exercise of the options and the consideration to be paid are set out in the easement that is Attachment "A" to Exhibit "A".

5. Tribal Resolution. Attached hereto as Exhibit "C" is a certified copy of a resolution of the Tribe authorizing this Settlement Agreement.

6. BN Resolution. Attached hereto as Exhibit "D" is a certified copy of a corporate resolution of BN authorizing this Settlement Agreement.

7. BN Release As To The Tribe. For the valuable consideration in the form provided by the terms of this Settlement Agreement, upon completion of each of the undertakings required by paragraphs 1 through 3 and 9 hereof and unless this Agreement is voided pursuant to paragraph 10 hereof, BN hereby

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releases and forever discharges the Tribe and its predecessors, successors, assigns, or related or affiliated persons or entities, its and their officers, agents, representatives, employees, insurers, and sureties, jointly and severally, from any and all liability, claims, demands, damages, debts, dues, accounts, cause or causes of action of whatever kind or nature, whether for cash, securities, property or otherwise, which exist by reason of or which are in any way related to or arise out of the location by BN of its pipeline across and through lands claimed by the United States and the Tribe or out of the claims asserted in the Actions, whether known or unknown, that BN now has or has had; provided that the obligations undertaken by each party to this Settlement Agreement shall survive. This release shall not be effective unless and until the parties have completed their respective undertakings pursuant to paragraphs 1 through 3 and 9 hereof or if this Agreement is voided pursuant to paragraph 10 hereof.

8. Tribal Release As To BN. For the valuable consideration in the form provided by the terms of this Settlement Agreement, upon completion of each of the undertakings required by paragraphs 1 through 3 and 9 hereof and unless this Agreement is voided pursuant to paragraph 10 hereof, the Tribe hereby releases and forever discharges BN and its predecessors, successors, assigns, or related or affiliated persons or entities, its and their officers, agents, representatives, employees, insurers, and sureties, jointly and severally, from

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any and all liability, claims, demands, damages, debts, dues, accounts, cause or causes of action of whatever kind or nature, whether for cash, securities, property or otherwise, which exist by reason of or which are in any way related to or arise out of the location by BN of its railroad across and through lands claimed by the United States and the Tribe or out of the claims asserted in the Actions, whether known or unknown, that either party now has or has had; provided that the obligations undertaken by each party in this Settlement Agreement shall survive. This release shall not be effective unless and until the parties have completed their respective undertakings pursuant to paragraphs 1 through 3 and 9 hereof or if this Agreement is voided pursuant to paragraph 10 hereof.

(a). **Releases As Between The United States And BN.** The United States of America and BN in order to settle those matters in dispute between them in the Actions agree as follows:

BN Release As To United States. For the valuable consideration in the form provided by the terms of this Settlement Agreement, upon completion of each of the undertakings required by paragraphs 1 through 3 and 9 hereof and unless this Agreement is voided pursuant to paragraph 10 hereof, BN hereby releases and forever discharges the United States of America and its predecessors, successors, assigns, or related or affiliated persons or entities, its and their officers, agents representatives, employees, insurers, and sureties, jointly and severally, from any and all liability, claims, demands, damages,

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debts, dues, accounts, cause or causes of action of whatever kind or nature, whether for cash, securities, property or otherwise, which exist by reason of or which are in any way related to the claims asserted in the Actions, whether known or unknown, that BN now has or has had or may hereafter have; provided that the obligations undertaken by each party to this Settlement Agreement shall survive. This release shall not be effective unless and until the parties have completed their respective undertakings pursuant to paragraphs 1 through 3 and 9 hereof or if this Agreement is voided pursuant to paragraph 10 hereof.

United States Release As To BN. For the valuable consideration in the form provided by the terms of this Settlement Agreement, upon completion of each of the undertakings required by paragraphs 1 through 3 and 9 hereof and unless this Agreement is voided pursuant to paragraph 10 hereof, the United States of America hereby releases and forever discharges BN and its predecessors, successors, assigns, or related or affiliated persons or entities, its and their officers, agents, representatives, employees, insurers, and sureties, jointly and severally, from any and all liability, claims, demands, damages, debts, dues, accounts, cause or causes of action of whatever kind or nature, whether for cash, securities, property or otherwise, which exist by reason of or which are in any way related to the claims asserted in the Actions, whether known or unknown, that BN now has or has had or may hereafter have; provided that the obligations undertaken by each party to this Settlement Agreement,

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shall survive. This release shall not be effective unless and until the parties have completed their respective undertakings pursuant to paragraphs 1 through 3 and 9 hereof or if this Agreement is voided pursuant to paragraph 10 hereof.

9. **Execution and Delivery of Easement.** Upon the BIA's delivery to BN of the approved and executed easement in the form attached as Attachment "A" to Exhibit "A" to this Agreement, the Tribal Attorney shall deliver to BN the executed stipulated Order of dismissal ("Order") referred to in paragraph 3 in exchange for the check for \$120,000 referred to in paragraph 2. BN shall forthwith file said stipulation with the United States District Court with a request that the Order contemplated by the stipulation be entered forthwith. Upon being advised by the Court that said Order has been entered, the Tribal attorney shall deliver the \$120,000 check provided for in paragraph 2 above to the Tribe, and BN shall record the easement.

10. **Failure to Complete Undertakings.** Should the BIA fail or refuse to execute the right-of-way easement in the form attached as Attachment "A" to Exhibit "A" to this Agreement, or should the attorney for the United States fail or refuse to execute the stipulated Order of dismissal ("Order") attached hereto as Exhibit "B", or should the United States District Court fail or refuse to enter a Order substantially similar in terms and effect to the Order provided for in said stipulation, then in any such event this Settlement Agreement, upon 30 days written notice by any party sent by certified mail to the addresses

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provided below, shall be null and void and all settlement funds will be forthwith returned to BN and all executed documents attached hereto will be forthwith returned to the party executing the same.

11. Insurance. BN agrees to maintain reasonable limits of insurance to protect itself against liability for damage resulting from the operation of the railroad, and if requested by the Tribe, BN will advise the Tribe of the amount of the insurance coverage then in effect.

12. Integration, Governing Laws, Miscellaneous. This Settlement Agreement shall be governed by federal law. The terms of this Agreement, (excluding section subtitles) are contractual and not mere recitals. No promise or inducement has been offered except as herein set forth. This Agreement has been executed following advise of counsel and without reliance upon any representation or statement by the persons released or their representatives other than as set forth herein. It is intended as and reflects the complete agreement of the parties and no modification hereof shall be effective unless made in writing duly executed by the parties. This Settlement Agreement shall be binding upon and inure to the benefit of the parties and their respective legal representatives, successors and assigns.

Nothing in this Settlement Agreement or the associated Right-of-Way Easement shall supersede any federal law or regulation as they now exist or as they may be amended or changed from time to time. Specifically, the annual rental shall not be

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less than that required by federal law in effect at any time during BN's occupancy of the right-of-way. BN shall comply with all applicable federal laws and regulations pertaining to BN's activities within the Swinomish Reservation.

13. Notice. Any notice (other than process) required or contemplated by the terms of the Settlement Agreement shall be sent to the following addresses:

(a) Swinomish Tribal Community:

Tribal Attorney
Swinomish Indian Tribal Community
P.O. Box 817 - 950 Moorage Way
LaConner, Washington 98257

(b) United States of America:

Department of Interior
Bureau of Indian Affairs
Puget Sound Agency
Federal Building
Everett, Washington 98201

(c) BN:

Burlington Northern Railroad Company
General Manager
2200 First Interstate Center
999 Third Avenue
Seattle, WA 98104

Any party may by written notice to other parties change the address to which subsequent notice shall be sent.

14. Nothing in the Settlement Agreement shall waive, affect or bar any claim or defense except those specifically covered by the Settlement Agreement.

DATED this 24th day of September, 198⁹5.

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UNITED STATES OF AMERICA

Charles E. O'Connell, Jr.

BURLINGTON NORTHERN RAILROAD
COMPANY

By J. J. Francis

Its VICE PRESIDENT, NORTHERN REGION

The SWINOMISH INDIAN TRIBAL
COMMUNITY hereby consents to
the foregoing Right-of-Way
Easement this 24th day, of
September, 1980.

SWINOMISH INDIAN TRIBAL COMMUNITY

By Robert G. S.

Its CHAIRMAN

EXHIBIT B

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RIGHT-OF-WAY EASEMENT - BURLINGTON NORTHERN

This Right-of-Way Easement is between the United States of America, the Swinomish Indian Tribal Community and Burlington Northern Railroad Company, a Delaware corporation.

BURLINGTON NORTHERN RAILROAD CO.
CORPORATE RECORDS MANAGEMENT
CONTRACT NO. *BN/39765*

R E C I T A L S

A. Burlington Northern ("BN"), the Swinomish Indian Tribal Community (the "Tribe"), and the United States have been engaged in a dispute concerning whether or not the existing line of railroad of BN passes through lands forming part of the Swinomish Indian Reservation held in trust by the United States for the benefit of the Tribe, without appropriate permission or easements having been granted to BN.

B. The dispute has taken the form of a lawsuit entitled: Swinomish Tribal Community v. Burlington Northern Railroad, et al., United States District Court for the Western District of Washington, Cause Number: C76-550V (the "Action").

C. Burlington Northern, the Tribe and the United States have now settled the dispute among them pursuant to the Settlement Agreement dated September 24, 1990 (the "Settlement Agreement"). The Settlement Agreement provides, among other things, for the dismissal of the Action by and against BN and the granting of a forty (40) year right-of-way easement with two twenty (20) year options to Burlington Northern for its existing railroad, or successor methods provided by paragraph 6 herein, over and across any and all lands of the Tribe held in trust for its benefit by the United States that such railroad crosses.

D. This right-of-way easement is intended to grant and convey to BN, despite any questions of survey, or any uncertainty as to the location of (a) the boundaries of the Swinomish Indian Reservation, and (b) any lands within the Reservation (whether tidelands, submerged lands, or uplands) held in trust by the United States for the benefit of the Tribe, a forty (40) year easement with two twenty (20) options over any and all lands comprising part of the Swinomish Indian Reservation and held in trust by the United States for the benefit of the Tribe over which the existing railway of BN passes.

NOW THEREFORE, in consideration of the sum deposited with the application for this right-of-way easement and the agreement and covenants contained in said application and in this agreement, the United States hereby grants and conveys to BN, under authority of the Act of February 5, 1948 (62 Stat. 17; 25 U.S.C. 323-328) and the regulations in 25 C.F.R. 169 promulgated thereunder, a right-of-way easement as follows:

1. Legal Description: The easement hereby conveyed shall be sixty (60) feet in width, being thirty (30) feet on the North Side and thirty (30) feet on the South Side of the center line described in Exhibit "A" hereto, located in Skagit County, Washington.

2. Term: The term of this easement is forty (40) years from the date hereof.

3. Payment: (a). As partial consideration for this Settlement, BN will deposit with the BIA along with said

application the sum of \$5,000 in the form of a check payable to the BIA. Upon the BIA's delivery to BN of the approved, executed easement, BN shall immediately deliver to Allan Olson, or his successor as named by the Tribe ("Tribal Attorney"), as attorney for the Tribe, a check payable to the Tribe in the sum of \$120,000. The sum of these checks, \$125,000, shall reflect payment in full for all rent, damages and compensation of any sort, due for past occupancy of the right-of-way from date of construction in 1889 until January 1, 1989. The BIA and the Tribal attorney shall hold said \$125,000, which they are to deliver or return as provided in paragraphs 9 and 10 of the Settlement Agreement.

(b). Pay an annual rental ("rental") commencing on the 1st day of January 1989, totaling a minimum of TEN THOUSAND DOLLARS (\$10,000) per year, and a like or adjusted sum on each January 1st thereafter during the term of the Right-of-Way Easement granted under this Agreement.

i. CPI-U Adjustment. On each January 1st after January 1, 1989, the rental shall be increased by a percentage equal to the percentage change in the All Items Consumer Price Index of the United States Department of Labor, Bureau of Labor Statistics for All Urban Consumers in the Seattle-Tacoma, Washington area ("CPI-U") based on the 1982-1984 base = 100 (or, if not available, the most nearly comparable index), from the CPI-U used to calculate the previous year's adjustment to the most recent calculation of the CPI-U. The annual rental

commencing on January 1, 1989 is based on the CPI-U for the first half of 1988 (CPI-U = 111.9).

ii. Appraisal Adjustment. In addition to the annual CPI-U adjustments, described in subparagraph (b)(i) of this paragraph, the rental shall be increased at five (5) year intervals to reflect changes in property values such as, but not limited to, changes in the real estate market, the acquisition of applicable permits for the development of nearby property, proposed or actual marina construction or other land development near said right-of-way. The rental shall be increased to an amount equal to TWELVE PERCENT (12%) of the sum of the "right-of-way value" of the property which is the value of the property subject to the right-of-way, and the "remainder damage" which is the severance damage to Reservation lands north of State Highway 20 as determined by normal real estate appraisal methods considering the highest and best use of such adjacent lands.

Development proposed for the property north and south of the Railroad is anticipated to include several separate and distinct land uses including a marina boat basin (with approximately 800 boat slips) to the north, upland commercial development to the south, and in the event the "South Lagoon" (adjacent to and south of the Railroad) is developed, an additional marina basin providing additional boat slip moorage facilities. The Railroad right-of-way is located between and adjacent to these land areas and uses. Acreage values used to calculate the right-of-way value shall be based on the use and

development of lands either to the north or south of the Railroad, whichever has the higher appraised value.

iii. Proposal. Either the Tribe or BN may initiate an appraisal adjustment by a written proposal forwarded by U.S. Mail prior to the end of the five (5) year increment or any time thereafter until an appraisal adjustment is made and a new 5 year increment is commenced. The Tribe may initiate an appraisal adjustment at any time after receiving all necessary federal permits for the development of all or part of the Reservation lands north of State Highway 20. The Tribe may also initiate an appraisal adjustment under paragraph 7.c. of this Right-of-Way Easement. If a party chooses to initiate an appraisal adjustment before the last six months of any five (5) year period, a new five (5) year increment will begin when the new rental begins.

If the parties are unable to agree upon a rental adjustment, such adjustment shall be determined in accordance with the Commercial Arbitration Rules of the American Arbitration Association and the provisions set forth herein by binding arbitration. Arbitration shall be initiated when one party, or the other, nominates an arbitrator in writing, and requests that the other party nominate an arbitrator. The other party shall nominate an arbitrator within 20 days of receipt of the written notice. Both arbitrators must be residents of the State of Washington and shall not be subject to disqualification. Thereafter, both arbitrators nominated shall meet and select a neutral third arbitrator. If they are unable to agree, a third

arbitrator will be selected under applicable rules of the American Arbitration Association. Arbitration proceedings shall be conducted informally with each party presenting evidence as may be appropriate to its proposed annual rental payment. The arbitration award shall not be subject to judicial review or other appeal unless it be determined that the arbitrators have ignored, or failed to enforce, any of the provisions of this Settlement Agreement.

iv. South Lagoon. In the event that the Tribe determines that it would be profitable to construct additional marina facilities in the area described as the South Lagoon on attached Exhibit A, and in the further event the Tribe secures the necessary Federal permits for such construction, the BN shall either provide a fifty (50) foot wide boat access at a location acceptable to the Tribe to said Lagoon with an appropriate bridge, which will admit at tide levels of mean higher high water boats with masts sixty (60) feet high, or as damage to that portion of remaining lands, compensate the Tribe for net income loss attributable to the inability to construct the South Lagoon portion of the marina. Such loss shall be compensated on the basis of expected rental or other income less costs of planning, development, construction, management, and operation.

4. Holdover: In the event that Burlington Northern fails to surrender and vacate the lands covered by this agreement, pursuant to the provisions herein, after expiration of either the

original term of this right of way or of any extended term, except pursuant to an option to extend, Burlington Northern shall pay to the Tribe a monthly rent in an amount equal to one-twelfth (1/12th) of the yearly rental in effect at the expiration of the preceding term adjusted upward but not downward by the percentage change in the CPI-U, as defined in paragraph 3(b), from the CPI-U in effect at the time of the most recent rental adjustment to the most recent calculation of the CPI-U prior to the date the payment is due. Payments under this paragraph will not be less than \$1000 a month. The payment shall be due monthly on the last day of every month following the expiration of the preceding term.

In any proceeding brought by the Tribe to evict Burlington Northern and/or seek damages for Burlington Northern's failure to surrender, the Tribe shall be entitled to payment for the holdover period in an amount equal to the fair rental value of the right of way so used by Burlington Northern; provided that such fair rental value shall not be less than the monthly payments provided for in the preceding sub-paragraph. Should Burlington Northern refuse or fail to make said monthly payments to the Tribe, the Tribe shall be entitled to apply to any court of competent jurisdiction for injunctive relief to compel such payments and shall be entitled to reasonable attorney fees therefor.

5. Options: In addition to the forty (40) year term, BN shall have an option to extend such term twenty (20) years. Each

option may be exercised by giving written notice to the United States and the Tribe as provided in paragraph 9 below; no later than thirty (30) days prior to the expiration of the prior term.

6. Rights of BN: Under this easement BN, its successors and assigns: (a) shall have the right to maintain, operate, inspect, repair, protect, and remove the existing line of railroad and to replace the existing line with another line for the transportation of general commodities by railroad or other comparable successor methods of transportation; to keep the right-of-way easement clear of underbrush and trees; to have the right of ingress and egress to and from the same for the aforesaid purposes; to construct and reconstruct bridges, culverts and other facilities necessary for the operation of the railroad; said right-of-way easements and privileges herein granted being assignable or transferable; and (b) shall have an exclusive easement across and over said right-of-way easement and no further easements maybe granted on said strip except as provided in paragraph 7 following. Upon discontinuance of the right-of-way granted under this Agreement, BN or its successors, may at its option, leave the railroad or other installations provided for herein on the ground or may pick up and remove said railroad.

7. Rights of the United States and the Tribe:

a. The United States and the Tribe may permit the construction, operation, repair and maintenance of utility lines, streets, or roadways under, across or along said

right-of-way easement. Should the United States or the Tribe wish to place or alter any body of water over the right-of-way easement, it will first present to BN, for review and comment, detailed plans and drawings of any proposal. If any such crossing or changes in any body of water are made in the future, it is agreed that the United States and the Tribe will reimburse, or cause BN to be reimbursed, for all of the reasonable and necessary costs for labor and materials incurred by BN in altering, or protecting, said railroad from said activities. Should the United States or the Tribes cause any damages to the railroad, they shall indemnify and hold BN harmless from any and all actual damages caused to said railroad by the United States or the Tribe. It is agreed that neither the United States nor the Tribe will permit any permanent buildings, or other structures, trees, underbrush, or any other unreasonable obstructions, to be placed upon the right-of-way easement without BN's consent. Should the United States or the Tribe wish to have the railroad relocated within the Reservation, BN will relocate the railroad provided the United States or the Tribe provides or secures for BN an alternate, feasible right-of-way with all necessary permits that gives BN all the rights it enjoys under this right-of-way easement at no additional cost to BN and with no interruption of service and provided further that the United States or the Tribe pays all costs directly, or indirectly, associated with said relocation.

b. Burlington Northern will keep the Tribe informed as to

the nature and identity of all cargo transported by Burlington Northern across the Reservation. Initially, Burlington Northern shall prepare a summary of all such commodities expected to cross the Reservation and the quantities of such commodities.

Thereafter, the disclosure shall be updated periodically as different products, or commodities, are added or deleted. Such updates shall occur at least annually. The disclosure updates shall identify any previously shipped cargo that is different in nature, identity or quantity from the cargo described in previous disclosures. Burlington Northern will comply strictly with all Federal and State Regulations regarding classifying, packaging and handling of rail cars so as to provide the least risk and danger to persons, property and the natural environment of the Reservation.

c. Burlington Northern agrees that, unless otherwise agreed in writing, only one eastern bound train, and one western bound train, (of twenty-five (25) cars or less) shall cross the Reservation each day. The number of trains and cars shall not be increased unless required by shipper needs. The Tribe agrees not to arbitrarily withhold permission to increase the number of trains or cars when necessary to meet shipper needs. It is understood and agreed that if the number of crossings or the number of cars is increased, the annual rental will be subject to adjustment in accordance with paragraph 3(b)iii of this Right-of-Way Easement and paragraph 2(b)iii of the Settlement Agreement. Train speeds over Reservation grade crossings shall not exceed

ten (10) miles per hour.

d. Burlington Northern will cooperate fully with the Tribe in providing appropriate landscaping on either side of Burlington Northern's railroad tracks in order to make Burlington Northern's facilities compatible with the Tribe's development of adjacent lands. It is understood and agreed that Burlington Northern requires an area clear of brush and flammables to a distance of at least 15 feet on either side of the center line of the railroad.

8. Liability of BN: BN will protect, indemnify and hold harmless the United States and the Tribe against any loss, damage or expense that may be incurred, suffered or had by either of them, resulting from the death or injury to any person or persons or any loss, damage or injury to property, from any intentional or negligent acts or omissions of BN its agents, servants or employees.

9. Notices: Any notices provided for in this agreement shall be given as follows:

(a) Swinomish Tribal Community:

Tribal Attorney
Swinomish Indian Tribal Community
P.O. Box 817 - 950 Moorage Way
LaConner, Washington 98257

(b) United States of America:

Department of Interior
Bureau of Indian Affairs
Puget Sound Agency
Federal Building
Everett, Washington 98201

(c) BN:

Burlington Northern Railroad Company
General Manager
2200 First Interstate Center
999 Third Avenue
Seattle, WA 98104

Any party may by written notice to other parties change the address to which subsequent notice shall be sent.

DATED this 19 day of July, 1991.

UNITED STATES OF AMERICA

RECEIVED OR FILED
FOR INDIAN AFFAIRS
PORTLAND AREA OFFICE

122 731

AUG 13 12 53

BRANCH OF REALTY
TITLES & RECORDS
SECTION

William A. Black
for William A. Black, Superintendent
BURLINGTON NORTHERN RAILROAD
COMPANY

By *[Signature]*
Its _____

- 122 731

The SWINOMISH INDIAN TRIBAL
COMMUNITY hereby consents to
the foregoing Right-of-Way
Easement this 24th day, of
September, 1989o.

SWINOMISH INDIAN TRIBAL COMMUNITY

By Robert J. Si.
Its CHAIRMAN

STATE OF WASHINGTON)
COUNTY OF Wash)

ss.

122 731

On this 19 day of July, 1991, before me personally appeared Donna Green, of the UNITED STATES OF AMERICA DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, to me known to be the individual who executed this within instrument and acknowledged that he signed the same as his free and voluntary act and deed for the uses and purposes herein mentioned.

IN WITNESS WHEREOF I have hereunto set my hand and affixed by official seal the day and year first above written.

P. Teresa Nelson
NOTARY PUBLIC in and for the State
of Washington, residing at Snokomish
My commission expires 8-20-91

[SEAL]

STATE OF WASHINGTON)
COUNTY OF SKAGIT)

ss.

On this 24th day of September, 1990, before me personally appeared Robert Joe, Sr., to me known to be the CHAIRMAN of the SWINOMISH TRIBAL COMMUNITY that executed this within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument.

IN WITNESS WHEREOF I have hereunto set my hand and affixed by official seal the day and year first above written.

Alla Olson
NOTARY PUBLIC in and for the State
of Washington, residing at LACONNER WA
My commission expires 4-6-94

[SEAL]

STATE OF WASHINGTON)
)
COUNTY OF KING)

122 731

ss.

On this 20th day of NOVEMBER, 1989, before me personally appeared J.H. ILKKA, of BURLINGTON NORTHERN RAILROAD COMPANY, the corporation that executed this within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument and that seal affixed is the corporate seal of said corporation.

IN WITNESS WHEREOF I have hereunto set my hand and affixed by official seal the day and year first above written.



NOTARY PUBLIC in and for the State of Washington, residing at SEATTLE, WA

My commission expires 1-9-1993



PADILLA BAY

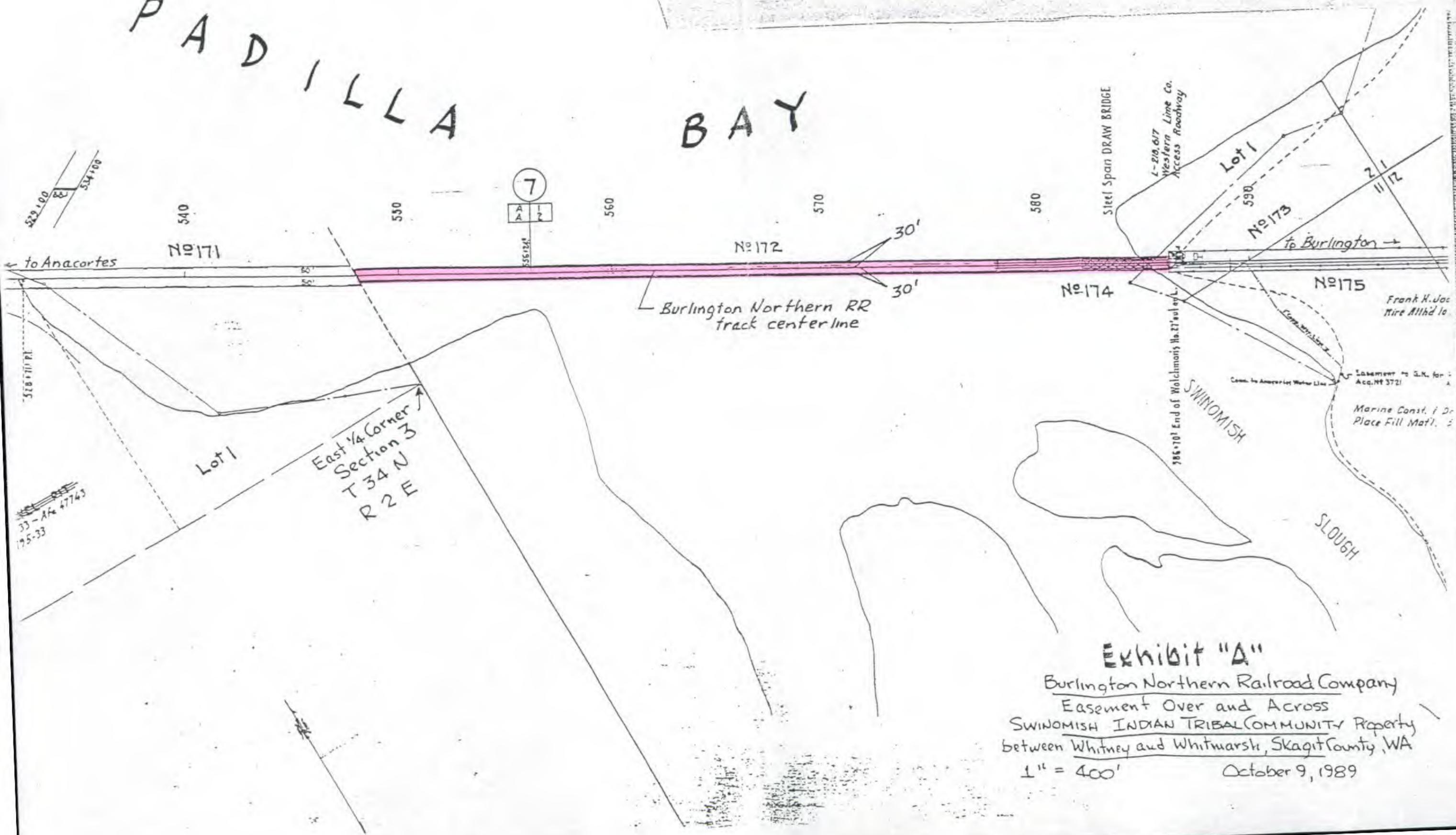


Exhibit "A"
 Burlington Northern Railroad Company
 Easement Over and Across
 SWINOMISH INDIAN TRIBAL COMMUNITY Property
 between Whitney and Whitmarsh, Skagit County, WA
 1" = 400' October 9, 1989

EXHIBIT No. 3

THE HONORABLE ROBERT S. LASNIK

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SWINOMISH INDIAN TRIBAL
COMMUNITY, a federally recognized Indian
tribe,

Plaintiff,

v.

BNSF RAILWAY COMPANY, a Delaware
corporation,

Defendant.

NO. 2:15-cv-00543 - RSL

**OPPOSITION TO DEFENDANT
BNSF RAILWAY COMPANY'S
MOTION TO DISMISS OR STAY**

**NOTE ON MOTION CALENDAR:
Friday, June 5, 2015**

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

1 BNSF Railway Company's ("BNSF") predecessors-in-interest trespassed upon the
2 Swinomish Indian Tribal Community's (the "Tribe") Treaty-reserved trust lands for nearly 100
3 years before the Tribe filed a lawsuit in 1978 to stop that trespass. After over a decade of
4 litigation, the parties settled the trespass dispute by entering into a right-of-way easement
5 agreement (the "Easement Agreement") governed by the Indian Right-Of-Way Act of 1948
6 ("IRWA") and the federal regulations associated therewith. Under the Easement Agreement,
7 the Tribe exercised its right under the IRWA to consent to any easement across Tribal trust
8 lands, and made a contractual exception to its right to exclude non-Indians from its homeland
9 by granting BNSF a temporary right-of-way. In exchange, it placed important limitations on
10 BNSF's use and occupancy of that right-of-way. Without the Easement Agreement, BNSF had
11 no right to enter onto the Tribe's lands. And without the limitations contained in the Easement
12 Agreement, the Tribe would not have granted BNSF its consent to use the right-of-way.
13

14 In or around 2012, BNSF began to ignore the express limitations of the Easement
15 Agreement, by running two times the number of trains and over four times the number of
16 railcars over the right-of-way on a daily basis as are permitted under the Agreement. While the
17 Easement Agreement contemplates that the Tribe may consent to an increase in rail traffic, the
18 Tribe is also allowed to withhold its consent as long as its decision to do so is not "arbitrary."
19 To preserve the sanctity of its economic and environmental resources, the Tribe made the
20 decision not to consent to BNSF's overburdening of the right-of-way. Given the substantial
21 increase as well as the nature of BNSF's cargo, the Tribe's decision was not arbitrary.

22 BNSF does not dispute that the Easement Agreement limits the number of trains and
23 attached railcars that may cross the right-of-way each day, nor does it dispute that it has
24 substantially exceeded those limits. Instead, BNSF seeks to avoid its contractual commitments
25 by arguing that the Tribe's efforts to enforce the terms of the Easement Agreement are
26 preempted by the Interstate Commerce Commission Termination Act ("ICCTA"). BNSF seeks
27 to dismiss this case so that it may be reviewed by the Surface Transportation Board ("STB"),

1 the agency charged with administering the ICCTA, under the doctrine of primary jurisdiction.
 2 But the STB has already ruled many times that contractual disputes are not preempted by the
 3 ICCTA and that such disputes are the province of the courts. Moreover, the STB is certainly
 4 not competent to adjudicate the respective rights of the parties under the IRWA, a federal
 5 statute enacted to protect tribal treaty and trust land rights. But the Court is competent to do so.
 6 Thus, referral to the STB would be an exercise in futility, a waste of the parties' resources, and
 7 only serves to prolong BNSF's overburdening of the right-of-way easement.

8 BNSF also asks the court to stay the litigation so that it may be submitted to arbitration.
 9 But the Easement Agreement expressly preserves the Tribe's right to seek relief in court for a
 10 breach of the Agreement. The remedy of arbitration is limited to valuation disputes. The Tribe
 11 therefore respectfully requests that the Court deny BNSF's motion to dismiss or stay.

12 II. FACTS

13 A. The Tribe

14 The Tribe is a federally recognized Indian tribe organized pursuant to the Indian
 15 Reorganization Act of 1934, 25 U.S.C. § 476. *See* Complaint at ¶ 1.1. The Tribe is a present
 16 day successor to signatories of the Treaty of Point Elliott of 1855, 12 Stat. 927 (1855), which
 17 established the Swinomish Reservation (the "Reservation"), located on the Southeastern end of
 18 Fidalgo Island in Skagit County, Washington. *Id.* at ¶¶ 3.1, 3.6. Certain Treaty-reserved lands
 19 on the Reservation, including those lands that are the subject of this lawsuit, are held in trust
 20 for the Tribe by the United States. *Id.* at ¶ 3.1. Article II of the Treaty set aside the Reservation
 21 for the Tribe's "exclusive use."

22 B. The Trespass Litigation

23 Beginning in or around 1890, BNSF's predecessor-in-interest began running trains
 24 across the Reservation without permission by the Tribe or the United States. *Id.* at ¶ 3.8. This
 25 unauthorized use continued for nearly 100 years until, in 1978, the Tribe commenced a
 26 trespass lawsuit in this Court to cease the invasion of the Tribe's Treaty-reserved land and
 27

1 rights.¹ *Id.* After over a decade of litigation, the parties settled the case in 1990. The
 2 resolution was memorialized by a settlement agreement executed on September 24, 1990, and
 3 later, the Easement Agreement, executed on July 19, 1991. *Id.* The Easement Agreement
 4 granted BNSF the right to run a limited number of trains and attached railcars over a right-of-
 5 way (the “Right-of-Way”) located at the northern end of the Reservation. *Id.* at ¶¶ 3.3–3.4.

6 Contrary to BNSF’s statement in its motion to dismiss, the Easement Agreement did
 7 not constitute “recognition of BNSF’s right to use the Right-of-Way.” *See* BNSF Railway
 8 Company’s Motion To Dismiss or Stay (“BNSF’s Motion”), at pg. 8. In the absence of the
 9 Agreement, BNSF *never* had *any* legal right to run trains across the Reservation. *See*
 10 Complaint at ¶ 3.9. Even though BNSF’s predecessors-in-interest had constructed and been
 11 using a railroad line on Tribal trust lands for many decades without the Tribe’s or the United
 12 States’ permission, the land’s status as property held in trust by the United States for the Tribe
 13 ensured that BNSF and its predecessors-in-interest could not have obtained the right to cross
 14 the Reservation without the consent of the United States and the Tribe, via adverse possession
 15 or otherwise. *Id.* The Easement Agreement, by contract, provided that right for a limited period
 16 of time and under carefully defined conditions. Thus, far from a “recognition of BNSF’s
 17 rights,” the Easement Agreement was a compromise that arose from a long- and hard-fought
 18 dispute between the parties. And like any compromise, it contained concessions on both sides.

19 **C. The Easement Agreement’s Terms and Conditions**

20 Under the terms of the Easement Agreement, BNSF is entitled to use the Right-of-Way
 21 for an initial 40-year term, along with two 20-year option periods. *Id.* at ¶ 3.10. Because the
 22 parties executed the Easement Agreement in 1991, it will terminate in accordance with its own
 23 terms no later than 2071. *Id.*

24 The Easement Agreement places limitations on the number of trains — and the number
 25 of cars attached to those trains — that may cross the Right-of-Way each day. It provides:

26 _____
 27 ¹ Sadly, neither the decades of unauthorized rail use of Native lands nor the resulting trespass litigation is unique to the Swinomish or BNSF. *United States v. S. Pacific Transp. Co.*, 543 F.2d 676, 699 (9th Cir.1976).

1 Burlington Northern agrees that, unless otherwise agreed in writing, only one eastern
 2 bound train, and one western bound train, (of twenty-five (25) cars or less) shall cross
 3 the Reservation each day. The number of trains and cars shall not be increased unless
 4 required by shipper needs. The Tribe agrees not to arbitrarily withhold permission to
 5 increase the number of trains or cars when necessary to meet shipper needs.

6 Easement Agreement, at ¶ 7(c) (emphasis added).² This provision — and BNSF’s violation
 7 thereof — forms the basis of the Tribe’s current lawsuit.

8 The Easement Agreement also requires BNSF to report at least once annually to the
 9 Tribe as to the nature and identity of all cargo transported over the Right-of-Way:

10 Burlington Northern will keep the Tribe informed as to the nature and identity of all
 11 cargo transported by Burlington Northern across the Reservation. Initially, Burlington
 12 Northern shall prepare a summary of all such commodities expected to cross the
 13 Reservation and the quantities of such commodities. Thereafter, the disclosure shall be
 14 updated periodically as different products, or commodities, are added or deleted. Such
 15 updates shall occur at least annually. The disclosure updates shall identify any
 16 previously shipped cargo that is different in nature, identity or quantity from the cargo
 17 described in previous disclosures.

18 Easement Agreement, at ¶ 7(b).

19 BNSF pays annual rent for its use of the Right-of-Way, which is subject to periodic
 20 adjustments based on the value of the property burdened by the Right-of-Way and severance
 21 damage to adjacent Tribal lands. *See* Complaint at ¶ 3.10. The Easement Agreement provides
 22 that the rent payable to the Tribe under the Agreement is to be increased every five years to
 23 reflect changes in property values, and may also be increased if the Tribe agrees to increase the
 24 limitations on train traffic described above. *See* Easement Agreement at ¶¶ 3(b)(ii), 7(c). The
 25 Agreement contemplates that the parties will attempt to negotiate and agree on rental increases
 26 but that, if they cannot do so, the matter will be submitted to binding arbitration. *Id.* at
 27 ¶ 3(b)(iii). This is the only circumstance under which arbitration is required under the
 Agreement. Otherwise, the Agreement allows the Tribe to seek redress in court. For example,
 it makes clear that the Tribe may institute a “proceeding . . . to evict [BNSF] or seek damages
 for [BNSF’s] failure to surrender” the Right-of-Way at the end of the term of the Easement
 Agreement. *Id.* at ¶ 4. Likewise, it provides that if BNSF breaches the Agreement by failing to

² The Easement Agreement is attached as Exhibit B to the Declaration of James Obermiller, submitted by BNSF.

1 make rental payments, “the Tribe shall be entitled to apply to any court of competent
2 jurisdiction for injunctive relief to compel such payments.” *Id.*

3 **D. The Parties’ Rights under the Easement Agreement Are Governed by the Indian**
4 **Right-of-Way Act**

5 The Right-of-Way granted by the Easement Agreement is governed by the IRWA (25
6 U.S.C. §§ 323–28) and its implementing regulations (25 C.F.R. Part 169). *See* Complaint at
7 ¶ 3.11. As such, interpretation of these provisions of federal law is central to the resolution of
8 this dispute. Under 25 U.S.C. § 324, 25 C.F.R. § 169.3, and the parties’ settlement agreement,
9 the Tribe’s consent was required before the Right-of-Way could be granted to BNSF. As part
10 of the settlement agreement, in exchange for the limitations contained in the Easement
11 Agreement, the Tribe agreed to grant consent. Again, without that consent, BNSF had no right
12 whatsoever to use and occupy the Right-of-Way. Additionally, BNSF was required by the
13 parties’ settlement agreement and by 25 C.F.R. § 169.5 to apply to the Bureau of Indian
14 Affairs of the Department of the Interior for formal approval of the Right-of-Way.³ (In
15 contrast, nothing in the settlement agreement or Easement Agreement required approval by
16 STB’s predecessor, the Interstate Commerce Commission). 25 C.F.R. § 169.5 also gives
17 BNSF a number of obligations with respect to maintaining the Right-of-Way. And, under 25
18 U.S.C. § 325, it was necessary for the Secretary of the Interior to approve of the compensation
19 to be paid to the Tribe for the Right-of-Way. The level of compensation to be afforded to the
20 Tribe for the Right-of-Way is set forth in 25 C.F.R. § 169.12. Most importantly for purposes of
21 BNSF’s Motion, under 25 C.F.R. § 169.20(a), the Right-of-Way grant is terminable by the
22 Secretary of the Interior for any “[f]ailure to comply with any term or condition of the grant or
23 the applicable regulations.”

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27 ³ Similarly, the Secretary has properly interpreted 25 U.S.C. § 312 to require a tribe’s consent before a railroad
easement may be granted. *See Pacific Transp. Co. v. Watt*, 700 F.2d 550, 553 (9th Cir. 1983), *cert. den.*, 464 U.S.
960 (1983).

1 **E. BNSF Disregards the Terms and Conditions of the Easement Agreement**

2 The Tribe learned in 2012 from a media report that the Tesoro refinery at March Point,
3 near Anacortes, Washington — which is served by the BNSF line over the Right-of-Way —
4 had begun to receive “unit trains” of 100 cars or more, each of which had to cross over the
5 Right-of-Way to reach the refinery. *Id.* at ¶ 3.14. BNSF did not notify the Tribe or seek its
6 agreement to exceed the limitations of the Easement Agreement before it began to do so. *Id.*
7 Although the Tribe promptly informed BNSF of the continuing requirements of the Easement
8 Agreement, and has repeatedly demanded that BNSF immediately cease the unauthorized use,
9 BNSF has ignored the Tribe’s requests. *Id.* The Tribe has never granted BNSF permission to
10 exceed the limitations contained in the Easement Agreement. *Id.* While BNSF has
11 acknowledged the requirements of the Easement Agreement and the Tribe’s demands, it has
12 informed the Tribe in writing, including as recently as March 13, 2015, that it will continue
13 running trains over the Right-of-Way at current levels regardless of the acknowledged
14 limitations in the Easement Agreement. *Id.* at ¶ 3.15.

15 Currently, in addition to the trains already crossing the Reservation pursuant to the
16 Easement Agreement, BNSF is running an additional six 100-car unit trains per week over the
17 Right-of-Way in each direction. *Id.* at ¶ 3.16. This is twice as many train trips and more than
18 four times as many railcars per day as are permitted under the explicit terms of the Easement
19 Agreement. *Id.* To make matters worse, BNSF has indicated that the number of tank cars
20 crossing the Reservation will be increased to ten to twelve 100-car unit trains per week in each
21 direction upon completion of a proposed new crude oil off-loading facility at the Shell Oil
22 Products US Puget Sound Refinery located at March Point. *Id.* at ¶ 3.17.

23 BNSF has also not complied with its reporting requirements under the Easement
24 Agreement. *Id.* at ¶ 3.29. Since at least 1999, the Tribe regularly requested that BNSF provide
25 an annual summary of all materials transported by BNSF across the Reservation, as required
26 by Paragraph 7(b) of the Easement Agreement, quoted above. *Id.* Despite these regular
27 requests, BNSF provided the Tribe with just four of the required annual update reports. *Id.*

1 In short, since at least 2012, BNSF has simply ignored the express terms and
2 conditions of the Easement Agreement. Now, BNSF seeks to hide behind the ICCTA to get
3 out of its straightforward, voluntary contractual obligations.

4 The substantial increase in train traffic across the Right-of-Way is the result of BNSF's
5 decision to transport large quantities of crude oil to the Tesoro refinery at March Point (and, in
6 the future, to the Shell refinery described above). *Id.* at ¶ 3.18. The 100-car unit trains
7 referenced above are dedicated entirely to the shipping of crude oil, and each unit train carries
8 approximately 2,898,000 to 3,402,000 gallons of crude oil. *Id.* The particular type of crude oil
9 BNSF is shipping across the Right-of-Way is known as "Bakken" crude, so named for having
10 originated in the Bakken Shale Formation located in parts of Montana, North Dakota, and
11 southern Canada. *Id.* at ¶ 3.19. As the Tribe's complaint sets forth in great detail, the shipment
12 of Bakken crude by rail is notoriously dangerous, and has resulted in numerous fiery and
13 explosive derailments, always resulting in extensive environmental damage, and sometimes in
14 loss of life. *Id.* at ¶¶ 3.20–3.27.

15 The Right-of-Way crosses a part of the Reservation uplands that constitutes the heart of
16 the Tribe's economic development enterprises. *Id.* at ¶ 3.4. It is in close proximity to multiple
17 elements of the Tribe's economic infrastructure, including the Swinomish Casino and Lodge, a
18 Chevron station and convenience store, and an RV Park, as well as a Tribal waste treatment
19 plant serving all of these facilities and a Tribal air quality monitoring facility. *Id.* Hundreds of
20 guests and employees are present at these facilities at all times, 24 hours a day, 7 days a week.
21 *Id.* This infrastructure serves as the primary source of funding for the Tribe's essential
22 governmental functions and programs. *Id.* At the time the parties' settlement was reached in
23 1990, this area of future development was known and acknowledged and constituted part of
24 the reason for the Easement Agreement's limitations on train traffic. *See* Settlement
25 Agreement, at pg. 3.⁴

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⁴ The Settlement Agreement is attached as Exhibit B to the Declaration of James Obermiller.

1 The Right-of-Way also crosses a swing bridge over the Swinomish Channel and a
2 trestle across Padilla Bay, both of which are within the Reservation, and both of which are
3 many decades old. *See* Complaint, at ¶ 3.7. These water bodies connect with other marine
4 waters of Puget Sound in which the Tribe has usual and accustomed fishing grounds and
5 stations, as recognized by this Court in *United States v. Washington*, 459 F.Supp. 1020, 1049
6 (W.D. Wash. 1978). *Id.* Since time immemorial, the Tribe and its predecessors have occupied
7 and used these bodies of water to support its fishing lifestyle, among other purposes, and
8 Pacific salmon and other marine resources have played central and enduring roles in the
9 Tribe’s subsistence, culture, identity, and economy. *Id.* at ¶ 3.5.

10 Based on the demonstrated hazards of shipping Bakken crude by rail, paired with the
11 proximity of the Right-of-Way to the Tribe’s critical economic and environmental resources
12 and facilities — and the substantial numbers of people who use those resources and facilities
13 on a daily basis — the Tribe made the determination that it would not consent to BNSF’s
14 overburdening of the Easement by running more than six 100-car unit trains loaded with
15 Bakken crude over the Easement each week. Given the Tribe’s very legitimate and well-
16 founded concerns, its decision not to consent was far from “arbitrary.”

17 **F. The Tribe Commenced This Lawsuit To Compel BNSF To Comply With Its**
18 **Voluntary Contractual Obligations**

19 Even though the Tribe repeatedly stated that it was not consenting to BNSF’s
20 overburdening of the Easement, BNSF simply disregarded the Tribe’s demands that BNSF
21 cease its unauthorized use. Consequently, the Tribe had no choice but to bring this lawsuit, to
22 seek the Court’s assistance in enjoining BNSF’s new trespass.

23 BNSF characterizes the Tribe’s complaint as an effort “to regulate BNSF’s
24 transportation of crude oil.” BNSF’s Motion at pg. 10. That is not so. This case has nothing to
25 do with regulation; it is a straightforward contract dispute. The parties entered into an
26 agreement to resolve a decade-old lawsuit. The Tribe agreed to allow BNSF to use and occupy
27 a right-of-way across its Treaty-reserved trust lands, but as a pre-condition required that BNSF

1 agree to limitations on BNSF's rights relating thereto. BNSF voluntarily agreed to limit the
 2 number of trains crossing the Right-of-Way, and agreed to allow the Tribe to withhold its
 3 agreement to an increase of those limitations, so long as it was not acting arbitrarily.

4 Now, BNSF has breached the Easement Agreement by simply ignoring its express
 5 limitations, and has notified the Tribe that it intends to keep doing so. The Tribe therefore filed
 6 this lawsuit to protect its rights under the parties' contract. Thus, far from being an effort to
 7 "regulate" BNSF, the Tribe's lawsuit is an effort to compel BNSF to comply with its
 8 voluntarily undertaken contractual obligations. BNSF should not be permitted to hide behind
 9 the preemption provisions of the ICCTA to get out of its voluntary contractual undertakings.

10 III. ARGUMENT

11 A. Standard for Granting Motion To Dismiss

12 In ruling on a motion to dismiss under Rule 12(b)(6), the court must construe the
 13 complaint in the light most favorable to the plaintiff. *Western Min. Council v. Watt*, 643 F.2d
 14 618, 624 (9th Cir. 1981). A claim may be dismissed only if "it appears beyond doubt that the
 15 plaintiff can prove no set of facts in support of his claim which would entitle him to relief."
 16 *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). "In deciding such a motion, all material
 17 allegations of the complaint are accepted as true, as well as all reasonable inferences to be
 18 drawn from them." *Id.* "Dismissal is proper only where there is no cognizable legal theory or
 19 an absence of sufficient facts alleged to support a cognizable legal theory." *Id.*

20 BNSF argues that the Tribe's lawsuit is an effort to "regulate" BNSF's transportation
 21 of crude oil and interfere with its common carrier obligations, and that any such regulation is
 22 preempted by the ICCTA. Therefore, BNSF contends the Court should dismiss this case under
 23 Rule 12(b)(6) so that the STB can review the matter under the doctrine of primary jurisdiction.
 24 BNSF's contention is meritless. It is well settled that contract claims are not preempted by the
 25 ICCTA, because a railroad's voluntary contractual commitments are an admission that their
 26 enforcement will not unreasonably interfere with the railroad's operations. Moreover, because
 27 the Tribe's rights are governed by the IRWA, interpretation of that statute will be central to

1 this dispute. The STB has no jurisdiction over tribal rights under the IRWA. Consequently, the
2 STB has no jurisdiction at all over this dispute, much less primary jurisdiction.

3 **B. ICCTA Preemption Applies to Efforts To Regulate Railroads**

4 The Tribe does not dispute that the ICCTA vests the STB with general jurisdiction over
5 *regulation* of railroads. *See, e.g., City of Auburn v. U. S. Government*, 154 F.3d 1025, 1030
6 (9th Cir. 1998) (“It is difficult to imagine a broader statement of Congress’s intent to preempt
7 state regulatory authority over railroad operations.”) (quoting *CSX Transp., Inc. v. Georgia*
8 *Public Service Comm’n*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996)). The *City of Auburn* case
9 dealt with governmental authority to impose environmental permitting regulations on
10 railroads. The court stated: “We believe the congressional intent to preempt this kind of state
11 and local regulation of rail lines is explicit in the plain language of the ICCTA and the
12 statutory framework surrounding it.” *Id.* at 1031 (emphasis added). State and local actions may
13 also be preempted “as applied” “if they have the effect of unreasonably burdening or
14 interfering with rail transportation.” *Franks Inv. Co. v. Union Pacific R.R. Co.*, 593 F.3d 404,
15 414 (5th Cir. 2010).

16 But ICCTA preemption applies only to actions that have the effect of regulating
17 railroads or unreasonably interfering with their operations. As one court has put it, “Congress
18 narrowly tailored the ICCTA preemption provision to displace only ‘regulation,’ i.e., those
19 state laws that may reasonably be said to have the effect of ‘managing’ or ‘governing’ rail
20 transportation, while permitting the continued application of laws having a more remote or
21 incidental effect on rail transportation.” *PCS Phosphate Co. v. Norfolk Southern Corp.*, 559
22 F.3d 212, 218 (4th Cir. 2009) (quoting *Florida East Coast Ry. Co. v. City of West Palm Beach*,
23 266 F.3d 1324, 1331 (11th Cir. 2001)).

24 **C. ICCTA Preemption Does Not Apply to Contract Disputes**

25 On the other hand, the courts and the STB have uniformly held that state law claims to
26 enforce a railroad’s voluntary contractual undertakings are not preempted by the ICCTA,
27

1 because such voluntary commitments are themselves an admission by the railroad that their
2 enforcement would not unreasonably interfere with railroad operations.

3 In the case of *Township of Woodbridge v. Consolidated Rail Corp.*, 2000 WL 1771044
4 (S.T.B. December 1, 2000), a municipality sought to enforce certain agreements with a
5 railway company regarding noise abatement. (Notably, just as in this case, the agreements
6 were entered into as part of the resolution of litigation.) The railway company contended that
7 the municipality's claims were preempted by ICCTA. The STB disagreed, concluding that a
8 rail carrier that voluntarily enters into an otherwise valid and enforceable agreement cannot
9 use the preemptive effect of section 10501(b) to shield it from its own commitments:

10 Here, Conrail voluntarily entered into an agreement to resolve a dispute. It then
11 submitted the agreement to the court and had it memorialized in the form of the
12 Stipulation and Order of Settlement and a later Consent Order. Significantly, the
13 railroad then expressly reaffirmed and renewed the original agreement after [an
14 acquisition by Conrail of two other railroads]. These voluntary agreements must be
seen as reflecting the carrier's own determination and admission that the agreements
would not unreasonably interfere with interstate commerce.

15 *Woodbridge*, 2000 WL 1771044, at *3 (emphasis added). Accordingly, the STB stated: "We
16 conclude that Conrail's own commitments (as reflected in the contracts that it entered into
17 voluntarily) are not preempted." *Id.* Instead, the Board reasoned, disputes relating to such
18 voluntary commitments are the province of the courts: "It would be inappropriate for us to
19 rule on the merits of the contract disputes in this case. Such matters are best addressed by the
20 courts. The courts can fashion appropriate remedies, such as damage awards, when required."

21 *Id.* (emphasis added). While the STB later clarified its order to point out that the railway
22 company was not precluded from arguing in the future that enforcement of the contract may
23 interfere with interstate commerce, it also made it clear that any such argument would be made
24 in court, and not before the STB:

25 [N]othing in the December 2000 decision was intended to bar Conrail, in a future court
26 proceeding, from raising the argument, as a matter of contract interpretation that: (1)
27 unreasonable interference with interstate commerce would result of these voluntary
agreements are interpreted [in the manner sought by the plaintiff], and (2) in

1 considering enforcement, the court should give due regard to the impact on interstate
2 commerce.

3 *Township of Woodbridge v. Consolidated Rail Corp.*, 2001 WL 283507 (S.T.B. March 23,
4 2001), at *2 (emphasis added).

5 Federal courts have likewise held that actions to enforce railroads' contractual
6 undertakings are not preempted by the ICCTA. For example, in *PCS Phosphate Co. v. Norfolk*
7 *Southern Corp.*, *supra*, the plaintiff alleged that an easement agreement between it and the
8 defendant railroad required the railroad to relocate the rail line. The court held that the claim
9 was not preempted by the ICCTA. Starting from the proposition that the purpose of the
10 preemption provision is primarily meant to deal with regulation, the court reasoned:

11 Voluntary agreements between private parties, however, are not presumptively
12 regulatory acts, and we are doubtful that most private contracts constitute the sort of
13 'regulation' expressly preempted by the statute. If contracts were by definition
14 'regulation,' then enforcement of every contract with 'rail transportation' as its subject
15 would be preempted as a state law remedy 'with respect to regulation of rail
16 transportation.' . . . If enforcement of these agreements were preempted, the contracting
17 parties' only recourse would be the 'exclusive' ICCTA remedies. But the ICCTA does
18 not include a general contract remedy. Such a broad reading of the preemption clause
19 would make it virtually impossible to conduct business, and Congress surely would
20 have spoken more clearly, and not used the word 'regulation,' if it intended that result.

21 *PCS Phosphate*, 559 F.3d at 218–19. As the court pointed out, “[t]he STB itself has
22 emphasized the courts, not the STB, are the proper forum for contract disputes, even when
23 those contracts cover subjects that seem to fit within the definition of ‘rail transportation.’” *Id.*
24 at 220 (citing *The N. Y., Susquehanna & W. Ry. Corp. – Discontinuance of Service Exemption*,
25 2008 WL 4415853 (S.T.B. September 30, 2008); *Saginaw Bay S. Ry. Co. – Acquisition and*
26 *Operation Exemption*, 2006 WL 1201791, at *2 (ST.B. May 5, 2006); *Morristown & Erie Ry.,*
27 *Inc. – Modified Rail Certificate*, 2004 WL 1387314, at *3 (S.T.B. June 22, 2004)).

The court emphasized that the railroad had essentially admitted that enforcement of the
agreement would not interfere with interstate commerce, simply by virtue of having entered
into the agreement to begin with:

In this case, the factual assessment is simple because the remedy sought is enforcement
of a voluntary agreement. The relocation agreements were freely negotiated between

1 sophisticated business parties. The agreements envision this exact circumstance — that
 2 many years after the agreements were made, the railroad would have to pay to relocate
 3 this portion of the line. We can assume, therefore, that the agreements reflect the
 4 market calculation that the benefits of operating the rail line for many years would be
 5 worth the cost of paying to relocate the line in the future.

6 *Id.* at 221.

7 Similarly, in *Pejepscot Industrial Park, Inc. v. Maine Cent. R. Co.*, 297 F.Supp.2d 326
 8 (D. Me. 2003), the plaintiff, among other claims, asserted that the defendant railroad breached
 9 a contract to provide shipping services. The railroad argued that the claim was preempted by
 10 the ICCTA. The court disagreed:

11 In Count V, [Plaintiff] alleges that Defendants have breached the contract into which
 12 they have voluntarily entered with respect to the rail transportation of materials from
 13 the Pejepscot Industrial Park, and [Plaintiff] should have the opportunity to establish
 14 that such a contract was formed and that Defendants have breached it. To the extent
 15 that Defendants have in fact entered into such a contract, they cannot hide behind the
 16 shield of section 10501(b) to avoid the commitments, and the Court will therefore deny
 17 [Defendants'] motion to dismiss with respect to Count V.

18 *Pejepscot*, 297 F.Supp.2d at 333. *See also Cedarapids, Inc. v. Chicago, Central & Pacific R.R.*
 19 *Co.*, 265 F.Supp.2d 1005, 1014–15 (N.D. Iowa 2003) (concluding plaintiff's state law lease
 20 claims preempted to the extent they sought to bar defendant railroad from using railroad
 21 tracks, but not preempted to the extent plaintiff sought determination of its rights under lease).

22 Thus, it is well settled that contract enforcement actions are not preempted by the
 23 ICCTA, and that the STB considers such actions to be outside their jurisdictional ambit.⁵
 24 Having entered into this voluntary agreement to resolve the parties' previous dispute, BNSF
 25 cannot now hide behind the preemptive shield of the ICCTA to avoid having to live up to its
 26 own voluntary undertakings. The Easement Agreement was negotiated by sophisticated
 27 business parties, in order to resolve hard-fought litigation. Plainly, the parties envisioned a
 28 scenario wherein the Tribe may not consent to an attempt by BNSF to increase traffic on the

⁵ The Ninth Circuit Court of Appeals has not specifically addressed whether and to what extent contract claims are preempted by the ICCTA. However, the Ninth Circuit would likely defer to the STB and other federal circuit courts of appeals. "We find further guidance on the scope of ICCTA preemption from the decisions of the Surface Transportation Board ('STB'), to which we owe *Chevron* deference, . . . and from decisions of our sister circuits." *Ass'n of Am. Railroads v. South Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010).

1 Right-of-Way. By expressly limiting the number of trains permitted to cross the Easement to
2 no more than two trains of twenty-five rail cars per day, BNSF acknowledged that this
3 limitation would not be an unreasonable interference with its operations.

4 Not surprisingly, in order to attempt to justify invoking the jurisdiction of the STB,
5 BNSF frames the Tribe's complaint as an effort to "regulate" rail transportation. For example,
6 BNSF contends that the Tribe's lawsuit is simply an effort to place limitations on the
7 transportation of crude oil across the Reservation. BNSF's Motion, at pg. 12. Also not
8 surprisingly, nearly all of the cases cited by BNSF relate to governmental attempts to regulate
9 railroads. For example, BNSF cites *Union Pac. R.R. Co. – Petition for Declaratory Order*, FD
10 35219, 2009 STB LEXIS 242 (June 11, 2009), and *CSX Transp., Inc. – Petition for*
11 *Declaratory Order*, FD 34662, 2005 STB LEXIS 675 (May 3, 2005), for the proposition that
12 the ICCTA preempts efforts to dictate what a railroad carrier can and cannot transport. But the
13 Tribe's lawsuit is not an effort to regulate BNSF's operations. It is a lawsuit to compel BNSF's
14 compliance with its contractual obligations.

15 In fact, BNSF concedes that the STB does not assert jurisdiction over contract claims,
16 *see* BNSF Motion, at pg. 19, but nevertheless contends that ICCTA preemption extends to
17 contract claims if the contract at issue unreasonably interferes with interstate commerce. *Id.* at
18 pg. 8 (citing *In re California High-Speed Rail Auth.*, FD 35861, 2014 STB LEXIS 311, at *28
19 (December 12, 2014)). To begin with, as discussed above, the substantial weight of authority
20 is to the contrary. Moreover, the *California High-Speed Rail* case is distinguishable. Like most
21 of the other cases cited by BNSF, that case dealt with governmental efforts to regulate a rail
22 authority, by causing it to comply with the California Environmental Quality Act ("CEQA") in
23 connection with constructing a rail line. Responding to an argument that the rail authority's
24 prior compliance with CEQA created an implied agreement to do so in the future, the STB had
25 no problem finding any such implied agreement preempted by ICCTA, as the authority
26 consistently reserved its right to assert federal preemption in the face of the regulation. Again,
27

1 the present case does not involve regulation, nor does it involve an “implied” agreement. It
2 involves BNSF’s express contractual commitments, which it is now seeking to avoid.

3 BNSF also argues that a railroad company “cannot relinquish its common-carrier
4 obligations through contract.” The cases cited by BNSF in support of this argument are not on
5 point. In *Allied Erecting and Dismantling, Inc. and Allied Indus. Dev. Corp. Petition for*
6 *Declaratory Order Rail Easements in Mahong County, Ohio*, FD 35316, 2013 LEXIS 407
7 (Dec. 20, 2013), the STB stated in dicta that a common carrier cannot contract away the state
8 law property rights that it possesses that are necessary to fulfill its common carrier obligations.
9 *Allied Erecting*, at *39. But here, BNSF did not contract away any property rights. On the
10 contrary, it had *no* legitimate right at all to use the Right-of-Way until the parties executed the
11 Easement Agreement. BNSF’s property rights were created by, and limited to, the Easement
12 Agreement. *Thompson v. Tex Mexican Ry.*, 328 U.S. 134 (1946), is likewise distinguishable. In
13 that case — a review of a bankruptcy proceeding — the owner of railroad tracks granted a
14 railway company trackage rights to use the tracks. When the railroad company filed for
15 bankruptcy but continued to use the tracks without paying compensation, the owner sued and
16 obtained a judgment concluding that the trackage agreement had been terminated and the
17 owner was entitled to damages. *Thompson*, 328 U.S. at 137. The Supreme Court reversed,
18 finding that termination of the agreement was not effective without the authorization of the
19 Interstate Commerce Commission, whose authority was required before the “abandonment” of
20 railway operations. *Id.* at 145. The case had nothing to do with whether the ICCTA’s
21 predecessor statute preempted the track owner’s claims.

22 The Tribe entered into the Easement Agreement relying on BNSF to live up to its end
23 of the bargain. The Tribe gave up valuable property rights in exchange for the important
24 limitations the parties incorporated into the Agreement. Now it appears that BNSF may have
25 never intended to abide by those limitations, and believed it could always get out of its
26 obligations by claiming that their enforcement would interfere with BNSF’s common carrier
27 obligations. Based on BNSF’s reasoning, even though the Easement Agreement will terminate

1 in accordance with its own terms no later than 2071, any such termination would likewise be
2 an impermissible interference with BNSF's common carrier obligations. In effect, BNSF's
3 position is that it falsely induced the Tribe into entering into an illusory agreement. If BNSF's
4 position is correct, the Easement Agreement was a nullity at its inception, and BNSF has
5 continued to trespass on the Reservation.

6 **D. The STB Is Not Competent To Adjudicate Tribal Rights under IRWA**

7 Moreover, the STB plainly has no authority over, experience in, or expertise with the
8 rights and responsibilities of parties under the IRWA — the interpretation of which is vital to
9 the resolution of this dispute — or with agreements entered into pursuant to the IRWA. BNSF
10 cannot and does not claim that it does. This Court, of course, is fully competent to adjudicate
11 these matters.

12 BNSF disregards the critical fact that the Easement Agreement concerns a Right-of-
13 Way across Tribal trust lands. The Secretary of the Interior — and not the STB — has
14 expansive authority in approving and administering such easements. The Supreme Court has
15 described this authority as comparable in scope to the Secretary's management of Indian
16 timber, which involves "comprehensive" responsibilities and "literally daily supervision"
17 where "virtually every stage of the process is under federal control." *U.S. v. Mitchell*, 463
18 U.S. 206, 222–23 (1983). The regulations for easements "have a long history" and "detail the
19 scope of federal supervision." *Id.* at 223, 223 n. 27. The scope and detail of the IRWA and
20 implementing regulations are so great that, like the Indian timber management laws, these
21 provisions create a fiduciary obligation on the part of the United States that defines the
22 contours of its responsibility to manage trust land for the benefit of the Tribe. *Id.* at 224.

23 BNSF has identified no basis to conclude that the STB is authorized or competent to
24 determine the Tribe's rights under the Easement Agreement and the IRWA and implementing
25 regulations.⁶ Instead, BNSF simply closes its eyes to the fact that the Easement Agreement
26

27 ⁶ Under those regulations, it is not the STB but the Secretary of the Interior who is authorized to terminate the Easement Agreement for non-compliance with its terms. 25 C.F.R. § 169.20.

1 was established, approved and is governed by the IRWA and associated regulations — despite
2 the fact that BNSF itself explicitly sought and received this Right-of-Way pursuant to these
3 Federal laws. *See* Obermiller Decl. Exh. B at 2. In this, it is apparent that BNSF’s disregard for
4 the rights of the Tribe in its trust lands continues today as it began in the 1890s, when BNSF’s
5 predecessors began operating trains on the Reservation without the consent or approval of
6 either the Tribe or the United States.

7 It would be absurd to defer to the STB to determine the parties’ rights under the IRWA.
8 The issue has obviously not been “placed by Congress within the jurisdiction of” the STB, nor
9 does the STB have any “expertise” under that statute. *See* BNSF Motion at pg. 11–12. It is not
10 the STB but the Secretary of the Interior whose regulation of easements on trust land is so
11 comprehensive and detailed that it establishes a fiduciary duty on the part of the United States.
12 *Mitchell*, 463 U.S. at 223–24. And none of the cases cited by BNSF purportedly involving
13 tribal interests are on point. Each of those cases involved a situation in which a railroad was
14 required to consult with an Indian tribe to ensure that its interests were represented in the
15 construction of a railroad line. None involved tribal rights under the IRWA, much less tribal
16 rights under a voluntarily negotiated right-of-way agreement governed by the IRWA.

17 Therefore, despite its broad preemption provision, the ICCTA does not preempt the
18 rights of the Tribe relating to an easement over lands held in trust by the U.S. for the Tribe, or
19 its rights and remedies under the IRWA, which was enacted to preserve and protect Indian
20 interests in tribal lands.⁷ *See Pacific Transp. Co. v. Watt*, 700 F.2d 550, 554 (9th Cir. 1983),
21 *cert. den.* 464 U.S. 960 (1983). The Tribe was willing to create a contractual exception to its
22 Federal right to withhold consent to an easement, and its Treaty right to exclusive use of the
23 Reservation, by consenting to BNSF’s use and occupancy of the Right-of-Way for a limited
24

25 ⁷ This litigation can and should be decided on the basis of the Easement Agreement, the IRWA and
26 implementing regulations, but the Tribe notes that, under Article II of the Treaty, the Reservation was set aside
27 for the Tribe’s “exclusive use.” Even in the absence of such express treaty rights, “a hallmark of Indian
sovereignty is the power to exclude non-Indians from Indian lands.” *Merrion v. Jicarilla Apache Tribe*, 455 U.S.
130, 141 (1982). Thus, tribes have broad authority “[t]o determine who may enter the reservation; to define the
conditions upon which they may enter; to prescribe rules of conduct; to expel those who enter the reservation
without proper authority.” *Quechan Tribe of Indians v. Rowe*, 531 F.2d 408, 411 (9th Cir. 1976).

1 period of time, in exchange for BNSF’s agreement to observe very specific limitations on its
2 use and occupancy. But the Tribe’s rights in its trust property otherwise remain fully intact and
3 enforceable.

4 But even assuming for the sake of argument the ICCTA can be said to have any effect
5 on this dispute, the Court obviously cannot simply ignore either the Tribe’s rights in its trust
6 lands or the IRWA and implementing regulations. Instead, the court must strive to harmonize
7 the seemingly conflicting laws. In doing so, the Court may be guided by two lines of authority:
8 first, the construction of the ICCTA when in conflict with other Federal law generally, and
9 second, and more importantly, the Indian law canons of construction.

10 As to the first, the ICCTA purports to preempt any remedies provided under both state
11 and federal law. 49 U.S.C. § 10501(b). However, as the Ninth Circuit Court of Appeals has
12 stated: “If an apparent conflict exists between ICCTA and a *federal* law, then the courts must
13 strive to harmonize the two laws, giving effect to both laws if possible.” *Assn. of Am.*
14 *Railroads v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094 (9th Cir. 2010) (citing *In re Bos.*
15 *& Me. Corp. & Town of Ayer*, No. 33971, 2001 WL 458685, at *6 n. 28 (S.T.B. Apr. 30,
16 2001)). Federal environmental statutes are therefore generally not preempted. *Id.* at 1098.

17 In this case, on one hand, BNSF contends that enforcement of its voluntary contractual
18 undertakings would result in an interference with its common carrier obligations, which BNSF
19 claims is impermissible under the ICCTA. On the other hand, the Tribe asserts that BNSF’s
20 violation of the terms and conditions of the Easement Agreement will result in termination of
21 the Right-of-Way under the IRWA if it is not corrected. Accordingly, to the extent this lawsuit
22 implicates the ICCTA at all, there is a conflict between the two statutes. Thus, the Court would
23 need to harmonize the two laws. And, significantly for purposes of BNSF’s motion, it is “the
24 courts” are who are charged with harmonizing the two laws — not the STB.

25 But this is not the end of the inquiry. This general approach to statutory construction
26 must be tailored in the Indian law context. As the Supreme Court has made clear, “the standard
27 principles of statutory construction do not have their usual force in cases involving Indian

1 law. . . . ‘The canons of construction applicable in Indian law are rooted in the unique trust
2 relationship between the United States and the Indians.’” *Montana v. Blackfeet Tribe*, 471 U.S.
3 759, 766 (1985) (quoting *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985)).
4 One of these important and enduring canons is that “statutes are to be construed liberally in
5 favor of the Indians, with ambiguous provisions interpreted to their benefit.” *Id.*

6 BNSF has pointed to no language whatsoever in the ICCTA suggesting that Congress
7 intended the ICCTA to in any way abrogate or diminish existing tribal rights in trust lands or
8 under easements across trust lands, or even that Congress considered that the ICCTA might
9 possibly have such an effect. *Cf. U.S. v. Dion*, 476 U.S. 734, 739–40 (1986) (“What is
10 essential is clear evidence that Congress actually considered the conflict between its intended
11 action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict
12 by abrogating the treaty.”). But even if there was any ambiguity on this point, the ICCTA must
13 be construed liberally in favor of and to the benefit of the Tribe. *Montana*, 471 U.S. at 766.
14 When so construed, and when considered with the IRWA and implementing regulations, as
15 well as the United States’ fiduciary duty in administering easements across trust land, there is
16 simply no basis for determining that the remedies that would otherwise available to the Tribe
17 for violation of the Easement Agreement have been in any way diluted or abrogated, or are in
18 any fashion pre-empted by the ICCTA.

19 **E. Invocation of Primary Jurisdiction Would Be an Exercise in Futility**

20 In short, because it is well-settled that the ICCTA does not preempt contract claims,
21 and because it cannot preempt the Tribe’s rights under the IRWA, the STB simply does not
22 have jurisdiction over this dispute. But even if this lawsuit tangentially implicates the STB’s
23 governance over rail transportation, it does not follow that the Court should invoke the
24 doctrine of primary jurisdiction. As the Ninth Circuit Court of Appeals has stated, “the
25 doctrine is reserved for a ‘limited set of circumstances’ that ‘requires resolution of an issue of
26 first impression, or of a particularly complicated issue that Congress has committed to a
27

1 regulatory agency.” *Astiana v. Hain Celestial Group, Inc.*, 783 F.3d 753, 760 (9th Cir. 2015)
2 (quoting *Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008)).

3 Again, the Tribe’s lawsuit is based on a relatively straightforward contract dispute. The
4 Easement Agreement indisputably contains limitations on the number of trains and attached
5 railcars that may cross the Right-of-Way each day, and BNSF has indisputably exceeded those
6 limitations. This is certainly not “an issue of first impression” nor a “particularly complicated
7 issue” that has been committed to the STB. The Court adjudicates contract disputes on a
8 regular basis, and is fully competent to do so. And, again, the parties’ respective rights under
9 the IRWA is plainly not an issue Congress has committed to the STB.

10 Moreover, “primary jurisdiction is not required when a referral to the agency would
11 significantly postpone a ruling that a court is otherwise competent to make.” *Id.* at 761. Here,
12 not only is the Court fully competent to make a ruling on the parties’ contract dispute, the STB
13 has stated repeatedly that it is not the proper forum for the resolution of contract claims.
14 Therefore, only the Court is competent to rule on the dispute. Likewise, only the Court is
15 competent to make a ruling with respect to the interplay between the ICCTA and the IRWA.

16 As the United States Supreme Court has made clear:

17 [T]he doctrine of primary jurisdiction is not a doctrine of futility; it does not require
18 resort to ‘an expensive and merely delaying administrative proceeding when the case
19 must eventually be decided on a controlling legal issue wholly unrelated to
determinations for the ascertainment of which the proceeding was sent to the agency.’

20 *Local Union No. 189 v. Jewel Tea Co.*, 381 U.S. 676, 686 (1965) (quoting *Federal Maritime*
21 *Board v. Isbrandtsen Co.*, 356 U.S. 481, 521 (1958) (Frankfurter, J., dissenting)). Here, it is a
22 foregone conclusion that the STB will decline to exercise jurisdiction over the Tribe’s
23 contractual claims, and it is equally clear that the STB is not competent to make any
24 determinations related to the Tribe’s rights under the IRWA. Eventually, this case will be
25 decided on the basis of controlling legal issues on which the STB either cannot or will not rule.
26 Therefore, referring the dispute to the STB would be an exercise in futility.

1 Further, BNSF's argument that STB should decide the scope of its jurisdiction is
 2 meritless. As noted above, the STB has already stated many times that contractual disputes
 3 belong in court and not before the STB. *See PCS Phosphate*, 559 F.3d at 220 (citing cases). It
 4 would be both futile and nonsensical to defer to the STB for the utterly predictable
 5 determination that "[i]t would be inappropriate for us to rule on the merits of the contract
 6 disputes in this case. Such matters are best addressed by the courts." *Woodbridge*, 2000 WL
 7 1771004, at *3.

8 In short, referring this matter to the STB would be futile, inefficient, and a waste of the
 9 parties' resources. "Under our precedent, 'efficiency' is the 'deciding factor' in whether to
 10 invoke primary jurisdiction." *Astiana*, 783 F.3d at 761 (quoting *Rhoades v. Avon Prods., Inc.*,
 11 504 F.3d 1151, 1165 (9th Cir. 2007)). Courts should not invoke primary jurisdiction where it
 12 will "needlessly delay the resolution of claims." *Id.* (citing *Reid v. Johnson & Johnson*, 780
 13 F.3d 952, 967-68 (9th Cir. 2015); *United States v. Philip Morris USA Inc.*, 686 F.3d 832, 838
 14 (D.C. Cir. 2012)). The Court should decline BNSF's invitation to needlessly delay the
 15 resolution of this matter with a futile invocation of primary jurisdiction. Avoiding delay is
 16 particularly critical in this case, as BNSF continues to violate the Tribe's property rights by
 17 overburdening the Right-of-Way.

18 **F. The Language of the Parties' Settlement Agreement Does Not Alter Their Rights**
 19 **as to the ICCTA**

20 In asserting that the ICCTA governs the parties' rights in this matter, BNSF makes
 21 numerous references to language in the settlement agreement stating that "[n]othing in this
 22 Settlement Agreement or the associated Right-of-Way Easement shall supersede any federal
 23 law or regulation as they now exist or as they may be amended or changed from time to time."
 24 However, BNSF neglects to include the full text of the quoted provision, which is as follows:

25 Nothing in this Settlement Agreement or the associated Right-of-Way Easement shall
 26 supersede any federal law or regulation as they now exist or as they may be amended
 27 or changed from time to time. Specifically, the annual rental shall not be less than that
required by federal law in effect at any time during BN's occupation of the right-of-
way.

1 Settlement Agreement, at pp. 11–12 (emphasis added).

2 Accordingly, it is clear that the quoted provision had nothing to do with BNSF’s rights
3 under the ICCTA or its predecessor statute. Instead, it was an effort by the parties to protect
4 *the Tribe’s* interests by ensuring that the compensation for the Right-of-Way would never be
5 less than is required under federal law. It is an established canon of contractual construction
6 that a more specific provision in a contract will govern a more general provision. *United States*
7 *v. Perry*, 360 F.3d 519, 535 (6th Cir. 2004); *United States v. Holbrook*, 368 F.3d 415, 431 (4th
8 Cir. 2004). Therefore, the reference to federal laws and regulations must be read in the context
9 of, and be limited by, those federal laws and regulations that relate to compensation for the
10 Right-of-Way. In any event, it is evident from the additional language that the parties were not
11 contemplating the applicability of the ICCTA or its predecessor statute when incorporating
12 this language; if they had been, they would have referenced those statutes or common carrier
13 obligations explicitly. The parties were, instead, contemplating and protecting the level of
14 compensation to be afforded to the Tribe. BNSF’s current interpretation is nothing more than
15 an opportunistic, *ex post facto* rationalization.

16 Moreover, even to the extent the quoted passage can be said to embrace any and all
17 federal laws and regulations, whether or not they have to do with compensation, it is important
18 to note that that would also include the IRWA and the regulations associated therewith. For
19 example, under this reading, nothing in the settlement agreement or Easement Agreement can
20 be read to supersede the Tribe’s right to seek termination of the Right-of-Way for BNSF’s
21 failure to comply with the terms and conditions of the Easement Agreement.

22 In any event, the language BNSF relies on is irrelevant to the resolution of this dispute.
23 The Easement Agreement was executed long after the settlement agreement. (While the copy
24 of the settlement agreement submitted by BNSF refers to an attached easement agreement, the
25 attachment was not included.) Under the merger doctrine, the terms of an agreement relating
26 to the transfer of real property merge into the deed conveying the property. *See, e.g., Brown v.*
27

1 *Johnson*, 109 Wn. App. 56, 59, 34 P.3d 1233 (2001). Thus, any terms of the settlement
2 agreement not incorporated into the Easement Agreement cannot be relied upon by BNSF.

3 **G. The Arbitration Provision in the Easement Agreement Does Not Apply to This**
4 **Dispute**

5 BNSF also seeks dismissal of this case upon the ground that the parties agreed to
6 arbitrate their disputes in the Easement Agreement. BNSF's assertion has no merit. "In
7 construing an arbitration agreement, courts must 'apply ordinary state-law principles that
8 govern the formation of contracts.'" *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205, 1210
9 (9th Cir. 1998) (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)).
10 In Washington, "[i]n interpreting an arbitration clause, the intentions of the parties as
11 expressed in the contract control." *Sales Creators, Inc. v. Little Loan Shoppe, LLC*, 150 Wn.
12 App. 527, 531, 208 P.3d 1133 (2009). The court "ascertains the parties' intent from reading
13 the contract as a whole." *Id.* (citing *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724,
14 733, 837 P.2d 1000 (1992)). "[A]rbitration 'should not be invoked to resolve disputes that the
15 parties have not agreed to arbitrate.'" *ACF Property Mgmt., Inc. v. Chaussee*, 69 Wn. App.
16 913, 919, 850 P.2d 1387 (1993) (quoting *King Cy. v. Boeing Co.*, 18 Wn. App. 595, 603, 570
17 P.2d 713 (1977)).

18 Here, the Easement Agreement contemplates arbitration in one circumstance only.
19 Specifically, the parties are to negotiate and agree on rental increases, but if they cannot do so,
20 the matter will be submitted to binding arbitration. This is the only situation under which
21 arbitration is required under the Agreement. Otherwise, the Agreement expressly allows the
22 Tribe to seek redress in court. For example, it makes clear that the Tribe may institute a
23 "proceeding . . . to evict [BNSF] or seek damages for [BNSF's] failure to surrender" the Right-
24 of-Way at the end of the term of the Easement Agreement. Likewise, it provides that if BNSF
25 breaches the Agreement by failing to make rental payments, "the Tribe shall be entitled to
26 apply to any court of competent jurisdiction for injunctive relief to compel such payments."
27

1 Even if the arbitration provision could be invoked in connection with an increase in
2 train traffic, it is apparent that the provision would come into play only after BNSF requested
3 and the Tribe consented to such an increase — that is, to determine the increased prospective
4 rental resulting from the stipulated increase. But BNSF did not even give notice before
5 increasing traffic, let alone request the Tribe’s consent. Having failed to utilize the process for
6 increasing traffic, BNSF cannot be allowed to invoke a remedy that, if applicable at all to
7 traffic increases, is applicable only as one final step in the mutual process for agreeing to
8 increases in traffic.

9 Thus, it is clear that the arbitration provision does not apply to situations in which, as
10 here, BNSF has breached the Agreement or otherwise failed to comply with its terms. Reading
11 the Agreement as a whole, it is plain that the parties only intended arbitration in the context of
12 valuation disputes. The Court should therefore decline BNSF’s request to submit this matter to
13 arbitration.⁸

14 **IV. CONCLUSION**

15 BNSF cannot hide behind the shield of the ICCTA’s preemption provisions to get out
16 of its contractual commitments. The STB has no jurisdiction to adjudicate contract disputes or
17 tribal rights under the IRWA. Referral to the STB in this case would be an exercise in futility,
18 and a waste of time and resources that prolongs BNSF’s overburdening of the Right-of-Way.
19 Moreover, arbitration is expressly not required under the Easement Agreement where the Tribe
20 seeks redress for a breach of its terms. For the foregoing reasons, the Tribe respectfully
21 requests that the court deny BNSF’s motion to dismiss or stay.

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27 ⁸ In the alternative, the Court may wish to bifurcate the case to first determine liability and later determine whether arbitration is appropriate.

DATED this 1st day of June, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

DATED at Seattle, Washington, this 1st day of June, 2015.

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EXHIBIT No. 4

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PRELIMINARY STATEMENT

1
2 BNSF's Motion to Dismiss seeks dismissal of the Tribe's complaint without prejudice
3 for two reasons: First, to allow the Surface Transportation Board ("STB") to address certain
4 threshold regulatory issues relating to BNSF's common-carrier obligations and, second, to
5 require the Tribe to pursue its claim for monetary relief in arbitration, pursuant to the parties'
6 arbitration agreement.

7 On the latter issue, the Tribe disputes that it has an obligation to arbitrate its demand for
8 monetary relief arising from increased traffic, but the Tribe's opposition brief says little. The
9 arbitration issue is straightforward: the Tribe does not contest the abundant case law in this
10 Circuit requiring that arbitrability disputes be decided by the arbitrator where, as here, the AAA
11 rules are incorporated in a contract. A stay or dismissal of the Complaint is therefore required
12 under established federal law so that an arbitration panel may, at a minimum, resolve the
13 dispute over arbitrability.

14 The Tribe's opposition brief directs most of its attention to BNSF's request that the
15 Complaint also be dismissed on primary jurisdiction grounds. Plaintiff's argument fails for
16 three main reasons. First, Plaintiff asks the Court to address the merits of the preemption issue.
17 But BNSF is not asking the Court to rule on the preemption question or to rule on the meaning
18 of the Easement or Settlement Agreement. A primary jurisdiction referral is necessary here to
19 obtain the STB's views on the probable conflict between the Tribe's claims and the STB's
20 regulation of common carriers and how that conflict should be resolved. The Court does not
21 have to – and should not – guess at how the STB will rule on the disputes over the Tribe's
22 factual assertions to rule on BNSF's request for a primary jurisdiction referral.¹

23
24 ¹ BNSF vigorously disputes the Tribe's accusations underlying its fairness argument. The Tribe repeatedly claims
25 that it would be unfair for BNSF to use ICCTA preemption to avoid an obligation voluntarily agreed to by its
26 predecessor. "[E]quitable arguments – such as judicial economy, fairness, prejudice and delay – . . . are not
relevant to the ultimate question of whether an issue is within the agency's primary jurisdiction." *Gentry v. Cellico
P'ship*, No. CV 05-7888 GAF (VBKx), 2006 WL 6927883, at *6 n.3 (C.D. Cal. Mar. 26, 2006). It is therefore not
clear why the Tribe returns to this theme so often in its Opposition except to try to portray BNSF in a bad light at a
point in this proceeding when BNSF is unable to defend itself on the facts. Further, what the Tribe obtained in the
DLA Piper LLP (US)

1 Second, the Tribe is patently wrong when it argues that this case is only “a
2 straightforward contract dispute” that has no regulatory implications. Opp. 8:25. The Tribe
3 asserts trespass damages and asks the Court to enforce the Easement in a way that BNSF could
4 be prevented from complying with its statutory common-carrier obligations. BNSF could
5 therefore be placed in a conflict between a court-imposed requirement limiting common-carrier
6 service and regulatory obligations requiring such service. The Ninth Circuit and other courts
7 have concluded that the precise purpose of the primary jurisdiction doctrine is to identify or
8 clarify existing regulatory obligations *before* a court order creates a conflict with regulatory
9 requirements. The Tribe’s claims here present a paradigmatic case for primary jurisdiction
10 referral.

11 Third, the Tribe’s reliance on IRWA is misplaced. The Tribe points to nothing in
12 IRWA that conflicts with, or has anything to do with, common-carrier obligations created
13 under ICCTA. And even if the Tribe had identified a true conflict between IRWA and ICCTA,
14 the starting point for addressing any possible “harmonization” of the two statutes would be an
15 assessment by the STB of the federal interests advanced by ICCTA, including the common-
16 carrier obligations that are at the heart of the regulatory scheme for the Nation’s railroads. If it
17 were necessary to assess ICCTA’s preemption of another federal law, like IRWA, the STB
18 would be in a much better position to address the preemption analysis, given the need for
19 uniformity in this emerging area of the law and the procedural flexibility that the STB has to
20 address the range of potentially relevant federal policies. Contrary to what the Tribe suggests,

21
22
23 Easement was not “illusory.” Opp. 16:3. The Tribe obtained the right to rentals, including rental adjustments in
24 the event of traffic increases, as well as a limited right to control BNSF’s use of the rail line for purposes that were
25 not necessary to comply with federal statutory requirements. Additionally, BNSF’s predecessor did not, because it
26 could not, give the Tribe control over BNSF’s ability to comply with federal statutory common-carrier obligations.
Finally, the Tribe knew well it was not obtaining rights that would supersede federal law obligations. As BNSF
explained, the Settlement Agreement – which the Tribe and the Department of Interior signed – explicitly
recognized that the Easement would not supersede federal law obligations. *See* BNSF Motion 8; *infra* Section
I.C.

1 the STB has ample experience balancing rail interests with those of Indian tribes, as evidenced
2 by the STB decisions BNSF cited in its opening brief.

3 The proper course of action in this case is to dismiss the Tribe's Complaint without
4 prejudice so that BNSF can seek the STB's views on the three questions set out in BNSF's
5 motion, before proceeding further with litigation over the Tribe's breach of contract and
6 trespass claims.

7 ARGUMENT

8 **I. Referral Is Proper Because the STB Should Make the Threshold Determination of 9 Whether the Tribe's Claims Create a Conflict With Statutory Common Carrier 10 Obligations.**

11 Plaintiff argues that this case is a "straightforward contract dispute" with no regulatory
12 issues for the STB to address. But the argument begs the question. The Tribe seeks direct and
13 indirect limits on the transportation that BNSF can provide over the line at issue. The threshold
14 question for the STB to address is whether these claims would create a conflict with BNSF's
15 regulatory obligations as a common carrier. As BNSF explained in its Motion, courts "almost
16 invariably defer to the STB's expertise regarding such [common carrier] disputes." *Chlorine
17 Institute, Inc. v. Soo Line R.R.*, No. 14-1029, 2014 WL 2195180, at *2 (D. Minn. May 27,
18 2014). Such disputes are "extremely complicated, fact-intensive inquiries that require both
19 extensive practical knowledge of the nation's rail system and a careful weighing of a broad
20 array of costs and benefits." *Id.*²

21 When contract claims could result in a conflict with regulatory requirements, the courts
22 have found it particularly important to refer the contract claims to the relevant agency under the
23 doctrine of primary jurisdiction to avoid putting the regulated entity into a position of having to
24 comply with irreconcilable orders of a court and an agency. *See Davel Comm'ns, Inc. v. Qwest*

25 ² *See also Pejepscot Industrial Park, Inc. v. Maine Central Railroad Co.*, 215 F.3d 195, 205 (1st Cir. 2000)
26 (rejecting the plaintiff's argument that "no technical issue exists for the STB's consideration" because the "STB's
expertise is clearly involved in the question of whether [the railroad's] actions constitute an unlawful refusal to
'provide . . . service on reasonable request[.]'").

THE HONORABLE ROBERT S. LASNIK

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON, AT SEATTLE

SWINOMISH INDIAN TRIBAL
COMMUNITY, a federally recognized
Indian tribe,

Plaintiff,

v.

BNSF RAILWAY COMPANY, a
Delaware corporation,

Defendant.

No. 2:15-cv-00543-RSL

**REPLY IN SUPPORT OF
DEFENDANT BNSF RAILWAY
COMPANY'S MOTION TO
DISMISS OR STAY**

**NOTE ON MOTION CALENDAR:
Friday, June 5, 2015**

ORAL ARGUMENT REQUESTED

1 *Corp.*, 460 F.3d 1075, 1090 (9th Cir. 2006) (“It is precisely the purpose of the primary
2 jurisdiction doctrine to avoid the possibility of conflicting rulings by courts and agencies
3 concerning issues within the agency’s special competence.”). For example, in *Oasis Petroleum*
4 *Corp. v. Dep’t of Energy*, 718 F.2d 1558, 1567 (Temp. Emer. Ct. App. 1983), the Court of
5 Appeals found that the district court had abused its discretion by failing to refer a contract
6 dispute to the Department of Energy to avoid a conflict between enforcement of the parties’
7 intent, as set forth in private agreements, and valid regulations. The court explained that the
8 parties’ intent with respect to the contract “may not be controlling where it conflicts with
9 lawfully issued regulations.” *Id.* at 1565. Therefore, the agency “should be given the
10 opportunity to explain and apply its policy and regulations before the district court considers
11 the merits of [the parties’] conflicting claims.” *Id.*

12 The exact same logic applies here. The Tribe’s “straightforward contract dispute” seeks
13 to put BNSF into an irreconcilable conflict between a court order limiting BNSF’s ability to
14 comply with statutory obligations, and BNSF’s requirements under ICCTA to provide service
15 requested by shippers. The purpose of a primary jurisdiction referral is to allow the agency
16 responsible for administering a federal regulatory scheme to determine the circumstances under
17 which such a conflict would be created and how to preserve the integrity of the regulatory
18 scheme in the face of such a conflict. *Davel Comm’ns, Inc.*, 460 F.3d at 1090 (reversing and
19 remanding to refer the matter to the FCC). The doctrine of primary jurisdiction was developed
20 by the courts precisely to deal with the types of potential conflicts that are raised in this case.
21 *See Syntek Semiconductor Co. v. Microchip Tech. Inc.*, 307 F.3d 775, 780 (9th Cir. 2002)
22 (citing Richard J. Pierce, Jr. *Administrative Law Treatise* § 14.1 p. 917 (4th ed. 2002)).

23 The STB also needs to consider the policy implications of the Tribe’s argument that
24 common-carrier obligations can be limited through private contracts. BNSF expects that the
25 STB would be particularly troubled by the Tribe’s argument that railroads could avoid
26 obligations to serve some shippers by entering into private agreements with landowners that

1 restrict the railroad’s ability to provide service. In recent cases, the STB has been adamant
2 about railroads’ need to comply with their common-carrier service obligations even in
3 circumstances where the railroad would like to avoid having to provide the requested service.
4 *See, e.g., Eric Strohmeyer and James Riffin—Acquisition and Operation Application, Valster*
5 *Industrial Tract in Middlesex and Union Counties, N.J.*, FD 35527, 2011 WL5006471 (Served
6 Oct. 20, 2011) (denying request by rail carrier to limit transportation of hazardous materials).

7 **II. The Tribe’s Complaint Raises Significant Preemption Issues That Should Be**
8 **Addressed By the STB.**

9 A. Preemption is warranted when contractual obligations conflict with federal law.

10 The Tribe argues that referral of the case to the STB would be “futile” because contract
11 enforcement actions are not subject to ICCTA preemption. Opp. 10:24-11:2. The Tribe is
12 simply wrong that ICCTA preemption is inconceivable here. Significant case law, including
13 the cases on which the Tribe relies, establishes that preemption is warranted when contractual
14 obligations directly conflict with common-carrier obligations.

15 For example, the Tribe points to the Fourth Circuit’s finding that contractual promises
16 are “‘presumptively’” valid under ICCTA. Opp. 12:10 (quoting *PCS Phosphate Co. v. Norfolk*
17 *S. Corp.*, 559 F.3d 212, 218-19 (4th Cir. 2009)). But the Fourth Circuit went on to state that
18 “[t]his is not to say that a voluntary agreement could never constitute an ‘unreasonable
19 interference’ with rail transportation” *PCS Phosphate*, 559 F.3d at 221. In fact, the court
20 emphasized that its ICCTA preemption analysis turned on “the facts of this case” *Id.*
21 According to the court, “the facts of this case indicate that any interference is not unreasonable”
22 in large part because the parties’ agreement explicitly stated that the track “‘relocation will not
23 affect the ability of [the railroad] to comply with its legal obligation to serve any existing
24 customer then on the line.’” *Id.* at 222 (quoting contract). That is not the case here, where the
25 Tribe is attempting to thwart BNSF’s legal obligation to serve existing rail customers.

1 The Tribe also relies on *Township of Woodbridge v. Consolidated Rail Corp.*, 5 S.T.B.
2 336, 2000 WL 1771044 (Served Dec.1, 2000), but that case similarly contradicts the Tribe's
3 claim that ICCTA preemption does not apply to contracts. There, the railroad agreed in a court
4 settlement to abate noise associated with rail operations and then later expressly renewed the
5 agreement after an acquisition. See 5 S.T.B. at 337, 340. The STB found no ICCTA
6 preemption "in the circumstances of this case," explaining that "Conrail has not shown that
7 enforcement of its commitments would unreasonably interfere with the railroad's operations."
8 *Id.* at 340. Just as the Tribe admits in its Opposition, the STB "later clarified its order to point
9 out that the railway company is not precluded from arguing in the future that enforcement of
10 the contract may interfere with interstate commerce" Opp. 11:20-22 (citing *Township of*
11 *Woodbridge v. Consolidated Rail Corp.*, 5 S.T.B. 488, 491, 2001 WL 283507 (STB served
12 Mar. 23, 2001)). Thus, the STB specifically contemplated that contractual rights could be
13 preempted when there is a direct conflict with federal law.

14 The other cases cited by the Tribe follow the same approach. In *Pejepscot Industrial*
15 *Park, Inc. v. Maine Central Railroad Co.*, the district court made clear that "Defendants will
16 have the opportunity to assert that any such contract, as interpreted by [plaintiff], is
17 unreasonably burdensome to interstate commerce." 297 F. Supp. 2d 326, 333 n.6 (D. Me.
18 2003) (cited at Opp. 13:19-20). As Plaintiff admits, an Iowa federal court found that state law
19 lease claims were preempted "to the extent that they sought to bar defendant railroad from
20 using tracks" Opp. 13:13-16 (citing *Cedarapids, Inc. v. Chi., Cent. & Pac. R.R. Co.*, 265
21 F. Supp. 2d 1005, 1014-15 (N.D. Iowa 2003)). Thus, every case cited by the Tribe on this issue
22 undermines its position that an STB referral would be futile because ICCTA preemption
23 supposedly does not apply to contracts.

24 Further, the courts and federal agencies repeatedly have held that private contracts
25 cannot be used to override regulatory obligations. See *United States v. Baltimore & O. R. R.*,
26 333 U.S. 169, 177-78 (1948) (finding that non-carrier owner of a railroad track segment may

1 not contract to restrict the common carrier’s statutory obligations in its operations on that track
 2 segment); *Railroad Ventures, Inc. v. STB*, 299 F.3d 523, 560-61 (6th Cir. 2002) (STB properly
 3 invalidated settlement agreement on public policy grounds because its enforcement would
 4 unreasonably interfere with the railroad’s future fulfillment of common-carrier obligations);
 5 *Hanson Natural Resources Co. — Non-Common Carrier Status — Petition for a Declaratory*
 6 *Order*, FD No. 32248, 1994 MCC LEXIS 111, at *4 (ICC served Dec. 5, 1994) (“[O]nce
 7 common carrier operations commence over all or part of [a] line, any contractual restrictions
 8 that unreasonably interfere with those common carrier operations will be deemed void as
 9 contrary to public policy.”). The STB has an obvious interest in claims that seek to enforce
 10 alleged contract obligations that are inconsistent with statutory requirements administered by
 11 the STB.³

12 The Tribe then undermines its argument that preemption does not apply to contracts by
 13 arguing that only a court – not the STB – is competent to decide whether a contract is
 14 preempted by ICCTA. *See* Opp. 11:21-12:1-3. However, in the lead cases cited by the Tribe,
 15 the STB acted on ICCTA preemption issues first and provided guidance for the federal courts
 16 on the scope of its jurisdiction under Section 10501(b). *See PCS Phosphate*, 559 F.3d at 221;
 17 *Township of Woodbridge*, 5 S.T.B. at 491. More importantly, the Tribe ignores the critical
 18 factor bearing on BNSF’s referral request: the preemption issue in this case arises from a
 19 possible conflict with common-carrier obligations. The duty to provide transportation services
 20 upon reasonable request—as required by § 11101—is assessed and enforced by the STB. And
 21 courts “almost invariably defer to the STB’s expertise” when the dispute concerns the
 22 railroad’s common-carrier obligations. *Chlorine Institute, Inc. v. Soo Line R.R.*, No. 14-1029,

23 ³ BNSF’s motion relied on *Allied Erecting and Dismantling, Inc. and Allied Indus. Dev. Corp. Petition for*
 24 *Declaratory Order Rail Easements in Mahoning County, Ohio*, FD 35316, 2013 STB LEXIS 407 (Served Dec. 20,
 25 2013) and *Thompson v. Texas Mexican Ry.*, 328 U.S. 134 (1946). *See* Motion at 6:6-13. The Tribe’s attempt to
 26 distinguish those cases misses the point. *See* Opp. 15. Those cases, as well as many others, find that only the STB
 can relieve a railroad of obligations to provide common-carrier service over rail lines that are part of the railroad’s
 common-carrier network. Railroads cannot, through contract commitments with other parties, unilaterally avoid
 statutory requirements.

1 2014 WL 2195180, at *2 (D. Minn. May 27, 2014). Referral to the STB is warranted so the
2 STB, drawing on its expertise regarding common-carrier obligations, can decide the
3 preemption issue. *See, e.g., B & S Holdings, LLC v. BNSF Ry. Co.*, 889 F. Supp. 2d 1252, 1257
4 (E.D. Wash. 2012) (“As the agency authorized by Congress to administer the ICCTA, the
5 [Surface] Transportation Board is uniquely qualified to determine whether state law . . . should
6 be preempted”) (brackets, quotations, and citations omitted).

7 B. The Tribe ignores the preemption issues its trespass claim implicates.

8 The Tribe’s position is belied by its own trespass claim and the trespass accusations it
9 levels at BNSF throughout its Opposition. *See, e.g., Opp.* 8:21-22 (“Consequently, the Tribe
10 had no choice but to bring this lawsuit, to seek the Court’s assistance in enjoining BNSF’s new
11 trespass.”). The trespass claims are significant here because, as explained by BNSF in its
12 Opening Brief, a trespass suit is preempted under ICCTA when a plaintiff seeks redress for an
13 alleged harm arising from the railroad’s operations, especially where the trespass claim would
14 have the effect of managing or governing rail transportation. *See* Opening Br. 7:8-7:17. The
15 Opposition makes no attempt to address this authority.

16 C. The parties agreed that federal law supersedes the Easement’s terms.

17 The Tribe argues that contractual undertakings generally are not preempted because
18 such voluntary commitments are supposedly an admission that the contract’s enforcement
19 would not interfere with federal law. *Opp.* 10:25-11:2. That argument is wrong as a matter of
20 law. As discussed above, the courts and the STB have recognized that contract commitments
21 can be preempted if they interfere with regulatory obligations, regardless of what “admissions”
22 can be inferred from the parties’ private agreement. Here, the Tribe’s argument is also
23 contradicted by the plain language of the parties’ Settlement Agreement.⁴

24 That document, which the Tribe only briefly addresses at the end of its brief, states
25 clearly that “[n]othing in this Settlement Agreement or the associated Right-of-Way Easement

26 _____
⁴ The Court does not need to address this contract interpretation issue to resolve this Motion.

1 shall supersede any federal law or regulation as they now exist or as they may be amended or
2 changed from time to time.” Settlement, ¶ 12. This language, which encompasses Section
3 11101(a)’s requirement that BNSF comply with shippers’ reasonable requests, shows that the
4 Tribe and BNSF expressly contemplated that federal law will supersede the agreement’s terms
5 if a conflict with federal law arose. Accordingly, the parties agreed that there would be no
6 conflict with federal law because the parties would not allow such a conflict to arise.

7 Because of the potency of the parties’ agreement that federal law, such as Section
8 11101(a), trumps the contract, the Tribe tries to juke around the Settlement Agreement’s terms.
9 The Tribe asks the Court to focus on the second sentence of the relevant provision but not to
10 give any weight to first or third sentences of the provision.⁵ If only the second sentence were
11 given meaning, the first sentence would be superfluous. The law is clear that all contractual
12 terms are to be given weight when interpreting an agreement. *See, e.g., Bogomolov v. Lake*
13 *Villas Condo. Ass’n of Apartment Owners*, 131 Wn. App. 353, 361, 127 P.3d 762 (2006)
14 (“When interpreting a document, the preferred interpretation gives meaning to all provisions
15 and does not render some superfluous or meaningless.”). Accordingly, the first sentence
16 regarding the parties’ intent not to supersede federal law must be given full weight.⁶

17 ⁵ The sentence quoted above from paragraph 12 is in the section titled “Integration, Governing Laws,
18 Miscellaneous,” not a section about the rental amount. And, the third sentence—the sentence following the
19 sentence to which the Tribe points—reads: “BNSF shall comply with all applicable federal laws and regulations
20 pertaining to BN’s activities within the Swinomish Reservation.” The broad language used in the first and third
21 sentences in this paragraph give no indication that the parties intended to limit their scope to the narrow issue of
22 rental amounts.

23 ⁶ In a throwaway comment, the Tribe obliquely asks the Court to ignore the Settlement Agreement because its
24 terms supposedly “merged” into the Easement. This argument has many flaws. For example, the fact that the
25 Easement does not wipe out the Settlement Agreement is confirmed by the Easement’s plain language, which
26 references the Settlement Agreement throughout and requires arbitrators to enforce provisions of the Settlement
27 Agreement. Easement ¶ 3(b)(iii)[at p. 6]; *see also Black v. Evergreen Land Developers, Inc.*, 75 Wn. 2d 241, 249-
28 50, 450 P.2d 470 (1969) (reiterating rule that merger doctrine does not apply to provisions in a contract for the
29 sale of land that do not relate to conveyance without evidence that they were intentionally surrendered through the
30 deed). Additionally, under *Brown v. Johnson*, 109 Wn. App. 56, 34 P.3d 1233, (2001), the case on which the
31 Tribe relies, the merger doctrine does not apply “where terms of a purchase and sale agreement are not contained
32 in or performed by the execution and delivery of the deed, are not inconsistent with the deed, and are independent
33 of the obligation to convey.” *Id.* at 60. To the extent the merger doctrine even applies to the Easement and
34 Settlement Agreement, the relevant terms fall within this exception. The Settlement Agreement’s terms at issue
35 here are not contained in the Easement and are not performed by delivery of the Easement; they are not
36 inconsistent with the Easement; and they are separate from an obligation to convey the Easement.

DLA Piper LLP (US)

REPLY IN SUPPORT OF DEFENDANT
BNSF RAILWAY COMPANY’S MOTION
TO DISMISS OR STAY - 9
No. 2:15-cv-00543-RSL

701 Fifth Avenue, Suite 7000
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1 **III. The Tribe's Argument About IRWA Misses the Mark.**

2 The Tribe argues that referral of its claims to the STB is inappropriate because “the
3 STB is certainly not competent to adjudicate the respective rights of the parties under the
4 IRWA.” Opp. 2:3-4. The Tribe devotes much of its brief to IRWA, but fails to explain how
5 IRWA is implicated by this lawsuit or by any of BNSF's arguments. As the Tribe's brief
6 discusses, IRWA covers the Easement's creation and the process by which the Tribe could
7 revoke the Easement if certain prerequisites are satisfied—two issues not before the Court.
8 Opp. 5:3-22. BNSF has never disputed that the Easement was properly created pursuant to
9 IRWA. The Tribe's claim is that BNSF breached the Easement, not that BNSF violated IRWA.
10 Referral to the STB of the Tribe's breach of contract (and trespass) claims is necessary to
11 determine whether those claims create a conflict with statutory obligations under ICCTA. The
12 STB is not being asked to adjudicate any “rights . . . under IRWA.”

13 The Tribe also asserts, without reference to any provisions of IRWA, that there is a
14 potential conflict between IRWA and ICCTA that only the Court is capable of resolving. Opp.
15 18:4-9. There is no conflict between these two federal statutes. IRWA does not address the
16 rights or obligations of common carriers operating on tribal lands that might conflict with
17 ICCTA. The only potential conflict that the Tribe identifies arises from the Tribe's threat to
18 seek termination of the Easement if BNSF is allowed to move the disputed shipments across
19 the tribal land. Opp. 18:17-24. But the Tribe in the current action is not trying revoke the
20 Easement pursuant to IRWA; rather, it is seeking to keep the Easement in place and secure an
21 injunction and monetary relief. If the Tribe were to exclude BNSF from any operations, the
22 importance of referring the Tribe's claims to the STB is obvious given the conflict with
23 BNSF's common-carrier obligations.⁷

24
25 ⁷ If the Tribe were to follow through with its threat, the STB's authority would clearly be implicated. In *City of*
26 *Des Moines, Iowa v. Chicago & N. W. Ry. Co.*, 264 F.2d 454 (8th Cir. 1959), the City sought to evict the railroad
on the ground that it had violated the conditions of the original grant for use of the street for right of way purposes.
See id. at 455. The Eighth Circuit agreed with the railroad that the case “must be referred to the Commission for
DLA Piper LLP (US)

1 The Tribe's threat to take some action based on the outcome of its litigation does not
2 create a conflict between IRWA and ICCTA. It emphasizes the central importance of the
3 regulatory scheme administered by the STB in addressing the Tribe's claims, which is the
4 reason for referring the Tribe's claims to the STB under the doctrine of primary jurisdiction.
5 Even if IRWA created a substantive conflict with ICCTA, the STB would need to have a role in
6 resolving that conflict. In creating the STB's organic statute, Congress made clear that
7 ICCTA's provisions "preempt the remedies provided *under Federal* or State law." 49 U.S.C. §
8 10501(b) (emphasis added). This preemption statute is part of the comprehensive regulatory
9 scheme given to the STB to administer. The STB would need to have a role in assessing the
10 scope of this broad preemption statute if there were a conflict with another federal law.

11 The Tribe nevertheless argues that "it is 'the courts' . . . who are charged with
12 harmonizing the two laws – not the STB." Opp. 18:23-24. In fact, there have been very few
13 cases involving the interplay between ICCTA and other federal laws, but the STB, not the
14 courts, has been the only tribunal that has addressed an actual conflict between ICCTA and
15 another federal law. See *U.S. Environmental Protection Agency–Petition for Declaratory*
16 *Order*, FD 35803, 2014 STB LEXIS 335 (STB Served Dec. 30, 2014). The STB is particularly
17 well suited to address any conflict that might arise with another federal law, given the need to
18 develop a uniform body of law in a new and emerging area of law and given the procedural
19 flexibility that an agency has to address policy issues that must be considered in any federal law
20 preemption case.

21 The Tribe's arguments in this regard are further undermined by the Federal Railroad
22 Administration ("FRA") and the Pipeline and Hazardous Materials Safety Administration
23 ("PHMSA") recent rulemaking concerning rail shipments of hazardous materials. See 80 Fed.
24 Reg. 26643 (May 8, 2015). There, the tribal governments raised concerns about "the

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26 answer, before any ouster could at all be decreed . . ." *Id.* at 459. "Until abandonment is authorized [by the
agency], operations must continue." *Id.* at 457 (quoting *Tex. Mex.*, 328 U.S. at 147).

1 environmental, economic and safety impacts of crude oil derailments in tribal lands” and asked
2 for stricter measures for shipping hazardous materials by rail than were being proposed in the
3 rulemaking. *Id.* at 26725. After rejecting these stricter measures, the FRA and PHMSA found
4 that their rulemaking preempted the tribal governments from regulating in the areas of routing,
5 packaging and classifying hazardous shipments by rail because the “federal government has a
6 superseding preemption with regard to hazardous materials regulation and railroad safety.” *Id.*

7 **IV. The Tribe’s Monetary Damages Claims Must Be Referred to an Arbitration Panel**

8 As noted in the introduction to this Brief, the Tribe has only a short, and ultimately
9 unpersuasive, argument relating to BNSF’s assertion that the Tribe’s monetary damages claims
10 must be addressed in arbitration. The Tribe argues that the parties intended to resolve any
11 breach of contract claims in court, not arbitration, pointing to two narrow issues completely
12 unrelated to compensation due to the Tribe that the parties agreed to address in court if disputes
13 arose over those issues. *Opp.* 23:23-26. The fact that the Easement specifically identified two
14 issues unrelated to Tribal compensation to be addressed in court says nothing about the parties’
15 intent with respect to the resolution of claims relating to Tribal compensation, which the parties
16 specifically identified as being subject to arbitration.

17 Much more importantly, the Tribe does not address the dispositive case law BNSF cited
18 in its opening brief for the well-established principle that incorporation of American Arbitration
19 Association rules in a contract is clear evidence that the parties intended to arbitrate
20 arbitrability. *See, e.g., Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1074 (9th Cir.
21 2013) (“Virtually every circuit to have considered the issue has determined that incorporation
22 of the American Arbitration Association’s (AAA) arbitration rules constitutes clear and
23 unmistakable evidence that the parties agreed to arbitrate arbitrability”). The Tribe does not
24 even contest this point. *See* LR 7(b)(2). Accordingly, the Court should dismiss without
25 prejudice or stay the Tribe’s damages claims to allow the parties to address the arbitrability of
26 those claims in the arbitration forum where that dispute must be resolved.

1 Respectfully submitted this 5th day of June, 2015.

2 s/ *Stellman Keehnel*

3 s/ *Andrew R. Escobar*

4 s/ *Jeffrey B. DeGroot*

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16 Attorneys for defendant BNSF Railway Company

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CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the attorneys of record for the parties.

Dated this 5th day of June, 2015.

s/ *Stellman Keehnel*
Stellman Keehnel, WSBA No. 9309

WEST258793342.2

EXHIBIT No. 5

THE HONORABLE ROBERT S. LASNIK

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON, AT SEATTLE

SWINOMISH INDIAN TRIBAL
COMMUNITY, a federally recognized
Indian tribe,

Plaintiff,

v.

BNSF RAILWAY COMPANY, a
Delaware corporation,

Defendant.

No. 2:15-cv-00543-RSL

**STATEMENT OF SUPPLEMENTAL
AUTHORITY IN SUPPORT OF
DEFENDANT BNSF RAILWAY
COMPANY'S MOTION TO DISMISS
OR STAY**

**ORAL ARGUMENT:
September 2, 2015, 1:30 p.m.**

Defendant BNSF Railway Company respectfully submits the following supplemental authority in support of its Motion to Dismiss or Stay (Dkt. No. 8) and its Reply in Support of Motion to Dismiss or Stay (Dkt. No. 13):

- 1. *The Chlorine Institute, Inc., et al. v. Soo Line Railroad, dba Canadian Pacific Railway Company*, No. 14-2346 (8th Cir. July 2, 2015).

A copy is attached to this Statement.

Respectfully submitted this 28th day of August, 2015.

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s/ Stelman Keehnel
s/ Andrew R. Escobar
s/ Jeffrey B. DeGroot
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Attorneys for defendant BNSF Railway Company

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CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the attorneys of record for the parties.

Dated this 28th day of August, 2015.

s/ Stellman Keehnel
Stellman Keehnel, WSBA No. 9309

WEST260236152.1

United States Court of Appeals
For the Eighth Circuit

No. 14-2346

The Chlorine Institute, Inc.; The American Chemistry Council; The Fertilizer
Institute; Erco Worldwide; PVS Chemicals

Plaintiffs - Appellants

v.

Soo Line Railroad, doing business as Canadian Pacific Railway Company

Defendant - Appellee

Appeal from United States District Court
for the District of Minnesota - Minneapolis

Submitted: February 12, 2015

Filed: July 2, 2015

Before BYE, BEAM, and BENTON, Circuit Judges.

BYE, Circuit Judge.

The Chlorine Institute, Inc., the American Chemistry Council, the Fertilizer Institute, Erco Worldwide, and PVS Chemicals (collectively "Appellants") filed this suit seeking to enjoin Soo Line Railroad, d/b/a Canadian Pacific Railway Company

("CP") from imposing a requirement that any toxic inhalation hazard ("TIH")¹ materials transported on CP's railways be transported in normalized steel rail cars.² Under the doctrine of primary jurisdiction, the district court³ held the Surface Transportation Board ("STB") should address whether CP's requirement is reasonable in the first instance, denied the request for injunctive relief, and dismissed the suit without prejudice. We affirm.

I

In 2009, the Pipeline and Hazardous Materials Safety Administration ("PHMSA") of the Department of Transportation ("DOT")—the agency tasked with regulating the transportation of hazardous materials—finalized extensive amendments to the regulations for the transportation of TIH materials. See Hazardous Materials: Improving the Safety of Railroad Tank Car Transportation of Hazardous Materials, 74 Fed. Reg. 1770 (Jan. 13, 2009) (codified in 49 C.F.R. pts. 171-174 & 179). The regulations included substantial background information regarding the safety issues concerning the transportation of hazardous materials and prior train derailments leading to tragic harms.

The amendments explained there was a "need to enhance the crashworthiness protection of railroad tank cars" because "although rail transportation of hazardous materials is a safe method for moving large quantities of hazardous materials over

¹In the industry, "poison inhalation hazard" and "toxic inhalation hazard" are interchangeable terms.

²Normalization produces steel with more ductile properties at lower temperatures. As such, non-normalized steel train cars are more prone to brittle fractures than normalized steel cars at the same temperature.

³The Honorable Patrick J. Schiltz, United States District Judge for the District of Minnesota.

long distances, rail tank cars used to contain these materials have not been designed to withstand the force of high-speed derailments and collisions." Id. The amendments specifically noted several high-profile train derailments involving TIH materials, including the CP derailment in Minot, North Dakota, in 2002,⁴ and explained that the failure of the tank cars in a derailment often leads "to fatalities, injuries, evacuations, and property and environmental damage." Id. at 1771. As a result of these incidents and concerns, the PHMSA initiated a strategy to improve the safety of transporting hazardous materials via rail tank cars by addressing "(1) [t]ank car design and manufacturing; (2) railroad operational issues such as human factors, track conditions and maintenance, wayside hazardous detectors, signals and train control systems; and (3) improved planning and training for emergency response." Id. In the proposed regulations, the agency proposed improving "tank-head and shell puncture-resistance standards" in the following way:

The enhanced standards proposed to require tank cars that transport PIH materials in the United States to be designed and manufactured with a shell puncture-resistance system capable of withstanding impact at 25 mph and with a tank-head puncture resistance system capable of withstanding impact at 30 mph. To ensure timely replacement of the PIH tank car fleet, we proposed an eight-year implementation schedule, contemplating design, development, and manufacturing ramp-up in the first two years, replacement of 50% of the fleet within the next three years, and replacement of the remaining 50% of the fleet in the following three years. As part of this implementation plan, we proposed the expedited replacement of tank cars used for the transportation of PIH materials manufactured before 1989 with non-normalized steel head or shell construction.

Id. at 1772-73.

⁴As explained in the amendments, the 2002 derailment in Minot, North Dakota, involved a CP train and resulted "in the catastrophic release of anhydrous ammonia, leading to one death and 11 serious injuries." 74 Fed. Reg. at 1772.

Commentators to the proposed regulations, however, expressed numerous concerns including the feasibility of the existing technology to accomplish the resistance goals and the proposed eight-year implementation period as "overly-aggressive and not realistic." Id. at 1773-76. Furthermore, as particularly relevant to this case, "[w]ith regard to the proposed rule's requirement that all PIH tank cars constructed of non-normalized steel in the head or shell be replaced within five years . . . , several commentators note[d] the PIH shipping industry's voluntary efforts already underway to phase out these tank cars." Id. at 1777. Based on these concerns, the agency explained it was not going to force the retirement of such cars:

We also are modifying our proposal for phasing out cars constructed prior to 1989 with non-normalized steel in the head or shell. Although we continue to believe that an accelerated phase out of these cars is justified, we recognize the voluntary efforts already underway by many fleet owners to phase out these cars, in many cases on schedules more aggressive than the five-year deadline proposed in the NPRM. Rather than imposing a fixed deadline, this rule requires rail car owners that elect to retire or remove rail tank cars from PIH service, other than because of damage to the cars, to prioritize the retirement or removal of pre-1989 non-normalized steel cars.

Id. at 1777-78. In other words, the rule "does not implement the proposed expedited replacement *requirement* for PIH tank cars" but instead "requires that tank car owners prioritize retirement or replacement of pre-1989 non-normalized steel cars when retiring or removing cars from PIH materials service." Id. at 1785 (emphasis added). However, the PHMSA recognized, in passing the regulations, that "the standards set forth . . . shall apply . . . *pending the development and commercialization of more stringent performance standards.*" Id. at 1771 (emphasis added).

On April 14, 2014, CP put into effect its Item 55 of Tariff 8 which requires TIH materials transported on CP's railways to be shipped in normalized steel tank cars. The change was intended to increase safety and reduce the likelihood of a TIH

materials spill in the event of a derailment. An executive from CP provided an affidavit explaining the potential drastic consequences of a TIH spill and CP's business reasons for pursuing a safer method of transport. The affidavit cites the derailment in Minot and explains that it was one of the driving forces behind the change.

After receiving notice about CP's intended requirement, Appellants filed this suit and brought claims against CP under the Hazardous Materials Transportation Act ("HMTA"), 49 U.S.C. §§ 5101-5128, and under 49 U.S.C. § 11101, which codifies the common-carrier obligations for rail carriers. The next day, Appellants filed a motion for declaratory and injunctive relief. On May 27, 2014, after a hearing on the merits of the motion, the district court issued its order holding, under the doctrine of primary jurisdiction, the STB should address the raised issue in the first instance, dismissing the suit without prejudice, and denying the request for injunctive relief after balancing the relevant factors.

II

On appeal, Appellants argue (1) there was no reason to defer to the expertise of the STB under the doctrine of primary jurisdiction because the question of whether CP has impermissibly expanded on the regulations promulgated by the DOT is a legal question; (2) even if the district court properly applied the doctrine of primary jurisdiction, it should have stayed the action rather than dismiss it; and (3) the district court erred in denying the preliminary injunction, even if the matter is referred to the STB. We address each issue in turn.

A

Before addressing the application of the doctrine of primary jurisdiction, we must first consider our standard for reviewing a district court order applying the

doctrine. There appears to be disagreement between our sister courts on whether such review is *de novo* or for an abuse of discretion, with the majority applying a deferential standard. Compare Endo Pharm. Inc. v. Actavis Inc., 592 F. App'x 131, 133 (3d Cir. 2014); Env'tl. Tech. Council v. Sierra Club, 98 F.3d 774, 789 (4th Cir. 1996); Wagner & Brown v. ANR Pipeline Co., 837 F.2d 199, 201 (5th Cir. 1988); Reid v. Johnson & Johnson, 780 F.3d 952, 958 (9th Cir. 2015); S. Utah Wilderness Alliance v. Bureau of Land Mgmt., 425 F.3d 735, 750 (10th Cir. 2005); Boyes v. Shell Oil Prods. Co., 199 F.3d 1260, 1266 n.13 (11th Cir. 2000); Nat'l Tel. Coop. Ass'n v. Exxon Mobil Corp., 244 F.3d 153, 156 (D.C. Cir. 2001), with Ellis v. Tribune Television Co., 443 F.3d 71, 83 n.14 (2d Cir. 2006); see also Consol. Rail Corp. v. Grand Trunk W. R.R Co., No. 13-2269, 2015 WL 1727306, at *5 (6th Cir. Apr. 15, 2015).

On two prior occasions we avoided deciding the issue. See Access Telecomms. v. S.W. Bell Tel. Co., 137 F.3d 605, 608 (8th Cir. 1998) ("Without deciding the standard-of-review question, . . . we accept the parties' invitation to review the primary jurisdiction issue *de novo*."); DeBruce Grain, Inc. v. Union Pac. R.R. Co., 149 F.3d 787, 790 n.4 (8th Cir. 1998) ("This court has not definitively stated the standard of review for the application of the doctrine of primary jurisdiction. Since the district court can be affirmed under *de novo* review, it is not necessary to consider the possible application of the clearly erroneous standard." (internal citation omitted)). In a subsequent decision, we stated "[t]his court *appears* to review primary jurisdiction *de novo*" but gave no analysis and made no express holding on the proper standard for review. United States v. Henderson, 416 F.3d 686, 691 (8th Cir. 2005) (emphasis added). In a more recent decision, we reviewed the issue of primary jurisdiction *de novo* but once again provided no analysis on the issue and made no reference to the disagreement among our sister courts. See United States v. Rice, 605 F.3d 473, 475 (8th Cir. 2010). Because the district court in Rice never had the opportunity to address the question of primary jurisdiction, and we found the doctrine to be inapplicable to that specific criminal case, we did not address the government's

argument that the issue should be reviewed for plain error. Appellants argue that Rice resolved the issue and controls here. We do not believe the Court in Rice intended to resolve a two-decade old circuit split without any analysis or without addressing this Court's prior hesitation to do so on two occasions. We think the better reading of the statement in Rice is that the Court simply reviewed the issue in that specific case *de novo* (it could not have done otherwise). Since we believe the district court in this case reached the correct conclusion even under a *de novo* review, we need not now decide the standard of review issue.

The doctrine of primary jurisdiction applies to claims "properly cognizable in court that contain some issue within the special competence of an administrative agency." Reiter v. Cooper, 507 U.S. 258, 268 (1993). "Under the doctrine of primary jurisdiction a court may leave an issue for agency determination when it involves the special expertise of the agency and would impact the uniformity of the regulated field." DeBruce Grain, 149 F.3d at 789. "No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." United States v. W. Pac. R.R. Co., 352 U.S. 59, 64 (1956).⁵

Appellants argue CP cannot, as a matter of law, override the requirements set forth by the PHMSA, which is a question of law that does not raise any issue within the STB's special expertise. They believe "[t]he DOT has exclusive jurisdiction regarding the specifications of the design, materials and construction of rail tank cars used to transport all hazardous materials in commerce." As such, "no circumstances exist that would allow the STB to overrule the DOT's edict that TIH materials can be

⁵Neither party disputes both the district court and the STB have jurisdiction to address Appellants' § 11101 claim. See Pejepscot Indus. Park, Inc. v. Me. Cent. R.R. Co., 215 F.3d 195, 197 (1st Cir. 2000).

transported in non-normalized steel rail cars safely and securely." According to Appellants, "[t]o permit otherwise would allow the STB to collaterally attack the DOT's exclusive jurisdiction and subject the DOT regulations to an STB veto power." The district court correctly found Appellants' arguments lacking.

Generally, a railway carrier is required to provide transport upon a reasonable request. See 49 U.S.C. § 11101(a) ("A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall provide the transportation or service on reasonable request."). As such, a railway carrier cannot outright refuse to transport TIH materials. See Riffin v. Surface Transp. Bd., 733 F.3d 340, 346-48 (D.C. Cir. 2013); see also Radioactive Materials, M.-Kansas-Texas R.R. Co., 357 I.C.C. 458, 464 (1977) ("Moreover, a carrier may not assert before this Commission that, as a general proposition, shipments meeting DOT and NRC requirements are too hazardous to transport. Such an assertion would amount to a collateral attack on the regulations of DOT and NRC. Any attacks on the regulations of DOT or NRC should be brought before those agencies." (citation omitted)). The question presented in this case, however, is not whether a carrier may refuse to transport TIH materials outright, but whether it may require criteria beyond those stated in the DOT regulations.

Although we have not had occasion to address this issue, two of our sister courts have concluded that the Interstate Commerce Commission ("ICC")—the predecessor agency to the STB⁶—has authority to review the imposition of requirements by carriers and railroads beyond those promulgated by the DOT in its regulations. In Consolidated Rail Corp. v. Interstate Commerce Commission, 646 F.2d 642, 652 (D.C. Cir. 1981), the court held the ICC had the authority and jurisdiction to review the railroads' imposition of additional rates for the

⁶"In 1995, Congress enacted the ICC Termination Act (ICCTA), which abolished the 108-year-old Interstate Commerce Commission and substantially deregulated the rail and motor carrier industries." Pejepscot Indus., 215 F.3d at 197. "In the ICC's place, the ICCTA established the [STB] within the [DOT]." Id.

transportation of radioactive materials. In that case, the railroads sought to impose additional tariffs premised on the use of "special train service" ("STS") for the transportation of the dangerous materials. Id. at 644-45. The ICC held the tariffs were "unreasonably high" because the railroads failed to show the use of special trains was reasonable: "based on the evidence at hand, the special train requirement is wasteful transportation and an unreasonable practice in violation of Section 10701(a) of the act." Id. at 645. In affirming the ICC, the court considered and addressed the varying arguments regarding the scope of the railroad, the ICC, and the DOT's authority and jurisdiction to impose regulations and requirements for the transportation of such materials. The railroads argued the ICC "lack[ed] authority to second-guess the railroads' 'rational judgment' on an 'operational' issue such as the need for STS." Id. at 646. The shippers argued the DOT had exclusive jurisdiction over the issue. Id. The ICC argued it "properly considered all available safety evidence to determine whether tariffs covering the cost of STS were reasonable." Id. The court explained that the ICC should "defer[] to the expertise and primary jurisdiction of the [Nuclear Regulatory Commission (NRC)] and DOT both in determining which particular measures are reasonably required to produce the necessary level of safety, and in deciding whether any particular safety measure will likely produce benefits commensurate with its cost . . ." but nevertheless held the "railroads may indeed seek to prove the *reasonableness of additional safety measures.*" Id. at 650 (emphasis added). The court found the "safety regulations promulgated by DOT and NRC are entitled to be considered by the ICC as embodying prima facie the appropriate balance between safety and nuclear development," but did not exclude the possibility the railroads could satisfy their burden of showing the additional requirements were reasonable. Id. at 651.

The Sixth Circuit reached a similar conclusion: a carrier "cannot refuse to haul any materials which meet (DOT and NRC) standards, but it may seek *approval* of a *stricter practice* which is shown to be just and reasonable." Akron, Canton & Youngstown R.R. Co. v. Interstate Commerce Comm'n, 611 F.2d 1162, 1169 (6th Cir.

1979) (emphasis added). "[W]hile DOT and NRC have exclusive authority to promulgate Industry-wide standards for the carriage of radioactive materials, the ICC may allow Individual carriers to make more (but not less) stringent rules for their own carriage of hazardous materials." Id. at 1170. The STB has also suggested carriers may impose additional requirements. See, e.g., Union Pac. R.R. Co.–Petition for Declaratory Order, STB Fin. Docket No. 35219, 2009 WL 1630587, at *2 (S.T.B. June 11, 2009) ("[C]arriers are not precluded from seeking imposition of stricter safety standards . . .").

Appellants have not cited us to any authority supporting their position and fail to meaningfully distinguish the prior case law. Their reliance on Louisville & Nashville Railroad Co. v. F.W. Cook Brewing Co., 223 U.S. 70 (1912) is entirely misplaced. In Louisville, the Supreme Court held the question of whether a railroad could refuse to transport intoxicating liquors, which were prohibited by state law, did not need to be presented to the ICC because there were no questions of fact to decide. Id. at 84. However, the Court was merely analyzing the legal question of whether a railroad could outright refuse (not reasonably limit) its transportation obligations pursuant to federal law based on a state law. Id. at 82. Furthermore, the Court specifically distinguished the case from one that would involve "the reasonableness of a rate[, which] . . . is primarily [a question] of administrative character, and the propriety of a prior resort to the Commission to obtain a ruling upon the question of reasonableness." Id. at 84. Here, we do not deal with an outright refusal to transport or with issues of competing state and federal regulations. While we recognize Appellants' argument that the STB's decision on this issue may have an impact on uniformity between railway carriers, the concern is better raised to the STB. Accordingly, we find the STB has the authority and jurisdiction to consider whether a carrier may impose a reasonable requirement beyond the minimum regulations set by the PHMSA.

Since we find CP's restrictions are not barred as a matter of law, we consider whether the question of reasonableness of the restrictions should be addressed by the district court or the STB. We believe the STB is better positioned to address the issue.

Determining whether any given transportation request is "reasonable" is no easy task. "Congress did not further elucidate the requisites of the common carrier obligations, leaving to the Commission and the courts the task of clarifying, on a case-by-case basis, a more precise definition of 'reasonable request' . . ." Nat'l Grain & Feed Ass'n v. United States, 5 F.3d 306, 310 (8th Cir. 1993). Determining whether a request is reasonable is a complex, fact-intensive inquiry that requires knowledge and consideration of the industry at issue. The task is usually best left to the STB—the agency most experienced in evaluating the particular circumstances of each case. See Granite State Concrete Co. v. Surface Transp. Bd., 417 F.3d 85, 92 (1st Cir. 2005) ("The STB has been given broad discretion to conduct case-by-case fact-specific inquiries to give meaning to these terms, which are not self-defining, in the wide variety of factual circumstances encountered."). And in other cases where the central issue was reasonableness, this Court and others have applied the doctrine of primary jurisdiction to defer claims to the STB. See, e.g., DeBruce Grain, 149 F.3d at 789-90 ("The question of the reasonableness of a railroad's response to a shortage of cars [was] . . . one best left for agency resolution due to the need for specialized expertise and uniform national treatment."); Pejepscot Indus., 215 F.3d at 205 (holding referral to the STB under the doctrine of primary jurisdiction was appropriate for a claim that the defendants unlawfully refused to provide service on reasonable request).

The decisions discussed above not only demonstrate that the STB can consider requirements beyond the DOT regulations but also that the STB will usually be best equipped to determine if such additional requirements are "reasonable." Like the ICC, "promoting safe rail transportation is one of the [STB's] statutory

responsibilities." Consol. Rail Corp., 646 F.2d at 648. No one would dispute that "[t]he railroads have a responsibility to protect their employees, their property and the public from harmful radiation" or other potentially toxic materials. Id. (quoting the ICC). It is the PHMSA's responsibility to balance the safety and economic concerns in the railroad industry and promulgate applicable regulations. When it comes to determining if any requirements beyond those regulations are reasonable, the STB, with its expertise in the industry, is better equipped than federal courts to address fact-intensive questions of whether a particular safety requirement beyond the regulations is consistent with the regulations and national policy.

Determining the issue in this case will likely involve consideration of the benefits offered by the requirement, the impact it will have on the industry, and the technical comparison between normalized and non-normalized steel cars. Given the complex economic and technical concerns raised by the entities objecting to the requirement of normalized steel cars in the consideration of the regulations, referral of this issue to the STB is appropriate. See id. at 650 ("*The ICC* therefore properly defers to the expertise and primary jurisdiction of the NRC and DOT both in determining which particular measures are reasonably required to produce the necessary level of safety, and in deciding whether any particular safety measure will likely produce benefits commensurate with its cost and will be economical." (emphasis added) (footnote omitted)); Akron, 611 F.2d at 1170 ("*[T]he ICC* may allow Individual carriers to make more (but not less) stringent rules for their own carriage of hazardous materials." (emphasis added)).⁷ Additionally, unlike the district

⁷Appellants filed an unopposed motion to supplement the record before this Court with the petition (a matter of public record) by the Association of American Railroads to the PHMSA to mandate the phase out of non-normalized steel train cars for transporting TIH materials by no later than December 31, 2016. Appellants' motion is granted. We have considered the petition, which asserts that transporting TIH materials in non-normalized steel cars "poses an unnecessary risk to the general public" and that many shippers have already voluntarily retired such cars. Its detailed

court, the STB can solicit comments from all interested parties and the DOT to address the issue from a more uniform perspective rather than merely the dispute between the parties in this case. Moreover, a resolution by the STB would promote uniformity in the question of "reasonableness" rather than the potential of separate district courts reaching inconsistent resolutions in each individual case.

As in DeBruce Grain, "[a]ssessing the reasonableness . . . [of the requirements] in this case . . . would involve issues related to national rail policy, and a judicial ruling could affect rail transportation throughout the country." 149 F.3d at 789. The analysis will require "'an informed evaluation of the economics [and] technology of the regulated industry,' which supports the invocation of primary jurisdiction." Id. (quoting Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 305 (1976)). Therefore, we find the district court correctly applied the doctrine of primary jurisdiction and appropriately referred the issue to the STB.

B

Once a district court decides to refer an issue or claim to an administrative agency under the doctrine of primary jurisdiction, it may either dismiss or stay the action. We review its decision on the issue for an abuse of discretion. See Reiter, 507 U.S. at 268-69 (holding district court has discretion "either to retain jurisdiction or . . . to dismiss the case"). Appellants offer nothing beyond conclusory arguments and fall far short of demonstrating the without-prejudice dismissal was an abuse of discretion.

discussion of the capabilities and differences between normalized and non-normalized steel cars further reaffirms the complexity and technical nature of the question before the Court.

We believe the district court properly dismissed the action without prejudice. Staying the matter may have been appropriate if the district court was referring only a specific factual question to the expertise of the STB that was part of a claim, which would ultimately be decided by the district court. In this instance, the STB's resolution of the referred issue will likely dispose of the entire case. Moreover, Appellants offer no reason why they have suffered any prejudice based on the dismissal. Therefore, the district court did not abuse its discretion in dismissing the action without prejudice. See DeBruce Grain, 149 F.3d at 790 (finding "[d]ismissal without prejudice was appropriate since it did not disadvantage DeBruce" and the STB's decision could be appealed to this Court).

C

In considering the denial of a motion for a temporary restraining order and preliminary injunction, we "review the district court's factual findings for clear error, its legal conclusions de novo, and its exercise of equitable judgment for abuse of discretion." Gen. Motors Corp. v. Harry Brown's, LLC, 563 F.3d 312, 316 (8th Cir. 2009). "An abuse of discretion occurs where the district court fails to consider an important factor, gives significant weight to an irrelevant or improper factor, or commits a clear error of judgment in weighing those factors." Id.

Appellants argue that even if the issue should be resolved by the STB rather than the district court, the district court erred in not granting injunctive relief to prohibit CP from imposing its requirement until after the STB has decided the issue.

In considering whether to issue a preliminary injunction, the district court must consider four factors: "(1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties []; (3) the probability that [the] movant will succeed on the merits; and (4) the public interest." Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d

109, 114 (8th Cir. 1981) (en banc). "The burden is on the movant to establish the need for a preliminary injunction" DISH Network Serv. L.L.C. v. Laducer, 725 F.3d 877, 881 (8th Cir. 2013) (internal quotation marks omitted). We find no error in the district court's denial of a preliminary injunction.

1 – Likelihood of Success

The primary argument for success advanced by Appellants is that CP cannot impose requirements beyond the regulations promulgated by the DOT. Because we have already rejected this argument, we consider whether Appellants are likely to convince the STB the requirement CP seeks to impose is unreasonable.

The presumption that the DOT has appropriately balanced the safety and economic policy reasons in promulgating adequate regulations favors Appellants. See Consol. Rail Corp., 646 F.2d at 652 ("[T]he safety regulations promulgated by DOT and NRC are entitled to be considered by the ICC as embodying prima facie the appropriate balance between safety and nuclear development."). CP may rebut the presumption, for example, by showing

DOT and NRC did not intend to establish comprehensive regulations to assure safe transportation of radioactive materials, but rather hoped that other agencies or private industry would substantially supplement their regulations; or else it might be shown that the regulations were drafted without any knowledge of the [relevant requirement]; or that the railroads lacked any meaningful opportunity to present the [relevant requirement] to DOT or NRC; or that some unusual or special conditions . . . made imposition of [the relevant requirement] reasonable in their case.

Id. at 651. Here, the change of the PHMSA's position between the proposed and promulgated rules in 2009 suggests that the agency may have intended to apply the regulations as the minimum for safety standards. CP argues that several indications

support such an inference. For instance, the agency repeatedly explained in its notice that it "continue[d] to believe that an accelerated phase out of these cars is justified," demonstrating it still believed there were safety reasons to require normalized steel cars. Moreover, it specifically noted "the voluntary efforts already underway by many fleet owners to phase out these cars, in many cases on schedules more aggressive than the five-year deadline proposed in the NPRM" as evidence for not *mandating* but merely *prioritizing* the retirement of such cars. Thus, CP asserts the agency continued to believe normalized steel cars were safer but found it unnecessary to impose stringent time lines since it appeared that the industry was voluntarily moving in that direction. These are at least plausible reasons to rebut the *prima facie* balance.

At this time, on the record before us, it is difficult to make an accurate prediction on the likely outcome before the STB. Indeed, this is precisely why referral to the STB was appropriate. For all of the reasons already discussed above, this task is best determined by the STB based on its expertise. Therefore, we find this factor does not favor either side.

2 – Threat of Irreparable Harm

"Irreparable harm occurs when a party has no adequate remedy at law, typically because its injuries cannot be fully compensated through an award of damages." Gen. Motors, 563 F.3d at 319. "[L]oss of consumer goodwill can be irreparable harm," id., however, "[e]conomic loss, on its own, is not an irreparable injury so long as the losses can be recovered." DISH Network, 725 F.3d at 882. "[T]he absence of irreparable injury is by itself sufficient to defeat a motion for a preliminary injunction." Id.

Appellants argue they would suffer irreparable harm if required to ship TIH materials in normalized steel cars because they "will be forced to forego transporting

their product and receivers will be prevented from obtaining those products." Condensed, their argument is that the requirement will cease the shipment of TIH materials. But the only shipper who provided record evidence stated that only 31 of its 100 leased cars will not meet the requirement. Thus, at least sixty-nine percent of business for this shipper should remain unchanged. Appellants also submitted an affidavit estimating that twenty-one percent of the chlorine train cars in North America—responsible for twenty percent of chlorine shipments in North America—are non-normalized steel cars. This is a far cry from their assertion that no one will ship any products or that they will become unavailable. Additionally, CP introduced evidence that "approximately 95% of the TIH-lading cars on CP's railroad were constructed after 1989"—such that they would be made of normalized steel—and that "in the last five years, the amount of TIH lading moved by rail has decreased by 17%."

The district court found Appellants offered "remarkably little evidence" that the requirement would make it impossible to move TIH materials through the rail. Chlorine Inst., Inc. v. Soo Line R.R., No. 14-CV-1029 (PJS/SER), 2014 WL 2195180, at *6 (D. Minn. May 27, 2014). It noted Appellants failed to explain why they could not obtain a sufficient supply of normalized steel cars, particularly since these have been the standard since 1989 and should have been gradually replacing older cars, as dictated in the 2009 regulations. Id. The court also discredited their arguments because they failed to "give any indication that they have even *attempted* to find alternative ways to meet their needs for normalized-steel cars, much less explained their efforts and their success or lack of success." Id. In summary, Appellants failed to introduce sufficient probative evidence that they could not overcome any effective reduction in the eligible fleet by obtaining other tank cars that meet the requirement or shipping the cargo through other means. Moreover, we do not find record evidence that the shippers were at full capacity and using all of their fleet all the time. As such, even a reduced number of cars may be able to fully accommodate their shipping needs. Even assuming, however, that the shippers were

using all available train cars at all times, the evidence showed the reduction would not be particularly significant and the cargo could be moved by alternative means.

Appellants' assertion that "[a] rail car shortage . . . will inevitably result sooner rather than later" is too speculative. See, e.g., Novus Franchising, Inc. v. Dawson, 725 F.3d 885, 895 (8th Cir. 2013) ("In order to demonstrate irreparable harm, a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief." (internal quotation marks omitted)); S.J.W. ex rel Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771, 779 (8th Cir. 2012) ("Speculative harm does not support a preliminary injunction."). Merely demonstrating the "possibility of harm" is not enough. See Roudachevski v. All-American Care Ctrs., Inc., 648 F.3d 701, 706 (8th Cir. 2011). Appellants also assert that if CP is permitted to enforce this requirement, other railways may adopt it as well; but even if true, Appellants have failed to show it would result in irreparable harm. Finally, the district court properly recognized that any increase in costs or reduction in business as a result of requiring normalized steel cars would simply be compensable economic harm and does not constitute irreparable harm.

Accordingly, we find no likelihood of irreparable harm and this factor favors the denial of an injunction.

3 – Balance of Harms and Public Interest

Appellants argue CP is unlikely to suffer any harm if the injunction is granted because it merely returns the parties to their status quo prior to the effective date of the Tariff. However, they ignore the prior significant and devastating train derailments that have continued to occur in the past decade which initially prompted the discussions of mandating, more than six years ago, what CP now seeks to require. Requiring CP to transport TIH materials on its railways in contravention to a safety measure it voluntarily imposed, believing it to be necessary, could result in

devastating harm to both CP and the public should there be another derailment. CP and the public both have interests in minimizing the risk and catastrophic effect of any potential derailments by providing for the safest possible transport of TIH materials. Since we do not agree with Appellants that CP's requirement would amount to a national crisis for an adequate water supply or fertilizer for crops, any minimum reduction in the ability to transport TIH materials by rail does not outweigh the real concerns which prompted CP to implement the requirement.

We find these two factors also favor denying injunctive relief. Accordingly, we hold the district court did not abuse its discretion in denying Appellants' request for injunctive relief.

III

For the reasons above, the district court's order is affirmed in all respects.

EXHIBIT No. 6

THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SWINOMISH INDIAN TRIBAL
COMMUNITY, a federally recognized Indian
tribe,

Plaintiff,

v.

BNSF RAILWAY COMPANY, a Delaware
corporation,

Defendant.

NO. 2:15-cv-00543 - RSL

**STATEMENT OF SUPPLEMENTAL
AUTHORITY IN SUPPORT OF
OPPOSITION TO DEFENDANT
BNSF RAILWAY COMPANY'S
MOTION TO DISMISS OR STAY**

**ORAL ARGUMENT:
September 2, 2015, 1:30 p.m.**

Plaintiff Swinomish Indian Tribal Community respectfully submits the following supplemental authority in support of its Opposition to Defendant BNSF Railway Company's Motion To Dismiss or Stay (Docket #11):

1. *Star Lake R.R. Co. v. Lujan*, 737 F. Supp. 103 (D. D.C. 1990), *aff'd*, 925 F.2d 490 (D.C. Cir. 1991).
2. *Star Lake R.R. Co. v. Navajo Area Director, Bureau of Indian Affairs*, 94 Int. Dec. 353, 15 IBIA 220 (D.O.I. 1987).
3. *New Mexico Navajo Ranchers Ass'n v. Interstate Commerce Comm'n*, 702 F.2d 227 (D.C. Cir. 1983).

Copies of the above-referenced authorities are attached hereto.

DATED this 31st day of August, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

DATED at Seattle, Washington, this 31st day of August, 2015.

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Star Lake R. Co. v. Lujan, 737 F.Supp. 103 (1990)

737 F.Supp. 103
 United States District Court,
 District of Columbia.

STAR LAKE RAILROAD COMPANY, Plaintiff,
 v.
 Manuel LUJAN, Secretary of the Interior,
 Defendant,
 and

Navajo Tribe of Indians, Intervenor-Defendant.

Civ. A. No. 88-2135. | Feb. 27, 1990.

Railroad challenged administrative decision terminating its easement through Indian lands. On cross motions for summary judgment, the District Court, Joyce Hens Green, J., held that Indian Right-of-Way Act required termination of railroad's easement due to nonuse.

Judgment for defendant.

West Headnotes (6)

- ¹¹¹ **Administrative Law and Procedure**
 ☞ Administrative construction
Administrative Law and Procedure
 ☞ Deference to agency in general
Administrative Law and Procedure
 ☞ Presumption of validity
Administrative Law and Procedure
 ☞ Arbitrary, unreasonable or capricious action; illegality

Court may set aside final agency actions only where it finds actions "arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law"; there is presumption in favor of validity of administrative action, and court must be especially deferential to agency's interpretation of its own statutes and regulations. 5 U.S.C.A. § 706(2)(A).

1 Cases that cite this headnote

- ¹²¹ **Administrative Law and Procedure**
 ☞ Trial De Novo

De novo review of final agency action is reserved for those administrative decisions that rest solely on principles of law unrelated to statutes or regulations that agency regularly interprets.

Cases that cite this headnote

- ¹³¹ **Administrative Law and Procedure**
 ☞ Administrative construction
Administrative Law and Procedure
 ☞ Deference to agency in general
Administrative Law and Procedure
 ☞ Erroneous construction; conflict with statute

Where agency interprets its own statutes and regulations, reviewing court scrutinizes record to determine whether decision was based on consideration of relevant factors, whether there has been clear error of judgment, and whether relevant factors on which decision is based are supported by some evidence.

1 Cases that cite this headnote

- ¹⁴¹ **Indians**
 ☞ Rights of way and easements

Indian Right-of-Way Act required termination of railroad's easement due to nonuse; though railroad claimed that circumstances prevented its use of easement within two years, as required by terms of easement, it had not filed any status reports during that period, and had not requested any extensions of period of use. 25 U.S.C.A. §§ 311-328.

Cases that cite this headnote

Star Lake R. Co. v. Lujan, 737 F.Supp. 103 (1990)

[5]

Indians

—Rights of way and easements

Railroad was not entitled to adjudicatory hearing prior to termination of easement across Indian land due to breach of easement requirement that easement be used for its intended purpose within two years; railroad had not requested extension of time, and its allegation of wrongful obstruction by tribe was speculative at best.

Cases that cite this headnote

[6]

Federal Courts

—Environment and health

Railroad's claim that termination of its easement violated National Environmental Policy Act, in that termination would require alternative routing of railroad and thus preparation of new environmental impact statement, was not ripe for adjudication in that no alternative route had yet been designated or even suggested. National Environmental Policy Act of 1969, § 2, as amended, 42 U.S.C.A. § 4321.

Cases that cite this headnote

Attorneys and Law Firms

*104 Jerome C. Muys, Thomas W. Wilcox, Will & Muys, P.C., Washington, D.C., Milton E. Nelson, Jr., Richard Weicher, Atchison, Topeka & Santa Fe Railway Co., Jeffrey T. Williams, Santa Fe Southern Pacific Corp., Chicago, Ill., for plaintiff.

R. Anthony Rogers, General Litigation Section, Land & Natural Resources Div., U.S. Dept. of Justice, Washington, D.C., for defendant.

Judith Bartnoff, Patton, Boggs & Blow, Washington, D.C., and Paul E. Frye, Nordhaus, Haltom, Taylor, Taradash & Frye, Albuquerque, N.M., for intervenor-defendant.

MEMORANDUM OPINION

JOYCE HENS GREEN, District Judge.

This matter is before the Court on cross motions for summary judgment.² For the *105 reasons elaborated below, the Court grants defendant's motion and denies plaintiff's motion, and this case stands dismissed.

I. BACKGROUND AND PROCEEDINGS BELOW

Plaintiff Star Lake Railroad (Star Lake) is appealing a final decision by the Interior Department's Interior Board of Indian Appeals (IBIA or Board) affirming the Navajo Area Board of Indian Affairs (Navajo Area BIA) termination of Star Lake's right-of-way on federal lands held in trust by the federal government for the Navajo. *See Star Lake Railroad Co. v. Area Director, Navajo Area Office, Bureau of Indian Affairs and Navajo Tribe of Indians*, 15 IBIA 220 (No. IBIA 86-42-A, July 10, 1987). The following account is derived primarily from the IBIA's decision.

In 1974 Star Lake, a subsidiary of the Atchison, Topeka and Santa Fe Railroad Company (Santa Fe), announced its plans to build a railroad line, connected to an existing line, in northwest New Mexico, for the transportation of coal. This line would cross state, Bureau of Land Management (BLM), tribal trust, tribal fee, private, and federal lands. In December 1979, the BLM granted Star Lake a right-of-way over more than twelve miles of public lands, but would not permit construction to begin until the Navajo Area BIA approved a right-of-way across Indian lands. 15 IBIA 222.

On January 15, 1981, the Assistant Secretary of the Interior-Indian Affairs directed the Navajo Area BIA Director to approve Star Lake's right-of-way across Navajo Trust lands, on the condition that the grant of the easement incorporate an agreement between the Navajo Tribe and the Santa Fe Railway. Administrative Record (AR) Folder D, Tab A. On January 16, 1981, the right-of-way, incorporating the agreement, was approved. In return for the grant, Star Lake agreed to pay \$11,672.80 as well as provide certain benefits to the Tribe. AR Folder A, Tab K; 15 IBIA at 223.

The disagreement that prompted the instant action centers on the following language in the grant:

PROVIDED, that this right-of-way shall be terminable in whole or in part by the Grantor for any of the

Star Lake R. Co. v. Lujan, 737 F.Supp. 103 (1990)

following causes upon 30 days' written notice and failure of the grantee within said notice period to correct the basis for termination:³

A. Failure to comply with any term or condition of the grant or the applicable regulations.

B. A nonuse of the right-of-way for a consecutive two-year period for the purpose for which it was granted.

AR Folder A, Tab K; 15 IBIA at 223. This language is identical in all material respects to the Interior Department regulations governing rights-of-way on Indian lands. *See* 25 C.F.R. § 169.20 (1987).

At the request of the Tribe, the Area Director wrote Star Lake on October 24, 1984, that the Tribe wished to terminate the right-of-way, primarily because Star Lake had failed for two years to use the easement for its purpose: to construct a railroad line. AR Folder D, Tab J; 15 IBIA at 225. Star Lake responded by letter on November 20, 1984, that although it still intended to construct the rail line, its application to the ICC for permission to build was being opposed and therefore its failure to begin working on the line was involuntary. It did not deny its non-use. *106 AR Folder A, Tab I. On December 21, 1984, the Area Director terminated the right-of-way on the basis of Star Lake's failure to demonstrate that it used the right-of-way for its intended purpose within the allotted time. In the termination letter, the Director noted that Star Lake had not filed any status reports during the first two years of the easement, nor had it requested any extensions of the period of use. 15 IBIA at 225; AR Folder A, Tab G.

During the same period as the events described above, Star Lake was attempting to secure rights-of-way over several lands held in trust by the United States for the benefit of individual Indians. 15 IBIA at 228. These actions by Star Lake were disputed at every stage; administrative findings and appeals, as well as various lawsuits, ensued.⁴ Ultimately the Interstate Commerce Commission, following a remand from the Court of Appeals for the District of Columbia Circuit,⁵ granted Star Lake authority to construct the railway as a whole, issuing a certificate of public convenience and necessity on April 4, 1987. Interstate Commerce Commission Decision, Finance Docket No. 28272, Star Lake Railroad Co.—Rail Construction and Operation in McKinley County, New Mexico (April 10, 1987) (ICC Decision); AR Folder H, Tab 21.⁶ The ICC decision took official notice of the termination of the easement at issue here, ICC Decision at

5, but nonetheless declared the line to be in the public interest. However, it noted, “[o]ur authorization is permissive; applicants will have to obtain the easement or make some other acceptable arrangement before they can construct the line.” ICC Decision at 6; *see also id.* at 12 n. 16 (“we do not withhold our approval to operate a rail line ... simply because the applicant has not already obtained all necessary approvals by other authorities.”). The Court of Appeals affirmed the certificate. *New Mexico Navajo Ranchers Association v. ICC*, 850 F.2d 729 (D.C.Cir.1988).

Meanwhile, Star Lake appealed the termination decision at issue here to the Acting Deputy Assistant Secretary—Indian Affairs. 15 IBIA at 226. On August 29, 1985, the Deputy remanded the case to the Area Director for his failure to explain his decision adequately. Specifically, the Deputy remanded for an explanation of what was in the Tribe's best interest and “[b]ecause the decision to terminate is a discretionary one and one which rests with the Area Director” and “his reasoning was not adequately explained.” AR Folder A, Tab A.

On February 12, 1986, the Area Director affirmed his 1984 termination decision. Two of the Director's findings are of note:

1) Grantee Star Lake failed to demonstrate that it had in any way used the right-of-way for the purpose for which it was intended or to otherwise cure the default including a timely filing of a request for an extension of time. The term of the grant of easement makes it mandatory that the easement be terminated; therefore, no extension of time can be granted.

3) To extend the grant of easement at this time would only be based upon the ‘intentions’ of the grantee to use the right-of-way sometime in the future and such ‘use’ is purely based upon ‘speculations’ for the future development and marketing of coal leases held by Star Lake sometime in the future.

AR Folder E, Tab B, at 8; 15 IBIA at 226–27.

*107 Star Lake appealed this decision to the Assistant Secretary, Indian Affairs, on March 14, 1986; the matter was taken to the IBIA, which ultimately affirmed the decision. This decision by the IBIA constitutes a final action by the Secretary of the Interior.

Star Lake asks this Court to vacate and remand the IBIA decision. It requests a declaration that it is entitled either to a reasonable extension of time in which to commence

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construction of the railroad line, or to an adjudicatory hearing concerning the Navajo Tribe's alleged involvement in preventing Star Lake's use of the easement. In addition, Star Lake asks for a declaration that the Secretary must comply with the National Environmental Policy Act before he can lawfully terminate Star Lake's right-of-way.

II. DISCUSSION

A. Standards

Summary judgment is appropriate when there is "no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Fed.R.Civ.Proc. 56(c). The parties have no disagreement as to the facts recited above, facts found by the Administrative Law Judge.⁷ Summary judgment, as the parties have proceeded, is therefore an appropriate vehicle for disposition of this matter. In this context, where the Court is being asked to review a final agency action, the inquiry is shaped by the standard of review that the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 702-706 (1988), requires in such cases.

¹¹ The role of a Court in reviewing final agency actions is extremely limited. Section 706 of the APA provides that a court may set aside an agency action only where it finds the action "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under this standard, there is a presumption in favor of the validity of administrative action. A court cannot substitute its judgment for that of the agency. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971). Where, as here, the action at issue involves an interpretation by the agency of its own statute and regulations, the court must be especially deferential. See *United States v. Rutherford*, 442 U.S. 544, 553, 99 S.Ct. 2470, 2475, 61 L.Ed.2d 68 (1979); *Satellite 8301123 v. Hodel*, 648 F.Supp. 410, 413 (D.D.C.1986).

¹² Plaintiff argues that the Board's decision involved "solely a legal question" and, therefore, should be subject to the heightened scrutiny of *de novo* review. While it is true that some questions of law require a reviewing court to cast aside the normal deference, plaintiff's argument fails to acknowledge the importance of the fact that the IBIA and the Secretary were interpreting and applying Department of Interior regulations. *De novo* review is inappropriate in such circumstances; it is reserved for those administrative decisions "that rest[] solely on

principles of law unrelated to the statutes or regulations that the agency regularly interprets." *Lowey v. Watt*, 684 F.2d 957, 965 (D.C.Cir.1982); see also *Satellite 8301123*, 648 F.Supp. at 413. The Department of Interior is charged with implementing the statute and developing the regulations; the decision is clearly within its area of expertise.

¹³ Rather than *de novo* review, then, this Court must afford the IBIA decision "the high level of deference" due "when the issue turns on the interpretation of the agency's own prior proclamations." *Wichita & Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 778 (D.C.Cir.1986). Thus to affirm the IBIA's decision requires only that the Court find reasonable the *108 IBIA's interpretations of the agreement, the right-of-way, and the statutes and regulations. The decision need not even be one that this Court would independently reach, given the findings and the law; it need only be reasonable. *Aluminum Co. of America v. Central Lincoln Peoples' Utility District*, 467 U.S. 380, 389, 104 S.Ct. 2472, 2479, 81 L.Ed.2d 301 (1984); see also *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

Nonetheless, this deference is not abdication. The record must be scrutinized to determine "whether the decision was based on a consideration of relevant factors and whether there has been a clear error of judgment." *Overton Park*, 401 U.S. at 416, 91 S.Ct. at 823. The Court must also find that the relevant factors on which the decision is based are supported by some evidence. *Doe v. Hampton*, 566 F.2d 265, 271 n. 15 (D.C.Cir.1977), quoted in *Ritter Transportation, Inc. v. ICC*, 684 F.2d 86, 88 (D.C.Cir.1982), cert. denied, 460 U.S. 1022, 103 S.Ct. 1272, 75 L.Ed.2d 494 (1983).

B. Star Lake's Arguments

The IBIA decision squarely positioned the issue: whether the Navajo Area BIA had authority to excuse Star Lake's admitted non-use of the right-of-way, when the Navajo tribe objected to excusing the non-use. In resolving this question, the IBIA Administrative Law Judge looked to the applicable federal statutes and regulations, the agreement that established the right-of-way, and the earlier agreement between Star Lake and the Navajo.

Plaintiff's claims can be summarized as follows:⁸ First, it seeks to overturn as arbitrary and capricious the IBIA's affirmance upholding the termination of its right-of-way for non-use. Star Lake contends that, rather than non-use, it was *prevented* from using the land in question, and hence should be excused from that requirement of the contract. Plaintiff further argues that the Secretary,

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through the Navajo Area BIA, had discretion under 25 C.F.R. § 169.20 with regard to the termination, and was therefore not compelled by the regulation to terminate its easement. Furthermore, not only did the Secretary in fact have discretion, plaintiff continues, he abused this discretion (and hence violated the APA) by not denying the Indians' initial request for termination. Finally, Star Lake argues that it is entitled as a matter of law to an adjudicatory hearing to develop facts with regard to whether the Indian tribes prevented use of the right-of-way. The Area Director, and the IBIA on appeal, rejected all these arguments.⁹

1. *Whether the Termination was Discretionary.*

¹⁴ The right-of-way at issue here is governed by the federal Rights-of-Way Through Indian Lands Act, 25 U.S.C. §§ 311–328 (1982), and the implementing regulations found at 25 C.F.R. Part 169 (1987). While the statute does not mention termination, the regulation, as noted above, does provide for termination in certain circumstances, upon due notice and opportunity for correction by the grantee. The question is whether termination is discretionary. More exactly, the issue is whether the termination provision of this particular easement could have been, and should have been, tolled under the circumstances.

In support of its argument that termination was discretionary, and not mandatory as the Navajo Area BIA Director found and the IBIA affirmed, Star Lake points to the language of the right-of-way grant. The grant itself, *see* AR Folder A, Tab K, at 2, states that the right “shall be terminable” which, plaintiff correctly points out, means “capable of being terminated.” *109 Plaintiff’s Response to Defendant’s Motion for Summary Judgment (Plaintiff’s Response) at 9. Similarly, the regulation from which the grant’s language is drawn, 25 C.F.R. § 169, provides that rights-of-way “*may* be terminated” (emphasis added).

The IBIA agreed with Star Lake that the *regulation’s* conditional language “allows for the exercise of some discretion.” 15 IBIA at 236. “However,” the Board continued, “that discretion is subject to limitation by Federal, statutory and case law and, in this case, also by the provisions of the grant of easement and the agreement incorporated therein,” to the extent they do not conflict with federal law. *Id.* at 236–37. In this case the Director complied with the grant and the applicable law, and Star Lake failed to fulfill the requirements that would have prevented termination or to make timely efforts to secure extensions of time which, if granted, might have permitted the fulfillment of those requirements.

Star Lake insists that the “plain purpose” of the regulation is “to afford a right-of-way grantee an opportunity to explain the reason for its non-use, so that the Secretary may exercise his discretion” to excuse the grantee from the grant’s conditions. Plaintiff’s Response at 10. But as the Director, and then the IBIA, pointed out, the regulation recites that once a grantee has been notified and fails to correct a problem that is the basis for termination, the Secretary “*shall*” terminate the right-of-way. Nowhere, either on the face of the regulation, or even implied, is there room for excuse or tolling. The IBIA did not abuse its discretion by accepting this completely reasonable reading by the Navajo Area BIA of a regulation it administers.

Moreover, this interpretation does not conflict with federal statutes, policies, or case law. The IBIA thoroughly considered related statutes that *do* provide for discretion and that excuse conditions of easements and other grants of public lands. *See* 15 IBIA at 237–39. Given the *difference* between those statutes and the statute and regulations at issue here—the former specifically provide for such exceptions,¹⁰ while the Indian Right of Way Act does not—the IBIA properly declined to read similar exceptions into plaintiff’s grant of easement.¹¹ The IBIA, as required, carefully considered “relevant factors,” *Overton Park*, 401 U.S. at 416, 91 S.Ct. at 823, including the weighty rule that statutes and regulations intended to benefit Indians be liberally construed in their favor. *Bryan v. Itasca County*, 426 U.S. 373, 392, 96 S.Ct. 2102, 2112, 48 L.Ed.2d 710 (1976); *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1332 (10th Cir.1982).

The IBIA’s interpretation of the regulation, and hence the Secretary’s affirmance thereof, is not unreasonable and must be affirmed.¹²

2. *Denial of Star Lake’s Request for an Adjudicatory Hearing.*

¹⁵ Star Lake asserts that the Board abused its discretion by denying Star Lake’s request for an adjudicatory hearing. The Board’s conclusion, that no adjudicatory hearing was required because the matter was disposed of entirely by resolution of the legal question, also deserves this Court’s deference.

Star Lake argues that it must have an adjudicatory hearing to determine whether the Indians, either collectively (as the Tribe) or individually, deliberately impeded *110 Star Lake’s use of the right-of-way during the two-year period by various court and administrative challenges. With this allegation Star Lake is attempting to invoke equitable

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tolling of the two-year limitation by coming under the rule of *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324 (10th Cir.1982). In that case, the Court of Appeals for the Tenth Circuit upheld the tolling of the terms of certain oil and gas leases from the Apache Tribe because the Tribe, by suing the lessees, had obstructed the lessees' efforts to perform under the leases. Star Lake asks for the opportunity to develop evidence that the Tribe covertly acted much in the same way to frustrate its efforts to obtain the approvals needed to begin using the easement. And, if such evidence were found, it contends, Star Lake would be entitled to similar equitable tolling under *Jicarilla*.

The only support of Star Lake's allegation of wrongful obstruction by the Tribe is that the attorney representing the Navajo Tribe in the instant dispute formerly represented the individual Navajos involved in the ICC challenge. Nothing in the record, the Board noted, indicates that "the tribe took any action to impede appellants use of the right-of-way during the first 2 years of its existence." 15 IBIA at 247. It was therefore reasonable for the Board to conclude that no genuine issue was presented and that the only proffers of evidence were speculative at best.

Furthermore, Star Lake has provided no explanation as to why it did not request, as frequently as necessary, an appropriate extension of time while the litigation progressed and the time continued to evaporate. Even more puzzling is that Star Lake did not request that the non-use provision be tolled *until* the two-year period of non-use had passed. This fact alone distinguishes *Jicarilla* from the facts in this case.

The IBIA's findings, more than adequately supported by the law, will not be disturbed. *See, e.g., General Motors Corp. v. FERC*, 656 F.2d 791, 798 n. 20 (D.C.Cir.1981). "[T]he standard of review which applies to an agency's decision to forego an evidentiary hearing in the absence of a disputed factual issue is quite narrow." *Cerro Wire & Cable Co. v. FERC*, 677 F.2d 124, 129 (D.C.Cir.1982). No evidentiary hearing is required when there is no issue of material fact in dispute. *Id.* at 128-29. "[M]ere allegations of disputed facts are insufficient to mandate a hearing; petitioners must make an adequate proffer of evidence to support them." *Id.* at 129. In the instant case, the IBIA did not find adequate evidence; we do not disagree.

Deference is also mandated with regard to this issue because Department of Interior regulations make the decision whether to hold an evidentiary hearing entirely discretionary with the Board: "where the record indicates

a need for further inquiry to resolve a genuine issue of material fact, the Board *may* require a hearing." 43 C.F.R. § 4.337 (1987) (emphasis added). This is an area committed to the Board's sound discretion and the IBIA has presented reasoned findings to support its discretion. The IBIA's conclusion on this issue is eminently appropriate and this Court will uphold that determination.

3. *Star Lake's NEPA claim.*

⁶¹ Star Lake's final argument is that the Area Director's decision should be overturned because it violated the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370b (1982). This claim lacks merit.

Star Lake bases its argument on the fact that the BLM prepared a comprehensive environmental impact statement (EIS) as required by NEPA, *see* 42 U.S.C. § 4332, on the proposed railroad and coal development in the San Juan Basin. The route via the right-of-way was found in that EIS to be the most cost-effective and least environmentally damaging. Star Lake contends that terminating the right-of-way will therefore require it "to use a longer, more environmentally damaging alternative route." Plaintiff's Response at 22. Accordingly, Star Lake claims that the termination constitutes a major federal action under NEPA, requiring the preparation of a new EIS.

*111 There is some dispute as to whether this argument was raised at the administrative level. According to the defendant, plaintiff only raised this question at the administrative level in its reply brief before the IBIA, at the last moment in the last administrative proceeding. The Board's decision does not discuss it. If indeed the claim was not presented to the agency in the first instance, it cannot be pressed on this Court. *Washington Association for Television & Children v. FCC*, 712 F.2d 677, 680 (D.C.Cir.1983).

Assuming, however, that this claim is properly before the Court, it nonetheless cannot be considered here because it is not ripe. An EIS is required only when there is a proposal for a major federal action. 42 U.S.C. § 4332. No such federal action has yet been proposed; a route other than through the tribal lands may be more environmentally damaging, but no route has yet been designated or even suggested. *See Kleppe v. Sierra Club*, 427 U.S. 390, 399, 406, 96 S.Ct. 2718, 2725, 2728, 49 L.Ed.2d 576 (1976). Accordingly, plaintiff's NEPA claim is dismissed.

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III. CONCLUSION

It is the hallmark of judicial review of agency action that the petitioner has the heavy burden of persuading the reviewing court to discard its deferential approach. To do so, it must demonstrate that the agency's action reflects a clear error of judgment. Plaintiff Star Lake, while it may be aggrieved by the IBIA decision, has failed to do so.

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment and defendant-intervenor's motion to affirm agency action be and hereby are granted; it is

FURTHER ORDERED that plaintiff's motion for

Footnotes

- 1 Pursuant to Fed.R.Civ.P. 25(d)(1), Manuel Lujan has been substituted for Donald Hodel as Secretary of the Interior.
- 2 Intervenor Navajo Tribe's Motion to Affirm Agency Action is, therefore, also granted.
Plaintiff also filed a motion for permission to cite new authority, "some published Congressional hearings." It must be denied, because the plaintiff did not timely cite these reports to the agency and offers no excuse for not doing so. Moreover, this Court may only consider material in the administrative record, which is closed. *See, e.g., Satellite 8301123 v. Hodel*, 648 F.Supp. 410, 414 (D.D.C.1986).
- 3 Here the grant cited an earlier version of 25 C.F.R. part 169, which provides, *inter alia*, that all rights of way granted under that part may be terminated by the Secretary on 30-days written notice on grounds identical to those recited in the approval and excerpted above.
- 4 These matters are set forth in 15 IBIA at 228-31.
- 5 *New Mexico Navajo Rancher's Association v. ICC*, 702 F.2d 227 (D.C.Cir.1983) (remanding decision to ICC for further proceedings to determine the financial viability of Star Lake's proposed rail line and for findings as to whether Star Lake acted in bad faith in obtaining consents from allottees).
- 6 This decision concerned whether there would be sufficient demand for Star Lake's San Juan Basin coal to make the proposed construction financially viable.
- 7 Star Lake "has no disagreement with any of the material facts set forth in the Secretary's memorandum," but asserts that "the broader factual statement submitted by Star Lake is the necessary foundation to resolve the legal issues raised by the pleadings." Plaintiff's Response to Motions for Summary Judgment of the Defendant Secretary of the Interior and Intervenor-Defendant Navajo Tribe of Indians, at 2.
- 8 Plaintiff raised these same arguments in its administrative appeals. *See, e.g., Reply Brief of Appellant Star Lake Railroad Co. Before the Interior Board of Indian Appeals*, Docket No. IBIA 86-424-A (1986); AR Folder H, Tab 7; 15 IBIA at 231-33.
- 9 The IBIA denied Star Lake's petition for reconsideration of its decision with regard to its request for an evidentiary hearing. *See Star Lake Railroad Co. v. Area Director, Navajo Area Office, Bureau of Indian Affairs*, IBIA 86-42-A (Reconsideration), 15 IBIA 271 (August 19, 1987).
- 10 *E.g., Federal Land Policy and Management Act of 1976*, 43 U.S.C. § 1766 (1982); *Mineral Leasing Act of 1920*, 30 U.S.C. § 185(o) (3) (1982).
- 11 Even were the Court to find that the policies and equitable principles found in similar laws should be read into the

summary judgment be and hereby is denied; it is

FURTHER ORDERED that all other pending motions in this case be and hereby are dismissed as moot; it is

FURTHER ORDERED that this case is dismissed.

IT IS SO ORDERED.

All Citations

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statute, it would nonetheless defer to the Secretary because the same decision could have been reached without contravening these policies. For example, the Secretary could have found that the policy favoring Indians overrode the equitable protection provided to Star Lake, especially since Star Lake knew of the 2-year provision but did not request any extensions.

- 12 Given this conclusion, the Court need not consider Star Lake's other arguments concerning the right-of-way grant and the regulations.

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94 Interior Dec. 353 (D.O.I.), 15 IBIA 220, 1987 WL 273284

Department of the Interior (D.O.I.)

Interior Board of Indian Appeals

STAR LAKE RAILROAD CO.

v.

NAVAJO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS, & NAVAJO TRIBE OF INDIANS

Decided July 10, 1987

Appeal from a decision of the Area Director, Navajo Area Office, Bureau of Indian Affairs, terminating a right-of-way over Navajo tribal trust lands.

Affirmed.

1. Administrative Procedure: Administrative Review--Appeals: Jurisdiction-- Board of Indian Appeals: Jurisdiction--Bureau of Indian Affairs: Administrative Appeals: Generally

Upon the expiration of the 30-day time period established by 25 CFR 2.19(b), any party to an appeal pending before the Bureau of Indian Affairs official exercising the review authority of the Commissioner of Indian Affairs may invoke the jurisdiction of the Board of Indian Appeals.

2. Indians: Lands: Rights-of-Way--Indians: Lands: Tribal Lands--Statutory Construction: Indians

Federal statutes concerning rights-of-way over tribal lands, and concerning tribal lands generally, evidence congressional intent to vest Indian tribes with power to control the use of their own lands.

3. Indians: Lands: Rights-of-Way--Indians: Lands: Tribal Lands--Regulations: Interpretation--Statutory Construction: Indians

25 CFR 169.20, providing for the termination of rights-of-way over Indian lands, is subject to the rule of construction that enactments intended to benefit Indians are to be liberally construed in their favor.

4. Indians: Land: Rights-of-Way--Indians: Lands: Tribal Lands--Regulations: Interpretation--Statutory Construction: Indians

Where 25 CFR 169.20 provides for the termination of a right-of-way for nonuse for a consecutive 2-year period for the purpose for which the right-of-way was granted, no provision of statute, regulation, or the right-of-way documents authorized the Bureau of Indian Affairs to excuse involuntary nonuse without the consent of the tribe.

****1 APPEARANCES:** Jerome C. Muys, Esq., and John F. Shepherd, Esq., Washington, D.C., and Jeffrey T. Williams, Esq., Chicago, Illinois, for appellant; Arthur Arguedas, Esq., Office of the Solicitor, U.S. Department of the Interior, Window Rock, Arizona, for appellant; Paul E. Frye, Esq., Albuquerque, New Mexico, for the Navajo Tribe.

OPINION BY ACTING CHIEF ADMINISTRATIVE JUDGE VOGT

Appellant Star Lake Railroad Co. challenges a February 12, 1986, decision of the Area Director, Navajo Area Office, Bureau of Indian Affairs (appellee; BIA) to terminate appellant's 2.726-mile right-of-way *354 over Navajo tribe trust lands in McKinley and San Juan Counties, New Mexico. For the reasons discussed below, the Board affirms that decision.

Background

In 1974, appellant, a wholly owned subsidiary of the Atchison, Topeka and Santa Fe Railway Co. (Santa Fe), announced plans to construct a railroad line into the San Juan Basin in northwestern New Mexico to provide transportation for coal to be mined in the Star Lake-Bisti area. The proposed line was to run from a connection on the existing line of the Santa Fe Railway near Baca (Prewitt), New Mexico, northeasterly through Hospah to Pueblo Pintado, a distance of about 62 miles, at which point the line was to branch off eastward some 10 miles to Star Lake with an additional 44 miles northwestward

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through Gallo Wash. The total length of the proposed line was approximately 114 miles. It was to cross Federal, State, tribal trust, trust allotted, and private lands.

**2 In December 1979, pursuant to approval given by the Secretary of the Interior in August 1979, the Bureau of Land Management (BLM) granted a right-of-way to appellant over 12 miles of public lands. The Secretary's approval stipulated that construction would not begin until BIA approved a right-of-way across Indian lands.

On January 15, 1981, the Assistant Secretary--Indian Affairs authorized and directed appellee to approve, on or before January 16, 1981, a right-of-way for appellant over Navajo tribal trust lands. The Assistant Secretary specified that the right-of-way was to incorporate an agreement dated January 12, 1981, between the Navajo Tribe (tribe), appellant, and Santa Fe. On January 16, 1981, appellee granted an easement for a 2.726-mile right-of-way, containing approximately 58.384 acres, to appellant. The right-of-way grant incorporated the January 12 agreement. It also contained the following proviso: PROVIDED, that this right-of-way shall be terminable in whole or in part by the Grantor for any of the following causes upon 30 days' written notice and failure of the Grantee within said notice period to correct the basis for termination (25 CFR 161.20):¹

A. Failure to comply with any term or condition of the grant or the applicable regulations, including but not limited to requirement for archaeological clearance prior to construction.

B. A nonuse of the right-of-way for a consecutive two-year period for the purpose for which it was granted.

*355 C. An abandonment of the right-of-way.

D. Failure of the Grantee, upon the completion of construction, to file with the Grantor an affidavit of completion pursuant to 25 CFR 161.16.

Consideration for the right-of-way was \$11,672.80.²

Sometime prior to October 24, 1984, the tribe notified appellee that it wanted the right-of-way terminated.¹ On October 24, 1984, appellee wrote to appellant stating that the tribe had requested termination, and that certain bases for termination of the right-of-way existed:

1. Failure to use the right-of-way for a consecutive two-year period for the purpose for which it was intended.

Field inspection of the tracts of land cited in the easement reveal that construction of the railroad has not commenced, and therefore, that the Star Lake Railroad Company could not have used the right-of-way for the purpose for which it was intended; *i.e.*, operation of a line of rail. Our records further show that supplemental archaeological clearance reports have not been filed.

2. Failure to comply with various terms, conditions and stipulations contained in the January 12, 1981 agreement between the Navajo Nation, Star Lake Railroad, and Atchison, Topeka and Santa Fe Railroad, in that:

[a] The Star Lake Railroad Company failed to submit to the Navajo Land Administration Department, Window Rock, Arizona, a proposed handbook concerning damage claims, policies and procedures by February 11, 1981 as required by Paragraph 4 of Agreement.

**3 [b] Star Lake Railroad Company failed to submit [to] the Navajo Nation a proposed handbook concerning employee conduct as required by Paragraphs 8 and 10 of the Agreement.

Appellee's letter concluded:

You have thirty [30] days to correct the deficiencies cited in this letter to demonstrate to our satisfaction that the above factual allegations are not correct. If you fail to do so within the 30-day period, the January 16, 1981 Grant of Easement for Right-of-Way shall be terminated in whole.

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Appellant responded by letter of November 20, 1984, stating in relevant part:

Star Lake has intended and still intends to construct a line of railroad across the right-of-way easement, as evidenced by its application to the Interstate Commerce Commission and continued prosecution thereof against the opposition thereto generated through the DNA-People's Legal Services, Inc. However, despite these efforts of Star Lake, the Interstate Commerce Commission has yet to issue its final decision approving such construction, thus rendering the inability of Star Lake to exercise further use of its easement through actual construction of the rail line involuntary on its part.

Appellant also stated that it had furnished the handbooks required by the agreement to the tribal attorney and a tribal employee.

*356 On December 21, 1984, appellee terminated appellant's right-of-way on the grounds that appellant had failed to show it had in any way used the right-of-way for the purpose for which it was intended. Appellee noted that BIA's records contained no status report from appellant or requests for extension of the 2-year period in which to begin construction.⁴

Appellant appealed the termination to the Acting Deputy Assistant Secretary-- Indian Affairs who, on August 29, 1985, remanded the matter to appellee for further consideration. The Acting Assistant Secretary concluded that appellee had not adequately explained his decision and that he should have analyzed the issue with respect to the best interests of the tribe. The decision concluded:

Because the decision to terminate is a discretionary one and one which rests with the Area Director, and because it is apparent from a review of his December 21, 1984, decision that his reasoning was not adequately explained, I am hereby remanding the matter for his consideration. In the process of considering whether the termination is in the best interests of the tribe, questions to be addressed include, but are not limited to, the following: 1) have any of the factual conditions surrounding the grant of easement changed since the December 21, 1984, decision, 2) was the Navajo Tribe being hurt by continuation of the grant, and 3) will any benefits accrue to the tribe from any extension that Star Lake might seek?

(Aug. 29, 1985, Decision at 3).

In his February 12, 1986, decision on remand, appellee discussed the points required by the Acting Deputy Assistant Secretary and concluded:

**4 I hereby affirm the December 21, 1984 decision to terminate the January 16, 1981, Grant of Easement for Right-of-way on the following grounds:

1) Grantee Star Lake failed to demonstrate that it had in any way used the right-of-way for the purpose for which it was intended or to otherwise cure the default including a timely filing of a request for an extension of time. The term of the grant of easement makes it mandatory that the easement be terminated; therefore, no extension of time can be granted.

2) There is substantial evidence that the reinstatement or extension of the grant of easement would not be in the best interest of the Navajo Tribe.

3) To extend the grant of easement at this time would only be based upon the "intentions" of the grantee to use the right-of-way sometime in the future and such "use" is purely based upon "speculations" for the future development and marketing of coal leases held by Star Lake sometime in the future.

(Feb. 12, 1986, Decision at 8). By letter dated March 4, 1986, appellant appealed this decision to the Assistant Secretary--Indian Affairs. The tribe filed answer briefs.

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[1] On June 6, 1986, the Board received a motion from the tribe stating that the appeal has been ripe for decision for more than 30 days and that no decision had been rendered. The tribe requested the Board to assume jurisdiction over the appeal pursuant to 25 CFR 2.19.⁵ *357 By order of June 11, 1986, the Board made a preliminary determination that it had jurisdiction over the appeal. Appellant objected to the Board's determination, contending that parties to an appeal other than the appellant did not have the right to request the Board to assume jurisdiction pursuant to 25 CFR 2.19. The Board, and ultimately the Director, Office of Hearings and Appeals, in an order dated August 21, 1986, concluded that, contrary to appellant's contention, 25 CFR 2.19 is more than a choice of forum provision for appellants, but is, rather, a jurisdictional provision which may be invoked by any party to an appeal. Therefore, appellant's motions seeking to divest the Board of jurisdiction were denied.

The appeal was docketed by the Board on August 28, 1986. Appellant, appellee, and the tribe filed briefs.

Related Proceedings

In addition to the right-of-way over tribal trust lands, which is the subject of this appeal, appellant has sought a right-of-way over allotted lands held in trust by the United States for individual Navajo Indians. The proceedings concerning this matter, which have been long and involved, are discussed extensively by both appellant and the tribe in this appeal. Therefore, a brief summary of these proceedings is set out.

As proposed, appellant's railroad line would cross 61 allotments. In 1977, appellant obtained over 600 consents from owners of these allotments. Subsequently, some of the allottees withdrew their consents, stating that they misunderstood the consent form. In November 1979, appellee rejected appellant's right-of-way application for allotments whose owners had revoked their consents. The Acting Deputy Commissioner of Indian Affairs affirmed appellee's decision on May 30, 1980, holding that the allottees' consent was a prerequisite to the granting of a right-of-way, and that the allottees could revoke their consent at any time prior to the grant. The Acting Deputy Commissioner directed appellee to approve the rights-of-way over allotments where the requisite consents had been obtained and other conditions had been met.

**5 An appeal⁶ was taken from this decision by the New Mexico Navajo Ranchers Ass'n, the Pueblo Pintado Chapter of the tribe, and 54 individual Navajos, who contended that, for a number of reasons, all the rights-of-way should have been disapproved as a matter of law. The appeal was referred to Administrative Law Judge L. K. Luoma, who *358 held an evidentiary hearing in December 1980, and issued a recommended decision on June 29, 1981. Judge Luoma agreed with the Acting Deputy Commissioner as to the necessity of the allottees' consent and their right to revoke their consent prior to the grant of a right-of-way. He found that appellant had shown good faith in its efforts to obtain a right-of-way but that there was a question as to whether some or many of the allottees have made knowledgeable consents. He also found there was a lack of appraisal data to support the assessment of fair market value for the right-of-way. He recommended that the right-of-way application be returned to appellee with instructions to "review all consents to determine which ones if any truly reflect the allottees' intent to grant rights-of-way under conditions now prevailing; [r]equire new fair market value appraisals, * * * and [r]equire new consents after appraisals, as appropriate" (Recommended Decision at 9).

On April 6, 1982, the Assistant Secretary returned the right-of-way application to appellee with the instructions recommended by Judge Luoma.

On April 16, 1982, appellant filed suit to condemn rights-of-way over allotments whose owners had revoked their consents. *Star Lake Railroad Co. v. Fourteen Rights of Way, etc.*, Civ. No. 82-392-JB (D.N. Mex.). Both appellant and the tribe state that this action was made moot by the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *New Mexico Navajo Ranchers Ass'n v. Interstate Commerce Comm'n*, 702 F.2d 227 (D.C. Cir. 1983). This decision concerned a challenge to the Interstate Commerce Commission's (ICC's) grant of authority to appellant and Santa Fe to construct the rail line here concerned. The court remanded the matter to the ICC for further proceedings with respect to the financial viability of the proposed line and for findings as to whether appellant acted in bad faith in soliciting consents from the allottees.

On remand,⁷ the ICC found, *inter alia*, that the proposed line was financially viable and that appellant "did not reveal a pattern of bad faith or misconduct such as would cast doubt upon the credibility of applicants' undertaking to comply with the environmental conditions imposed in this and previous decisions." *Star Lake Railroad Co.*, Finance Docket Nos. 28272, 29036, 29228, and 29602 (Nov. 13, 1984, Decision at 29).

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The ICC reopened the proceeding in December 1985, to consider updated data submitted by the protestants (New Mexico Navajo Ranchers Ass'n *et al.*) concerning the financial viability of the proposed line. In April 1987, it reaffirmed its earlier decisions. It took official notice of appellee's February 12, 1986, termination of appellant's right-of-way over tribal lands and stated:

****6** Taking into consideration the termination of the easement and the BIA's analysis, we find that they are not a sufficient reason to modify our earlier finding that the ***359** construction and operation of the line is in the public interest. Our authorization is permissive; applicants will have to obtain the easement or make some other acceptable arrangement before they can construct the line.

Star Lake Railroad Co., Finance Docket No. 28272 (Apr. 10, 1987, Decision at 6).

Contentions of the Parties

Appellant argues that appellee should not have terminated its right-of-way for nonuse because it was prevented from using the right-of-way during the 2-year period by circumstances beyond its control. It argues that principles of common law, and provisions of statutory law governing rights-of-way over public lands,⁸ favor the rule that rights-of-way should not be terminated for nonuse when the nonuse is beyond the control of the grantee. Appellant argues that appellee's authority under 25 CFR 169.20 is discretionary and that he should have exercised that authority in a manner consistent with Federal policy concerning public lands. In August 1984, pursuant to appellant's request, BLM granted appellant an extension of time in which to file proof of construction on its right-of-way over public lands. Appellant states: "It would clearly be arbitrary and capricious for the Secretary not to apply the same rule to the portion of the right-of-way he has approved over tribal trust lands, since there is no basis in fact or law for a different treatment" (Appellant's Opening Brief at 20).

Appellant also argues that, as a matter of contract law, its inability to perform should be excused as long as the events frustrating performance continue, and that the tribe's past and present opposition to the right-of-way is a defense to the tribe's invocation of the termination provisions of the 1981 agreement between appellant and the tribe.

Appellant further argues that, if its nonuse is not excused as a matter of law, it is entitled to an adjudicatory hearing on certain factual issues: (1) appellant's alleged fault in causing the Navajo objectors' litigation, (2) the role of the tribe in the litigation, and (3) whether termination of the right-of-way is in the tribe's best interest.⁹

Finally, appellant argues that the issue of the 1908 boundary of the Navajo reservation,¹⁰ which was discussed at pages 4-5 of appellee's ***360** February 12, 1986, decision, is not relevant to the matter on appeal and should not be decided by the Board.

Appellee argues that 25 CFR 169.20 provides a basis for the termination of a right-of-way as a matter of discretion but requires termination once the grantee has been given the 30-days' notice specified in the regulation and fails to take corrective action. Appellee states that appellant did not take corrective action, did not apply for an extension of time in which to begin construction, and offered no legal arguments or substantial factual explanation for its failure to use the right-of-way.

****7** Appellee also argues that the right-of-way was terminable under the January 12, 1981, agreement between appellant and the tribe.

Appellee agrees with appellant that an analysis of the best interest of the tribe is not necessary to the resolution of this appeal. He also agrees with appellant that the reservation boundary issue is not relevant and should not be decided by the Board.

Finally, appellee argues that appellant is not entitled to an adjudicatory hearing because the basis for appellee's decision, nonuse of the right-of-way for a 2-year period, does not involve a disputed issue of fact.

The tribe contends that, because appellant's failure to use the right-of-way is un rebutted, and because the tribe had no part in causing appellant's failure, appellee correctly terminated the right-of-way as a matter of law. It states that, contrary to appellant's contentions, principles of public land law and contract law are not relevant to Indian lands, which are subject to special statutory provisions. The statutory provision governing forfeiture of railroad rights-of-way, 25 U.S.C. § 315,¹¹ does

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not contain a provision similar to those contained in the public land laws, which allow for excuse of nonuse caused by events beyond the control of the grantee. Neither does the regulatory provision at 25 CFR 169.20. These provisions, under rules of statutory construction developed in the courts, should be construed in favor of the Indians for whose benefit they were enacted. The tribe notes that this principle of construction was incorporated into the January 12, 1981, agreement between appellant and the tribe.

The tribe also argues that various alternative grounds, in addition to the grounds relied on by appellee, compel affirmance of appellee's decision: (1) BIA's grant of the right-of-way was void *ab initio* for violation of 25 U.S.C. §§ 312 and 313, and 25 CFR 169.23(b), (f), and (g), concerning construction of passenger and freight stations, right-of-way width limitations, and other matters; (2) the right-of-way has been *361 forfeited by appellant under the provisions of 25 U.S.C. § 315; (3) the right-of-way was void *ab initio* because it was granted in violation of the trust duty, and failure to terminate it would be a breach of trust. The tribe contends that approval of the right-of-way violated the trust duty because it was given over the objection of the tribe and because consideration for the grant was insufficient.¹²

The tribe, like appellee, contends that appellant is not entitled to an evidentiary hearing.

Finally, the tribe contends that the rail line would fall primarily within the Navajo reservation, and that the Board is an appropriate forum to address the issue of the 1908 reservation boundary.

Request for Evidentiary Hearing

As discussed below, the Board concludes that this appeal is properly decided on the law and that appellant has shown no reason why an evidentiary hearing is required. It therefore denies appellant's request for a hearing.

Discussion and Conclusions

**8 Although the parties have raised a number of issues, and appellee's decision also addressed several issues, the Board finds that this appeal must be decided with reference to the applicable statutes and regulations, the January 16, 1981, grant of easement for right-of-way, and the January 12, 1981, agreement between appellant and the tribe, which was incorporated into the grant of easement.

Initially, there is disagreement among the parties as to whether appellee's termination of appellant's right-of-way was mandatory or discretionary. Appellee and the tribe argue that termination was mandatory under the circumstances. Appellant contends that appellee's authority to terminate the right-of-way was discretionary¹³ and allowed appellee to exercise his discretion in a manner consistent with Federal law and policy governing public lands.

The regulation at 25 CFR 169.20, in providing that rights-of-way "may be terminated" under certain circumstance, allows for the exercise of some discretion.¹⁴ However, that discretion is subject to *362 limitation by Federal statutory and case law and, in this case, also by the provisions of the grant of easement and the agreement incorporated therein. Having approved these documents, appellee was bound by their terms, to the extent they were not in conflict with Federal law or regulation.¹⁵ *Cf. Patencio v. Deputy Ass't Secretary--Indian Affairs (Operations)*, 14 IBIA 92, 98 (1986).

The fundamental issue in this appeal is simply stated: Was appellee authorized by any provision of Federal statute or regulation, by the grant of easement, or by the agreement between appellant and the tribe, to excuse appellant's nonuse of the right-of-way over the objection of the tribe?

Appellant first argues that the Federal policy governing termination of rights-of-way over public lands, which provides that nonuse of a right-of-way may be excused if it results from circumstances beyond the control of the grantee, should be extended to Navajo tribal lands, regardless of the tribe's wishes.

The Federal policy concerning termination of rights-of-way over public lands is embodied in Federal statutes, which specifically include an excuse provision. 30 U.S.C. § 185(o)(3); 43 U.S.C. § 1766. Federal policy concerning rights-of-way over Indian lands is also embodied in Federal statutes, none of which contain a provision analogous to the excuse provision in the public land laws. *See* 25 U.S.C. §§ 311-328. The failure of Congress to include such a provision in the Indian

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right-of-way statutes, when it has included one in the public land statutes, is reasonably construed, under rules of statutory construction, as an indication of intent on the part of Congress to deal differently with these two different types of land. See 2A N. Singer, *Sutherland Statutory Construction* § 53.05 (4th ed. 1984).

[2] In fact, the general body of statutory law governing tribal lands reflects a policy quite different from the policy which guides the management of the public lands. One critical distinction lies in the clear expression in the Indian statutes of a congressional intent to vest Indian tribes with power to control use of their own lands. For instance, 25 U.S.C. § 324 provides: "No grant of a right-of-way over and across any lands belonging to a tribe organized under [the Indian Reorganization Act, 25 U.S.C. §§ 461-479, or the Oklahoma Indian Welfare Act, 25 U.S.C. §§ 501-510] shall be made without the consent of the proper tribal officials." See also, e.g., 25 U.S.C. §§ 396a, 415, 476, 2102, 2203. The judicial and executive branches have also recognized the policy favoring tribal control of tribal lands and resources. E.g., *Southern Pacific Transportation Co. v. Watt*, 700 F.2d 550 (9th Cir.), cert. denied, 464 U.S. 960 (1983); *Wilson v. U.S. Department of the Interior*, 799 F.2d 591 (9th Cir. 1986); President's Statement on Indian Policy, 19 Weekly Comp. Pres. Doc. 98, 100 (Jan. 24, 1983); *Conway v. *363 Acting Billings Area Director*, 10 IBIA 25, 28, 89 I.D. 382, 384 (1982); *Hawley Lake Homeowners' Ass'n v. Deputy Ass't Secretary--Indian Affairs (Operations)*, 13 IBIA 276, 288 (1985); *Redfield v. Billings Area Director*, 13 IBIA 356, 360 (1985).

**9 The regulations concerning rights-of-way over tribal lands further this Federal policy. See *Disposal of Rights in Indian Tribal Lands Without Tribal Consent*, H.R. Rep No. 78, 91st Cong., 1st Sess. (1969). 25 CFR 169.3 requires consent of tribal landowners for all rights-of-way, although tribal consent is not required by statute in all cases.¹⁶ To construe the Federal statutes and regulations governing rights-of-way over tribal land as amenable to the interpretation advanced by appellant would clearly appear to run counter to this policy.

[3] The Indian right-of-way statutes are, moreover, subject to the rule of statutory construction that enactments intended to benefit Indians are to be construed liberally in their favor. E.g., *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976). This rule of construction applies as well to regulations. *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1332 (10th Cir. 1982). See also *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1569 (10th Cir. 1984), *dissenting opinion adopted as majority opinion by the court en banc*, 782 F.2d 855 (10th Cir. 1986), cert. denied, _____ U.S. _____, 107 S. Ct. 471 (1986), holding, *inter alia*, that where the regulations governing tribal oil and gas royalties may reasonably be interpreted in two ways, the Secretary is required by the trust responsibility to interpret them in the way most favorable to the tribe.

Moreover, section 18 of the January 12, 1981, agreement between appellant and the tribe provides:

Where consistent with its terms, this document is to be construed to the benefit of the Navajo people and Tribal government, with the purpose in mind of fostering understanding of and respect for the land, environment, culture and religion of the Navajo Nation in the greater eastern part of the Navajo Indian Country in these United States. Also, where consistent with its terms, this document is to be construed with the history of Navajo and Indian relationships with railroads and the Federal Government in mind. Such history includes the conditioning of the release of Navajo people from Bosque Redondo on the promise that Navajos would not interfere with railroads then being built; with the taking of vast tracts of unceded Indian lands by the railroads with the condoning or knowing inaction of the Department of the Interior; with the assertion of Navajo Tribal sovereignty and jurisdiction in Eastern Navajo; with the present intentions of our Congressman/trustee who will not consider Navajo (public) needs until private rights are granted to the Railroad Companies; and with the expressed intention of the Secretary of Interior to grant a private right-of-way over the considered objections of the Navajo Nation.¹⁷

*364 This provision incorporates the rule of construction just discussed. Thus the agreement is, by its own terms, subject to that rule.

Appellant correctly notes that the rule of construction may not be invoked in derogation of the plain language of statutes or regulations. E.g., *Andrus, v. Glover Construction Co.*, 446 U.S. 608, 619 (1980). Appellant's proposed construction of the statutes and regulations, however, is not limited to their plain language but, rather, seeks to embellish upon that language to the disadvantage of the Indians.

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****10** The Board rejects appellant's argument that the termination provisions of the public land laws should be read into the laws and regulations governing tribal lands and finds, to the contrary, that 25 CFR 169.20 and the January 12, 1981, agreement must be interpreted to the benefit of the tribe and in accord with the Federal policy favoring tribal control over tribal lands.

Appellant next argues that general principles of contract law support its position that its nonuse of the right-of-way must be excused under the January 12, 1981, agreement with the tribe. It thus invokes the Restatement rule concerning frustration of performance:

Temporary Impracticability or Frustration

Impracticability of performance or frustration of purpose that is only temporary suspends the obligor's duty to perform while the impracticability or frustration exists but does not discharge his duty or prevent it from arising unless his performance after the cessation of the impracticability or frustration would be materially more burdensome than had there been no impracticability or frustration.

Restatement (Second) of Contracts § 269 (1981). It also argues that the tribe acted in derogation of its implied contractual duty not to hinder appellant's efforts to obtain authorization to build the rail line.

The tribe counters, *inter alia*, with the obligation of a contractor, under ordinary circumstances, to secure a necessary Government license:

Ordinarily, when one contracts to render a performance for which a government license or permit is required, it is his duty to get the license or permit so that he can perform. The risk of inability to obtain it is on him; and its refusal by the government is no defense in a suit for breach of his contract.¹⁸

6 A. Corbin, *Corbin on Contracts* § 1347 (1962).

These principles of contract law, while perhaps of some relevance to the January 12 agreement, cannot control interpretation of the Federal regulation involved here. Moreover, the agreement itself must be interpreted primarily by reference to its own provisions, including the rule of construction incorporated in the agreement and discussed above.

Section 9 of the agreement provides: "This Agreement shall be effective on the date hereof and shall terminate in accordance with the provisions of 25 C.F.R. [Part 169] and the Interstate Commerce Act." Neither this section nor any other provision of the agreement indicates ***365** an intent to limit or expand upon the regulatory provisions for termination of rights-of-way. Specifically, the agreement does not contain a *force majeure* provision, in contrast to many leases of Indian trust lands. *See, e.g., Sunny Cove Development Corp. v. Cruz*, 3 IBIA 33, 40, 81 I.D. 465, 469 (1974); *Racquet Drive Estates, Inc. v. Deputy Ass't Secretary--Indian Affairs (Operations)*, 11 IBIA 184, 196, 90 I.D. 243, 249 (1983); *Franks v. Acting Deputy Assistant Secretary--Indian Affairs (Operations)*, 13 IBIA 231, 236 (1985). Therefore, the Board finds that the parties to the January 12, 1981, agreement did not intend therein to vest any party with additional rights of obligations regarding termination beyond those provided in the regulations.

****11** The provisions for termination in the grant of easement, quoted above, are also substantially identical to the regulatory provisions. In *Administrative Appeal of Brown County, Wisconsin*, 2 IBIA 320 (1974), the Board upheld the termination of a right-of-way for nonuse for a 2-year period. Noting that the regulatory provisions for termination had been incorporated into the right-of-way grant, the Board stated: "The * * * limitations contained in the regulations are clearly and expressly set forth in the grant and consequently not subject to interpretation because of ambiguity. The appellant accepted the Grant and by so doing becomes bound by all its restrictions, reservations, and exceptions." 2 IBIA at 323. In *Whatcom County Park Board v. Portland Area Director*, 6 IBIA 196, 84 I.D. 938 (1977), upholding termination of a right-of-way over tidelands belonging to the Lummi Tribe, the Board similarly found that the parties were bound by the terms of the right-of-way grant, including a tribal resolution incorporated therein. The Board found that termination was proper because the grantee had breached conditions of the grant.¹⁹

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lawyer or in a statement in open court, *may properly be made only when the lawyer knows the assertion is true* or believes it to be true on the basis of a reasonably diligent inquiry. [*Italics added.*]

Tribal counsel is, accordingly, potentially subject to disciplinary proceedings, both by his state bar association and by the Department of the Interior (*see* 43 CFR 1.6), if he knowingly made a false statement concerning the tribe's involvement in the earlier proceedings in this case. On the record here, the Board is unwilling to assume that he may have done so.

****13** Under these circumstances, the Board does not find appellant's speculations persuasive of the necessity for an evidentiary hearing on this issue. There is nothing in the record to indicate the tribe took any action to impede appellant's use of the right-of-way during the first 2 years of its existence. The tribe and its counsel deny any such action. Other than the identity of counsel, appellant offers nothing to suggest that its assertion of tribal involvement has merit. *See General Motors Corp. v. Federal Energy Regulatory Comm'n.* 656 F.2d 791, 798 n.20 (D.D. Cir. 1981) ("[W]here a party requesting an evidentiary hearing merely offers allegations or speculations without an adequate proffer to support them, the Commission may properly disregard them"). Therefore, the Board finds no grounds for ordering an evidentiary hearing or invoking the equitable tolling doctrine of *Jicarilla Apache* against the tribe.

While the Board is not prepared to hold that there are no circumstances in which involuntary nonuse of a right-of-way may be excused without the consent of the tribe, it concludes that, under the circumstances of this case, termination was mandated by the regulation and the right-of-way documents, because no provision of statute, regulation, or the right-of-way documents authorized him to excuse the nonuse without the consent of the tribe.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the February 12, 1986, decision of the Navajo Area Director is affirmed.²¹

ANITA VOGT
Acting Chief Administrative Judge

***368** I CONCUR:

KATHRYN A. LYNN
Administrative Judge

Footnotes

- ¹ 25 CFR Part 161 was redesignated Part 169 at 47 FR 13327 (Mar. 30, 1982). Sec. 169.20 provides:
"All rights-of-way granted under the regulations in this part may be terminated in whole or in part upon 30 days written notice from the Secretary mailed to the grantee at its latest address furnished in accordance with § 169.5(j) for any of the following causes:
"(a) Failure to comply with any term or condition of the grant or the applicable regulations;
"(b) A nonuse of the right-of-way for a consecutive 2-year period for the purpose for which it was granted;
"(c) An abandonment of the right-of-way.
"If within the 30-day notice period the grantee fails to correct the basis for termination, the Secretary shall issue an appropriate instrument terminating the right-of-way. Such instrument shall be transmitted by the Secretary to the office of record mentioned in § 169.15 for recording and filing."
- ² The Jan. 12 agreement also provided that appellant would furnish certain benefits to the tribe and its members. These benefits included construction of sidetracks and other facilities for use by Navajos, employment preference and training for Navajos, and contribution to a college scholarship program for Navajo students (Agreement at secs. 12, 13, 14, and 15).
- ³ The record contains an undated memorandum addressed to appellee and entitled, "Notification of Termination of Right-of-Way to **Star Lake** Railroad and Request for Action by Navajo Area Director." It is signed by the tribe's Attorney General. Appellee's Oct. 24 letter and the Attorney General's memorandum both refer to a Nov. 8, 1983, resolution of the Advisory Committee of the Navajo Tribal Council requesting appellee to notify appellant that the right-of-way was terminated.

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4 Appellee's letter also stated that both the attorney and the employee to whom appellant stated it furnished the required handbooks had left tribal employment, and that although the tribe was unable to locate the handbooks in its files, appellee would assume they had been delivered as stated by appellant.

5 25 CFR 2.19 provides in relevant part:

"(a) Within 30 days after all time for pleadings (including extension granted) has expired, the Commissioner of Indian Affairs [or BIA official exercising the administrative review functions of the Commissioner] shall:

"(1) Render a written decision on the appeal, or

"(2) Refer the appeal to the Board of Indian Affairs for decision.

"(b) If no action is taken by the Commissioner within the 30-day time limit, the Board of Indian Appeals shall review and render the final decision."

6 The appeal was originally made to the Board, *New Mexico Navajo Ranchers Ass'n v. Comm'r of Indian Affairs*, IBIA 80-47-A. By memorandum of Oct. 31, 1980, the Acting Secretary of the Interior assumed jurisdiction over the appeal pursuant to 43 CFR 4.5(a) and transferred it to the Ass't Secretary--Indian Affairs for decision.

7 The tribe intervened in the ICC proceeding on remand (Nov. 13, 1984, ICC Decision at 4).

8 Appellant quotes 30 U.S.C. § 185(o)(3) concerning pipeline rights-of-way, and 43 U.S.C. § 1766, derived from § 506 of the Federal Land Policy and Management Act of 1976. 43 U.S.C. § 1766 provides in relevant part:

"Failure of the holder of the right-of-way to use the right-of-way for the purpose for which it was granted, issued, or renewed, for any continuous five-year period, shall constitute a rebuttable presumption of abandonment of the right-of-way for the purpose for which it was granted, issued, or renewed for any continuous five-year period is due to circumstances not within the holder's control, the Secretary concerned is not required to commence proceedings to suspend or terminate the right-of-way." All references to the *United States Code* are to the 1982 edition.

9 Appellant states that the issue of the tribe's best interest is largely irrelevant to the termination issue but, to the extent it is relevant, contends that construction of the railroad is in the tribe's best interest.

10 This issue concerns the continued existence of the boundary of the Navajo reservation established in various Executive Orders and referred to in sec. 25 of the Act of May 29, 1908, 35 Stat. 444, 457.

11 25 U.S.C. § 315, derived from sec. 4 of the Act of Mar. 2, 1899, 30 Stat. 990, provides:

"If any such [railroad] company shall fail to construct and put in operation one-tenth of its entire line in one year, or to complete its road within three years after the approval of its map of location by the Secretary of the Interior, the right of way granted shall be deemed forfeited and abandoned ipso facto as to that portion of the road not then constructed and in operation: "Provided, That the Secretary may, when he deems proper, extend, for a period not exceeding two years, the time for the completion of any road for which right of way has been granted and a part of which shall have been built."

Appellant contends that the 1899 Act is not applicable to its right-of-way. Given its disposition of this appeal, the Board finds it unnecessary to address this issue.

12 The tribe cites an Aug. 21, 1979, letter from appellant to the Secretary of the Interior, which states that it would have cost appellant \$11.1 million to route the rail line around the tribal land. The tribe contends that BIA breached its trust duty to maximize return on the trust property by approving the right-of-way for a consideration of \$11,672.80, one one-thousandth of the amount it would have cost appellant to avoid the tribal property.

13 The Acting Deputy Ass't Secretary--Indian Affairs also concluded that the authority to terminate the right-of-way was discretionary and, therefore, that an analysis of the best interest of the tribe was necessary. Under the Board's disposition of this appeal, such an analysis is not required. Therefore, an evidentiary hearing on this issue is not appropriate.

14 The Board does not address the question of how broad this discretion is, or under what circumstances, if any, BIA could decline to terminate a right-of-way where one of the regulatory grounds for termination was present and termination was requested by the Indian landowner.

To the extent that the termination of a right-of-way is based on the exercise of discretion, it is not reviewable by this Board. 43 CFR 4.330(b); *Simmons v. Deputy Ass't Secretary--Indian Affairs (Operations)*, 14 IBIA 243 (1986).

15 The tribe asserts that the waiver of certain regulatory provisions in the grant of easement was in violation of law. The Board does not address this contention.

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- 16 This provision has been held valid as applied to rights-of-way granted under the Act of Mar. 2, 1899, 30 Stat. 990, 25 U.S.C. §§ 312-318, which does not contain a tribal consent provision. *Southern Pacific Transportation Co. v. Watt, supra*. See also *Transwestern Pipeline Co. v. Acting Deputy Ass't Secretary--Indian Affairs (Operations)*, 12 IBIA 49, 57-58, 90 I.D. 474, 479 (1983) (concerning the applicability of the consent provision to tribes, like the Navajo Tribe, which are not organized under the Indian Reorganization Act); *Northern Natural Gas v. Minneapolis Area Director*, 15 IBIA 124, 126-27 (1987).
- 17 The tribe's concern that the right-of-way might be granted without its consent was apparently not without foundation. Correspondence between Santa Fe, Departmental officials, and the tribe evidence an attempt on the part of Santa Fe to secure the right-of-way without the tribe's consent, and a willingness on the part of Departmental officials to consider that course of action. Santa Fe's letters to the Secretary, Aug. 21 and Oct. 31, 1979; Solicitor's letters to Santa Fe, Nov. 1, 1979, and tribe, Dec. 5, 1979; Secretary's letter to the tribe, Dec. 14, 1979. See also Solicitor's letters to members of Congress, Nov. 13 and Dec. 5, 1979.
- 18 Appellant disputes the relevance of this rule, arguing that the tribe prevented it from obtaining the license. See discussion *infra*.
- 19 The Lummi Tribe had initially favored the right-of-way, but ultimately changed its mind and requested termination. The Board noted:
"While there is ample support for appellant's claim that the Lummi Indian Tribe unilaterally decided in 1972 that it did not want to go ahead with plans for a park on Portage Island, the record is convincing that this change of attitude occurred only after the appellant breached important conditions of the right-of-way grant." 6 IBIA at 224, 84 I.D. at 951. Similarly, the record here indicates that the tribe sought termination only after the 2-year period had expired. See discussion *infra*.
- 20 25 U.S.C. § 315, quoted at note 11, *supra*, authorizes excuse under certain circumstances not present here. The Board's disposition of this appeal would be the same whether or not the Act of Mar. 2, 1899, 30 Stat. 990, from which sec. 315 is derived, applies to the right-of-way at issue here.
- 21 Other issues raised by the parties are found not to be relevant and are not addressed.

94 Interior Dec. 353 (D.O.I.), 15 IBIA 220, 1987 WL 273284

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702 F.2d 227
 United States Court of Appeals,
 District of Columbia Circuit.

NEW MEXICO NAVAJO RANCHERS
 ASSOCIATION, Martin Martinez, and Pueblo
 Pintado Chapter, Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and
 the United States of America, Respondents,
 Star Lake Railroad Company, et al., Intervenors.

No. 81-1534. | Argued Oct. 18, 1982. | Decided
 March 1, 1983.

Objectors brought action challenging Interstate Commerce Commission's grant to applicants of authority to construct and operate a rail line. The Court of Appeals held that: (1) ICC erred in failing to require that applicants comply with regulations requiring the submission of estimates of expenses and receipts expected for the rail line's operation, and (2) ICC erred in granting railroads' application without considering objectors' allegations of misconduct on the part of applicant in its promises to preserve sacred and historic Indian sites, and in failing to consider the public policy of avoiding unnecessary disturbance of Indians' quiet possession.

Remanded.

West Headnotes (5)

11 Commerce
 ☞Certificates and Extension or Abandonment
 of Lines

The Interstate Commerce Commission may award railroad a certificate of authority to construct and operate a rail line only if it is convinced that the proposed venture will not drain railroad's resources and disable it from performing those duties of public service under which it then rested, with consequent detriment to the public in the matter of service and rates, i.e., Commission must determine that applicant is financially "fit."

Cases that cite this headnote

121 Commerce
 ☞Evidence in General

In proceeding on railroads' application for authority to construct and operate a rail line, Interstate Commerce Commission erred in failing to require that applicants comply with ICC regulations requiring submission of estimates of expenses and receipts expected for the rail line's operation; because the required information was easily provided and was critical to the ability of Commission and interested parties to evaluate whether proposed venture would be self-sustaining, cause would be remanded to the Commission.

1 Cases that cite this headnote

131 Commerce
 ☞Certificates and Extension or Abandonment
 of Lines

In determining whether the present or future public convenience or necessity requires the construction of an additional railroad line, Interstate Commerce Commission must consider whether the construction would subject the communities directly affected to serious injury.

3 Cases that cite this headnote

141 Commerce
 ☞Proceedings Before Commission

Where a factual question within the primary responsibility of a sister agency is relevant to Interstate Commerce Commission's determinations in ruling on an application for authority to construct and operate a rail line, Commission should ordinarily defer by staying

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its decision pending a determination of the issues by the sister agency and then consider and act upon that agency's findings.

Cases that cite this headnote

[5]

Commerce

↔Certificates and Extension or Abandonment of Lines

Interstate Commerce Commission erred in granting railroads' application for authority to construct and operate a rail line without considering objectors' allegations of misconduct on the part of applicant in its promises to preserve sacred and historic Indian sites, and in failing to consider the public policy of avoiding unnecessary disturbance of Indians' quiet possession.

2 Cases that cite this headnote

*228 **249 Petition for Review of an Order of the Interstate Commerce commission.

Attorneys and Law Firms

Paul E. Frye, Crownpoint, N.M., with whom Eric D. Eberhard, Placitas, N.M., was on the brief for petitioners, New Mexico Navajo Ranchers Ass'n, et al. and intervenors Torreon Chapter, et al. Dan Press, Window Rock, Ariz., also entered an appearance for petitioners.

John J. McCarthy, Jr., Atty., I.C.C., Washington, D.C., for respondents. John Broadley, General Counsel, Henri F. Rush, Associate General Counsel, Cecelia E. Higgins, Atty., I.C.C., John J. Powers, III and Kenneth P. Kolson, Attorneys, Dept. of Justice, Washington, D.C., were on the brief for respondents. Daniel B. Harrell, Richard A. Allen and Ellen K. Schall, Attys., I.C.C. and James H. Laskey, Attorney, Dept. of Justice, Washington, D.C., also entered appearances for respondents.

R. Eden Martin, Washington, D.C., with whom Lawrence A. Miller and Ronald S. Flagg, Washington, D.C., were on the brief for intervenors, Star Lake Railroad Company, et al. Ann L. Rieck, Washington, D.C., also entered an

appearance for intervenors.

Before EDWARDS and BORK, Circuit Judges, LUMBARDE*, Senior Circuit Judge.

Opinion

Opinion PER CURIAM.

PER CURIAM:

Petitioners here challenge the Interstate Commerce Commission's grant to Star Lake Railroad Company ("Star Lake") and to The Atchison, Topeka and Santa Fe Railway Company ("Santa Fe") of authority to construct and operate a rail line in the coal-rich San Juan Basin of northwestern New Mexico, a region whose coal resources cannot currently be tapped because there is no way to move the coal to markets. Nearly all of petitioners' objections are meritless. This Court has concluded, however, that two aspects of the proceedings before the ICC were deficient and that the case should therefore be remanded.

Star Lake filed an application for construction and operation authority, under what is now 49 U.S.C. § 10901 (Supp. IV 1980), on September 3, 1976. During the following several years, the Department of the Interior, with help from the ICC and from other agencies, prepared a comprehensive environmental impact statement, which exhaustively analyzed the physical, social, and economic effects of the proposal and which concluded that the Star Lake rail line was a method of transporting coal that would be highly beneficial to the region and that was environmentally superior to alternative methods. In 1979 Star Lake submitted supplemental information, and on March 6, 1980, the ICC decided to consider the application under its modified procedure, 49 C.F.R. §§ 1100.43-1100.52 (1981), solely on written submissions and without a hearing.

Petitioners, who represent various Navajo Indian interests in the area where the rail line would be built, intervened shortly thereafter. Petitioners objected to the Star Lake proposal on numerous grounds: that Star Lake was not financially fit, that it had obtained consents to rights of way from Navajos by improper means, that there was no need for the rail line, that the record contained insufficient information on Star Lake's affiliations with prospective customers, that the environmental impact statement was deficient under the National Environmental Policy Act

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("NEPA"), 42 U.S.C. § 4332(2)(C) (1976), and that granting the construction and operation authority would violate various federal statutes, including the American Indian Religious Freedom Act ("AIRFA"), 42 U.S.C. § 1996 (Supp. IV 1980), the Indian Laws, 25 U.S.C. §§ 312, 313 (1976), the National Historic *229 **250 Preservation Act ("NHPA"), 16 U.S.C. § 470f (1976), and the National Trails System Act, 16 U.S.C. §§ 1241-1249 (1976). In addition to raising those objections, petitioners sought leave to conduct a broad range of discovery on Star Lake and on Star Lake's proposed rail line.

On October 23, 1980, the ICC denied the discovery request because it considered the evidentiary record adequate to make the statutory determination whether the public convenience and necessity required or permitted the Star Lake rail line. On March 23, 1981, the ICC rejected petitioners' objections to the rail line, made findings favorable to Star Lake, and granted the certificate. Because Santa Fe would operate the line once Star Lake had constructed it, the ICC conditioned its approval on Santa Fe's joinder as an applicant, a condition that Santa Fe subsequently fulfilled. On July 8, 1981, the ICC reopened the record to reconsider alternative routes and possible measures to mitigate any adverse environmental effects of the rail line. The ICC prepared a supplemental environmental analysis, received comments from the several interested parties, including the State of New Mexico (which urged immediate construction of the line), and on February 3, 1982, reaffirmed its grant of construction and operation authority, adding certain mitigation requirements. This appeal followed.

Petitioners make here virtually all the arguments they raised before the ICC. We have reviewed these arguments and find almost all so lacking in merit as not to warrant discussion. Litigants should be reminded that they do not help their cause by filling their briefs with so many empty arguments that it becomes difficult to discover any valid claims amidst the clutter. In the welter of claims made by petitioners, we have found two that deserve attention.

I.

Petitioners contend that the ICC's conclusion that the rail line will be self-sustaining must be reversed. We agree with one of the arguments put forth to support this contention: the ICC erred in failing to require that Star Lake or Santa Fe comply with ICC regulations requiring the submission of estimates of the expenses and receipts expected for the rail line's operation.

¹¹ The ICC may award a railroad a certificate of authority to construct and operate a rail line only if it is "convinced that the proposed venture [will] not drain the railroad's resources and disable it from performing those duties of public service under which it then rested, with consequent detriment to the public in the matter of service and rates." *ICC v. Oregon-Washington R.R.*, 288 U.S. 14, 37, 53 S.Ct. 266, 272, 77 L.Ed. 588 (1933) (footnote omitted). That is, the ICC must determine that the applicant is financially "fit." The ICC here undertook to meet this obligation by inquiring whether Star Lake's proposal "in the reasonably near future will be self-sustaining, or so nearly so as not unduly to burden interstate commerce." *Id.*; *Illinois Cent. R.R. v. Norfolk & W. Ry.*, 385 U.S. 57, 66-67, 87 S.Ct. 255, 260-261, 17 L.Ed.2d 162 (1966).

¹² In finding that the proposed rail line would be self-sustaining and hence that Star Lake and Santa Fe, the two companies granted certificates, were financially fit, the ICC failed to follow its own regulations. Those regulations require an applicant for construction or operation of rail lines to submit, among other things,

[a]n estimate, in detail, of the character and volume of traffic expected and the gross revenue to be derived therefrom, covering each of the first five years of operation, together with an estimate of the annual gross revenues expected after the first five years. The detailed estimate required for the first five years should show the amount of each class of traffic, the mean length of haul, the rate per unit, and the revenue to be derived, also chief points or territories of origin and destination.

49 C.F.R. § 1120.6 (1981) (Question 29). The regulations further require an applicant to estimate the

*230 **251 gross revenue, operating expenses, net revenue, and net railway operating income, corresponding with the estimates of traffic under question 29. By "net railway operating income" is meant the excess of the credits over the debits to income, as reflected by the operating revenue, operating expense, railway tax accrual, uncollectible railway revenue,

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25 U.S.C. §§ 312-318 (1976), and the Act of February 5, 1948, codified at 25 U.S.C. §§ 323-328 (1976), and regulation 25 C.F.R. § 169.3 (1982), Star Lake must obtain the consent of the Indian owners along the right-of-way.

The Navajo parties charged that, in its attempt to obtain these consents, Star Lake was guilty of serious misconduct: that it employed coercive tactics, made misleading statements concerning the value of the land and the legal effect of the forms it sought to have signed, and otherwise took advantage of legally and commercially unsophisticated owners, many of whom speak or read little English.² A field solicitor for Interior described Star Lake's behavior as unconscionable in at least one instance,³ and the ICC acknowledged that the charges of misconduct were serious. However, the Commission declined to consider the allegations on the ground that the issue was being "fully and fairly addressed" by the Department of the Interior.⁴ For the same reason, the Commission refused to consider the Navajo parties' claims that the proposed right-of-way would violate 25 U.S.C. §§ 312, 313 (1976), which set limits on the conditions under which the Secretary of the Interior may grant a right-of-way.

In subsequent proceedings before the Department of the Interior, the Navajo owners withdrew the consents in question. The Department found the withdrawals valid, and because the owners no longer consented, the Department refused Star Lake permission to build across Navajo land.⁵ It was thus unnecessary for Interior to pass upon the claims that, in obtaining the now withdrawn consents, Star Lake had acted unconscionably.

B.

¹³¹ The ICC is charged with determining whether "the present or future public *232 **253 convenience or necessity" requires the construction of an additional railroad line. 49 U.S.C. § 10901(a) (Supp. IV 1980). In carrying out this task, the Commission must consider whether the construction "would subject the communities directly affected to serious injury...." *Colorado v. United States*, 271 U.S. 153, 169, 46 S.Ct. 452, 456, 70 L.Ed. 878 (1926). The American Indian Religious Freedom Act, 42 U.S.C. § 1996 (Supp. IV 1980), the National Historic Preservation Act, 16 U.S.C. § 470f (1976), and the Acts of March 2, 1899, and of February 5, 1948, 25 U.S.C. §§ 312-318, 323-328 (1976), help define the types of injuries from which the ICC must strive to protect local communities. By ignoring the serious charges of

misconduct and violations of statutes designed to protect Indian lands, the ICC failed to consider (A) the evidence of bad faith in Star Lake's promises to preserve sacred and historic Indian sites and (B) the public policy of avoiding unnecessary disturbance of the Indians' quiet possession. Thus, we believe that the ICC failed to "draw its conclusion from the infinite variety of circumstances which may occur in specific instances." *ICC v. Parker*, 326 U.S. 60, 65, 65 S.Ct. 1490, 1493, 89 L.Ed. 2051 (1945).

1. The Charges of Bad Faith

The failure to consider the allegations of misconduct undermines the Commission's finding of compliance with the American Indian Religious Freedom Act, 42 U.S.C. § 1996, and the National Historic Preservation Act, 16 U.S.C. § 470f. AIRFA adopts a federal policy of protecting and preserving "for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian ..., including but not limited to access to sites...." 42 U.S.C. § 1996. NHPA directs agency heads, in spending money or granting licenses, to take into account the effect on certain historic sites. 16 U.S.C. § 470f. The Commission attempted to enforce the two Acts in part by requiring Star Lake to make reasonable efforts to mitigate adverse effects on sites along the proposed right-of-way. As the Environmental Impact Statement noted, the area through which the proposed line would pass is unusually rich in archeologically important sites and in sites of religious significance to the Navajos.⁶

This court held in *Mobil Oil Corp. v. ICC*, 685 F.2d 624 (D.C.Cir.1982), that the ICC's requirement that a railroad take "reasonably practical" or "reasonably required" "mitigation measures" to protect, among other things, paleontological and archeological resources, placed on the railroad an "obligation of good faith." *Id.* at 639. We affirmed the ICC's decision in that case, noting that the worries about the railroads' good faith were purely speculative. *Id.* Here, however, we are not faced with mere speculation. The ICC was offered evidence of Star Lake's bad faith in dealing with the Indian parties in the closely related matters of acquiring their consents. The Commission's ready acceptance of the railroad's assurances that it would take appropriate steps to mitigate the damage to historic and sacred sites, together with the Commission's ready dismissal, on "jurisdictional" grounds, of allegations that Star Lake's dealings with individual Indians were characterized by coerciveness and unconscionability, does not adequately take account of the federal policies adopted in AIRFA and NHPA.

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[4] [5] We agree with the ICC that it may defer to any findings of the Department of the Interior concerning the claims of misconduct. There would, of course, be no need for the ICC to duplicate any Interior Department investigation and report, especially since Interior has the primary responsibility and presumably the greater expertise in this area. However, we do not believe that the ICC properly defers in this case by itself granting permission before action on the allegations has been taken by the Interior Department. Rather, where, as here, a factual question within the primary responsibility of a sister agency is relevant to the ICC's determinations, the ICC should ordinarily defer by staying its *233 **254 decision pending a determination of the issues by the sister agency and then considering and acting upon that agency's findings. If, for instance, the Department of the Interior were to find that Star Lake has been guilty of bad faith in its dealings with the Navajo owners, then the ICC would have to consider the relevance of that finding to the good faith of the railroad in offering to protect historic and sacred Indian sites. However, since the Interior Department has failed to resolve the question whether Star Lake dealt unconscionably with the Navajo owners, and since the issue is relevant to the AIRFA and the NHPA issues before the ICC, the Commission will be required to accept evidence on the question and to make its own determination.

2. The Right to Quiet Possession

Finally, and more generally, the Act of March 2, 1899, 25 U.S.C. §§ 312-318, and the Act of February 5, 1948, 25 U.S.C. §§ 323-328, reflect a federal policy of avoiding or minimizing the disturbance of the Indians' quiet possession of the restricted domains they now occupy. Although we agree with the Commission that it need not pass on the precise conditions on grants of right-of-way that have already been the subject of proceedings before the Interior Department,⁷ we nevertheless hold that this policy of non-disturbance may not be ignored by an agency charged with determining whether the building of a new line is in the public interest. The ICC is bound to consider the extent to which the proposed construction is consistent with the public interest in preserving the status of the Navajo tribe as a "quasi-sovereign nation" and in preserving the tribe's ability "to maintain itself as a culturally and politically distinct entity." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71, 72, 98 S.Ct. 1670, 1683, 1684, 56 L.Ed.2d 106 (1978).

All Citations

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Footnotes

* Sitting by designation pursuant to Title 28 U.S.C. § 294(d).

1 Star Lake Railroad Co.-Rail Construction and Operation in McKinley County, New Mexico, ICC Finance Docket No. 28272, at 7, 12 (March 23, 1981).

When the Environmental Impact Statement was completed, Star Lake had not yet determined the steps it would take to preserve various sites. See 2 Environmental Statement, Ch. IV at 6.

2 The Navajo parties submitted twenty-three affidavits of individual owners alleging that agents of Star Lake misrepresented themselves as agents for the Bureau of Indian Affairs, misrepresented forms consenting to construction as merely forms consenting to a survey, failed to specify a price or later to negotiate a price for land, and told individual owners that they would go to jail if they did not consent to the construction of a railroad across their lands.

3 Opinion of the Office of the Field Solicitor, Window Rock, Arizona, at 3 (Sept. 21, 1979).

4 *Star Lake Railroad Co.*, *supra* note 1, at 15.

5 Navajo New Mexico Ranchers Association v. Commissioner of Indian Affairs, No. IBIA 80-47-A (ALJ, Dep't of the Interior, June 29, 1981), *aff'd*, No. IBIA 80-47-A (Assistant Secretary of Indian Affairs, Dep't of the Interior, Mar. 21, 1982).

6 See 1 Environmental Statement, Ch. II at 89, Ch. IX at 7 (Feb. 2, 1979).

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7 Interior's disposition of the Navajo parties' claim that the proposed line violated 25 U.S.C. § 313 (1976) is unclear. Section 313 sets a maximum width of fifty feet on each side of the center line, with certain exceptions. The parties do not appear to dispute that the proposed line violates this law. However, the Interior's administrative law judge found that the Act of February 5, 1948, 25 U.S.C. §§ 323-328, "allows a right-of-way as wide as reasonably necessary." *Navajo New Mexico Ranchers Association v. Commission of Indian Affairs*, *supra* note 5, at 8. This "finding" clashes with express Interior regulations. Section 169.23(b) of 25 C.F.R. expressly applies the width requirements of 25 U.S.C. § 313 to rights-of-way granted under the 1948 Act, 25 U.S.C. §§ 323-328. On appeal, the Assistant Secretary of Indian Affairs did not discuss this issue. The Secretary simply held that Star Lake had not obtained proper consent and was therefore barred from commencing construction. At this point, the railroad commenced a state action to condemn the land in question. We express no opinion as to the relevance of 25 U.S.C. § 313 and 25 C.F.R. § 169.23(b) to that proceeding.

Lack of clarity in Interior's conclusions about compliance with 25 U.S.C. § 313 does not in and of itself oblige the ICC to address the specific statutory question. We hold only that the ICC must address itself to the federal policies embodied in that and other statutes.

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EXHIBIT No. 7

BACKGROUND

1
2 Plaintiff occupies land held in trust by the United States as the Swinomish Indian
3 Reservation (“Reservation”), located on Fidalgo Island in Skagit County, Washington.
4 Complaint (Dkt. # 1) at ¶ 3.1. Defendant operates a freight railroad system with tracks that run
5 along the northern edge of the Reservation. *Id.* at ¶¶ 3.2, 3.4.

6 Plaintiff and defendant’s predecessor-in-interest, Burlington Northern, Inc., are parties to
7 an Easement Agreement dated July 19, 1991. Plaintiff negotiated and the United States granted
8 the easement in settlement of a long-running lawsuit under the authority of 25 U.S.C. §§ 323-
9 328 and 25 C.F.R. § 169. The Easement Agreement granted defendant the right to run its train
10 operations across the Reservation with certain limitations. Complaint at ¶ 3.3. Unless otherwise
11 agreed in writing, the Easement Agreement restricts the number of trains (one in each direction)
12 and number of cars attached to those trains (twenty-five) that may cross the Right-of-Way each
13 day. *Id.* at ¶ 3.12; Easement Agreement (Dkt. # 9-2) at ¶ 7(c). It also requires defendant to report
14 to plaintiff at least once a year the nature and identity of the cargo transported over the Right-of-
15 Way. *Id.* at ¶ 3.28; Easement Agreement at ¶ 7(b).

16 Plaintiff alleges that defendant breached and continues to breach the Easement
17 Agreement in the following ways: defendant is currently operating six 100-car trains per week
18 over the Reservation in each direction and has not provided annual updates regarding the
19 contents of cargo transported over the Right-of-Way. Complaint at ¶¶ 3.16, 3.29. Defendant has
20 ignored demands that it comply with the Easement Agreement and has indicated that the number
21 of trains and cars traveling across the Right-of-Way will increase when a new crude oil off-
22 loading facility opens at March Point, near Anacortes, Washington. Plaintiff filed this lawsuit
23 seeking (1) declaratory judgment, (2) injunctive relief limiting train traffic across the Right-of-
24 Way and barring transportation of crude oil, (3) trespass damages, and (4) breach of contract
25 damages.

DISCUSSION

A. Primary Jurisdiction

Defendant argues that plaintiff's claims for contract damages and injunctive relief, if successful, would effectively regulate the type and volume of traffic defendant can handle on its rail line and may, therefore, be preempted under 49 U.S.C. § 10501(b). Defendant suggests that enforcing the limitations on the volume or nature of cargo crossing the Reservation set forth in the Easement Agreement may cause defendant to violate its common carrier obligations. Defendant does not seek a judicial resolution of these issues, however, instead requesting that this matter be dismissed or stayed so that the Surface Transportation Board ("STB"), the federal agency that regulates rail carriers, has an opportunity to consider them. Defendant maintains that even if the STB decides that preemption does not preclude plaintiff's claims outright, a referral to the STB is appropriate so that the agency "can provide guidance on the scope and meaning of the federal laws and regulations governing common carriers." Dkt. # 8 at 21.

Defendant relies on the primary jurisdiction doctrine, "a prudential doctrine under which courts may, under appropriate circumstances, determine that the initial decisionmaking responsibility should be performed by the relevant agency rather than the courts." Syntek Semiconductor Co. v. Microchip Tech. Inc., 307 F.3d 775, 780 (9th Cir. 2002). Pursuant to the doctrine, district courts may defer to the agency with regulatory authority over the relevant industry or subject matter if technical or policy questions must be resolved. Clark v. Time Warner Cable, 523 F.3d 1110, 1114 (9th Cir. 2008). When determining whether to defer, courts in the Ninth Circuit consider "(1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory scheme that (4) requires expertise or uniformity in administration." U.S. v. Gen. Dynamics Corp., 828 F.2d 1356, 1362 (9th Cir. 1987). Agency competence or expertise alone is not sufficient, however. Id. at 1363. "Rather, the doctrine is reserved for a limited set of

1 circumstances that requires resolution of an issue of first impression, or of a particularly
2 complicated issue that Congress has committed to a regulatory agency.” Astiana v. Hain
3 Celestial Group, Inc., 783 F.3d 753, 760 (9th Cir. 2015) (internal quotation marks and citations
4 omitted). The Court must also consider whether an agency referral would promote efficiency: if
5 a referral would be futile or would cause needless delay in the resolution of the case, application
6 of the doctrine is not appropriate. Id.

7 Defendant argues that the STB has expertise regarding the duties of common carriers and
8 is well placed to determine whether the relief plaintiff requests will adversely impact defendant’s
9 performance of those duties and/or whether the claim is preempted. Pursuant to § 10501(b) of
10 the Interstate Commerce Commission Termination Act (“ICCTA”), the STB has exclusive
11 jurisdiction over “transportation by rail carriers,” and the remedies provided by the act “with
12 respect to regulation of rail transportation are exclusive and preempt the remedies provided
13 under Federal or State law.” Courts regularly defer to the STB on issues related to common
14 carrier obligations. Chlorine Institute, Inc. v. Soo Line R.R., 2014 WL 2195180, at *2 (D. Minn.
15 May 27, 2014) (collecting cases). Some courts also refer preemption issues to the STB (Boston
16 and Maine Corp. v. Town of Ayer, 191 F. Supp.2d 257 (D. Mass. 2002)), although most make
17 the determination themselves (Norfolk S. Ry. Co. v. City of Alexandria, 608 F.3d 150 (4th Cir.
18 2010); Franks Inv. Co. LLC v. Union Pac. R. Co., 593 F.3d 404 (5th Cir. 2010); Green Mountain
19 R.R. Corp. v. Vermont, 404 F.3d 638 (2nd Cir. 2005); B&S Holdings, LLC v. BNSF Ry. Co.,
20 889 F. Supp.2d 1252, 1257 (E.D. Wash. 2012)).

21 In the context of this case, referral to the STB is neither efficient nor necessary. The
22 preemption issue can be decided by this Court: it is, at base, a legal question that can be resolved
23 without the delay of initiating a separate agency action. Defendant offers no reason to believe
24 that the relevant facts related to its operations are complex or that an intimate knowledge of
25 transportation policy is required to adjudicate the preemption issue. If plaintiff’s breach of
26

1 contract claim and request for injunctive relief are not preempted, their resolution will require a
2 thorough knowledge of Washington contract law and a balancing of the various interests
3 represented by the ICCTA and the Indian Right-of-Way Act of 1948. Based on defendant's
4 arguments here, it may also be necessary to evaluate whether defendant could have obtained a
5 right to use Reservation land from any source other than the Easement Agreement (which may
6 require an evaluation of various right-of-way enactments dating back more than a century), the
7 resolution of disputes regarding easements granted by the Bureau of Indian Affairs, and the
8 effect of representations made to the Honorable Walter T. McGovern when settling the first
9 action between the parties. While the STB would be able to shed light on the nature of the
10 common carrier's obligations and the importance of uniformity in the regulation of rail
11 transportation, those issues are addressed in the statute and published agency decisions.¹ The
12 STB has no expertise in the other areas of law that will govern the outcome of this case, and in
13 fact has recognized the primacy of the Bureau of Indian Affairs in handling disputes regarding
14 rights-of-way granted by that agency. Alaska R.R. Corp. - Constr. and Operation Exemption -
15 Rail Line Between N. Pole and Delta Junction, FD 34658, 2010 WL 24954, at *57 (STB Jan. 5,
16 2010).² Because the STB is not better equipped to handle the variety of issues that will arise in
17 this action, the Court will not decline the exercise of jurisdiction. Rhoades v. Avon Prods., Inc.,
18 504 F.3d 1151, 1164 (9th Cir. 2007).

23 ¹ If it later appears that a matter of first impression uniquely within the expertise of the STB
24 exists, a narrower request for referral may be appropriate.

25 ² The other cases cited by defendant pertaining to Native American land rights and interests
26 discuss only a process for consulting with the Tribes regarding the impact of railroad operations
occurring on neighboring lands.

1 **B. Improper Venue**

2 Federal Rule of Civil Procedure 12(b)(3) allows a court to dismiss a complaint for
3 improper venue. “An agreement to arbitrate before a specified tribunal is, in effect, a specialized
4 kind of forum selection clause that posits not only the situs of suit but also the procedure to be
5 used in resolving the dispute.” Scherk v. Alberto-Culver, 417 U.S. 506, 519 (1974). Defendant
6 argues that plaintiff’s claims for monetary relief – whether based in contract or in tort – must be
7 resolved through arbitration pursuant to the terms of the Easement Agreement. Plaintiff
8 maintains that the agreement to arbitrate applies to a specific type of dispute in specific
9 circumstances that are not at issue here. At oral argument, the parties agreed to bifurcate issues
10 related to damages in favor of resolving the preemption and liability issues first. The request for
11 dismissal under Rule 12(b)(3) is therefore denied without prejudice to it being raised again
12 should the preemption and liability issues be resolved in plaintiff’s favor.

13
14 **CONCLUSION**

15 For all of the foregoing reasons, Defendant’s “Motion to Dismiss or Stay” (Dkt. #8) is
16 DENIED.

17
18 Dated this 11th day of September, 2015.

19
20 
21 Robert S. Lasnik
22 United States District Judge
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EXHIBIT No. 8

THE HONORABLE ROBERT S. LASNIK

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SWINOMISH INDIAN TRIBAL
COMMUNITY, a federally recognized Indian
Tribe,

Plaintiff,

v.

BNSF RAILWAY COMPANY, a Delaware
corporation,

Defendant.

NO. 2:15-cv-00543-RSL

DECLARATION OF ALLAN OLSON
IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT

I, Allan Olson, being over the age of eighteen and competent to testify hereto, declare as follows:

1. I am the General Manager of the Swinomish Indian Tribal Community (the "Tribe").

2. At the time of the litigation and negotiations leading up to the execution of the settlement agreement ("Settlement Agreement") and right-of-way easement agreement ("Easement Agreement") between the Tribe and Burlington Northern ("BN") that are the subject of this dispute, I was an in-house attorney for the Tribe, working in the Office of the Tribal Attorney. I was very involved in the negotiation of both agreements.

1 3. The Tribe is a Federally-recognized Indian tribe organized pursuant to the Indian
2 Reorganization Act of 1934, 25 U.S.C. § 476. The Tribe is a successor to signatories of the
3 Treaty of Point Elliott of 1855, 12 Stat. 927 (1855), which established the Swinomish Reservation
4 (the “Reservation”), located on the Southeastern end of Fidalgo Island in Skagit County,
5 Washington. The lands on the Reservation that are the subject of this lawsuit are held in trust for
6 the Tribe by the United States. The Treaty set aside the Reservation for the Tribe’s “exclusive
7 use.”

8 4. The right-of-way established by the Easement Agreement (the “Right-of-Way”)
9 crosses a part of the Reservation that constitutes the heart of the Tribe’s economic development
10 area. The Right-of-Way is adjacent to many elements of the Tribe’s economic infrastructure,
11 including the Swinomish Casino and Lodge, a Chevron station and convenience store, and an
12 RV Park, as well as a Tribal waste treatment plant and a Tribal air quality monitoring facility.
13 Hundreds of guests and employees are present at these facilities 24 hours a day, seven days a
14 week. This infrastructure is the primary source of Tribal funding for the Tribe’s essential
15 governmental functions and programs.

16 5. The Right-of-Way also crosses a BNSF swing bridge over the Swinomish
17 Channel and a BNSF trestle across Padilla Bay, both of which are within the Reservation and are
18 many decades old. These water bodies connect with other waters of Puget Sound in which the
19 Tribe has usual and accustomed fishing grounds and stations, as recognized by this Court in
20 *United States v. Washington*, 459 F.Supp. 1020, 1049 (W.D. Wash. 1978). Since time
21 immemorial, the Tribe and its predecessors have benefited from these bodies of water to support
22 its fishing lifestyle, among other purposes, and salmon and other marine resources have played
23 central and enduring roles in the Tribe’s subsistence, culture, identity, and economy.

24 6. As noted, I had significant involvement in the negotiation of both the Settlement
25 Agreement and the Easement Agreement. The specific terms and conditions contained in the
26 Easement Agreement were very important to the Tribe. Absent those conditions, the Tribe would
27

1 not have given its consent for a right-of-way grant to BN. Instead, the Tribe would have
2 continued with the litigation of its trespass claims. Had the Tribe known that BNSF would later
3 take the position that the Easement Agreement conditions were unenforceable due to BNSF's
4 common carrier obligations, the Tribe never would have consented to the Right-of-Way.

5 7. Never once did BN indicate to the Tribe that it might not be able to comply with
6 the limitations contained in the Easement Agreement due to common carrier obligations, or that
7 it considered the terms of the Easement Agreement to be subordinate to ICC or common carrier
8 obligations. If BN had done so, the Tribe would never have granted its consent to the Right-of-
9 Way.

10 8. The Tribe learned in 2012 from a media report that BNSF was running "unit
11 trains" of 100 cars or more over the Right-of-Way to reach the Tesoro refinery at March Point,
12 near Anacortes, Washington. BNSF did not notify the Tribe or seek its agreement to exceed the
13 limitations of the Easement Agreement before it began doing so. Although the Tribe promptly
14 reminded BNSF of the limitations of the Easement Agreement, and repeatedly demanded that
15 BNSF cease the unauthorized use, BNSF ignored the Tribe's requests. The Tribe has never
16 granted BNSF permission to exceed the limitations contained in the Agreement. BNSF
17 acknowledges the terms of the Easement Agreement and the Tribe's demands, but has informed
18 the Tribe that it will continue running trains over the Right-of-Way at current levels regardless
19 of the terms of the parties' agreement.

20 9. BNSF has also not complied with its reporting requirements under the Easement
21 Agreement. Since at least 1999, the Tribe regularly requested that BNSF provide an annual
22 summary of all materials transported by BNSF across the Reservation, as required by Paragraph
23 7(b) of the Easement Agreement. Despite these regular requests, BNSF provided the Tribe with
24 just four of the required annual update reports.

25
26 I declare under penalty of perjury of the laws of the state of Washington and the United
27 States that the foregoing is true and correct.

DATED this 4th day of March, 2016.

By: Allan Olson
Allan Olson

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CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Stellman Keehnel, WSBA #9309
Andrew Escrobar, WSBA #42793
Jeffrey DeGroot, WSBA #46839
DLA Piper LLP
701 Fifth Avenue, Suite 7000
Seattle WA 98104

DATED at Seattle, Washington, this 4th day of March, 2016.

/s/ Christopher I. Brain
Christopher I. Brain, WSBA #5054
cbrain@tousley.com
Attorneys for Plaintiff
TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
Tel: 206.682.5600
Fax: 206.682.2992

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EXHIBIT No. 9

THE HONORABLE ROBERT S. LASNIK

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SWINOMISH INDIAN TRIBAL
COMMUNITY, a federally recognized Indian
Tribe,

Plaintiff,

v.

BNSF RAILWAY COMPANY, a Delaware
corporation,

Defendant.

NO. 2:15-cv-00543-RSL

DECLARATION OF CHRISTOPHER
I. BRAIN IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT

I, Christopher I. Brain, declare as follows:

1. I am a member of Tousley Brain Stephens PLLC, attorneys of record for Plaintiff Swinomish Indian Tribal Community, am competent to testify and make this declaration based upon my personal knowledge.

2. I have personally reviewed the files and records produced by Plaintiff in response to discovery requests by Defendant related to the legal disputes between the Tribe and BNSF captioned *Swinomish Tribal Community v. Burlington Northern Railroad*, No. C76-550V (the “Trespass Litigation”) and *Burlington Northern Railway v. Andrus, et al*, No. CV 79-1199V (the “Right of Way Request Litigation”), collectively referred to as the “Prior Litigation.”

1 3. Right of Way Request Litigation. In the 1970's, the Tribe and Burlington
2 Northern ("BN") entered into discussions to attempt to resolve disputes between them over use
3 of the railway crossing the reservation. They were unsuccessful and BN filed an application for
4 a right of way with the Bureau of Indian Affairs ("BIA"), under 25 U.S.C. 312 et seq. The
5 application was rejected by the BIA because the Tribe refused to consent to the grant of a right
6 of way easement across the reservation. BN processed the administrative appeals through the
7 Department of Interior which ultimately affirmed the rejection based on a failure to obtain the
8 Tribe's consent. BN then filed the Right of Way Request Litigation challenging the necessity
9 of obtaining the Tribe's consent as a condition prior to grant of a right of way. This case was
10 ultimately resolved after the Ninth Circuit decided *Southern Pacific Trans. Co. v. Watt*, 700
11 F.2nd 550 (9th Circuit 1983) which held that tribal consent was required as a condition of
12 granting a right of way across a reservation.

13 4. Trespass Litigation. The Trespass Litigation was commenced by the Tribe
14 against BN and a number of other defendants relating to trespass on Tribal lands. This case,
15 with respect to BN, was resolved by the execution of the Settlement Agreement and Right of
16 Way Easement subject of this litigation.

17 5. On January 21, 2016, we provided counsel for BNSF with the vast majority of the
18 documents in the Tribe's possession related to the Prior Litigation and provided the few
19 remaining documents by February 19, 2016. Those documents included (i) historical
20 correspondence related to the initial construction of the railway in 1889, (ii) the historical
21 documents from then through the filing of the Prior Litigation, (iii) pleadings related to the Prior
22 Litigation, (iv) correspondence and documents related to and documenting the negotiation of the
23 Settlement Agreement and Right of Way. Attached hereto as Exhibits are true and correct copies
24 of specific documents related to the Prior Litigation and settlement of the Trespass Litigation.

25 Exhibit 1: August 23, 1889 letter from W.H. Talbot, U.S. Indian agent to
26 Honorable Commission of Indian Affairs.
27

1 Exhibit 2: August 28, 1889 letter from W.H. Talbot, agent, to R.O. Belk, Acting
2 Commissioner of Indian Affairs.

3 Exhibit 3: September 10, 1889 letter from Assistant Commissioner, Office of
4 Indian Affairs to W.H. Talbot.

5 Exhibit 4: October 17, 1889 letter from Commissioner, Office of Indian Affairs,
6 to W.H. Talbot.

7 Exhibit 5: April 26, 1890 letter from Acting Commissioner, Office of Indian
8 Affairs to McDonald, Bright & Fay, Attorneys at Law.

9 Exhibit 6: December 27, 1890 letter from Assistant U.S. Attorney to W.H. Talbot.

10 Exhibit 7: Swinomish Tribal Senate Resolution No. 77-08-463 dated August 2,
11 1977.

12 Exhibit 8: Swinomish Tribal Senate Resolution No. 77-12-487 dated December
13 7, 1977.

14 Exhibit 9: August 15, 1977 memorandum from the Superintendent, Western
15 Washington Agency, forwarding Resolution No. 77-08-463 to the Portland Area Director.

16 Exhibit 10: September 27, 1977 letter and Application from Burlington Northern
17 to Superintendent, Western Washington Agency, Bureau of Indian Affairs for Railroad
18 Right of Way Across Swinomish Indian Reservation.

19 Exhibit 11: October 3, 1977 letter from Superintendent, Bureau of Indian Affairs
20 to Portland Area Director.

21 Exhibit 12: October 5, 1977 letter from Native American Relief Fund to John
22 Benedetto, Superintendent, Bureau of Indian Affairs, Western Washington agency.

23 Exhibit 13: October 17, 1978 letter from Superintendent, Western Washington
24 Agency, to Burlington Northern notifying it that Tribal consent is required for issuance
25 of right of way.

26 Exhibit 14: Swinomish Tribal Senate Resolution No. 78-10-554 dated 1978.
27

1 Exhibit 15: Complaint for Injunctive and Declaratory Relief in the Trespass
2 Litigation dated July 18, 1978.

3 Exhibit 16: Answer and Counterclaim for Injunctive and Declaratory relief by
4 Burlington Northern in Trespass Litigation dated September 11, 1978.

5 Exhibit 17: November 10, 1978 letter enclosing the October 17, 1998 appeal by
6 Burlington Northern from the decision refusing to file an application for right of way.

7 Exhibit 18: Answer of Swinomish Tribal Community to Burlington Northern
8 appeal dated December 1, 1978 along with copies of the July 19, 1978 letter from the
9 U.S. Department of Interior and the Order on Motion for Partial Summary Judgment
10 dated May 28, 1978 in the Southern Pacific Transportation Company litigation referenced
11 in the Answer.

12 Exhibit 19: May 4, 1979 Decision by the Area Director of the Bureau of Indian
13 Affairs denying the Burlington Northern appeal.

14 Exhibit 20: May 25, 1979 letter appeal by Burlington Northern appeal of the May
15 4, 1979 decision.

16 Exhibit 21: September 5, 1979 letter decision by the Acting Deputy
17 Commissioner of the Bureau of Indian Affairs denying the Burlington Northern appeal.

18 Exhibit 22: Complaint dated October 12, 1979 filed by Burlington Northern in
19 the Right of Way Request Litigation.

20 Exhibit 23: Order entered February 21, 1980 joining the Tribe as a party in the
21 Right of Way Request Litigation.

22 Exhibit 24: Order dated October 10, 1980 deferring decision on motion for
23 summary judgment pending Court of Appeals decision in Southern Pacific appeal.

24 Exhibit 25: Order dated August 16, 1983 granting summary judgment to the Tribe
25 in the Right of Way Request Litigation.

26 Exhibit 26: Notice of Appeal by Burlington Northern dated September 15, 1983.
27

1 Exhibit 27: Entry of Dismissal of Right of Way Request Litigation entered
2 February 22, 1984.

3 Exhibit 28: Settlement Agreement dated September 24, 1990 in the Trespass
4 Litigation.

5 Exhibit 29: Right of Way Easement - Burlington Northern dated July 19, 1991.

6 Exhibit 30: Conceptual Development Plan for Tribe's economic development
7 dated May 15, 1987.

8 Exhibit 31: June 5, 1989 letter from Richard Dauphinais to Lawrence Silvernale
9 with draft copies of the Settlement Agreement and Right of Way Easement.

10 Exhibit 32: June 22, 1989 letter from Lawrence Silvernale to Richard Dauphinais.

11 Exhibit 33: July 10, 1989 letter from Lawrence Silvernale to Richard Dauphinais
12 and Allan Olson.

13 Exhibit 34: Motion of the Interstate Commerce Commission for Leave to
14 Intervene in the Trespass Litigation.

15 Exhibit 35: Order entered March 7, 1980 denying Motion to Intervene.

16 Exhibit 36: Swinomish Tribal Senate Resolution No. 89-8-73 dated August 1,
17 1989 approving and attaching copies of the Settlement Agreement and Right of Way
18 Easement.

19 Exhibit 37: July 6, 1990 letter and Application for Right of Way by Burlington
20 Northern.

21 Exhibit 38: Letter dated November 27, 1990 from the U.S. Department of Interior
22 Deputy Solicitor recommending the United States approve the settlement.

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I declare under penalty of perjury of the laws of the state of Washington that the foregoing is true and correct.

DATED this 10th day of March, 2016.

By: /s/ Christopher I. Brain
Christopher I. Brain, WSBA #5054

CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing all counsel of record.

DATED at Seattle, Washington, this 10th day of March, 2016.

/s/ Christopher I. Brain
Christopher I. Brain, WSBA #5054
cbrain@tousley.com
Attorneys for Plaintiff
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Exhibit No. 1

Tulalip W.T.
Aug 23rd 9

Hon. Commissioner of Indian Affairs
Washington. D.C.

Sir:

I have the honor to forward
herewith for your approval a traveling
expense Voucher amounting to \$4.67.
incurred while visiting Seattle for
the purpose of consulting U.S. Attorney
White, in reference to instituting injunction
& proceedings to prevent construction
of Railroad across the Suiionist's Ind.
Reservation.

I am Sir

Very Respectfully
W. H. Talbot
U.S. Indian Agent

Exhibit No. 2

Copy - W. H. Leggett.

Tulalip
Aug 28th 9

To P. W. Beck

Acting Commissioner Indian Affairs
Washington, D.C.

Railroad is being built on Samiamish
Reservation. A crew of Tompkins
and Mathews. Work suspended at
present. About seven hundred and
twenty yards constructed.

W. H. Falbert
Agent.

Exhibit No. 3

Refer in reply to the following
Letter 24385 '39
Authority 20827
1 Incl.

Handwritten initials

Department of the Interior,

OFFICE OF INDIAN AFFAIRS,

WASHINGTON, September 10, 1889

W. H. Talbott,
U. S. Indian Agent,
Tulalip Agency, W.T.

Sir:

You are heroby advised that authority has been grant-
ed you to settle an indebtedness amounting to \$4.87, incurred
during the 1st quarter 1890 in traveling to Seattle, W.T. to
consult with the U.S. District Attorney, with reference to in-
stituting injunction proceedings to prevent the construction
of a railroad across the Swinomish reservation, as evidenced by
voucher herewith returned to be filed with your quarterly ac-
counts.

Very respectfully,



Assistant Commissioner

N.B.L.

Exhibit No. 4

OFFICE OF INDIAN AFFAIRS,

WASHINGTON, October 17, 1889.

W. H. Talbott, Esq.,

U. S. Indian Agent,

Tulalip Agency

W. T.

Sir:

Referring to recent telegraphic correspondence relative to unauthorized construction of a railroad across the northern portion of the Swinomish Reservation, by the Seattle and Northern Railway Company, you are hereby informed that the Department of Justice, under date of the 1st instant, advised this Department that the U. S. Attorney for Washington Territory has been instructed to investigate the case and take requested action, if such investigation shall show it to be advisable.

Very respectfully,

J. J. Morgan

Commissioner.

arrabee)

Exhibit No. 5

copy

reply to the following: L. a.

36624 - 1889.

Department of the Interior.

OFFICE OF INDIAN AFFAIRS.

WASHINGTON, April 26, 1890.

McDonald, Bright & Fay,

Attorneys at Law.

Washington, D.C.

Gentlemen:

The petition of the Seattle and Northern Railway Company filed by you with the Secretary of the Interior, on December 21st last, in which it is urged that the wishes of the Indians of the Swinomish reservation, in the then Territory, now State of Washington, in regard to a right of way sought to be obtained by said Company across said reservation may be ascertained, &c., and in the event of their giving their consent to such right of way, that this Department may acquiesce therein, having been referred to this office for action thereon, I have to state that the Secretary of the Interior, in a letter to this office dated March 10, 1882, held that 'in all cases where right of way for railroads through Indian reservations is not provided for by treaties or agreements by the United States with the Indians, congressional action is necessary to ratify agreements by railway companies with the Indians for such right of way &c.'

2.

Right of way for railroads through the Swinomish Reservation not being provided for by treaty or agreement with the Indians of said reservation, the proper course for the Seattle and Northern Railway Company to pursue would be to apply to Congress for the necessary legislation to enable them to procure a right of way through said reservation, upon such terms and conditions with reference to compensation to the Indians &c., as that body may see fit to impose.

It is not the practice of this Department to take the initiative looking to a grant of a right of way through Indian lands, but to require the Railroad Company to apply to Congress in its own behalf.

Very respectfully,



Acting Commissioner.

(Larrabee)

L.

Exhibit No. 6

TACOMA, WASH. — Dec. 27th, 1890.89

W. H. Tallcott, Esq.,
Tulalip Indian Reservation,
Wash.

Dear Sir,-

In going through ex-United States attorney White's old papers I find a communication from you to the Department of the Interior relating to the building of a railroad to Anacortes from some point on the Skagit river, which railroad crossed the north end of the Swinomish Indian Reservation. These letters were all dated during the year 1889, and upon the strength of your letter and telegram to the Department the U.S. attorney was directed to institute proceedings to prevent the building of the railroad across the said Indian reservation.

Will you please let me know whether the railroad was built, or whether work ceased upon it after the company was notified?

It appears that no suit was ever brought by U.S. attorney White and I am desirous of obtaining some information relating to this matter. Will you therefore kindly give me what information you can relating to this matter and oblige,

Yours respectfully,

"Dictated."

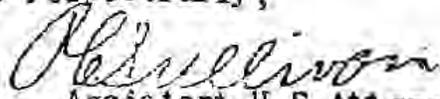

Assistant U.S. Attorney.

Exhibit No. 7

RESOLUTION NO. 77-88-463

Requesting the U. S. Solicitor to Bring Suit against Burlington Northern Railroad for Trespassing on Swinomish Tribal Tidelands

WHEREAS, the Swinomish Indian Reservation was established by the Point Elliott Treaty of 1855, and the northern boundary was redefined by an executive order of 1873, and

WHEREAS, the Swinomish Indian Tribal Community is a federally recognized tribe under a constitution and by-laws approved by the Secretary of the Interior pursuant to the Indian Reorganization Act; and the Swinomish Senate is the duly constituted governing body of the Swinomish Indian Tribal Community; and

WHEREAS the Seattle and Northern Railway Company constructed a railroad across tidelands owned by the Swinomish Indian Tribal Community in 1889 without authority from the Commissioner of Indian Affairs and in defiance of efforts by the U. S. Indian Agent and Commissioner of Indian Affairs to stop this construction, and

WHEREAS the Commissioner of Indian Affairs on October 17, 1889, officially notified the Indian Agent that the Department of Justice had advised the U. S. Attorney for Washington Territory to bring action though no action was ever brought, and

WHEREAS since 1890 other railroad companies have continually owned and used said railroad, with Burlington Northern Railroad being the latest successor in interest, and

WHEREAS the Swinomish Indian Tribal Community has attempted to negotiate a settlement of this trespass since 1970, but Burlington Northern Railroad has refused to accept the terms proposed by the Tribal Community which were based on legitimate appraisals.

NOW BE IT THEREFORE RESOLVED that the United States Solicitor bring a long over due legal action against the unauthorized use of Tribal tidelands by suing Burlington Northern Railroad for trespass and requiring that they remove said railroad from Tribal tidelands.

BE IT FURTHER RESOLVED that Native American Rights Fund attorneys officially represent the Swinomish Indian Tribal Community in assisting the Solicitor with this law suit.


Landy James, Chairman
Swinomish Indian Senate


Helen Ross, Secretary
Swinomish Indian Senate

C E R T I F I C A T I O N

As Secretary of the Swinomish Indian Senate, I certify that the above Resolution was adopted by the Swinomish Indian Senate on the 2nd day of August, 1977, by a vote of 9 For and 0 Against, and that a quorum was present.


Helen Ross, Secretary
Swinomish Indian Senate

Exhibit No. 8

RESOLUTION NO. 77-12-487

Reaffirming rejection of Burlington Northern Railroad Company's last offer of settlement to the Swinomish Indian Tribal Community for Trespass and renewing request to the United States to file suit against said Railroad for ejection and damages.

WHEREAS the Swinomish Indian Reservation was established by the Treaty of Point Elliott of 1855, and the northern boundary was redefined by an Executive Order of 1873; and

WHEREAS the Swinomish Indian Tribal Community is a federally recognized Tribe organized under a Constitution and By-Laws approved by the Secretary of the Interior pursuant to the Indian Reorganization Act; and the Swinomish Indian Senate is the duly constituted governing body of the Swinomish Indian Tribal Community; and

WHEREAS the Seattle and Northern Railroad Company constructed a railroad across tidelands owned by the Swinomish Indian Tribal Community in 1889 without authority from the Commissioner of Indian Affairs and the Swinomish Indian Tribal Community; and

WHEREAS the Burlington Northern Railroad Company is the latest in a continuous stream of successors in-interest to own and use said Railroad without proper authorization from the Swinomish Indian Tribal Community and the United States; and

WHEREAS the Swinomish Indian Tribal Community has attempted to negotiate a settlement of this trespass since 1970; and

WHEREAS the last settlement offer made by Burlington Northern Railroad to the Senate of the Swinomish Indian Tribal Community was \$150,000 for past, present and future right to a railroad right-of-way; and

WHEREAS the Senate of the Swinomish Indian Tribal Community has rejected said offer as being substantially less than just and adequate compensation for this continuous flagrant trespass of some 87 years; and

WHEREAS the Senate of the Swinomish Indian Tribal Community desires to reaffirm its rejection of said \$150,000 settlement offer from Burlington Northern Railroad and renew its request to the United States to bring suit for ejection and damages against said railroad company as originally requested in Senate Resolution 77-08-463;

Resolution No. 77-12 487

NOW THEREFORE BE IT RESOLVED that the Senate of the Swinomish Indian Tribal Community in session this 7th day of December, 1977, with a quorum present does hereby reaffirm its rejection of Burlington Northern Railroad Company's inadequate settlement offer of \$150,000 for all past, present and future damages for trespass on Tribal tidelands.

BE IT FURTHER RESOLVED that the Senate renew its request to the United States to bring suit for ejectment and damages against the Burlington Northern Railroad Company as per our Resolution No. 77-08-463.


Landy James, Chairman
Swinomish Indian Senate


Helen Ross, Secretary
Swinomish Indian Senate

C E R T I F I C A T I O N

As Secretary of the Swinomish Indian Senate, I hereby certify that the foregoing Resolution was adopted at a Regular meeting of the Swinomish Indian Senate held on the 7th day of December, 1977, at which time a quorum was present and the Resolution was adopted by a vote of 8 For and 0 Against.


Helen Ross, Secretary
Swinomish Indian Senate

Exhibit No. 9

Tribal Operations
254.1- Swinomish

Western Washington Agency
3006 Colby Avenue, Federal Building
Everett, WA 98201

August 15, 1977

Blad

Memorandum

To: Area Director, Portland Area
Attention: Tribal Operations

From: Superintendent

Subject: Swinomish Resolution No. 77-05-463 - Tribal Tideland
Trespass.

Enclosed for your information and action is the subject resolution which requests that the Solicitor bring action against Burlington Northern Railroad for trespass on tribal tidelands. The Tribe also requests that the attorneys with the Native Rights Fund assist the Solicitor in the law suit.

This matter has been the subject of recent discussion with regards to prosecution of claims on behalf of the Swinomish Tribe as the owner of lands held in trust by the Government. It appears that this resolution is a major step in the preparation by the Tribe in its litigation reports for action against the Burlington Northern Railroad to recover damages resulting from trespass on Swinomish Tribal tidelands.

It is our recommendation that this resolution be reviewed with the Office of the Regional Solicitor for action.

EDH: [unclear]
Superintendent

Enclosure
cc: The Swinomish Senate
Pink copies - Reading files
Subj.
Br. Chrono
Master Chrono
WMA BLACK: bhw: 8-12-77

C

Requesting the U. S. Solicitor to Bring Suit against Burlington Northern Railroad for Trespassing on Swinomish Tribal Tidelands

*Filed - 8-1-77
Quinto - PAO w/llc*

WHEREAS, the Swinomish Indian Reservation was established by Joint Elliott Treaty of 1855, and the northern boundary was fixed by an executive order of 1873, and

WHEREAS, the Swinomish Indian Tribal Community is a federally recognized tribe under a constitution and by-laws approved by the Secretary of the Interior pursuant to the Indian Reorganization and the Swinomish Senate is the duly constituted governing body of the Swinomish Indian Tribal Community; and

WHEREAS the Seattle and Northern Railway Company constructed a railroad across tidelands owned by the Swinomish Indian Tribal Community in 1889 without authority from the Commissioner of Indian Affairs and in defiance of efforts by the U. S. Indian Agent and Commissioner of Indian Affairs to stop this construction, and

WHEREAS the Commissioner of Indian Affairs on October 17, 1889, officially notified the Indian Agent that the Department of Justice advised the U. S. Attorney for Washington Territory to bring an action though no action was ever brought, and

WHEREAS since 1890 other railroad companies have continually used and used said railroad, with Burlington Northern Railroad being the latest successor in interest, and

WHEREAS the Swinomish Indian Tribal Community has attempted to negotiate a settlement of this trespass since 1970, but Burlington Northern Railroad has refused to accept the terms proposed by the Swinomish Indian Tribal Community which were based on legitimate appraisals.

NOW BE IT THEREFORE RESOLVED that the United States Solicitor bring a long over due legal action against the unauthorized use of Swinomish Indian Tribal Tidelands by suing Burlington Northern Railroad for trespass requiring that they remove said railroad from Tribal tidelands.

BE IT FURTHER RESOLVED that Native American Rights Fund attorneys officially represent the Swinomish Indian Tribal Community in bringing the Solicitor with this law suit.

[Signature]
Gandy James, Chairman
Swinomish Indian Senate

[Signature]
Gandy James, Secretary
Swinomish Indian Senate

Exhibit No. 10

5000458

BURLINGTON NORTHERN

Matthew L. Taylor
Regional Counsel

September 27, 1977

RECEIVED
Lawrence D. Swinomish
ASTORIA Regional Council
George E. Ingham, Jr.
Portland, Oregon
Assistant Regional Counsel
BUREAU OF INDIAN
AFFAIRS
PORTLAND AREA

Mr. John Bendetto
Superintendent
Western Washington Agency
Bureau of Indian Affairs
Federal Building
Everett, Washington 98201

RE: Application for Railroad Right-of-Way Across
Swinomish Indian Reservation

Dear Mr. Bendetto:

The Swinomish Indian Tribe claims ownership to the tide-lands adjacent to a portion of Padilla Bay and Swinomish Slough where Burlington Northern's railroad right-of-way and bridge cross the same. Without conceding said ownership, but on the assumption that the Tribe may be correct in contending the said lands were included in the Reservation at the time of the initial grant, Burlington Northern applies to the Secretary of Interior for a railroad right-of-way across said lands under the authority of the Act of March 2, 1899, Chapter 374, 30 Stat. 990 (25 U.S.C. 312 et seq.). Said application is made without the consent of the Swinomish Indian Tribe being first obtained for the reason that a right-of-way grant under said Act does not require said consent. We expect to justify our legal position with the Secretary of Interior by legal memorandum in support of the view that the Act of 1899 granted to railroads a right-of-way across Indian reservations without regard to whether Indian tribal consent is sought or obtained, and has not been superseded by the Act of 1948, which appears to require said consent. We understand, however, that the policy of the Department is that all such applications (whether under the 1899 Act or the 1948 Act) be processed through the Bureau of Indian Affairs, and the regional office of the Bureau at Portland has further informed us that your office is the place to make the filing.

Mr. John Bendetto
September 27, 1977
Page 2

Accordingly, attached to this letter application will be found the following instruments:

1. Certified copy of Resolution of the Board of Directors of the railroad dated September 12, 1977, authorizing this application.
2. Three original tracing linens and four reproductions of a map of definite location, together with the certification of the Chief Engineer and President of the railroad as required by the Code of Federal Regulation rules.
3. Stipulation with respect to maintenance of right-of-way applied for, executed by the President.
4. Check in the sum of \$20,858.00, representing the total estimated consideration and damages due for said railroad right-of-way in its present location on said lands.
5. Certification by the MAI appraiser that said amount represents in his view the fair value thereof. Upon request we are prepared to submit a full appraisal report with respect to the matter and basis for the determination of said amount.

Burlington Northern will require return of two of the original tracing linens and two reproductions showing approval by the Department of Interior.

For your general information, Burlington Northern's line of railroad over these lands was constructed in 1896. A valid permit exists from the Corps of Engineers for the placement and maintenance of the bridge across the Swinomish Slough channel as it now exists. It is the railway's belief that the Swinomish Slough channel is not included within the Reservation and the Tribe does not hold ownership to the bed of the Slough channel, even if it is correct in its assertion that it owns the tidelands adjacent thereto. Nevertheless, the map of definite location was drawn so as to

Mr. John Bendetto
September 27, 1977
Page 3

include the applicant's right-of-way and bridge across both the tidelands and the Swinomish Slough channel, so that if the Tribe is correct in its contention with respect to the ownership of the bed of the Slough, the grant of right-of-way by the Secretary of Interior will include the same. The map of definite location was premised on the existing physical conditions, particularly with respect to the location and width of the Swinomish Slough, which we considered a preferable method of depicting the physical conditions, although we can if necessary provide a map prepared about the turn of the century which would depict the then condition of the terrain that the right-of-way was originally constructed on.

Anticipating that this application will be forwarded to the regional office for consideration, we are copying this application letter and one copy of each of the enclosures to it for its advance review. Although we have attempted to scrupulously follow the Code of Federal Regulations with respect to such an application, please advise immediately if there is any other material that you feel necessary to process this application. Your prompt processing of said application will be appreciated.

Very truly yours,


Woodrow L. Taylor
Regional Counsel

WLT/mb

Encl.

cc: ~~Mr.~~ Wilford G. Bowker, Chief
Branch of Real Property Management
Bureau of Indian Affairs
Portland, Oregon
Attention: Mr. Jack Glasgow

Mr. Robert S. Pelcyger
Native American Rights Fund

BURLINGTON NORTHERN INC.

CERTIFICATE

I, F. A. DEMING, hereby certify that I am one of the Assistant Secretaries of Burlington Northern Inc. (the Company); that as such Assistant Secretary I am one of the keepers of the records and corporate seal of the Company; that attached hereto is a true and complete copy of certain resolutions duly adopted at a meeting of the Board of Directors of the Company held in St. Paul, Minnesota, on September 12, 1977, at which a quorum was present and acting throughout; and that said resolutions have not been altered, amended or repealed and remain in full force and effect.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the corporate seal of the Company this 20th day of September, 1977.


Assistant Secretary

RESOLVED, that the survey of definite location of this Company's line of railway, made under the direction of B. G. Anderson, Assistant Vice President-Engineering of this Company, as accurately represented on the map now submitted and approved, which map has attached thereto affidavit of said B. G. Anderson dated August 29, 1977, verifying the accuracy thereof, is on file in the office of the Assistant Vice President-Engineering of this Company and is entitled:

MAP OF DEFINITE LOCATION
BURLINGTON NORTHERN INC.
RAILROAD RIGHT OF WAY
SWINOMISH INDIAN RESERVATION
SECTION 2, T. 34 N., R. 2 E. W. M., SEAGIT CO., WA.
SCALE: 1" = 400' JULY 15, 1977

be, and the same is, hereby designated and adopted as the definite location of this Company's line of railway.

RESOLVED, that the proper officers of this Company be, and they are, hereby authorized and directed, for and on behalf of this Company and in its name, (a) to present the map referred to above, together with application for right-of-way for location of this Company's line of railway as represented thereon, for the approval of the Secretary of the Interior, (b) to execute such stipulation or stipulations as the Secretary of the Interior may require and containing such terms and conditions as the officers executing said stipulation or stipulations may in their discretion approve, the execution of such stipulation or stipulations by said officers to evidence the discretion hereby conferred, and (c) to do whatever may be necessary or proper in order to give full effect hereto and to carry out the purposes and intent hereof.

STIPULATION WITH RESPECT TO MAINTENANCE OF
RIGHT OF WAY APPLIED FOR

Burlington Northern Inc., Applicant, expressly agrees as follows with respect to the right of way applied for, as described in the accompanying Application:

- (a) To maintain the right of way in a workmanlike manner;
- (b) To pay promptly all damages and compensation in addition to the deposit made, pursuant to Section 161.4, determined by the Secretary, to be due the landowners and authorized users and occupants of the land on account of maintenance of said right of way;
- (c) If required by law, to indemnify the landowners and authorized users and occupants of said right of way against any liability for loss of life, personal injury and property damage arising from the maintenance, occupancy or use of the lands by the Applicant, its employees, contractors and their employees or subcontractors and their employees;
- (d) To keep clear the lands within the right of way to the extent compatible with the purpose of the right of way; and to dispose of all vegetation and other material cut, uprooted, or otherwise accumulated, in the maintenance of said right of way;
- (e) To take soil and resource conservation and protection measures, including weed control, if appropriate, on the land covered by the right of way;

- (f) To do everything reasonably within its power to prevent and suppress fires on or near the lands to be occupied under the right of way;
- (g) To build and maintain necessary and suitable crossings for all existing roads that intersect the right of way;
- (h) Upon revocation or termination of the right of way, the Applicant shall so far as is reasonably possible restore the land to its original condition;
- (i) At all times to keep the Secretary of Interior informed of its address and principal place of business, together with the names and addresses of its principal officers;
- (j) To the extent that the law would otherwise be applicable, not interfere with the use of the lands by or under the authority of the landowners for any purpose not inconsistent with the primary purpose for which the right of way is granted;
- (k) To use all precautions possible to prevent forest fires and to suppress such fires when they occur;
- (l) To permit the crossing, in a manner satisfactory to government officials in charge, of the right of way by canals, ditches, and other projects.
- (m) That said right of way is for an existing line of common carrier railroad (Asencotes-Burlington branch main line) and has been continuously operated as such since 1890. It is an integral part of the transcontinental railway system of Burlington Northern serving vital industries and communities located in the area.

DATED this 19th day of SEPTEMBER, 1977.

BURLINGTON NORTHERN INC.

By Thomas J. Joseph
President, Transportation Division

Burlington Northern Inc.
St. Paul, Minnesota 55101

No 2411

AMOUNT
\$20,858.00

Date September 21, 1977

Twenty Thousand Eight Hundred Fifty-eight and No/100-
Pay to the order of

Department of the Interior
Washington, D.C.

APPROVED FOR PAYMENT

R. Keenan
Vice President
FORM 3020 (78) PRINTED

To Treasurer Burlington Northern, Inc.
Trust First National Bank, St. Paul, Minnesota 55101

⑆0960⑉0001⑆ 12⑉02157⑈

DETACH CHECK BEFORE PRESE
FOR PAYMENT

THIS IS YOUR RECORD

2411
FDR:

Payment of estimated consideration and damages for railroad
right of way in its present location as shown on Map of
Definite Location involving Burlington Northern Inc. Railroad
Right of Way across the Swinomish Indian Reservation dated
July 15, 1977 covering portions of the Padilla Bay Tide Lands
and Swinomish Slough channel bed abutting or lying in front
of Lots 1 through 5 of Sec. 2, T. 14 N., R. 2 E., W.M.,
Skagit County, Washington.

\$20,858.00

APE Pending

File: 1834 Whitney, WA.

Acct. 742.20.03

M 00000 1-76

BURLINGTON NORTHERN INC.

John E. Miller

AMERICAN INSTITUTE OF
REAL ESTATE APPRAISERS

September 6, 1977

PHONE — 734-1420
1401 AUSTIN ST. N.W.
BELLINGHAM, WASHINGTON 98225

RECEIVED
LAW DEPT.
SEPT 1977
DIRECTOR GENERAL

Western Washington Indian Agency
Everett, Washington

RE: Burlington Northern Railway Right of Way
Swinomish Tidelands

Dear Sir:

At the request of Burlington Northern Inc., I have examined and appraised the property occupied by Burlington Northern trackage across tidelands in front of the Swinomish Indian Reservation in Section 2, Township 34 North, Range 2 East, W.M., Skagit County, Washington, for the purpose of determining the current Fair Market Value and damages, if any, as a basis for deposit of estimated consideration pursuant to Title 25 CFR, Section 161.14. As of the date of this letter, I find the value of the lands to be acquired by Burlington Northern to be \$20,858. This computation is based upon a right-of-way 60 feet wide and approximately 3,029 feet long, a total of 4.17 acres.

I have determined that the lands remaining will not sustain any severance damages by reason of the location, construction and operation of Burlington Northern, and I have further determined that no damages will result from the survey, if any, for location and construction of said railway.

I have also examined the area of Swinomish Slough which is occupied by Burlington Northern's bridge and approaches, and it is my conclusion that as long as the Slough is burdened with a navigational servitude, the underlying fee has no recognizable market value and the use of the Slough for purposes of construction and operation of a railroad bridge does not damage or diminish the value of the underlying fee in any respect.

I therefore certify that the market value as of the date of this certificate totals ----- \$ 20,858.00 -----

Very truly yours,

John E. Miller
John E. Miller, M.A.I.

JEM:ab

Administration

Western Washington Agency
3006 Colby Avenue Federal Building
Everett, WA 98201

September 28, 1977

Mr. Lawrence D. Silvernale
Attorney at Law
810 Third Avenue
Seattle, WA 98104

Re: Application for Railroad Right-of-Way Across
Swinomish Indian Reservation

Dear Mr. Silvernale:

This will acknowledge receipt this date of Application for Railroad Right-of-Way Across Swinomish Indian Reservation dated September 27, 1977, together with maps. Upon completion of local review, we will forward it to the Portland Area Office for further review and response.

Sincerely yours,

Superintendent

cc: sub
Chronies
PThreeStars:gg

SITC000008096

Exhibit No. 11

IN REPLY REFER TO:
Real Property Mgmt
Tenure & Mgmt.
Burlington Northern
r/w



United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Western Washington Agency
3006 Colby Avenue - Federal Building
Everett, WA 98201

October 3, 1977

RECEIVED
OCT 5 8 03 AM '77
BUREAU OF INDIAN
AFFAIRS
PORTLAND AREA

50186-

Memorandum

To: Area Director, Portland Area
Attention: Real Property Mgmt.

From: Superintendent, Western Washington Agency

Subject: Burlington Northern Inc. Application for Railroad Right-of-Way across Swinomish Tribal Tidelands.

Enclosed for your information and action is the subject application along with the stipulation, appraisal, original and two copies of the map, letter of transmittal dated August 15, 1977 and tribal resolution #77-08-464, Western Washington interoffice memorandum of April 19, 1977 covering tribal resolution #77-3-481, Western Washington letter dated September 28, 1977, copy of check #2411 and a copy of Western Washington letter dated October 3, 1977.

Our letter of September 28, 1977 to Burlington Northern acknowledged receipt and returned their check certified mail for safe keeping. The local review finds this case to be lacking under current GR regulations in that:

1. The appraisal has not been reviewed by the Bureau of Indian Affairs appraisal staff.
2. The landowners have not concurred. In fact the tribe organized under the IIA has gone on record in tribal resolution #77-08458 in requesting removal of said railroad.

As this case is in litigation, please advise if this office can be of further assistance.

[Signature]
Superintendent



Save Energy and You Serve America!

Exhibit No. 12

Native American Rights Fund

1506 Broadway • Boulder, Colorado 80502 • (303) 440-8742

October 5, 1977

Executive Office
1506 Broadway, Suite 200
Boulder, Colorado 80502
(303) 440-8742

Attorneys
Lorenson, Kesteven &
Pritchard LLP
Denver, Colorado

Local Office
514 Main Street
Boulder, Colorado 80502
(303) 440-1713

Attorney
Thomas M. Patten
Denver, Colorado

Executive Office
1506 Broadway, Suite 200
Boulder, Colorado 80502

10/5 1977

Mr. John Benedetto
Superintendent
Western Washington Agency
Bureau of Indian Affairs
United States Department of the Interior
3006 Colby Avenue - Federal Building
Everett, Washington 98201

Re: Application by Burlington
Northern, Inc. for a Railroad
Right-of-Way Across the
Swinomish Reservation.

Dear Mr. Benedetto:

We recently received a copy of an application submitted to the Western Washington Agency by Burlington Northern, Inc. for a railroad right-of-way across the Swinomish Reservation. The application states that it is being made pursuant to the Act of March 2, 1899, 30 Stat. 998 (25 U.S.C. §312, et seq.) and that tribal consent is not required even though the Act of February 5, 1948, 62 Stat. 17 (25 U.S.C. §523, et seq.) requires such consent. For some time now the Native American Rights Fund has been representing the Swinomish Tribal Community in negotiations with Burlington Northern for a right-of-way across tribal lands. It is the Tribal Community's position that it is an absolute requirement that tribal consent be obtained before the granting of a right-of-way across Swinomish lands. This position is supported by the applicable statutes and regulations governing rights-of-way across Indian lands and by present federal Indian policies. Enclosed is a memorandum outlining our research on the issue of the necessity of tribal consent for the granting of railroad rights-of-way, particularly where the tribe is organized under the Indian Reorganization Act, 25 U.S.C. §461, et seq. The Swinomish Tribal Community was organized under the Act in the 1930's.

Recently NARF represented the Walker River Paiute Tribe of Indians in a trespass action against Southern Pacific Transportation Company. Subsequent to a Ninth Circuit Court of Appeals decision establishing liability on the part of the

Mr. John Benedetto
October 5, 1977
Page Two

railroad, Southern Pacific applied to the Western Nevada Agency for a right-of-way across the Walker River Reservation pursuant to the 1899 Act, without tribal consent. The Western Nevada Superintendancy agreed with WARE and refused to grant the right-of-way without tribal consent. The matter has been appealed by Southern Pacific to the Portland Area Office. The above memorandum was done in connection with that appeal.

The Swinonish Tribal Community is very concerned that a right-of-way not be granted to Burlington Northern, Inc. without the Tribe's consent. If you need any additional information concerning the Tribe's position, please feel free to contact me.

Sincerely yours,


Joanne S. Whiting

JSW/cix
Enclosure

cc: Randy James, Chairman
Michael Moyer, Planning Director

MEMORANDUM

RE: The Requirement of Tribal Consent for
Railroad Rights-of-Way

TRIBAL CONSENT IS A PRECONDITION TO THE
GRANTING OF A RAILROAD RIGHT-OF-WAY

The Railroad argues that the grant of a railroad right-of-way is governed solely by the terms of the 1899 Act,^{1/} and not by the terms of the 1948 Act.^{2/} This is clearly wrong. As a matter of law, the 1899 Act must be construed together with the 1948 Act. Read together the conclusion is clear that, under present law, tribal consent is a precondition to any railroad right-of-way grant, where the tribe involved is organized pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461, et seq., and in particular §476. See, 25 U.S.C. §324.

The legislative history of the 1948 Act shows beyond question that Congress enacted the 1948 Act on the specific recommendation of the Secretary of the Interior that there was a real need "for simplification and uniformity" in the administration of grants of rights-of-way of any nature over Indian lands." See, S. Rept. No. 823, 1948 U.S. Code and Administrative

^{1/} Act of March 7, 1899, 30 Stat. 990, 25 U.S.C. §§312, et seq.

^{2/} Act of February 5, 1948; 62 Stat. 17, 25 U.S.C. §§323, et seq.

News 1033, 1036. The suggestion for a general right-of-way act was initiated by the Secretary of the Interior in a report on a bill dealing solely with the administration of rights-of-way grants over the Osage Reservation. The Secretary's report suggested "that there is a real need for additional legislation relating not only to the right-of-way on Osage Indian lands but also to the rights-of-way on Indian lands on all reservations . . ." S. Rept. No. 823, supra at 1034. The text of the 1948 Act as finally adopted is the same as the bill drafted by the Secretary and attached to his report and recommendation for general right-of-way legislation. Id.

The Secretary traced his problems in granting rights-of-way to the fact that his authority to grant any right-of-way

. . . is contained in many acts of Congress, dating as far back as 1875. Thus, each application for a right-of-way over Indian land must be painstakingly scrutinized in order to make certain that a right-of-way sought falls within a category specified in some existing statute, which may limit the type of right-of-way that may be granted, or the character of the land across which it may be granted.

Id. at 1036. The Secretary further pointed out that certain acts were applicable to specific types of Indian lands and not to others for no valid reason. And finally, the Secretary stated that in many instances when no statutory authority could be found for a particular right-of-way grant, the Secretary was forced to spend an inordinate amount of time and expense obtaining the signatures of all owners of interests in land to obtain an easement deed. The time and expenses were generally

not justified by the benefits obtained from the right-of-way. Id.

Thus, the 1948 Act was specifically designed to address the administrative problems of the Secretary in granting rights-of-way over Indian lands caused by the existence of so many special statutes governing specified rights-of-way over Indian land. The 1948 Act addresses the problems outlined by the Secretary essentially by vesting in the Secretary the power to make grants of rights-of-way of all kinds across Indian lands as well as the power to establish the conditions for such grants. Presumably the regulations implementing the Act would simplify and provide uniformity in the granting of rights-of-way across Indian lands.

The 1948 Act does expressly preserve existing statutory authority for rights-of-way, including the 1899 Act. The legislative history reveals that the reason for such preservation was "to avoid any possible confusion which may arise, particularly in the period of transition from the old system to the new . . ." Id. A second reason was presumably to avoid any question as to the Secretary's authority which might have arisen from a repeal of the preexisting statutes on Indian rights-of-way.^{3/}

^{3/} Indeed a strong argument can be made that the pre-existing acts were as a matter of law repealed, except to the extent such acts authorized the Secretary to grant specific rights-of-way. In such an instance, the Secretary would not be bound to adopt as conditions those set forth in the pre-existing acts.

Accordingly, the regulations promulgated pursuant to the 1948 Act establish a uniform procedure for the administration of right-of-way grants over Indian lands, but preserve certain provisions of preexisting right-of-way statutes which the Secretary has determined do not affect the uniform administration of right-of-way grants across Indian lands; See, 25 C.F.R. Part 151.

It is clear from the above described legislative history of the 1948 Act that the intention of Congress was to authorize the Secretary by regulation^{4/} to effect the simplification and uniformity of the multitude of statutes authorizing rights-of-way over Indian lands, including the 1899 Act. Moreover, the 1948 Act expressly refers to all such preexisting statutes by stating "nor shall any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands be repealed." 25 U.S.C. §326. Furthermore, §324 expressly incorporates as part of the 1948 Act the protection afforded tribes organized under the Indian Reorganization Act "to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; . . ." 25 U.S.C. §476.

As stated by the Ninth Circuit in Stevens v. C.I.R., 483 F.2d 741, 744 (1971):

^{4/} 25 U.S.C. §326 authorizes the Secretary "to prescribe any necessary regulations for the purpose of administering the provisions of sections 323-327 of this title."

Federal policy toward particular Indian tribes is often manifested through a combination of general laws, special acts, treaties, and executive orders. All must be construed in pari materia in ascertaining congressional intent. [Emphasis added.]

The instant case is even simpler because the congressional intent as to the administration of grants of rights-of-way over Indian lands is clear from the legislative history and from the terms of the 1948 Act itself. Plainly Congress intended that the 1948 Act effectuate a consolidated, simplified and manageable system of granting rights-of-way across Indian lands to replace the then existing fragmented and unmanageable system. Thus, the 1948 Act, the 1899 Act and all other pre-existing statutes specially authorizing the grants of rights-of-way of any nature across Indian lands, and the Indian Reorganization Act of 1934, constitute parts of a single congressional system governing grants of rights-of-way over Indian lands. Those statutes are therefore in pari materia and must be so construed. See, e.g., Stevens v. C.I.R., *supra*; Kirkwood v. Arenas, 242 F.2d 863, 866-867 (9th Cir. 1957); United States v. Jackson, 286 U.S. 194, 196, 74 L.Ed. 361, 367 (1930); United States v. Mexico, 115 F.2d 389, 393 (10th Cir. 1940); and see generally, 2A Sutherland Statutory Construction, §§§1.01-31.05 at 289-320 (1973 Cum.Supp. 1977).

Finally, the following principle of construction is pertinent to the construction of the 1899 Act and the 1948 Act:

It is a familiar rule of statutory construction that great weight is properly to be given to the construction consistently

given to a statute by the Executive Department charged with its administration [citations omitted] and such construction is not to be overturned unless clearly wrong, or unless a different construction is plainly required.

United States v. Jackson, supra at 151. Accord, Stevens v. C.I.R., supra at 746.

Constructing all applicable statutes together in light of the intent of Congress in enacting the 1948 Act, and giving weight to their interpretation by the Department of the Interior and Interior's long established practice, the conclusion is inescapable that the consent of tribes organized under 25 U.S.C. §476 of the Indian Reorganization Act is a precondition to any grant of a railroad right-of-way across the tribal lands. This conclusion is, of course, expressly incorporated into the regulations of the Secretary pursuant to the 1948 Act at 25 C.F.R. §161.3(a) which states:

No right-of-way shall be granted over and across any tribal land, nor shall any permission to survey be issued with respect to any such lands, without the prior written consent of the tribe.

THE 1999 ACT READ TOGETHER WITH 25 U.S.C. §476 OF THE INDIAN REORGANIZATION ACT MEANS THAT TRIBAL CONSENT IS A REQUIRED PRECONDITION TO A GRANT UNDER THE 1999 ACT.

Assuming that the 1948 Act does not apply to railroad rights-of-way grants, an assumption which we think is clearly unsupported, the 1999 Act must nevertheless be read together with 25 U.S.C. §476 of the Indian Reorganization Act. 25 U.S.C. §476 states in pertinent part:

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe [pursuant to the IRA] shall also vest in such tribe or its tribal council the following rights and powers: . . . to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe.

In construing the effect of the above language as a limitation on the granting of rights-of-way across Indian lands, the Solicitor for the Interior Department in 1936 declared:

The only limitations which the Reorganization Act imposes upon the exercise of authority conferred by such specific acts of Congress are: (a) a tribe organized under section 16 may veto the grant under the broad power given it by that section 'to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe' and (b) a tribe incorporated under section 17 may be given the power to make such grants without restriction.

Memo. Sol. I.D., September 2, 1936, quoted in Cohen, Handbook on Indian Law, 103 (1942 ed.).

Based on the above Solicitor's opinion, Cohen in the 1942 edition of the Handbook on Indian Law states:

[I]t would appear that section 16 of the act requires the consent of an organized tribe to any grant of right-of-way which the Secretary is authorized to make.

Cohen, at 103.

Subsequently, in the 1956 version of Cohen's Handbook, the Department of the Interior confirms Cohen's opinion by adding after the previous statement: "Any doubt that may have existed [as to whether the IRA requires tribal consent to

grants of rights-of-way] was resolved by the act of February 5, 1948 [25 U.S.C. §324]."
Handbook of Federal Indian Law at 62 (1976 ed.).

Indeed the legislative history of the 1948 Act expressly states that the Act "preserved the powers of those Indian tribes organized under the Indian Reorganization Act of 1934 . . . with reference to the disposition of tribal land." (Emphasis added.) S. Rept. No. 833, supra at 1036. The unmistakable implication from this language is that prior to the 1948 Act, IRA tribes had the power to veto grants of rights-of-way of any nature, and Congress wished to make it clear that the 1948 Act did not abrogate that existing power.

Therefore Indian tribes organized under 25 U.S.C. §476 have the power under that section to consent or not consent to any proposed grant of a railroad right-of-way under the 1899 Act. 25 C.F.R. §161.3 simply reflects the existence of that power, and provides a place for it in the procedural scheme of such grants.

Exhibit No. 13

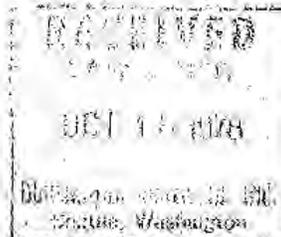


United States Department of the Interior

Real Property Mgmt.
Tenure & Mgmt.
Pending Right-of-way
Swinomish General

BUREAU OF INDIAN AFFAIRS
Western Washington Agency
3006 Colby Ave., Federal Building
Everett, Washington 98201.

October 17, 1978



Burlington Northern Railroad Company
Attention: Lawrence D. Silvernale,
Associate Regional Counsel
350 Central Building
Seattle, WA 98104

Gentlemen:

The Swinomish Indian Senate in session on October 3, 1978, resolved that the Swinomish Indian Tribal Community refuses to authorize the Secretary of the Interior to grant an easement for the right-of-way, applied for by the Burlington Northern Railroad Company. As tribal consent is required under both the law and the regulations, we have no choice but to deny the application. Accordingly, by copy of this letter, we will notify our Portland Area Office to return your original application and attachments thereto without approval.

Sincerely yours,

[Signature]
Superintendent

EXHIBIT A



Save Energy and You Serve America!

Exhibit No. 14

RESOLUTION NO 78-10-554

Rejecting Burlington Northern Railroad Company's request for right-of-way across the Swinomish Indian Reservation.

WHEREAS The Swinomish Indian Reservation was established by the Treaty at Point Elliott in 1855, and the Northern boundary was redefined by an Executive Order in 1873; and

WHEREAS the Swinomish Indian Tribal Community is a federally recognized Tribe, organized under a constitution and By-Laws approved by the Secretary of the Interior pursuant to the Indian Reorganization Act; and the Swinomish Indian Senate is the duly constituted governing body of the Swinomish Indian Tribal Community; and

WHEREAS The Seattle and Northern Railroad Company constructed a railroad across tidelands owned by the Swinomish Indian Tribal Community in 1889 without authority from the Commissioner of Indian Affairs and the Swinomish Indian Tribal Community; and

WHEREAS The Burlington Northern Railroad Company is the latest in a continuous stream of successors in-interest to own and use said railroad without proper authorization from the Swinomish Indian Tribal Community and the United States; and

WHEREAS the Burlington Northern Railroad Company has applied to the Secretary of the Interior for permission to cross Swinomish Indian Tribal Community tidelands, pursuant to the Act of March 2, 1899; and

WHEREAS the Secretary cannot grant such an application without the approval of the Tribe involved; and

WHEREAS The Swinomish Indian Senate has already resolved (Nos. 77-12-487 and 77-08-463) that suit should be brought by the Tribe and the United States against Burlington Northern Railroad Company for ejection and damages;

NOW THEREFORE BE IT RESOLVED by the Swinomish Indian Senate in session this 3rd day of October, 1978, with a quorum present that the Swinomish Indian Tribal Community refuses to authorize the Secretary of the Interior to grant an easement for the right-of-way to the Burlington Northern Railroad Company for the aforesaid railroad located on Swinomish Tribal tidelands.

BE IT FURTHER RESOLVED that the Senate does hereby renew Resolutions # 77-12-487 and 77-08-463, urging the United States government to inter immediate action in its capacity as our trustee to remove the trespasser, Burlington Northern Railroad Company from our Tribal tidelands


Nancy Wilby, Secretary


Randy James, Chairman
Swinomish Indian Senate

RESOLUTION # 78-10-554

CERTIFICATION

As Secretary of the Swinomish Indian Senate, I hereby certify that the above resolution was enacted at a regular meeting of the Swinomish Indian Senate, held at LaConner, Washington, on the day of 1978, at which time a quorum was present, by a vote of 7 for and 0 against.



Nancy Wilbur, Secretary
Swinomish Indian Senate

Exhibit No. 15

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

SWINOMISH TRIBAL COMMUNITY,)	
)	
Plaintiff,)	No.
)	
v.)	
)	
BURLINGTON NORTHERN, INC.,)	<u>COMPLAINT FOR INJUNCTIVE</u>
)	<u>AND DECLARATORY RELIEF</u>
Defendant.)	
)	

The plaintiff, Swinomish Tribal Community, alleges:

1. This Court has jurisdiction in this matter pursuant to 28 U.S.C. §§ 1362 and 1331. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars (\$10,000.00).

2. Declaratory and injunctive relief is requested pursuant to 28 U.S.C. §§ 2201 and 2202.

3. Plaintiff Swinomish Tribal Community is the successor in interest to certain tribes, bands, and groups of Indians which were parties to the Treaty of Point Elliott. The Swinomish Tribal

1 Senate is duly recognized by the Secretary of the Interior as the
2 governing body of the Swinomish Indian Reservation and is organized
3 pursuant to § 16 of the Indian Reorganization Act of June 18, 1934,
4 48 Stat. 987, 25 U.S.C. § 476.

5 4. Defendant Burlington Northern, Inc. is a corporation
6 incorporated under the laws of the State of Delaware and is duly
7 licensed and doing business within the State of Washington as a
8 railway carrier.

9 5. The Swinomish Indian Reservation was established by
10 the Treaty of Point Elliott between the United States and the
11 Dwamish, Suquamish, and other allied and subordinate tribes of
12 Indians in Washington Territory, dated January 22, 1855, ratified on
13 March 8, 1859, proclaimed by the President on April 11, 1859.
14 12 Stat. 927. The Treaty of Point Elliott (Article 2) secured and
15 confirmed the Swinomish Tribal Community's predecessors in the
16 possession of a portion of their aboriginal lands described as "the
17 peninsula at the southeastern end of Perry's Island called
18 Sh'ais-quihl". The Reservation includes, at a minimum, the western
19 one-half of the Swinomish Channel on the east and all surrounding
20 and adjacent tidelands.

21 6. During all times since 1855, the tidelands surrounding
22 and adjacent to the upland portions of the Swinomish Indian
23 Reservation were, and are, held in trust by the United States on
24 behalf of the Swinomish Tribal Community.

25 7. A railway and bridge and appurtenant facilities were
26 constructed across the Swinomish Channel and the tidelands on the

COMPLAINT - 2

1 northern portion of the Swinomish Indian Reservation by the Seattle
2 and Northern Railway Company in 1890. Burlington Northern, Inc. is
3 the successor in interest to the Seattle and Northern Railway
4 Company. The railway is presently in use and is maintained and
5 operated by Burlington Northern, Inc.

6 8. No grant of a right-of-way across the tribally owned
7 tidelands has been made by the Swinomish Tribal Community or the
8 United States to defendant Burlington Northern, Inc. or its
9 predecessors. Burlington Northern, Inc. and its predecessors have
10 been trespassing on these lands from 1890 to the present.

11 9. By constructing the railway through tribal lands, the
12 defendant gained the benefit of greatly reduced cost in the
13 construction and annual maintenance of the railway. Such benefit
14 would not have been gained if the railway facilities had been
15 constructed north of the Reservation. As a result of said wrongful
16 use and occupation of tribal lands, Burlington Northern, Inc. and
17 its predecessors have been unjustly enriched.

18 10. By constructing the railway through these tribal
19 tidelands, the defendant severely damaged a prime traditional mussel
20 and shellfish gathering grounds of the Indians residing on the
21 Swinomish Indian Reservation.

22 11. Plaintiff has no adequate remedy at law to protect
23 itself from said future and presently continuing trespasses except
24 by filing a multiplicity of suits. In addition, there is a grave
25 danger of irreparable damage to the land and the fishery in Padilla
26 Bay and the Swinomish Channel, upon which the Swinomish Tribal

COMPLAINT - 3

1 Community relies as their major source of economic stability, should
2 a derailment or accident occur.

3 WHEREFORE, plaintiff Swinomish Tribal Community prays for
4 the following relief against defendant Burlington Northern, Inc.:

5 1. A permanent injunction against the continuing trespass
6 by defendant;

7 2. A judgment against defendant for the possession of
8 said tidelands and channel;

9 3. Monetary damages for trespass, unjust enrichment of
10 the defendant and/or restitution for use and occupation of the land;
11 and

12 4. For costs and such further and additional relief as
13 the Court may deem necessary.

14 DATED: July 12th, 1978.

15 Respectfully submitted,

16 SHARON K. EADS
17 ROBERT S. PELCYGER
18 Native American Rights Fund
19 1506 Broadway
20 Boulder, Colorado 80302
21 (303) 447-8760

22 By Sharon K. Eads
23 Sharon K. Eads

24 PETER J. WILKE
25 Swinomish Tribal Community
26 P. O. Box 416
La Conner, Washington 98257
(206) 466-3185

By _____
Peter J. Wilke
Attorneys for Plaintiff

COMPLAINT - 4

SITC000004330

Exhibit No. 16

STATE OF WASHINGTON
COUNTY OF KING

The undersigned, being first duly sworn, deposes and says that on this day affixed deposited in the court of the United States at America a properly stamped and addressed envelope which led to the payment of record of plaintiff subsequently containing a copy of the document to which this affidavit is attached.

Mavis J. Bata

Subscribed and sworn to before me this 10th day of August,

R. J. [Signature]
Notary Public for Washington
Residence of Seattle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

SWINOMISH TRIBAL COMMUNITY,

Plaintiff,

vs.

BURLINGTON NORTHERN INC.,

Defendant.

NO. C78-429V

ANSWER AND COUNTERCLAIM
FOR INJUNCTIVE AND
DECLARATORY RELIEF

COMES NOW defendant Burlington Northern Inc., and in answer to plaintiff's complaint states as follows:

I.

Answering paragraphs 1, 2, 3 and 4 of plaintiff's complaint, defendant admits the same.

II.

Answering paragraphs 5, 6, 7, 8, 9, 10 and 11 thereof, defendant denies each and every allegation therein contained.

WHEREFORE, defendant prays that the plaintiff's complaint be dismissed and that defendant recover its costs.

FOR FURTHER ANSWER AND BY WAY OF AFFIRMATIVE DEFENSE, defendant alleges:

WOODROW I. TAYLOR
LAWRENCE D. SILVERNALE
GEORGE C. INMAN, JR.
ROBERT C. WILLIAMS
GERALD A. TROY
350 Central Building
Seattle, Washington 98104
Telephone: (206) 625-6446

ANSWER AND
COUNTERCLAIM - 1

I.

Burlington Northern Inc. holds a right of way for railroad and telegraph purposes as constructed at all points on or adjacent to said Swinomish Indian Reservation.

II.

If Burlington Northern's right of way for railroad crosses lands over which it does not have record ownership, easement or other interest, there exists an implied license for said right of way.

III.

If Burlington Northern's right of way for railroad crosses lands owned by or held for the benefit of plaintiff, defendant has a valid right of way pursuant to the terms and provisions of the said Treaty of Point Elliott, which provides in part in Article 2:

"If necessary for the public convenience, roads may be run through the said reserves, the Indians being compensated for any damage thereby done them."

IV.

If defendant's right of way for railroad crosses lands owned by or held for the benefit of plaintiff, defendant has obtained an easement for right of way purposes by the construction of its railway in 1890 and its application for right of way under the Act of March 2, 1899 (25 U.S.C. 112 et seq., or other applicable statutory right of way grants.

V.

The claims of the plaintiff are barred by laches, estoppel, waiver and the running of the applicable statutes of limitation.

VI.

If it be determined that defendant railroad has no valid right of way and that the lands over which it operates are owned

ANSWER AND
COUNTERCLAIM - 2

1 by or held for the benefit of the plaintiff, and further that
2 plaintiff Tribal Community's consent to railroad right of way
3 is essential, said plaintiff Tribal Community has arbitrarily
4 and capriciously refused its consent in violation of the U.S.
5 Constitution and the Indian Civil Rights Act, 25 U.S.C. 1302.

6 VII.

7 In respect to areas occupied by defendant's bridge and
8 approaches over the Swinomish Channel, such premises consti-
9 tute navigable waters of the United States subject to the jurisdic-
10 tion of the United States Government, and defendant's bridge
11 and approaches were lawfully constructed with plaintiff's knowl-
12 edge and consent pursuant to a valid Federal permit.

13 VIII.

14 The plaintiff has failed to state a claim upon which relief
15 can be granted.

16 CROSS-COMPLAINT OF BURLINGTON NORTHERN
17 FOR DECLARATORY AND INJUNCTIVE RELIEF AND DAMAGES

18 I.

19 This court has jurisdiction in this matter pursuant to
20 28 U.S.C. 1331, 1332, 1343(4) and 1362.

21 II.

22 Declaratory and injunctive relief is requested pursuant to
23 28 U.S.C. 2201 and 2202.

24 III.

25 Burlington Northern (hereinafter BN) is a Delaware corpora-
26 tion which owns and operates a transcontinental line of inter-
27 state common carrier railroad through, over and across the United
28 States and Canada. The railroad line herein disputed is an
29 integral part thereof and substantial shippers, receivers and
30 communities rely on the rail service provided.

31 ANSWER AND
32 COUNTERCLAIM - 3

1 Cross-claim defendant is the governing body of the
2 Swinomish Indian Reservation organized under 25 U.S.C. 476
3 (hereafter referred to as Tribal Community).

4 IV.

5 In the vicinity of the tidelands and Swinomish Channel
6 herein involved, said railroad was located and constructed in
7 1890 by BN's predecessor. BN has a valid easement for railroad
8 and telegraph right of way purposes over and across said premises
9 pursuant to said location and construction, pursuant to said
10 treaty and the general right of way statutes or other basis as
11 pleaded by BN in its affirmative defenses to Tribal Community's
12 complaint.

13 V.

14 The Tribal Community has no right, title or interest in or
15 to said tidelands and channel, or if said Tribal Community has
16 an interest in said tidelands or channel, said Tribal Community
17 has acquiesced in the location, construction and reconstruction
18 of BN's railroad and telegraph lines, or alternatively, said
19 Tribal Community's refusal to consent to said right of way con-
20 stitutes an arbitrary and capricious exercise of discretion in
21 violation of 25 U.S.C. 1302.

22 VI.

23 The Tribal Community has, since 1975, embarked upon a
24 program of attacking holders of public utility, pipeline, rail-
25 road and other rights of way on or near said reservation with
26 threats to interfere with said public utility, pipeline or
27 railroad operations. Said activities include threats to inter-
28 fere with BN operations and demands for payment of large sums
29 of money for tribal consent to the continuation of said rights
30 of way.

31 ANSWER AND
32 COUNTERCLAIM - 4

VII.

The construction and operation of BN's railroad right of way over and across the tidelands in question since 1890 has resulted in significant benefits to the Tribal Community in that the Tribal Community's lands are served by railroad facilities and such facilities have permitted the Tribal Community to develop an industrial site adjacent to said railroad premises.

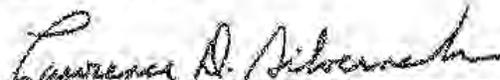
VIII.

BN has no adequate remedy at law to protect itself from future and continuing threats to interfere with its operations. Temporary or permanent interruption of BN's common carrier railroad operations and service to the Tribal Community's lands and to railroad users east and west of said reservation would result in irreparable damage to the shipping and receiving public, several communities, BN and to the citizens of the United States.

WHEREFORE, Burlington Northern prays for the following relief against said Swinomish Tribal Community:

1. A permanent injunction against activities or threats to interfere with BN's railroad right of way and railroad operations.
2. A judgment against said Tribal Community for the possession and use of said railroad and telegraph right of way.
3. Monetary damages in amounts to be proved for the Tribal Community's wrongful interference with BN's operation of its railroad right of way.
4. For costs and such further and additional relief as the court may deem necessary.

DATED this 11th day of September, 1978.


 Lawrence D. Silvernale
 Of Attorneys for Defendant
 and Cross-Claim Plaintiff
 Burlington Northern Inc.

ANSWER AND
COUNTERCLAIM - 5

Exhibit No. 17

BURLINGTON NORTHERN

Woodrow L. Taylor, 825-6441
Regional Counsel

Lawrence D. Silvernale 825-6444
Associate Regional Counsel

George C. Inman, Jr. 825-6443
Robert C. Williams 825-6447
Assistant Regional Counsel

Gerald A. Troy 825-6448
General Attorney

November 10, 1978

Area Director
Bureau of Indian Affairs
P.O. Box 3621
Portland, Oregon 97208

Dear Sir:

Enclosed is the appeal of Burlington Northern Inc. from the decision refusing to file an application for right of way through the Swinomish Indian Reservation, Washington.

Very truly yours,

Lawrence D. Silvernale
Associate Regional Counsel

LDS/mb

Encl.

cc: Mr. P. P. Threestars
Office of the Solicitor, Portland Region
Ms. S. K. Eads, Native American Rights Fund
Mr. P. J. Wilke, Swinomish Tribal Community

1 Woodrow L. Taylor
Lawrence D. Silvernale
2 350 Central Building
Seattle, Washington 98104
3 Telephone: (206) 625-6444

4 Attorneys for Appellant

5

6

DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

7

8

9 In the Matter of Appeal of)
Burlington Northern Inc. from)
10 Decision Refusing to File an)
Application for Right of Way)
11 Through the Swinomish Indian)
Reservation, Washington.)
12 _____)

13

14 APPEAL OF BURLINGTON NORTHERN INC.

15

16 Burlington Northern Inc. (hereinafter BN or Appellant) ap-
17 peals to the Area Director from the decision of October 17, 1978,
18 of the Superintendent of the Western Washington Agency to reject
19 for filing Burlington Northern's application for railroad right
20 of way through tribal lands of the Swinomish Indian Tribal Com-
21 munity in the Swinomish Indian Reservation, Washington.

22

23

STATEMENT OF THE CASE

24

25 Burlington Northern Inc. tendered for filing on September
26 27, 1977, with the Western Washington Agency an application for

1 a railroad right of way under the Act of March 2, 1899, Chapter
2 374, 30 Stat. 990 (25 U.S.C. 312 et seq.), through the tribal
3 land within the Swinomish Indian Reservation. Duplicate origi-
4 nals of the application, original tracing linen and reproductions
5 of the map of definite location and all other documents tendered
6 to the Agency, including voucher for payment of estimated com-
7 pensation, are herewith re-tendered to the Area Director accom-
8 panying this appeal.¹

9 By letter dated October 17, 1978, copy attached as Exhibit
10 A, the Superintendent of the Western Washington Agency refused
11 to file the foregoing documents, advising that without tribal
12 consent he had no choice but to deny the application and that
13 with a copy of his letter he notified the Portland Area Office
14 to return BN's original application and attachments thereto with-
15 out approval. Although the original application with attachments
16 has not as yet been returned to Burlington Northern, BN treats
17 the Superintendent's letter as a rejection of its application.

18 By letter dated November 2, 1978, received by the Agency on
19 the 3rd day of November, 1978, BN filed with the Superintendent
20 its timely notice of appeal of the decision rejecting the tendered
21 filing. Copy of the notice of appeal is attached as Exhibit B.
22 Also filed with this appeal is a certificate of service of the
23 notice of appeal on interested parties, attached as Exhibit C.

24 _____
25 ¹As of this writing Appellant's original application and attached
26 documents have not been returned. All will be resubmitted to the
Area Director when or if returned. Appellant's voucher for pay-
ment of estimated compensation is herewith resubmitted.

STATEMENT OF FACTS

1
2
3 The railroad in question was constructed in 1890 by the
4 Seattle and Montana Railroad Company. The line was subsequently
5 acquired by Great Northern Railway Company, which, through merger,
6 became Burlington Northern Inc. in 1970. In recent years the
7 Swinomish Indian Tribal Community, represented by attorneys from
8 a group known as the Native American Rights Fund, has contended
9 that BN does not have a valid right of way over and across tide-
10 lands adjacent to the Swinomish Indian Reservation. Although BN
11 believes it has a valid right of way over the tidelands in ques-
12 tion and further that the Swinomish Tribe does not own the tide-
13 lands, nevertheless BN seeks, by its application for right of
14 way, to put to rest any question as to right of way ownership.

15 The application and map rejected by the Western Washington
16 Agency Superintendent seeks rights only through tribal land and
17 does not affect allottee land. The application is for a 60 foot
18 right of way 3,029 feet long plus a right of way over the
19 Swinomish Slough and for telephone and telegraph lines along the
20 right of way. The application is filed under the Act of March 2,
21 1899, Chapter 374, 30 Stat. 990 (25 U.S.C. 312 et seq.).

STATEMENT OF REASONS IN SUPPORT OF APPEAL

22
23
24
25 The reason given for rejection of the filing as set forth
26 in the attached letter of the Superintendent is lack of tribal

1 consent to the grant. In response to this objection, Appellant
2 states as follows:

3 I. Tribal consent to the grant is not required because the
4 Act of 1899 is a grant in praesenti, not conditioned on such
5 consent.

6 The language of the Act of 1899 is that of a grant in
7 praesenti: "A right of way for a railway, telegraph and tele-
8 phone line through any Indian reservation . . . is granted to
9 any railroad company . . ." Act of March 2, 1899, Chapter 374,
10 Section 1, 30 Stat. 990 (25 U.S.C. 312) (emphasis ours). The
11 operation of grants in praesenti was well understood at the time
12 of passage of the 1899 Act. The language imports a present grant.
13 It passes a present title, not a promise to transfer one in the
14 future. Schulenberg v. Harriman (1875), 21 Wall. 44; St. Paul &
15 P. R. v. Northern Pac. R. (1891), 139 U.S. 1. If one or more of
16 the factors necessary to attachment of the grant is lacking, e.g.,
17 lack of definite grantee or route, when these items become ascer-
18 tained the grant attaches. Jamestown & Northern R. v. Jones
19 (1900), 177 U.S. 125. By way of comparison, in practically con-
20 temporaneous legislation Congress adopted for highways through
21 reservations a system, not of a present grant, but of discre-
22 tionary permission from the Secretary. Act of March 3, 1901,
23 Chapter 832, Section 4, 31 Stat. 1084 (25 U.S.C. 311).

24 In response to the foregoing contention, the 9th Circuit
25 held, in United States v. Southern Pacific Transportation Company
26 (CA 9-1976) 543 F.2d 676, not that the Act is not a grant in

1 praesenti, but that merely filing articles of incorporation is
2 not sufficient, and that, "the grantee must in addition comply
3 with all the provisions of the Act including the requirements
4 that maps be filed and approved and that compensation be paid
5 to the Indians." Indeed, in view of the many Supreme Court cases
6 construing like acts, the 9th Circuit could hardly hold that the
7 Act of 1899 was not a grant in praesenti. The effect of tender-
8 ing the instant application is to comply with all the provisions
9 of the Act, i.e., maps, compensation, etc. Translated into con-
10 temporary terms, when all the requirements of the Act are met,
11 the in praesenti effect is to remove from the Secretary any dis-
12 cretion he might have. The grantee becomes entitled to the
13 legislative grant. On the one hand, tribal consent is not called
14 for by the Act, while on the other hand, all the requirements of
15 the Act (and of the 9th Circuit's interpretation of it) are met
16 by the application and map which have been tendered.

17 II. Tribal consent is not required by the Act. The regula-
18 tion requiring it is inconsistent with the Act.

19 25 CFR 161.3 states, "No right-of-way shall be granted over
20 and across any tribal land . . . without the prior written con-
21 sent of the tribe."

22 A reading of the terms of the Act discloses the first impor-
23 tant fact about this regulation: nowhere does the Act call for
24 tribal consent. In contrast, other acts granting rail rights of
25 way in Indian reservations do call for tribal consent. Act of
26

1 July 26, 1866, 14 Stat. 289, Section 8. Thus Congress chose not
2 to impose a consent requirement in this general Act.

3 In the second place, because of its in praesenti mode, for
4 the Secretary to impose additional substantive requirements not
5 present in the Act itself thwarts the operation of the Act, and
6 is thus inconsistent with it.

7 Finally, a comparison of the Act of 1899 with the Right of
8 Way Act of 1948 (Act of Feb. 5, 1948, Chapter 45, 62 Stat. 17,
9 25 U.S.C. 323 et seq.) indicates that Congress reaffirmed its
10 decision not to require tribal consent under the 1899 Act. The
11 1948 Act specifically provides that as to certain recognized
12 tribes, "No grant of a right-of-way . . . shall be made without
13 the consent of the proper tribal officials." (25 U.S.C. 325).
14 In contrast the Act of 1899 requires, "In case objection to the
15 granting of such right of way shall be made, said Secretary shall
16 afford the parties so objecting a full opportunity to be heard."
17 (25 U.S.C. 312). Objecting parties were granted a hearing, but
18 not a veto by withholding consent. Congress expressly kept ex-
19 isting acts on the statute books. The Act of 1948 states:

20 " . . . nor shall any existing statutory authority
21 empowering the Secretary of the Interior to grant
22 rights-of-way over Indian lands be repealed."
23 25 U.S.C. 326

24 The regulation requiring tribal consent is thus inconsistent with
25 and outside the scope of the Act of 1899, and not reasonably
26 necessary to effectuate the purposes of the Act.

The legislative history of the 1948 Act contained in the
U.S. Code and Congressional Report clearly evidences an intent

1 that the 1899 and other specific right of way acts were neither
2 superseded nor repealed by the 1948 Act. In addition to the
3 specific proviso preserving the existing acts, the official
4 Bureau of Indian Affairs explanation to Congress in a letter
5 written to the President of the Senate on July 22, 1947, 1948
6 U.S. Code/Congressional Report, pp. 1036, 1037, Undersecretary
7 of the Interior Oscar Chapman explained that the purpose of the
8 bill was to simplify and liberalize the process of approving
9 right of way applications in specific situations, while at the
10 same time preserving all existing statutory authority relating
11 to rights of way over Indian lands. The most that can be said
12 of the 1948 statute is that it gave the Department of the Interior
13 a procedure for simplifying right of way grant procedures in cir-
14 cumstances where prior statutory authorities were complex or
15 conflicting and where the tribe consented to the grant.

16 This issue was before the 9th Circuit in Nicodemus v. W.W.
17 Power, 264 F.2d 614. There the Indian allottees argued that
18 Section 323 of Title 25 (the 1948 Act) provided the exclusive
19 method of obtaining a power line easement and that the consent
20 of the Secretary of the Interior was a prerequisite. The 9th
21 Circuit held that Congress had provided two methods of acquisi-
22 tion of such easements and that the subsequent enactment of the
23 1948 law did not repeal or diminish the right of condemnation
24 granted in the Act of 1901 (25 U.S.C. 357).

25 IV. Under the facts of this case it would be an abuse of
26 discretion for the Secretary to deny the legislative grant.

1 Assuming, arguendo, that the Secretary has discretion to
2 refuse the legislative grant even after all the requirements of
3 the Act have been met, it would be an abuse of discretion for him
4 to do so in the facts of this case. The "facts" which Appellant
5 is prepared to prove are as follows:

6 The rail line has been in continuous operation since
7 1890. No additional operations or uses have been im-
8 posed that have not been present for the entire life
9 of every person who might be affected by the presence
10 of the line. The people in the reservation are not
11 subjected to any greater danger, noise, etc., than
12 any other persons situated near the Burlington
13 Northern's line in any other rural community.

14
15 Although the Swinomish Tribal Community is duly rec-
16 ognized by the Secretary of the Interior as the gov-
17 erning body of the Swinomish Indian Reservation or-
18 ganized pursuant to Section 16 of the Indian Reor-
19 ganization Act of June 18, 1934, 48 Stat. 987, 25
20 U.S.C. 476, and presumably has long had knowledge
21 of its claim to own the tidelands adjacent to said
22 reservation, said tribe made no effort to oppose or
23 alter the U.S. Army Corps of Engineers' permit for
24 the reconstruction of Appellant's railroad bridge
25 in 1950.
26

1 This railway line provides the only rail service to
2 Anacortes, Washington, a substantial community which
3 includes numerous rail-served industries, including
4 two large oil refineries. Said Swinomish Tribal Com-
5 munity permitted persons in the vicinity of Anacortes
6 to make large investments in plants and facilities
7 located on the railroad line providing a significant
8 source of employment to that community. Such indus-
9 tries are economically tied to rail service for their
10 continued existence.

11
12 This railway line provides the only rail service to
13 the Swinomish Indian Reservation and to Anacortes and
14 its vicinity. The United States Government has
15 granted the Swinomish Tribal Community substantial
16 sums (\$750,000) for the development of an indus-
17 trial park adjacent to Appellant's line of railway.
18 The grant was predicated in substantial part on the
19 availability of rail service--the very service to
20 which the Tribal Community now arbitrarily and un-
21 reasonably refuses its consent to a right of way
22 grant.

23
24 In view of the extraordinary costs of new rail con-
25 struction and the fact that any railroad to Anacortes
26 must pass over the Swinomish Indian Reservation or

1 its claimed tidelands, it is impossible to provide
2 rail service to said reservation or Anacortes,
3 Washington, without crossing reservation owned or
4 claimed lands.

5
6 In view of the foregoing, if the Secretary has discretion to
7 deny the legislative grant, it would be an abuse of discretion
8 for him to do so.

9 Moreover, if one argues that the Secretary has an area of
10 discretion, this becomes an additional argument against the
11 validity of the regulation requiring tribal consent. An agency
12 with discretionary power to decide cases must act case by case
13 and may not limit its discretion by general rules. Work v.
14 United States ex rel. Mosier (1923) 261 U.S. 352; Herkness v.
15 Irion (1928) 278 U.S. 92. Here the regulations (requiring tribal
16 consent) is outside anything required by the legislation and acts
17 to thwart the proper exercise of any discretion.

18 If the Secretary has an area of discretion to reject Ap-
19 pellant's application for right of way under the Act of 1899, it
20 is a manifest abuse of discretion to deny the application for
21 lack of tribal consent based solely on Appellant's refusal to
22 meet the tribe's exorbitant compensation demands. The Act of
23 1899 in 25 U.S.C. 314 makes specific provision for the method
24 of appraisement by disinterested referees subject to further
25 de novo review by either party if dissatisfied.

26

1 Where, as here, the refusal of tribal consent is predicated
2 entirely on a dispute as to the amount of compensation for past
3 and future occupancy, the Secretary abuses its discretion in re-
4 fusing to accept the application for filing, rather than proceed-
5 ing to an appropriate determination of compensation under Section
6 314. Attached as Exhibit D is a copy of the land appraisal pre-
7 pared by Appellant's M.A.I. appraiser showing just compensation
8 at \$20,858. Attached as Exhibit E is a letter written on behalf
9 of the tribe demanding compensation which converted to present
10 value exceeds one million dollars for a right of way lease which
11 expires in 40 years.

12 IV. Other reasons given for rejecting the application are
13 erroneous.

14 If the reason for rejecting the application is that it
15 should be made under the 1948 Act, such reason is erroneous.
16 The Department cannot repeal the 1899 Act any more than it can
17 refuse to observe and administer it. Congress declined to remove
18 this legislation (i.e., the method of the 1899 Act) from the
19 statute books.

20 As will be seen from the application itself, the stipula-
21 tions required by the regulations in connection with the 1899
22 Act were all agreed to. See 25 CFR 161.23 and the attached ap-
23 plication. Regulation 161.23 specifies that grants under the
24 1899 Act will be subject to "other pertinent sections" of part
25 161, but the "stipulations" of 161.5 are not "other sections",
26 and nowhere do the regulations specify what "other" sections are

1 pertinent. Additionally many of the stipulations of 161.5 are
2 duplicative of those found in 161.23, and others have to do with
3 original construction, obviously not pertinent here. Therefore,
4 by the Department's own regulations the stipulations of 161.5 are
5 not applicable to grants under the Act of 1899.

6 V. The Act of 1899 can apply to railroads already con-
7 structed at the time of passage of the Act.

8 It is anticipated that the Tribe will contend that the Act
9 of 1899 cannot apply to a railroad already constructed at the
10 passage of the Act. Such arguments are based on interpretations
11 of the language of the Act. All such linguistic arguments were
12 laid to rest by the holding of the 9th Circuit in United States
13 of America v. Southern Pacific Transportation Company, (CA 9-
14 1976) 543 F.2d 676, where the court reviewed such contentions
15 and held:

16 "We do not find much assistance in this language (of
17 the Act), however. Some of the provisions cited do
18 not refer to construction at all but only specify
19 conditions precedent . . . This provision by itself
20 (for filing of maps and payment of compensation)
21 does not preclude the grant's becoming effective
22 long after construction of the railroad.

23 Other provisions seem to presume that the railroad
24 is to be constructed in the future without neces-
25 sarily precluding application of the Act to an ex-
26 isting railroad."

Thus such contentions have been rejected by the 9th Circuit.

Although the court in the Walker River Paiute case declined
to rule directly, the court's opinion is heavily suggestive that
the Act should apply. For example, the court notes that the

1 General Right of Way Act of 1875 has been held to apply to rail-
2 roads constructed before 1875, citing Rio Grande R. R. v.
3 Stringham (1910) 38 Utah 113, 110 Pac. 868, affirmed, 239 U.S.
4 44 (1915).

5 More importantly, the 9th Circuit seems to say that all
6 other considerations militate toward applicability of the Act.

7 The court noted:

8 "The only alternatives to obtaining a right-of-way
9 under the 1899 Act would be to seek a special act
10 of Congress or to forego a right-of-way altogether.
11 The first alternative is inconsistent with the pur-
12 pose of the two general railroad right-of-way acts;
13 to free Congress from the burden of applications
14 for special right-of-way legislation. See H.R. Rep.
15 No. 1896, 55th Cong., 3d Sess. 1 (1899). The second
16 is contrary to the congressional policy of encourag-
17 ing western settlement by promoting the extension of
18 railroads."

19 In short, the court appears to hold that if the Act of 1899
20 does not apply, Congressional policy will be frustrated. It
21 follows that the Act should be available for already constructed
22 lines.

23 VI. Conclusion.

24 The application and map of definite location of Burlington
25 Northern Inc. for right of way through tribal lands in the
26 Swinomish Indian Reservation, Washington, should be accepted for
filing and acted upon by the Department.

Respectfully submitted,



Lawrence D. Silvernale
350 Central Building
Seattle, Washington 98104

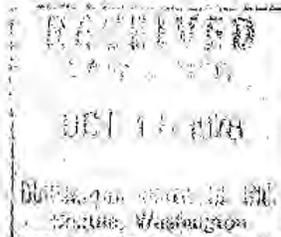


United States Department of the Interior

Real Property Mgmt.
Tenure & Mgmt.
Pending Right-of-way
Swinomish General

BUREAU OF INDIAN AFFAIRS
Western Washington Agency
3006 Colby Ave., Federal Building
Everett, Washington 98201.

October 17, 1978



Burlington Northern Railroad Company
Attention: Lawrence D. Silvernale,
Associate Regional Counsel
350 Central Building
Seattle, WA 98104

Gentlemen:

The Swinomish Indian Senate in session on October 3, 1978, resolved that the Swinomish Indian Tribal Community refuses to authorize the Secretary of the Interior to grant an easement for the right-of-way, applied for by the Burlington Northern Railroad Company. As tribal consent is required under both the law and the regulations, we have no choice but to deny the application. Accordingly, by copy of this letter, we will notify our Portland Area Office to return your original application and attachments thereto without approval.

Sincerely yours,

[Signature]
Superintendent

EXHIBIT A



Save Energy and You Serve America!

BURLINGTON NORTHERN

Woodrow L. Taylor, 625-6441
Regional Counsel

November 2, 1978

Lawrence D. Silvernale 625-6444
Associate Regional Counsel

George C. Inman, Jr. 625-6440
Robert C. Williams 625-6447
Assistant Regional Counsel

Gerard A. Troy 625-6448
General Attorney



Mr. Peter P. Threestars
Superintendent
Western Washington Agency
Bureau of Indian Affairs
Federal Building
Everett, Washington 98201

Dear Mr. Threestars:

Please refer to your letter of October 17, 1978, to Burlington Northern Railroad Company, Attention Lawrence D. Silvernale, Associate Regional Counsel, your file Real Property Management, Tenure and Management, Pending Right of Way, Swinomish General. As you know, I am attorney for Burlington Northern Inc. with offices at 350 Central Building, Seattle, Washington 98104. My telephone number is 206-625-6444. All further correspondence and communication in this matter should be with me.

Pursuant to 25 CFR 2.3 and following sections, Burlington Northern Inc. hereby appeals to the Area Director the decision set forth in your letter of October 17, 1978, to reject for filing the application for grant of right of way to Burlington Northern Inc. through tribal lands in the Swinomish Indian Reservation. In due course we will file our appeal with the Area Director, the original certificate of service pertaining to this notice of appeal, and the duplicate originals of the tendered application and accompanying documents if they are returned by the Area Director.

Will you please stamp as "Received" the attached copy of this letter and return it to me in the enclosed stamped, self-addressed envelope. Please telephone me if you should wish to discuss this matter.

Very truly yours,

Lawrence D. Silvernale
Associate Regional Counsel

EXHIBIT B

LDS/mb

Encl.

cc: Area Director, Portland, Bureau of Indian Affairs
Office of the Solicitor, Portland Region
Ms. Sharon K. Eads, Native American Rights Fund
Mr. Peter J. Wilke, Swinomish Tribal Community

Lawrence D. Silvernale / Counsel, Washington OR104

SITC000006083

John E. Miller

MEMBER—AMERICAN INSTITUTE OF
REAL ESTATE APPRAISERS

September 6, 1977

PHONE - 754-2420
1401 AVENUE "J"
BELLINGHAM, WASHINGTON 98221

Western Washington Indian Agency
Everett, Washington

RE: Burlington Northern Railway Right of Way
Swinomish Tidelands

Dear Sir:

At the request of Burlington Northern Inc., I have examined and appraised the property occupied by Burlington Northern trackage across tidelands in front of the Swinomish Indian Reservation in Section 2, Township 34 North, Range 2 East, W.M., Skagit County, Washington, for the purpose of determining the current Fair Market Value and damages, if any, as a basis for deposit of estimated consideration pursuant to Title 25 CFR, Section 161.14. As of the date of this letter, I find the value of the lands to be acquired by Burlington Northern to be \$20,858. This computation is based upon a right-of-way 60 feet wide and approximately 3,029 feet long, a total of 4.17 acres

I have determined that the lands remaining will not sustain any severance damages by reason of the location, construction and operation of Burlington Northern, and I have further determined that no damages will result from the survey, if any, for location and construction of said railway.

I have also examined the area of Swinomish Slough which is occupied by Burlington Northern's bridge and approaches, and it is my conclusion that as long as the Slough is burdened with a navigational servitude, the underlying fee has no recognizable market value and the use of the Slough for purposes of construction and operation of a railroad bridge does not damage or diminish the value of the underlying fee in any respect.

I therefore certify that the market value as of the date of this certificate totals ----- \$ 20,858.00 -----

Very truly yours,

John E. Miller
John E. Miller, M.A.I.

JEN:ab

EXHIBIT D

SITC000006085

Native American Rights Fund

1305 Broadway - Boulder, Colorado 80302 • (303) 447-8768

Washington Office
1712 H Street, N.W.
Washington, D.C. 20036
(202) 735-9766

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Thomas H. Turner
Cynthia M. Montgomery

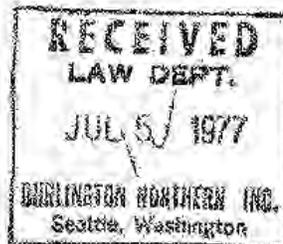
Executive Director

AName
Richard B. Collins
Raymond Cross
Sharon K. East
John E. Edchatski
Walter R. Echo-Hawk
Daniel H. Israel
Wyome T. Knight
Robert S. Pelinger
A. John Vabouras
Joseph S. Whiteley

Technical Writer
Lorraine Conko

Executive Manager
James A. Lewis

June 29, 1977



Mr. Lawrence D. Silvernale
Associate Regional Counsel
Burlington Northern, Inc.
350 Central Building
Seattle, Washington 98104

Re: Swinomish Indian Right-of-Way

Dear Mr. Silvernale:

It appears that we are at an impasse. I have discussed the situation again with my client and we have decided to set down the terms of our final offer in one last attempt to avoid needless litigation.

1. Past damages of \$350,000;
2. Future right-of-way for a period of 40 years with an option in Burlington Northern to renew for an additional 40 years;
3. Future rent of \$38,470 per year for the first five years, reappraisals at five year intervals to adjust the base rent up or down, the minimum rent to be \$30,000 per year.

I do not know why my letter of May 13 should have been such a shock to you. The \$38,000+ for future rental is most certainly based on the current appraised value of the tribal tidelands in the Swinomish Industrial District of \$1 per square foot. It is the figure that we have insisted on throughout our negotiations. We have consistently stated that the Tribal Community would not lease its lands to Burlington Northern for any less than the comparable lands within the Industrial District. The going rate is \$1 per square foot, which is supported by a M.A.I. appraisal and we will not accept any less.

I did describe to you how the figure of \$600,000 was calculated. It is based on Mr. Miller's appraisal with the modifications indicated in my letter of May 13. In order to reach a compromise resolution in an area that is necessarily difficult to prove with exactitude, the Tribal Community has agreed to accept \$350,000 for past damages.

EXHIBIT E

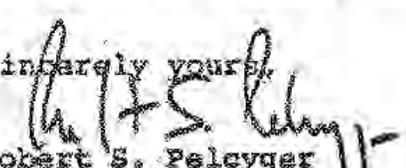
Mr. Silvernale
June 29, 1977
Page two

With regard to the Slough, first of all I do not think that it is in Burlington Northern's interest to limit the right-of-way to 3,390 feet. I thought that we all wanted to settle this matter once and for all. If the right-of-way granted by the Tribal Community excluded the Slough and our ownership of it was subsequently confirmed, we would be back negotiating or litigating another trespass claim. Let's resolve this once and for all. Certainly, our claim to ownership of at least the western half of the Slough is well founded simply as a matter of law. Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 n.8 (1970); Choctaw Nation v. Cherokee Nation, 393 F.Supp. 224 (E.D.Okla. 1975). The Tribal Community will not abandon, waive or grant its rights to any lands for which it is not adequately compensated.

I would ask you to consider the consequences of our failure to reach agreement. The title issue seems so clear that little can be gained by litigating. We would wind up in the same position in which we now find ourselves after having expended needless time, energy and resources. The Tribal Community truly believes that this final offer is fair to all concerned. It is based on fair market value for past and future use which you have insisted on from the outset of our negotiations. Although the railroad may be an asset to the Industrial District, the Tribal Community has resolved that the railroad will not be allowed to use tribal lands for any less than the terms presented in this letter. If litigation is initiated and we are successful, the Tribal Community will, in all probability, insist on greater monetary compensation.

The Tribal Community has also indicated that if we are required to resort to the courts, once we are successful in establishing our title we will require that if Burlington Northern stays on the reservation, it must reconstruct part of the railroad line, specifically the bridge span, so that larger ships will have access to the Slough and to the Tribal Community's potential deep water port in the northern part of the reservation fronting on Padilla Bay.

Sincerely yours,


Robert S. Pelcyger

RSP:gal

Exhibit No. 18

SHARON K. EADS
ROBERT S. PELCYGER
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

PETER J. WILKE
Swinomish Tribal Offices
P. O. Box 415
La Conner, Washington 98257
(206) 466-3163

Attorneys for Swinomish Tribal Community

DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

In the Matter of Appeal of)
Burlington Northern, Inc. from)
Decision Refusing to File an)
Application for Right-of-Way)
through the Swinomish Indian)
Reservation, Washington)

ANSWER OF SWINOMISH
TRIBAL COMMUNITY

I. INTRODUCTION

The main thrust of the Railroad's appeal in this matter is directed at avoiding the requirement that the consent of the Swinomish Tribal Community be obtained before a railroad right-of-way is granted across tribal lands. Such an effort requires the Railroad to advance rather far-fetched legal arguments in attempting to avoid the express language of the applicable statutes and regulations. Moreover, the Railroad's position is anachronistic and directly contrary to the current federal policy

in Indian affairs to promote and encourage tribal self-determination and financial self-sufficiency. See, e.g., Letter of June 19, 1978 from Forrest J. Gerard, Assistant Secretary - Indian Affairs, to Echeverria & Osborne (Assistant Secretary's Decision). See also, the congressional declaration of policy in the Indian Financing Act of 1974. 25 U.S.C. § 1453. And see Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 663-64 (9th Cir. 1975), cert. denied, 429 U.S. 1038 (1976).

The basic facts of this Appeal are identical to the basic facts involved in the Matter of Appeal of Southern Pacific Transportation Co. from Decision Refusing to File an Application for Right-of-Way through the Walker River Reservation, Nevada (hereinafter referred to as Southern Pacific Appeal). The Southern Pacific Railroad and its predecessors built and maintained a railroad across the Walker River Reservation without a valid right-of-way for over 90 years, the Tribe filed suit for ejectment and trespass damages, and Southern Pacific attempted to sidestep the statutory and regulatory requirement of tribal consent by applying for a right-of-way under the 1899 Act. ^{1/} After Southern Pacific exhausted its intermediate level administrative appeals, the Assistant Secretary for Indian Affairs, by letter of June 19, 1978, affirmed the Superintendent's and Area Director's decision to reject Southern Pacific's

^{1/} Act of March 2, 1899, 30 Stat. 990, 25 U.S.C. §§ 312, et seq.

application for a right-of-way under the 1899 Act because there was no tribal consent (Exhibit A).

Identically in the present situation, Burlington Northern and its predecessors built and maintained a railroad across the Swinomish Indian Reservation without a valid right-of-way for approximately 90 years, the Tribe has filed suit for ejectment and trespass damages, and Burlington Northern is attempting to sidestep the statutory and regulatory requirement of tribal consent by arguing tribal consent is not required under the 1899 Act. ^{2/} Thus, the Assistant Secretary's Decision issued on June 19, 1978 requiring tribal consent in an identical fact situation is controlling in this matter.

Nevertheless, we will again show in this answer, as we did previously in the Southern Pacific Appeal, that the Railroad's arguments as to why it cannot be required to obtain the consent of the Swinomish Tribal Community to a railroad right-of-way across tribal lands are totally without foundation.

11. THE 1899 ACT AND THE 1948 ACT CONSTITUTE PARTS OF ONE CONGRESSIONAL SCHEME FOR THE ADMINISTRATION OF RAILROAD RIGHTS-OF-WAY GRANTS OVER INDIAN LANDS, AND PROPERLY CONSTRUED TOGETHER MEAN THAT TRIBAL CONSENT IS A PRECONDITION TO SUCH GRANTS UNDER EXISTING LAW.

The Railroad argues that the grant of the railroad right-of-way in this case is governed solely by the terms of the

^{2/} Not only is Burlington Northern making the same arguments Southern Pacific made, which have been rejected by the Department of Interior, but with few exceptions Burlington Northern's Appeal is an exact copy of Southern Pacific's Appeal.

1899 Act, and not by the terms of the 1948 Act. ^{3/} This is clearly wrong. Secretary's Decision at page 2. As a matter of law, the 1899 Act must be construed together with the 1948 Act. Read together the conclusion is clear that, under present law, tribal consent is a precondition to any railroad right-of-way grant, where the tribe involved is organized pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461, et seq., and in particular § 476. ^{4/} See 25 U.S.C. § 324. A discussion follows.

The legislative history of the 1948 Act shows beyond question that Congress enacted the 1948 Act on the specific recommendation of the Secretary of the Interior that there was a real need "for simplification and uniformity in the administration of grants of rights-of-way of any nature over Indian lands." See S. Rept. No. 823, 1948 U.S. Code Cong. Services 1033, 1036. The suggestion for a general right-of-way act was initiated by the Secretary of the Interior in a report on a bill dealing solely with the administration of rights-of-way grants over the Osage Reservation. The Secretary's report suggested "that there is a real need for additional legislation relating not only to the right-of-way on Osage Indian lands but also to the rights-of-way on Indian lands on all reservations

^{3/} Act of February 5, 1948, 62 Stat. 17, 25 U.S.C. §§ 323, et seq.

^{4/} The Swinomish Tribal Community is organized under 25 U.S.C. § 476.

... S. Rept. No. 823, supra at 1034. The text of the 1948 Act as finally adopted is the same as the bill drafted by the Secretary and attached to his report and recommendation for general right-of-way legislation. Id.

Generally, the Secretary traced his problems in granting rights-of-way to the fact that his authority to grant any right-of-way

[i]s contained in many acts of Congress, dating as far back as 1875. Thus, each application for a right-of-way over Indian land must be painstakingly scrutinized in order to make certain that a right-of-way sought falls within a category specified in some existing statute, which may limit the type of right-of-way that may be granted, or the character of the land across which it may be granted.

Id. at 1036. The Secretary further pointed out that some such acts were applicable to certain types of Indian lands and not to others for no valid reason. And finally, the Secretary stated that in many instances when no statutory authority could be found for a particular right-of-way grant, the Secretary was forced to spend an inordinate amount of time and expense obtaining the signatures of all owners of interests in land to obtain an easement deed. The time and expenses were generally not justified by the benefits obtained from the right-of-way. Id.

Thus, the 1948 Act was specifically designed to address the administrative problems of the Secretary in granting rights-of-way over Indian lands caused by the existence of so many special statutes governing specified rights-of-way over Indian lands. The 1948 Act addresses the problems outlined by the

Secretary essentially by vesting in the Secretary the power to make grants of rights-of-way of all kinds across Indian lands as well as the power to establish the conditions for such grants. Presumably the regulations implementing the Act would simplify and provide uniformity in the granting of rights-of-way across Indian lands.

The 1948 Act does expressly preserve existing statutory authority for rights-of-way, including the 1879 Act. The legislative history reveals that the reason for such preservation was "to avoid any possible confusion which may arise, particularly in the period of transition from the old system to the new. . . ." Id. The 1948 Act expressly provided that it would not go into effect until 30 days after its approval, presumably to allow sufficient time for the Secretary to promulgate regulations implementing the "new system" of right-of-way grant administration. A second reason was presumably to avoid any question as to the Secretary's authority which might have arisen from a repeal of the pre-existing statutes on Indian rights-of-way.

Accordingly, the regulations promulgated pursuant to the 1948 Act establish a uniform procedure for the administration of right-of-way grants over Indian lands, but preserve certain

provisions of pre-existing right-of-way statutes which the Secretary has determined do not affect the uniform administration of right-of-way grants across Indian lands. See 25 C.F.R. Part 161.

It is clear from the above-described legislative history of the 1948 Act that the intention of Congress was to authorize the Secretary by regulation ^{5/} to effect the simplification and uniformity of the multitude of statutes authorizing rights-of-way over Indian lands, including the 1899 Act. Moreover, the 1948 Act expressly refers to all such pre-existing statutes by stating "nor shall any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands be repealed." 25 U.S.C. § 326. Furthermore, § 324 expressly incorporates as part of the 1948 Act the protection afforded tribes organized under the Indian Reorganization Act, supra, "to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; . . ." 25 U.S.C. § 476; Assistant Secretary's Decision at page 2.

As stated by the Ninth Circuit in Stevens v. C.I.R., 482 F.2d 741, 744 (1971):

Federal policy toward particular Indian tribes is often manifested through a combination of general laws, special acts, treaties, and

^{5/} 25 U.S.C. § 328 authorizes the Secretary "to prescribe any necessary regulations for the purpose of administering the provisions of §§ 323-27 of this title.

executive orders. All must be construed in pari materia in ascertaining congressional intent. [Emphasis added.]

The instant case is even simpler because of the congressional intent as to the administration of grants of rights-of-way over Indian lands is clear from the legislative history and from the terms of the 1948 Act itself. Plainly Congress intended that the 1948 Act effectuate a consolidated, simplified and manageable system of granting rights-of-way across Indian lands to replace the then existing fragmented and unmanageable system. Thus, the 1948 Act, the 1899 Act, and all other pre-existing statutes specially authorizing the grants of rights-of-way of any nature across Indian lands, and the Indian Reorganization Act of 1934, especially 25 U.S.C. § 476, constitute, by virtue of the 1948 Act, parts of a single congressional system governing grants of rights-of-way over Indian lands. Those statutes are therefore in pari materia, and must be so construed. See, e.g., Stevens v. C.I.R., supra; Kirkwood v. Arenas, 243 F.2d 853, 866-67 (9th Cir. 1957); United States v. Jackson, 280 U.S. 183, 194-96 (1930); United States v. Pixico, 115 F.2d 389, 393 (10th Cir. 1940); and see generally, 2A Sutherland Statutory Construction §§ 51.01-.09 at 289-320 (1973 Cum. Supp. 1977).

Finally, the following principle of construction is pertinent to the construction of the 1899 Act and the 1948 Act stated by the Supreme Court in United States v. Jackson, supra at 193:

It is a familiar rule of statutory construction that great weight is properly to be given to the construction consistently given to a statute by the Executive Department charged with its administration [citations omitted] and such construction is not to be overturned unless clearly wrong, or unless a different construction is plainly required.

Accord, Stevens v. C.I.R., supra at 746.

Constructing all applicable statutes together in light of the intent of Congress in enacting the 1948 Act, and giving weight to their interpretation by the Department of the Interior and Interior's long-established practice, the conclusion is inescapable that the consent of tribes organized under 25 U.S.C. § 476 of the Indian Reorganization Act, supra, is a precondition to any grant of the railroad right-of-way across the tribal lands. This conclusion is, of course, expressly incorporated into the regulations of the Secretary pursuant to the 1948 Act at 25 C.F.R. § 161.3(a) which states:

No right-of-way shall be granted over and across any tribal land, nor shall any permission to survey be issued with respect to any such lands, without the prior written consent of the tribe.

III. THE 1899 ACT READ TOGETHER WITH 25 U.S.C. § 476 OF THE INDIAN REORGANIZATION ACT MEANS THAT TRIBAL CONSENT IS A REQUIRED PRECONDITION TO A GRANT UNDER THE 1899 ACT

Even assuming that the 1948 Act does not apply to railroad rights-of-way grants, an assumption which we think is clearly unsupportable, nevertheless, the 1899 Act must be read together with 25 U.S.C. § 476 of the Indian Reorganization Act. 25 U.S.C. § 476 states in pertinent part:

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe [pursuant to the IRA] shall also vest in such tribe or its tribal council the following rights and powers: . . . to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe.

In construing the effect of the above language as a limitation on the granting of rights-of-way across Indian lands, the Solicitor for the Interior Department in 1936 declared:

The only limitations which the Reorganization Act imposes upon the exercise of authority conferred by such specific acts of Congress are: (a) a tribe organized under section 16 may veto the grant under the broad power given it by that section "to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe" and (b) a tribe incorporated under section 17 may be given the power to make such grants without restriction.

Memo. Sol. I.D., September 2, 1936. Quoted in Cohen, Handbook on Indian Law, 105 (1942 ed.).

Based on the above Solicitor's Opinion, Cohen in the 1942 edition of the Handbook on Indian Law states:

[I]t would appear that section 16 of the act requires the consent of an organized tribe to any grant of right-of-way which the Secretary is authorized to make.

Cohen at 105.

Subsequently, in the 1956 revision of Cohen's Handbook, the Department of the Interior confirms Cohen's opinion by adding after the previous statement that "[a]ny doubt that may have existed [as to whether the IRA requires tribal consent to

grants of rights-of-way] was resolved by the act of February 5, 1948 [25 U.S.C. § 324]." Federal Indian Law 62 (1986 ed.).

Indeed the legislative history of the 1948 Act expressly states that the Act "preserves the powers of those Indian tribes organized under the Indian Reorganization Act of 1934 . . . with reference to the disposition of tribal land." [Emphasis added]. S. Rept. No. 823, supra at 1036. The unmistakable implication from this language is that prior to the 1948 Act, IRA tribes had the power to veto grants of rights-of-way of any nature, and Congress wished to make it clear that the 1948 Act did not abrogate that existing power.

Therefore, the Swinomish Tribal Community, as a tribe organized under 25 U.S.C. § 476, has the power under that section to consent or not consent to any proposed grant of a railroad right-of-way under the 1899 Act. 25 C.F.R. § 161.3 simply reflects the existence of that power, and provides a place for it in the procedural scheme of such grants.

IV. THE QUESTION OF WHETHER THE SECRETARY HAS ABUSED HIS DISCRETION IS NOT RIPE FOR REVIEW WHERE DEFENDANT HAS REFUSED TO COMPLY WITH THE REQUIREMENTS OF FEDERAL LAW FOR OBTAINING A RAILROAD RIGHT-OF-WAY ACROSS TRIBAL LANDS

The Railroad's contention that the Secretary will be in abuse of his discretion if he refused to approve the Railroad's application is not ripe for review for two basic reasons.

First, the Secretary has not denied the Railroad a right-of-way grant. Rather, the Secretary has merely rejected

the Railroad's application for a right-of-way across Swinomish Tribal Community lands essentially because the Railroad has failed to comply with the regulation's requirements as to the content of an application. The primary reason for the Railroad's failure to apply appears to be its insistence that the 1948 Act is not applicable to grants of railroad rights-of-way. The most glaring defect in the Railroad's application is the failure to provide evidence of the written consent of the Swinomish Tribal Community pursuant to 25 C.F.R. § 161.3. Without this required consent, the Secretary has no power to act upon the application and to grant a right-of-way.

Another defect is that the amount deposited with the filing of the right-of-way application, as consideration for the right-of-way, must "not be less than the amount specified in the consent covering that parcel." 25 C.F.R. § 161.14. The Secretary simply reviews the consideration specified in the consent and determines whether such compensation is adequate. 25 C.F.R. § 161.14. The Railroad ignored this requirement and simply deposited its own estimated amount of compensation.

Clearly, the written consent requirement of 25 C.F.R. § 161.3 contemplates an initial agreement between the Tribe and the Railroad. This conclusion is supported by 25 C.F.R. § 161.15 which states that the conveyance instrument evidencing such grant "shall incorporate all conditions or restrictions set out in the contents obtained pursuant to § 161.3." Thus, until the Railroad obtains the written consent of the Tribe pursuant

to 25 C.F.R. § 161.3, its application is incomplete and, in particular, cannot be completed insofar as determining the amount of compensation to be deposited "[a]t the time of filing an application for right-of-way." 25 C.F.R. § 161.14. And until the application is filed with all required data, any discretionary action by the Secretary in interpreting the data in light of the law would be premature.

The second reason that the abuse of discretion issue is not ripe for review is that the major issue raised in this appeal is the extent of the Secretary's discretion to grant railroad rights-of-way. Until that issue is resolved, the question of whether the Secretary abused his authority by applying the law and regulations in an arbitrary manner is premature. This is particularly applicable in this case because the Railroad has simply not complied with certain requirements of the Secretary, and thus, the Secretary has insufficient information under the present regulatory scheme upon which to take any action, reasonable or arbitrary.

In summary, the question of whether the Secretary abused his discretionary power under the relevant acts and regulations governing railroad rights-of-way is necessarily dependent upon a resolution of the threshold question of the scope of the Secretary's discretionary power under the relevant acts. See, e.g., Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415-16 (1971); Udall v. Littell, 366 F.2d 658, 674 (D.C. Cir. 1966); Board of Com'n of Pawnee County, Okl. v.

United States, 139 F.2d 248, 252 (10th Cir. 1943).

V. WHETHER THE 1899 ACT IS APPLICABLE TO ALREADY CONSTRUCTED RAILROADS IS, UNDER THE LAW OF THIS CASE, IRRELEVANT TO THE ISSUE OF WHETHER THE RAILROAD CAN OBTAIN A RIGHT-OF-WAY GRANT TODAY

The Railroad argues that the 1899 Act is applicable to railroads constructed before its passage. The Railroad relies upon parts of the Ninth Circuit's opinion in the case indicating that the 1899 Act may indeed apply to such instances. However, as the Railroad admits, the Ninth Circuit specifically declined to decide that question.

However, contrary to the Railroad's view, see Appeal at page 6, the district court clearly held that the 1948 Act constitutes the current basis for authority to grant railroad rights-of-way over Indian lands. The district court declared in its opinion at page 16: ^{6/}

Future enjoyment of that right [to operate a railroad across Indian lands] hinges on the defendant's success in . . . obtaining a right of way interest pursuant to present statutes enacted for that purpose. See 25 U.S.C. §§ 324, 325. (Emphasis added.)

It is the Tribe's position that insofar as present grants of railroad rights-of-way are concerned, it is irrelevant whether the 1899 Act applied to railroads constructed prior to its passage, for the authority granted by the 1948 Act is broad

^{6/}United States v. Southern Pacific Transp. Co. (Civ. No. B-2708 BRT) and Walker River Paiute Tribe v. Southern Pacific Transp. Co. (Civ. No. B-2707 BRT) (consolidated cases, unpublished opinion dated May 28, 1974) (Exhibit B).

enough to enable the Railroad in this case to acquire a railroad right-of-way grant.

Thus, the law of this case is that the 1948 Act governs grants of railroad rights-of-way. Therefore, the issue of the application of the 1899 Act to railroads constructed prior to its passage is irrelevant to whether a right-of-way may be authorized across Swinomish Tribal Community tribal lands today.

VI. CONCLUSION

Upon the foregoing points and authorities, the Swinomish Tribal Community submits that the Area Director must affirm the decision of the Superintendent of the Western Washington Agency, and reject the application of the Railroad for a right-of-way until such time as it complies with all requirements as established by statute and the Secretary's regulations, including obtaining the written consent of the tribe upon such terms and conditions and for such consideration as may be mutually agreeable to both parties.

DATED: December 7, 1978.

Respectfully submitted,

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By 
Sharon K. Eads

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER OF SWINOMISH TRIBAL COMMUNITY was placed in the United States mail, certified, return receipt requested, postage prepaid and correctly addressed to:

WOODROW D. TAYLOR
LAWRENCE D. SILVERNALE
Burlington Northern, Inc.
350 Central Building
Seattle, Washington 98104

on this 1 day of December, 1979.


Sharon K. Hads

Attorney for Swinomish Tribal Community



United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

CERTIFIED-RETURN RECEIPT REQUESTED

Scheverria & Osborne, Chartered
555 South Center Street
Reno, Nevada 89501

JUN 19 1979

Mr. Larry W. Delford
One Market Plaza
San Francisco, California 94105

Gentlemen:

This is an appeal by the Southern Pacific Transportation Company, through its attorneys, from a decision of the Assistant Area Director of the Phoenix Area Office affirming the decision of the Superintendent, Western Nevada Agency, to reject for filing, Southern Pacific's application for a railroad right-of-way across tribal lands of the Walker River Reservation. A request was made on behalf of the appellant that the matter be referred to an Administrative Law Judge to conduct an evidentiary hearing. This request has been taken into consideration and rejected. The decision is therefore based on the written briefs of the appellee and the appellant.

A review of the file indicates the following relevant facts. The Southern Pacific Transportation Company (hereinafter "appellant") filed an application on April 28, 1977, for a railroad, telephone and telegraph right-of-way under the Act of March 2, 1899 (25 U.S.C. § 312, et seq.). The application is for a 60-foot width, 10.89 miles in length, across tribally-owned land. On May 4, 1977, the Agency Superintendent returned the application as being incomplete without written evidence of tribal approval. He recommended, at that time, ". . . that negotiations between you and the tribe be finalized before approval action can be considered on your application."

On May 27, 1977, the Acting Superintendent sent appellant a second letter outlining the contents of a properly filed application. In so doing, the Acting Superintendent specified that the application should be submitted under the Act of February 8, 1948 (25 U.S.C. 323), and that, among other things, the application ". . . must have the tribe's concurrence in the form of a tribal resolution." The Superintendent also indicated that the application for telephone and telegraph lines should be submitted separately.

EXHIBIT A

SITC000006150

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On May 27, appellant filed an appeal with the Area Director. On December 12, 1977, the Assistant Area Director, acting on the advice of the Portland Regional Solicitor, affirmed the agency's decision to return the application. The Area Director concentrated on the issue of whether appellant needed to show evidence of tribal consent in presenting its application. In so doing, the Area Director stated that the Secretary has the authority to require appellant to apply under the 1948 Act, but regardless of which act applied, tribal consent is a matter of statutory law and congressional policy. Therefore, waiver of the consent requirement would constitute an abuse of the Secretary's discretion. The current appeal is from the Area Director's decision.

In its argument, appellant has argued that it is entitled to file its application under the 1899 Act, and that requiring tribal consent is inconsistent with the terms of the 1899 Act. Appellant argues that the 1899 Act provides for an in praesenti grant and that requiring tribal consent cannot therefore be imposed afterwards as a condition of such a grant. Alternatively, the appellant argues that applying the 25 CFR 161.3 consent requirements to applications filed pursuant to the 1899 Act is a denial of due process because the regulations do not make it clear that 161.3 is a pertinent section, applicable to applications under the 1899 Act. Finally, appellant has argued that given the history of the United States' actions toward appellant and its predecessor in interest, the Assistant Secretary should in this case exercise his discretion to waive the consent requirement. Alternatively, because of such behavior, the Assistant Secretary is estopped from applying the consent requirement.

Consent Requirement

We conclude that it is immaterial whether the subject application is filed pursuant to the 1948 or the 1899 Acts, since Congress has made it clear that the consent of tribes organized under the 1934 Indian Reorganization Act is essential before the United States can alienate interests in their trust lands. The Walker River Tribe is an IRA tribe. This requirement flows from 25 U.S.C. § 476, which guarantees IRA tribes the power to prevent the sale, disposition, lease or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe. In other words, the consent requirement is not, in our view, an attribute of the Secretary's power or discretion but is a statutory element of a tribe's sovereign power which the Secretary does not have the discretion to waive.

-3-

Indeed, the 1948 Right-of-Way Act specifically bars the Secretary's ability to abrogate a tribe's prerogative in such matters. "No grant of a right-of-way over and across any lands belonging to a tribe organized under sections 461-473 and 474-479 of this title; . . . shall be made without the consent of the proper tribal officials." 25 U.S.C. § 324. (See also 1948 U.S. Code Cong. Service, p. 1033.)

That Congress fully understood and intended such a policy is clear from a 1969 report of the House Committee on Government Operations (H. Rep. 91-78, 91st Cong. 1st Sess.), concerning this Department's revised right-of-way regulations which would have allowed the Secretary to waive the consent requirement in the case of non-IRA tribes.

"We believe the Department's obligation to protect the rights of the Indian tribes should be concluded in regulations which clearly and emphatically preclude any possible misuse of right-of-way grants to alienate Indian land without the consent of the Indians or to evade the maximum terms of years fixed in the acts of Congress authorizing land leasing.

For all of these reasons, it would appear best to retain the present section 161.4 without any change, and to announce unambiguously that your Department intends to observe its own regulations."

(Letter to the Secretary of the Interior from Chairman, Natural Resources and Power Subcommittee, February 16, 1968.)

Appellant argues that since 25 U.S.C. § 326 preserves the Secretary's authority under prior right-of-way statutes, the Secretary has continuing authority under the 1999 Act to grant rights-of-way without regard to the consent requirement of § 324. We reject such an interpretation of § 326. The legislative history states that the purpose of the § 326 provision was to ". . . avoid any possible confusion which may arise, particularly in the period of transition from the old system to the new . . ." That exonerates the inference that § 326 was intended to maintain separate procedures immune from the consent requirement of the 1948 Act.

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Also, § 326 must be read together with other sections of the same Act. While § 325 evidences Congress' awareness of continuing authority under other statutes to grant rights-of-way, § 324 categorically and unequivocally states that "no right-of-way" shall be granted without tribal consent. Thus, the language of § 324 embraces rights-of-way granted under § 326. Furthermore, the precise language of § 326 creates an important distinction. It states that the Federal Water Power Act is neither repealed nor amended by the 1948 Act; but, it merely states that prior right-of-way statutes are not repealed. In other words, if imposition of the § 324 consent requirement can be construed as a quasi-amendment of the 1899 Right-of-Way Act, such an amendment is not barred by § 326. We do not think that either the language of § 326, or its legislative history, warrant an abridgment of the application of § 324 to all rights-of-way granted after 1948.

Due Process

We also conclude that, contrary to appellant's assertions, 25 CFR 161.3 and 25 CFR 161.23 make it clear that tribal consent must be obtained before any right-of-way can be granted. Therefore, appellant is not denied procedural due process. 25 CFR 161.23, the section applying to applications filed under the 1899 Act, provides that such applications shall also be subject to ". . . other pertinent sections of this Part 161." Because the consent requirement in 161.3 is so all-inclusive, "(a) no right-of-way shall be granted over and across any tribal land . . .," we do not see any room for question but that such a requirement is pertinent. Also, 161.15, the provision concerning action on applications, states that the grant of a right-of-way shall be evidenced in a conveyancing instrument which incorporates the conditions or restrictions set out in the required consent. Moreover, 161.14 requires that the consideration and damage deposit filed with the applications shall in no event be less than the amount specified in the consent. In other words, the consent requirement is pervasive in the Part 161 application scheme.

Estoppel

Finally, appellant argues that the Assistant Secretary ought to exercise HIS discretion to waive the consent requirement because of the Department's past approval of the right-of-way. They also argue that the Secretary is estopped from applying it because of such past behavior. As already stated, the Secretary does not have discretion to waive the requirement. Under the 1934 and the 1948 Acts, such an action would, in our view, infringe upon tribal sovereignty.

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Moreover, estoppel is not applicable to the situation at hand. The case of United States v. Wharton, 514 F.2d 406 (C.A. 9 1975), cited by appellants, concerned title to public lands. The lands involved here are not public but are held in trust for the tribe. Moreover, the Wharton decision placed emphasis on the facts that not applying estoppel would work a fundamental unfairness to the injured party but applying it against the United States would not unduly harm the public interest. Such is not the case here. Requiring the appellant to acquire tribal consent to its right-of-way application will not cause fundamental unfairness, as the divesting of title to land would have in the Wharton case. Moreover, the public interest, namely the tribe's sovereignty and ability to control its lands, would be unduly harmed were the consent requirement dropped in favor of the appellant. The compensation figure is to be negotiated and stated in the tribal consent. The tribe is the direct beneficiary of such compensation. Appellant essentially asks us to shift the burden of past government actions to the tribe's profound disadvantage--the loss of control over their lands and the inability to participate in the determination of how much they should be compensated for such use.

In addition, several cases cited in the Wharton decision indicate that courts are less likely to apply estoppel against the government in matters of legislative significance, as opposed to purely administrative matters (e.g., the interpretation of Department regulations). Bunker v. C.I. R., 312 F.2d 311 (C.A. 9 1962). Appellant asks that estoppel be applied to prevent the federal statutory consent requirement from being applied to them. We do not see that past unauthorized Department approval of a right-of-way is adequate grounds for estopping the application of a current federal requirement. Indeed, if estoppel did not bar the United States from obtaining a federal appellate decision that appellant did not have a valid right-of-way and is a trespasser until such time as it acquires one, we see no basis for applying estoppel to prevent the Department from requiring an applicant to adhere to federal statutory standards in filing an application.

The Area Director's decision also discussed the requirement under the 1899 Act that any deposit tendered upon application to the Secretary must be for the amount determined by the Secretary to be correct. Also, the 1899 Act requires that the application stipulate that passenger terminals be provided. We think that these points can be worked out in conjunction with the agency when appellant submits its amended right-of-way application.

-6-

It is our conclusion that the Assistant Secretary cannot grant a right-of-way across the lands of a tribe which is subject to the provisions of the Indian Reorganization Act, without written evidence in the application of tribal consent--whether such application be submitted under the 1948 or the 1899 Act.

Accordingly, the decision of the Assistant Area Director dated December 12, 1977, is hereby affirmed. This decision, having been made in the capacity of Assistant Secretary is final for the Department and not subject to the provisions of 25 CFR 2.19(c).

Sincerely,

/s/ Forrest J. Gerard

Assistant Secretary--Indian Affairs

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

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UNITED STATES OF AMERICA, Civil No. R-2768 DRJ
Plaintiff,
vs.
SOUTHERN PACIFIC TRANSPORTATION COMPANY, et al,
Defendants.

THE WALKER RIVER PAIUTE TRIBE OF NEVADA, et al, Civil No. R-2707 BRJ
Plaintiffs,
vs.
SOUTHERN PACIFIC TRANSPORTATION COMPANY, et al,
Defendants.

ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT

This is an action joining separate suits brought by the United States and by the Walker River Paiute Tribe of Nevada and a class of allottees of land within the Walker River Reservation against the Southern Pacific Transportation and Land Companies. The actions seek damages for trespass or, in the alternative, breach of contract stemming from the

FD-204 (Rev. 1-25-60)

EXHIBIT B

1 operation of a railroad line through the Walker River Reserva-
 2 tion from 1860 to the present time. The question of trespass
 3 is currently before the Court on plaintiffs' motion for per-
 4 tial summary judgment. It is plaintiffs' contention that de-
 5 fendants and their predecessors in interest have been and con-
 6 tinue to be without right to operate their railroad on lands
 7 within the boundaries of the Reservation. Defendants rely on
 8 an agreement entered into between their predecessors in in-
 9 terest and the Tribe in 1882 (hereinafter the "Agreement") and
 10 on claims set forth under various statutes as creating a valid
 11 right of way for the line through the Reservation.

12 JURISDICTION. Defendants challenge the Court's jurisdic-
 13 tion over the claims of the class of allottees of Reserva-
 14 tion land. Plaintiffs invoke the Court's jurisdiction under
 15 28 U.S.C. § 1331 and 28 U.S.C. § 345.

16 There is no question that the allottees' claims "arise
 17 under" the Constitution and laws of the United States. The
 18 question is, rather, whether the allottees' claims satisfy the
 19 jurisdictional amount requirement. 28 U.S.C. § 1331(a). The
 20 allottees are joined in this action as a class pursuant to
 21 Rules 23(a) and 23(b)(1)(B), Federal Rules of Civil Procedure.^{1/}
 22 For the purpose of satisfying the jurisdictional amount re-
 23 quirement, the claims of the members of a class may be aggreg-
 24 gated if the claims are common and undivided. If the claims
 25 are separate and distinct, however, each member of the class
 26 must satisfy the jurisdictional amount individually. Snyder

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1 v. Harris, 394 U.S. 332 (1969), and Zahn v. International
 2 Paper Co., ____ U.S. ____ (Dec. 17, 1973), 42 L.W. 4067. In
 3 either event, "it must appear to a legal certainty that the
 4 claim is really for less than the jurisdictional amount to
 5 justify dismissal." St. Paul Mercury Indemnity Co. v. New
 6 Shb Co., 303 U.S. 263, 269 (1938). (Emphasis added.)

7 At issue is the defendants' right to the use of a
 8 right of way through the Walker River Reservation. The right
 9 of way crosses parcels of the reservation which have been al-
 10 lotted to the individual members of the class. The right of
 11 each class member to share in the recovery, if any, in this
 12 action therefore has its basis in that member's individual
 13 allotment. Whether claims growing out of such separate in-
 14 terests may be aggregated for purposes of satisfying the jur-
 15 isdictional amount is controlled by Skokomish Indian Tribe v.
 16 France, 269 F. 2d 555 (9th Cir. 1959).

17 Plaintiff in that quiet title and trespass action in-
 18 voked the Court's jurisdiction pursuant to 28 U.S.C. § 1332.
 19 Defendants challenged that jurisdiction for an alleged failure
 20 to satisfy the jurisdictional amount. The Court held:

21 "The land involved in this quiet title ac-
 22 tion is divided into separate parcels, each de-
 23 scribed with particularity in the complaint,
 24 separate appellants being named as to each parcel.
 25 All of the appellants, however, claim to derive
 26 their title from a common source. Moreover,
 27 while the land in question is divided into par-
 28 cels, it comprises essentially a single tract of
 29 land * * *.

30 "Under these circumstances, the value of
 31 the entire tract is to be considered in deter-
 32 mining whether the jurisdictional amount has
 33 been pleaded, notwithstanding the fact that the
 34 claims of the individual appellants relate to par-
 35 ticular parcels contained in such tract." Skokomish Indian Tribe, supra, at 558-559.

36 Although the Skokomish case dealt with the question
 37 of the jurisdictional amount with respect to the claims against
 38 the individual defendants, it is equally applicable in cases

ing whether a plaintiff class has the character of interest warranting aggregation of its claims for determination of the jurisdictional amount. Paterson Hill Community Action Com. v. Housing Authority, 410 P. 2d 974, 977 (9th Cir. 1966).

In the present case, a single tract of land (the Reservation) has, in some instances, been allotted in individual parcels. The title to the individual parcels, as well as to the Reservation as a whole, however, continues to rest in the same entity, the United States, in trust for the allottees and the Tribe. Finally, the claims of the allottees each stem from a single source, the railroad's alleged continuing trespass under Skokomish Indian Tribe. Therefore, the claims of the individual allottees may be aggregated to determine whether the jurisdictional amount is satisfied.

The damages sought herein arise from the alleged trespass by defendants and their predecessors in interest over a period in excess of ninety years. Aggregating the allottees' claims, the Court cannot say to a legal certainty that the allottees will not be able to recover an amount satisfying the jurisdictional requirement of 28 U.S.C. § 1331(a).

In the light of this holding, it is unnecessary to consider defendants' challenge to the Court's jurisdiction under the provisions of 28 U.S.C. § 345.

RIKENESS FOR SUMMARY JUDGMENT. Defendants assert that summary judgment is improper because there exist genuine issues as to material facts. Rule 56 (c), Federal Rules of Civil Procedure. With the exception noted infra, with regard to the separate claim of trespass based on the erection and operation of telegraph and telephone lines on the right of way, defendants have not carried their burden of demonstration that such fact issues exist "by affidavits or as otherwise provided in this rule" * * *. Rule 56(a), Federal Rules of Civil Pro-

1 culture. With that exception, therefore, partial summary judg-
 2 ment is appropriate.

3 ATURE OF LIMITATIONS, LACHES AND ESTOPPEL. Defend-
 4 ants draw attention to the fact that the railroad has been in
 5 operation over the right of way for more than ninety years
 6 without complaint from plaintiffs. Such a delay would, in
 7 ordinary cases, give rise to the defenses of statute of limi-
 8 tations, laches and estoppel. Plaintiffs argue, however, that
 9 the special status enjoyed by the United States and its Indian
 10 words insulates their claims from these defenses.

11 It is beyond dispute that the Government is immune
 12 from these defenses whether bringing suit on its own behalf or
 13 on behalf of the Indians. Board of Comm'rs v. United States,
 14 300 U.S. 343, 351 (1932), and United States v. California, 332
 15 U.S. 19, 39-40 (1947).

16 It is also true that such defenses will not bar the
 17 rights of Indians in lands subject to statutory restrictions.
 18 Swart v. Blinnicket, 259 U.S. 129, 136 (1922), and Sevard v.
 19 United States, 167 F. 2d 931 (9th Cir, 1948). Alienation of
 20 Indian lands has been subject to restriction since the Act of
 21 June 30, 1834, ch. 161, sec. 4, 4 Stat. 730, 28 U.S.C. § 177.
 22 This Act has been interpreted to require that acquisitions of
 23 Indian lands and interests therein be approved by the Govern-
 24 ment. United States v. Gaudinaria, 221 U.S. 432 (1926); Fed-
 25 eral Power Commission v. Tuscarora Indian Nation, 362 U.S. 69
 26 (1960).

27 Therefore of interests in allotted lands are also sub-
 28 ject to governmental approval. McFar v. Ewing, 204 U.S. 448

29
 30 2/ The Act reads: "Be it further enacted, no purchase, grant,
 31 lease or other conveyance of lands, or of any title or claim
 32 thereto, from any Indian nation or tribe of Indians, shall be
 33 of any validity in law or equity, unless the same be made by
 treaty or convention entered into pursuant to the Constitution."

1 456 (1907); United States v. Pelican, 212 U.S. 442, 447 (1914).
 2 The class of allottees therefore shares the immunity from de-
 3 fence of statute of limitation, laches and estoppel enjoyed by
 4 the United States and the plaintiff tribe.

5 Defendants assert that these defenses do apply to
 6 holders of patented allotments. It is not necessary for the
 7 Court to consider this question because such persons are not
 8 within the plaintiff class. The class is limited to the
 9 "eight named plaintiffs and all original allottees and suc-
 10 cessors in interest of original allottees." (See the Court's
 11 Order of July 19, 1973, filed in this action.) None of the
 12 named plaintiffs hold patents. (See the letter from the
 13 Bureau of Indian Affairs, Nevada Indian Agency, dated June 16,
 14 1972, attached as an exhibit to plaintiffs' motion to proceed
 15 as a class.) Rule 23(a)(3), Federal Rules of Civil Procedure,
 16 requires that the claims or defenses of the representatives
 17 be "typical" of the class. The claims and defenses of the
 18 present representatives remain typical of those of the class
 19 only so long as the class is limited to non-patentees. The
 20 class is, therefore, so limited.

21 The defenses of statute of limitation, laches and es-
 22 toppel do not apply to the claims of plaintiffs in this action.

23 TRESPASS BY OPERATION OF THE RAILROAD LINE. The cen-
 24 tral issue on this motion is whether the construction and op-
 25 eration of a railroad line across the Reservation by defend-
 26 ants and their predecessors in interest constituted a trespass.
 27 It is defendants' position that the Agreement of 1882 and
 28 their compliance with the provisions of two Acts dealing with
 29 acquisition of rights-of-way by railroads have authorized
 30 their presence on the Reservation.

31 THE AGREEMENT OF 1882. The Agreement entered into be-
 32 tween the predecessors of the Indians and defendants provided:

"THIS AGREEMENT is made subject to final ratification thereof by Congress." It is not disputed that Congress has never expressly ratified the agreement (see p. 3 of the Stipulation filed by the parties on December 16, 1973).

Failing to establish express ratification, defendants contend that Congress impliedly ratified the Agreement. Defendants would substantiate this theory by the fact that Congress has never expressly denied ratification and by the fact that Congress has appropriated funds for use of the railroad line in shipping government supplies and materials and the mails.

Congressional ratification will not be implied from a failure to disapprove where its affirmative action is required. The Agreement and the Act of June 10, 1834, as well as the Acts of March 3, 1878 and March 2, 1890, which are discussed below, require affirmative government approval of a transaction such as that here presented by either the Congress or its appointed administrative agency. Failure to approve the right of way will not satisfy the requirements of the Agreement or the Acts.

Congressional ratification may not be inferred from appropriation enactments where their legislative histories do not "plainly show a purpose to bestow the precise authority which is claimed." *Ex Parte Basso*, 123 U.S. 283, 303 (1887), and followed in *McCune v. McElroy*, 360 U.S. 472, 503 (1959).

Because the agreement has not been expressly ratified by Congress and because it has not been impliedly ratified, the conditions of the agreement have not been satisfied and the agreement does not create a valid right of way for the operation of defendants' railroad.

THE ACT OF MARCH 2, 1878. Failing to establish a valid right of way pursuant to the Agreement, defendants would

parties as discussed above), nor has the right of way been the subject of a treaty (see United States v. Walker River Irrigation Dist., 104 F. 2d 334, 336 (9th Cir. 1939)). The Secretary's actions on January 29, 1881, June 15, 1905, and October 8, 1926, were, therefore, without effect insofar as they purported to approve the right of way crossing "lands within the limits" of the Walker River Reservation.

There is no dispute as to the limits of the Reservation in 1881. The Secretary's approval of the right of way within those limits at that time was, therefore, clearly invalid.

A dispute does exist, however, as to the nature of the Reservation lands when the Secretary approved the maps in 1926. This dispute involves the effect of various transactions occurring between 1908 and 1926.^{3/} These Acts ceded certain lands within the Walker River Reservation back to the United States. Defendants do not contend that these Acts altered the "limits" of the reservation (see p. 7, Defendants' Memorandum, filed July 12, 1973). This position is in keeping with the law. Clarke v. Bowen, 39 F. 2d 860, 814 (10th Cir. 1930); Mahla v. Arnett, 412 U.S. 481, 504-505 (1973); United States of America vs. Peil, Gordon v. Erickson, 478 F. 2d 684, 689 (8th Cir. 1973).

Defendants do, however, contend that these transactions transformed what had previously been Indian lands into "public lands" for the purpose of section 1 of the Act of 1875. Defendants therefore argue that these lands became subject to right of way acquisition pursuant to that Act. If this theory were correct, the Secretary's approval of the maps

^{3/} See: Act of May 27, 1902, 32 Stat. 268; Act of June 19, 1902, 32 Stat. 744; Act of March 3, 1903, 32 Stat. Part 1, 297; Act of June 21, 1906, 34 Stat. 388; Land Cession Agreement of July 24, 1904; Presidential Proclamation of September 26, 1906, 34 Stat., Part 3, 3237.

1 on October 9, 1906 would provide defendants with a valid right
 2 of way to the lands made public by the acts of 1902 to 1906.

3 It has been held that "when Congress has once estab-
 4 lished a reservation all tracts included within it remain a
 5 part of the reservation until separated therefrom by Congress."
 6 United States v. Celestine, 319 U.S. 278, 283 (1943). Creation
 7 of reservation land to the Government does not necessarily
 8 render such property "public land." "Whether or not the Gov-
 9 ernment became trustee for the Indians or acquired an unre-
 10 stricted title by the cession of their lands, depends in each
 11 case upon the terms of the agreement or treaty by which the
 12 cession was made." Ash Sheep Co. v. United States, 352 U.S.
 13 159, 164 (1956).

14 The terms of the acts here at issue contain the fol-
 15 lowing statements relevant to the intentions of the parties
 16 regarding the character of the land therein affected:

17 "And when such allotments shall have been
 18 made, and the consent of the Indians obtained as
 19 aforesaid, the President shall, by proclamation,
 20 open the land so relinquished to settlement, to
 21 be disposed of under existing laws." Act of May
 22 27, 1902, supra, emphasis added.

23 "[The Indians] for the consideration here-
 24 inafter mentioned, do hereby cede, grant and re-
 25 linquish to the United States all right, title
 26 and interest which they may have to the lands
 27 enclosed within said reservation * * *." The
 28 Land Cession Agreement of July 24, 1906, em-
 29 phasis added.

30 Additionally, the Acts of June 19, 1902 and June 21,
 31 1906, supra, each refer to opening the lands in question "to
 32 disposition under any public land law." Those various acts
 33 culminated in the Presidential Proclamation, supra, which de-
 34 clared that these lands were subject to settlement and dis-
 35 posal "under the existing laws of the United States."

36 The terms of these relevant acts clearly intend that
 37 the former reservation lands were to be returned to public

lands" subject to disposition under the then existing laws of the United States. One such law was the Act of 1875 providing for the acquisition of rights of way across public lands.

The Acts of 1902 to 1908 did not, therefore, state the limits or boundaries of the Reservation, but those Acts did reserve certain of the lands within those limits to public land status. This finding creates a conflict within the terms of the Act of 1875. Section 1 provides for rights of way across "public lands," while section 5 denies application of Section 1 to "lands within the limits" of a reservation. The Court is here confronted with a situation wherein "public lands" are found "within the limits" of the reservation. Which section of the Act prevails?

The language of the Act indicates that section 5 should supersede and control section 1. Section 1 is the provision of the Act establishing its general application: the Act is to provide for rights of way across public lands. Section 5, however, limits the application of section 1 by excepting from its effect rights of way sought across "any lands within the limits" of the reservation. (Emphasis added.) The phrase "any lands" is broad. It includes within its scope the "public lands" of Section 1. The use of the phrase "any lands" therefore argues for an interpretation of the Act which subjects applications for rights of way across public lands which are within the limits of an Indian Reservation to the requirement of Section 5 that such applications be approved by treaty or Act of Congress.

Such a construction is supported by standard principles of statutory construction. The specific provision of an Act is given precedence over the general. Winters and Sons v. Forkin, 205 U.S. 204, 209 (1902). Statutes enacted for the benefit of dependent Indian tribes are to be given

liberal construction protecting the rights of those Indians. Alaska Pacific Fishermen v. United States, 248 U.S. 78, 89 (1918). The specific nature of the provisions of Section 5 and the clear purpose of protecting Indian interests by its enactment, therefore, support a conclusion that Section 5 limits that authority granted by Section 1. Since the research of the parties and the Court has discovered no judicial or administrative consideration of this question in the past, there is no reason not to follow the dictates of the language of the Act and the principles of statutory construction in imposing the requirement of Section 5.

It must be concluded, therefore, that the Secretary of the Interior exceeded his authority in approving the above-cited applications to the extent that those applications sought rights of way across any lands, including public lands, within the limits of the Walker River Reservation. The presence of the railroad lines across the Reservation is not justified by any applications for such right of way made pursuant to the Act of 1875.

The Act of March 2, 1899. Defendants also attempt to satisfy the requirement of the Agreement that it be ratified by Congress by reference to the Act of March 2, 1899, ch. 374, 30 Stat. 990, 25 U.S.C. § 312, et seq. (hereinafter "the Act of 1899"). Since the railroad lines here in question were built between 1880 and 1882, the question with respect to the Act of 1899 becomes whether it is to be given retroactive application.

In White v. United States, 191 U.S. 545, 552 (1903), the following statement was made with respect to the contemporaneous Navy Personnel Act of March 2, 1899:

"Where it is claimed that a law is to have retroactive operation, such must clearly be the intention, evidenced in the law and its purposes,

1 on the Court will presume that the lawmaking
 2 power is acting for the future only and not
 3 the past. * * * Retroactive legislation is
 4 not favored."

5 This statement comports with present standards. Soxla
 6 v. Gwynard School District Board of Trustees, 487 F. 2d 59, 60
 7 (9th Cir. 1972).

8 An examination of the language of the Act of 1869 is-
 9 dicated an intention of prospective application only. Section
 10 1 of the Act (25 U.S.C. § 312), for example, provides that
 11 "no right of way shall be granted under this act until the
 12 Secretary of the Interior is satisfied that the company apply-
 13 ing has made said application * * * with intent and ability to
 14 construct said road." This section has meaning only so long
 15 as the statute is limited to prospective application; an exami-
 16 nation of the applicant's intention and ability is pointless
 17 where the road is already constructed.

18 Section 2 of the Act (25 U.S.C. § 313) authorizes the
 19 railroad to survey the line "at any time, upon permission
 20 therefor being obtained from the Secretary of the Interior."
 21 This provision of the Act would also be negated by retroactive
 22 application. There would be no reason for requiring railroads
 23 to seek permission to survey where the road was already com-
 24 pleted.

25 Section 4 of the Act (25 U.S.C. § 315) provides for
 26 forfeiture of the right of way where the railroad fails to
 27 "construct and put in operation one-tenth of its entire line
 28 in one year or to complete its entire road within three years
 29 after approval of its map * * *." Again, this provision has
 30 meaning only with respect to prospective application of the
 31 Act.

32 The language of the Act does not, therefore, evidence
 33 a "clear intention" that the Act be given retroactive effect.

1 To the contrary, the inference to be drawn from the language
 2 of the Act is an intention that the Act be limited to pros-
 3 pective application. As to lines of railroad constructed
 4 across the Walker River Reservation prior to March 2, 1873,
 5 therefore, the defendants may not rely on the Act of that date
 6 to satisfy the Agreement's requirement of congressional rati-
 7 fication.

8 LICENSE. If the unratified Agreement does not create
 9 a valid right of way, defendants cite the construction of the
 10 railroad line across the Reservation, the continued failure of
 11 the Tribe to voice an objection to its presence (prior to com-
 12 mencement of this suit), the acceptance by the Tribe of money
 13 on the signing of the Agreement and of other considerations
 14 in the form of services of the railroad subsequent thereto,
 15 and the fact of the Agreement itself as facts supporting de-
 16 fendants' position that they and their predecessors in inter-
 17 est have, as this line, validly operated the railroad across
 18 the Reservation as licensees. Plaintiffs respond with the
 19 maxim of Indian law that Indian land cannot be conveyed or
 20 encumbered except by act of Congress. Act of June 30, 1834,
 21 ch. 141, sec. 12, 4 Stat. 739, 25 U.S.C. § 177.

22 Plaintiffs' position rests on the unsupported assump-
 23 tion that creation of a license constitutes a conveyance of
 24 the land subject thereto. A license, however, merely estab-
 25 lishes "an authority to do a particular act, or series of acts,
 26 on another's land, without possessing any estate therein."
 27 Smith v. Royal Insurance Co., 111 P. 2d 667, 670 (9th Cir.
 28 1940). It is true, of course, that a license "cannot be
 29 granted by one having no rights in the adjacent property."
 30 Norfolk Dredging Company v. Radcliff Materials, Inc., 264 F.
 31 Supp. 393 (D.C. Va. 1967). Although the title to reservation
 32 lands does continue in the United States, the "Indian title"

1 represents * * * a right to occupancy of the land," Bennett
 2 County, South Dakota v. United States, 394 F. 2d 8, 11 (8th
 3 Cir. 1958).

4 it has long been recognized that the Indians have the
 5 right to regulate this possessory interest:

6 "In the absence of a treaty or statute, it
 7 seems that the power of the nation lies to regu-
 8 late its own rights of occupancy, and to say who
 9 shall participate therein and upon what condi-
 10 tions, cannot be doubted." Choctaw and Chicka-
 11 saug Permit Laws, 18 Op. Atty. Gen. 34, 36 (1834).

12 "That an Indian tribe may grant permission
 13 to third parties to enter upon tribal lands and
 14 may impose such conditions as it deems desirable
 15 upon such permission, is a proposition that has
 16 been repeatedly affirmed * * *." Cohen, Hand-
 17 book of Federal Indian Law, University of New
 18 Mexico Press reprint of the 1942 edition, p.
 19 332.

20 Based on such authority, it must be concluded that
 21 "where the parties intend to create a bare license to use and
 22 enjoy tribal property, there is no statute under which the
 23 licensee may be barred from the use of such property * * *."
 24 Id., at 333.

25 An Indian tribe may, therefore, create a license in a
 26 third party for the use of reservation lands.

27 Whether a license has been created by a particular
 28 transaction or set of circumstances is governed by principles
 29 of license law:

30 "A license with respect to real property
 31 may be created by way of express grant from the
 32 person entitled to possession of the realty, or
 33 it may arise through implications under the at-
 34 tendant circumstances. It may be implied from
 35 the acquiescence of a landowner in certain acts
 36 or in a series of acts done by another upon his
 37 land. A license may be implied from the acts of
 38 the parties, from their relations, and from usage
 39 and custom * * *. If the owner of the land, with
 40 full knowledge of the facts, tacitly permits an-
 41 other repeatedly to do acts upon his land, a li-
 42 cense may be implied from his failure to object."
 43 Thompson, Real Property, 1994 replacement, Vol.
 44 1A, sec. 347, p. 310-311.

45 The circumstances attending the railroad's use of the

1 reservation lands, as outlined above, clearly establish an
 2 implied license in favor of defendants and their predecessors
 3 in interest for the use of those lands. It is beyond dispute
 4 that the existence of a license is a defense to a trespass
 5 action. See, for example, 52 Am. Jur., Trespass, sec. 33,
 6 and cases cited therein.

7 Although defendants do have a defense to the trespass
 8 action based on the license theory, it must not be overlooked
 9 that a license is revocable and that revocation may be ef-
 10 fected by "commencement of an action for damages by the li-
 11 censor against the licensee." Thompson, *supra*, at p. 232.
 12 It is also of interest that "[a] railroad company does not
 13 acquire any easement upon land by entering under a mere li-
 14 cense from the owner and constructing its road * * *. There
 15 is no exception to the general rule in favor of a railroad
 16 company that a license is revocable at the pleasure of a li-
 17 censor where it has entered the land under a parol license
 18 and built its road, on the ground that considerations of pub-
 19 lic policy forbid that the continuous operation of the road
 20 should be interrupted." Thompson, *supra*, sec. 221, pp. 207-
 21 208.

22 By the commencement of this action, therefore, plain-
 23 tiffs have revoked the license formerly operating in favor of
 24 defendants' operation of the railroad line across the Reser-
 25 vation. Future enjoyment of that right hinges on the defend-
 26 ants' success in negotiating a new license or obtaining a
 27 right of way interest pursuant to present statutes enacted
 28 for that purpose. See 25 U.S.C. §§ 324, 325.

29 TRESPASS BY OPERATION OF TELEPHONE AND TELEGRAPH LINES

30 Plaintiffs also seek trespass damages for defendants' opera-
 31 tion of telephone and telegraph lines. It is clear that
 32 neither defendants nor their predecessors in interest applied

1 separately for rights of way for such lines across the Reser-
 2 vation. See the affidavit of Agent Robert Donlowy attached to
 3 the instant motion as Exhibit B and page 5 of defendants'
 4 Answer to Interrogatory No. 7. It is also clear that no such
 5 right was obtained pursuant to the Agreement of 1882. The
 6 question is thus reduced to whether the license implied for
 7 operation of the rail line extended to operation of the tele-
 8 phone and telegraph lines.

9 It is fundamental license law that:

10 "As a general rule, permission to do a par-
 11 ticular act carries with it authority and a right,
 12 by implication, to do all that is necessary to
 13 effect the principal objects and to avail the li-
 14 censee of his rights under the license." Thompson,
 15 supra, at p. 211.

16 In the analogous situation of a railroad's right to
 17 erect telephone or telegraph lines where it has an easement
 18 for the operation of the rail line, the railroad has no right
 19 to permit the use of such lines for purely commercial purposes
 20 (see Hodges v. Western Union Tel. Co., 133 N.C. 228, 42 S.E.
 21 572 [1903]), and such use entitles the holder of the fee to
 22 additional compensation (see Query v. Postal Telegraph-Cable
 23 Co., 178 N.C. 639, 101 S.E. 390 [1919]). An easement does,
 24 however, authorize construction of a commercial telephone or
 25 telegraph line where it is for the joint use of the railroad
 26 and the telegraph company and the preference is given to the
 27 railroad for its use in moving its trains. Cobb v. Western
 28 Union Telegraph Co., 90 Va. 342, 48 S. 752 [1916].

29 Whether the construction of telephone or telegraph
 30 lines along the railroad tracks through the Reservation was
 31 authorized as a use necessary to effectuating the principal
 32 purposes for which the license existed depends on the factual
 33 questions of whether operation of a telegraph is necessary to
 34 the operation of a railroad and whether the lines constructed

1 were primarily available for that purpose. Pursuant to Rule
 2 56(d), Federal Rules of Civil Procedure, this factual question
 3 is deferred for consideration at trial. There exists a ques-
 4 tion of material fact as to the claim of trespass by operation
 5 of telephone and telegraph lines through the Reservation so
 6 that question is not ripe for summary judgment. Rule 56(c),
 7 Federal Rules of Civil Procedure.

8 The summary judgment rule, Rule 56(d), Federal Rules
 9 of Civil Procedure, enjoins the Court from ruling on the mo-
 10 tion.

11 * (d) Case Not Fully Adjudicated on Motion.
 12 If an motion under this rule judgment is not
 13 rendered upon the whole case or for all the re-
 14 lief asked and a trial is necessary, the court
 15 at the hearing of the motion, by examining the
 16 pleadings and the evidence before it and by in-
 17 terrogating counsel, shall in practicable ascer-
 18 tain what material facts exist without substan-
 19 tial controversy and what material facts are ac-
 20 tually and in good faith controverted. It shall
 21 thereupon make an order specifying the facts that
 22 appear without substantial controversy, including
 23 the extent to which the amount of damages or other
 24 relief is not in controversy, and directing such
 25 further proceedings in the action as are just.
 26 Upon the trial of the action the facts so speci-
 27 fied shall be deemed established, and the trial
 28 shall be conducted accordingly."

29 Accordingly, IT HEREBY IS ORDERED:

30 1. That defendants Southern Pacific Transportation
 31 Company and Southern Pacific Land Company have never acquired
 32 and do not now own an easement for the right of way of the
 33 railroad within the limits of the Walker River Indian Reser-
 34 vation.

35 2. That from 1882 until July 17, 1972 (the date this
 36 action was instituted), defendants have enjoyed a revocable
 37 license to maintain the railroad tracks and facilities across
 38 the Reservation.

39 3. Issues of fact remain for trial with respect to
 40 whether the telegraph and telephone lines constructed and
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maintained by defendants are a reasonably necessary and proper adjunct of the license to maintain the railroad tracks and, if not, what, if any, damages have been suffered by plaintiffs.

4. Pursuant to Rule 54(b), Federal Rules of Civil Procedure, this Court expressly determines that there is no just reason for delay and directs that judgment be entered forthwith in favor of defendants and against plaintiffs on plaintiffs' cause of action for trespass arising from the construction, maintenance and operation of the railroad tracks and appurtenances across the Walker River Indian Reservation from 1882 until July 17, 1972.

Dated: May 28, 1974.



UNITED STATES DISTRICT JUDGE

Exhibit No. 19



United States Department of the Interior ^{Real Property Management}

BUREAU OF INDIAN AFFAIRS
MAIL ROOM AND ARCHIVE SECTION
WASHINGTON, D.C. 20540
PHONE (202) 501-3100

CERTIFIED - RETURN RECEIPT REQUESTED

MAY 4 - 1979

Burlington Northern, Inc.
c/o Lawrence D. Silvernale
Associate Regional Counsel
350 Central Building
Seattle, Washington 98104

RE: Appeal of Burlington Northern, Inc. - Application For
Railroad Right-of-Way

Gentlemen:

This matter has come before me, the Area Director, Bureau of Indian Affairs, on the appeal filed by Burlington Northern, Inc., through its attorney, Lawrence D. Silvernale, from the decision dated October 17, 1978, of the Superintendent of the Western Washington Agency, denying its application for a railroad right-of-way across tribal trust land on the Swinomish Indian Reservation. The decision from which the appeal is taken denies the appellant's application because prior consent of the Swinomish Indian Senate had not been obtained.

The notice of appeal was timely filed and received by the Superintendent of the Western Washington Agency on November 3, 1978, and the appeal, together with supporting documents, was filed within the 30-day period following the notice. The appellant also tendered its check in the amount of \$20,858 to the Department of the Interior as the amount claimed to be due for a grant of right-of-way. This was returned by me to the appellant on November 29, 1978. Within 30 days after service of a copy of the appeal upon it, the Swinomish Tribal Community, through its attorney Sharon K. Bads of Native American Rights Fund, filed an answer supporting the Superintendent's decision.

The appellant contends that the Superintendent was in error in failing to approve its application, claiming that its application for a right-of-way under the Act of March 2, 1899, 25 U.S.C. § 312, et seq., is a grant in praesenti and tribal consent is not required. It also claims that if the



EXHIBIT A

-2-

Superintendent had discretion to deny the grant, it would be an abuse of discretion for him to do so. It is noted that the Superintendent's decision denying the application was based solely on the failure of the appellant to obtain tribal consent holding that such consent was "required under both the law and regulations." The Superintendent did not otherwise review or determine the merits of the application. Therefore, the decision turns solely on whether tribal consent is a prerequisite to the review of an application for a right-of-way under the 1899 Act.

The applicant argues that the rights granted under the 1899 Act are exclusive and compliance with the provisions of that act is the only requirement. To avoid the application of Section 2 of the Act of 1948, 25 U.S.C. § 324, which prohibits the grant of a right-of-way across lands belonging to a tribe organized under the Indian Reorganization Act without the consent of the proper tribal officials, it relies upon Section 4, 25 U.S.C. § 326, which provides that the act does not repeal any existing authority. The Swinomish Tribal Community was organized under 25 U.S.C. § 476 its constitution thereunder having been approved by the Secretary on January 27, 1936.

The appellant cites Nicodemus v. Washington Water Power Company, 264 F.2d 617 (9th Cir. 1959), as authority that 25 U.S.C. § 323 is not an exclusive method of obtaining a right-of-way across allotted land. However, this case lends no support to its argument since the alternative being considered there was 25 U.S.C. § 357, which allows acquisition of allotted land by condemnation. That case is not precedent since the land here is tribal land and cannot be acquired by condemnation under that section. Also, no one is contending that interests in tribal land cannot be acquired under other statutes - only that Section 2 of the 1948 Act is applicable regardless of the authority. Nor is the case of United States v. Southern Pacific Transp. Co., 543 F.2d 676 (9th Cir. 1976), cited by the appellant, any assistance since it does not address the issue here presented - the necessity of tribal consent to a grant of a right-of-way over tribal land.

The appellant also contends that if the Superintendent had discretion to deny the application, it was an abuse of that discretion to deny it based on lack of tribal consent. The appellant alleges that the lack of tribal consent was "based solely on Appellant's refusal to meet the tribe's exorbitant compensation demands" (page 10). There is no evidence to support this allegation. However, if tribal consent is a

prerequisite is imposed by Congress, the Superintendent has no authority to disregard the lack of consent or inquire into the reasonableness of the tribe in withholding its consent. In such case the exercise of discretion of the Superintendent would not be an issue.

The issue here presented -- the application of 25 U.S.C. § 3324 to all grants of tribal trust land of tribes organized under the Indian Reorganization Act came before the Assistant Secretary, Indian Affairs, in the Appeal of the Southern Pacific Transportation Company. By decision dated June 19, 1978, a copy of which is attached, the Assistant Secretary held that Congress had made it clear that the consent of tribes organized under the Indian Reorganization Act was essential before the United States could alienate interests in those tribe's trust lands, and that it was immaterial whether the application was under the 1899 or the 1948 Act. He held that the consent requirement was not "an attribute of the Secretary's power or discretion" (page 2). The facts and issues presented in that matter are almost identical with the facts and issues here presented. The appellant has presented no other persuasive authority than that considered by the Assistant Secretary. Therefore, that decision is controlling here. The decision of the Superintendent denying the application because of lack of tribal consent is affirmed.

The appellant has the right to appeal this decision to the Assistant Secretary for Indian Affairs pursuant to Part 2 of Title 25 of the Code of Federal Regulations. If an appeal is taken, 25 CFR 2.10 requires that the notice of appeal together with all supporting documents must be received in this office within thirty (30) days after the notice of this decision is received. An extension of time cannot be granted (25 CFR 2.10(b)). The appeal must be filed within 30 days after the filing of the notice of appeal. Pursuant to 25 CFR 2.11, copies of the notice of appeal and the appeal, together with all supporting documents, must be served on all interested parties, and proof of service thereof must be filed in this office within 15 days after such service. A copy of the notice of appeal must also be filed with the Board of Indian Appeals, 2015 Wilson Boulevard, Arlington, Virginia, 22203. Unless a notice of appeal is filed as above provided, this decision will become final 60 days from the date of receipt thereof as provided in 25 CFR 2.12.

Sincerely yours,

(Sgd.) W. D. Barry
Acting Area Director

Enclosure

cc: Sharon Ladd, Native American Rights Fund
Swinomish Indian Tribal Community
Superintendent, Western Washington Agency
Office of the Regional Solicitor

Exhibit No. 20

BURLINGTON NORTHERN

Woodrow L. Taylor, 625-6441
Regional Counsel

May 25, 1979

Lawrence D. Silvernale 625-6444
Associate Regional Counsel

George C. Torsac, Jr. 625-6440
Robert D. Williams 625-6447
Assistant Regional Counsel

Gerald A. Troy 625-6448
General Attorney

Area Director
Portland Area Office
Bureau of Indian Affairs
United States Department of the Interior
P.O. Box 3785
Portland, Oregon 97208

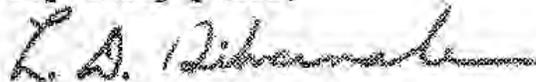
RE: Real Property Management
Appeal of Burlington Northern Inc.--Application for
Railroad Right of Way

Dear Sir:

Pursuant to 25 CFR 2.3 and following sections, Burlington Northern Inc. hereby appeals to the Assistant Secretary for Indian Affairs the decision set forth in your letter of May 4, 1979, to affirm the decision of the Superintendent denying our application because of lack of tribal consent. In due course we will file our appeal with the Assistant Secretary for Indian Affairs, the original certificate of service pertaining to this notice of appeal, and the duplicate originals of the tendered application and accompanying documents if they are returned by you.

Will you please stamp as "Received" the attached copy of this letter and return it to me in the enclosed stamped, self-addressed envelope. Please telephone me if you should wish to discuss this matter.

Very truly yours,



Lawrence D. Silvernale
Associate Regional Counsel

LDS/mb
Encl.

cc: Assistant Secretary for Indian Affairs
Board of Indian Appeals
Ms. Sharon K. Eads
Mr. Peter J. Wilke
Mr. Peter P. Threestars
Office of the Solicitor, Portland Region

Exhibit No. 21



United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
WASHINGTON, D. C. 20245INTERNAL SECURITY
Trust Services
Tenure & Management.

CERTIFIED RETURN RECEIPT REQUESTED

SEP 5 1979

Burlington Northern Railroad Company
Attention: Lawrence D. Silvernale
Associate Regional Counsel
150 Central Building
Seattle, Washington 98104

Gentlemen:

This is an appeal by the Burlington Northern Railroad Company, through its Associate Regional Counsel, Lawrence D. Silvernale, from a May 4 decision of the Acting Area Director of the Portland Area Office, affirming the October 17, 1978 decision of the Superintendent, Western Washington Agency, denying the Burlington Northern's application for a railroad right-of-way across tribal trust lands on the Swinomish Indian Reservation. The decision from which the appeal is taken denies the application of the Burlington Northern Railroad Company (hereinafter "appellant") because prior consent of the Swinomish Indian Senate had not been obtained.

A review of the file indicates the following relevant facts. The appellant filed an application on September 27, 1977, for a railroad right-of-way under the Act of March 2, 1899 (25 U.S.C. § 312, et seq.). The application is for a 60-foot right-of-way 3,029 feet long, plus a right-of-way over the Swinomish Slough and for telephone and telegraph lines along the right-of-way across the tidelands and channel of the Swinomish Slough within the Swinomish Reservation. On October 17, 1978, the Agency Superintendent denied the application, stating: "The Swinomish Indian Senate in session on October 3, 1978, resolved that the Swinomish Indian Tribal Community refuses to authorize the Secretary of the Interior to grant an easement for right-of-way applied for by the Burlington Northern Railroad Company."

The appellant contends that the Superintendent was in error in failing to approve its application, claiming that its application for a right-of-way under the Act of March 2, 1899, 25 U.S.C. § 312, et seq., is a grant in praesenti and tribal consent is not required. It also claims that if the Superintendent had discretion to deny the grant, it would be an abuse of discretion for him to do so. It is noted that the Superintendent's decision denying the application was based solely on the failure of the appellant to obtain tribal consent holding that such consent was "required under both the law and regulations." The Superintendent did not otherwise review or determine the merits of the application. Therefore, the decision turns solely on whether tribal consent is a prerequisite to the review of an application for a right-of-way under the 1899 Act.

1 of 5

SITC000004570

On May 4 the Acting Area Director affirmed the agency's decision to deny the application because of lack of tribal consent. On June 20 the appellant filed an appeal with the Assistant Secretary for Indian Affairs. This appeal was received June 28 in the office of the Acting Deputy Commissioner of Indian Affairs.

The appellant argues that the rights granted under the 1899 Act are exclusive and compliance with the provisions of that act is the only requirement. To avoid the application of Section 2 of the Act of 1948, 25 U.S.C. § 324, which prohibits the grant of a right-of-way across lands belonging to a tribe organized under the Indian Reorganization Act without the consent of the proper tribal officials, it relies upon Section 4, 25 U.S.C. § 326, which provides that the act does not repeal any existing authority. The Swinomish Tribal Community was organized under 25 U.S.C. § 476 and its constitution was approved by the Secretary on January 27, 1936.

The application of 25 U.S.C. § 324 to all grants of tribal trust land of tribes organized under the Indian Reorganization Act came before the Assistant Secretary, Indian Affairs, in the Appeal of the Southern Pacific Transportation Company. By decision dated June 19, 1978, the Assistant Secretary held that Congress had made it clear that the consent of tribes organized under the Indian Reorganization Act was essential before the United States could alienate interests in those tribes' trust lands, and that it was immaterial whether the application was under the 1899 or the 1948 Act. He held that the consent requirement was not "an attribute of the Secretary's power or discretion". The facts and issues presented in that matter are almost identical with the facts and issues here presented. The appellant has presented no other persuasive authority than that considered by the Assistant Secretary. Therefore, that decision is controlling here. A copy of the Assistant Secretary's June 19, 1978 decision was furnished the appellant by the Portland Area Director with his May 4 decision.

In its argument, appellant has argued that it is entitled to file its application under the 1899 Act, and that requiring tribal consent is inconsistent with the terms of the 1899 Act. Appellant argues that the 1899 Act provides for an in praesenti grant and that requiring tribal consent cannot therefore be imposed afterwards as a condition of such a grant. Alternatively, the appellant argues that applying the 25 CFR 161.3 consent requirement to applications filed pursuant to the 1899 Act is a denial of due process because the regulations do not make it clear that 161.3 is a pertinent section, applicable to applications under the 1899 Act. The appellant argues the Assistant Secretary should in this case exercise his discretion to waive the consent requirement.

We conclude that it is immaterial whether the subject application is filed pursuant to the 1948 or the 1899 Acts, since Congress has made it clear that the consent of tribes organized under the 1934 Indian Reorganization Act is essential before the United States can alienate interests in their trust lands. This requirement flows from 25 U.S.C. § 476, which guarantees IRA tribes the power to prevent the sale, disposition, lease or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe. In other words, the consent requirement is not, in our view, an attribute of the Secretary's power or discretion but is a statutory element of a tribe's sovereign power which the Secretary does not have the discretion to waive.

The 1948 Right-of-Way Act specifically bars the Secretary's ability to abrogate a tribe's prerogative in such matters. "No grant of a right-of-way over and across any lands belonging to a tribe organized under sections 461-473 and 474-479 of this title; . . . shall be made without the consent of the proper tribal officials." 25 U.S.C. § 324. (See also 1948 U.S. Code Cong. Service, p. 1033.)

That Congress fully understood and intended such a policy is clear from a 1969 report of the House Committee on Government Operations (H. Rep. 91-78, 91st Cong. 1st Sess.), concerning this Department's revised rights-of-way regulations which would have allowed the Secretary to waive the consent requirement in the case of non-IRA tribes.

"We believe the Department's obligation to protect the rights of the Indian tribes should be concluded in regulations which clearly and emphatically preclude any possible misuse of rights-of-way grants to alienate Indian land without the consent of the Indians or to evade the maximum terms of years fixed in the acts of Congress authorizing land leasing.

For all of these reasons, it would appear best to retain the present section 161.3 without any change, and to announce unambiguously that your Department intends to observe its own regulations."

(Letter to the Secretary of the Interior from Chairman, Natural Resources and Power Subcommittee, February 16, 1968.)

Appellant argues that since 25 U.S.C. § 326 preserves the Secretary's authority under prior rights-of-way statutes, the Secretary has continuing authority under the 1899 Act to grant rights-of-way without regard to the consent requirement of § 324. We reject such an interpretation of § 326. The legislative history states that the purpose of the § 326 provision was to ". . . avoid any possible confusion which may arise, particularly in the period of transition from the old system to

the new" That counters the inference that § 326 was intended to maintain separate procedures immune from the consent requirement of the 1948 Act.

Also, § 326 must be read together with other sections of the same act. While § 325 evidences Congress' awareness of continuing authority under the statutes to grant rights-of-way, § 324 categorically and unequivocally states that "no right-of-way" shall be granted without tribal consent. Thus, the language of § 324 embraces rights-of-way granted under § 326. Furthermore, the precise language of § 326 creates an important distinction. It states that the Federal Water Power Act is neither repealed nor amended by the 1948 Act; but, it merely states that prior rights-of-way statutes are not repealed. In other words, if imposition of the § 324 consent requirement can be construed as a quasi-amendment of the 1899 Right-of-Way Act, such an amendment is not barred by § 326. We do not think that either the language of § 326, or its legislative history, warrant an abridgment of the application of § 324 to all rights-of-way granted after 1948.

We also conclude that, contrary to appellant's assertions, 25 CFR 161.3 and 25 CFR 161.23 make it clear that tribal consent must be obtained before any right-of-way can be granted. Therefore, appellant is not denied procedural due process. 25 CFR 161.23, the section applying to applications filed under the 1899 Act, provides that such applications shall also be subject to ". . . other pertinent sections of this Part 161." Because the consent requirement in 161.3 is so all-inclusive, "(a) No right-of-way shall be granted over and across any tribal land" we do not see any room for question but that such a requirement is pertinent. Also, 161.15, the provision concerning action on applications, states that the grant of a right-of-way shall be evidenced in a conveyancing instrument which incorporates the conditions or restrictions set out in the required consent. Moreover, 161.14 requires that the consideration and damage deposit filed with the applications shall in no event be less than the amount specified in the consent. In other words, the consent requirement is pervasive in the Part 161 application scheme.

It is our conclusion that the Acting Deputy Commissioner cannot grant a right-of-way across the lands of a tribe which is subject to the provisions of the Indian Reorganization Act, without written evidence in the application of tribal consent--whether such application be submitted under the 1948 or the 1899 Act.

Accordingly, the decision of the Acting Area Director dated May 4, 1979, is hereby affirmed. This decision, having been made in the capacity of Acting Deputy Commissioner, is final for the Department and not subject to the provisions of 25 CFR 2.19(e).

Sincerely,

Ltj Theodore C. Knezyke

Acting Deputy Commissioner

Enclosure

Exhibit No. 22

1 LAWRENCE D. SILVERNALE
2 WOODROW L. TAYLOR
3 ROBERT C. WILLIAMS
4 350 Central Building
5 Seattle, WA 98104
6 Phone: (206) 628-6444
7 Attorneys for Plaintiff

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BURLINGTON NORTHERN INC.,

Plaintiff

vs.

CECIL H. ANDRUS, Secretary of the Interior; THEODORE C. BRENKE, Acting Deputy Commissioner, Bureau of Indian Affairs; W. D. BAUM, Acting Area Director, Portland Area, Bureau of Indian Affairs; PETER F. THOMPSON, Superintendent, Western Washington Agency,

Defendants

NO. _____
COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

1. This is an action for declaratory judgment and injunctive relief to compel the Secretary of the Interior of the United States and his subordinates to file an application for, and to confirm by issuance of necessary approvals and instruments a legislative grant of railroad right of way through 3520 feet, more or less, of Tidulans claimed by the Sishonish Indian Reservation, Washington.

2. This action arises under the Fifth Amendment of the Constitution of the United States and an Act of Congress providing for the granting of railroad rights of way through Indian

COMPLAINT FOR DECLARATORY JUDGMENT & INJUNCTIVE RELIEF - 1

1 reservations, Act of March 2, 1899, Ch. 174, 30 Stat. 680 (25 USC
2 sec. 312 et seq.) (hereinafter "Act of 1899").

3 1c. Jurisdiction is vested in this Court under 28 USC sec.
4 1331, the Act of 1899, the Declaratory Judgment Act, 28 USC sec.
5 2401-2402, and secs. 702 and 706 of the Administrative Procedure
6 Act, 5 USC secs. 702, 706. The matter in controversy exceeds,
7 exclusive of interest and costs, the sum of \$10,000.

8 4. Plaintiff is a corporation organized and existing under
9 the laws of the State of Delaware, duly qualified to transact
10 business in the State of Washington, and is a common carrier by
11 railroad owning and operating a line of railroad between Anacortes,
12 Washington and points and places in Washington, within the geo-
13 graphic district of this Court.

14 5. Defendant Cecil B. Andrus is Secretary of the Interior of
15 the United States and is charged with the duty of carrying out
16 the provisions of the Act of 1899 and is the administrative head
17 of the Department of the Interior and responsible for its acts.
18 Defendant Theodore C. Krenzke is Acting Deputy Commissioner,
19 Bureau of Indian Affairs of the Department and is charged with
20 the duty of administering the Act of 1899 and, in appropriate
21 cases, of making final decisions for the Department in regard to
22 the Act under the direction of the Secretary, and is the official
23 who rendered the decision hereinafter set forth. Defendant H. U.
24 Babby is the Acting Area Director of the Portland Area Office of
25 the Bureau of Indian Affairs of the Department of the Interior,
26 having supervision over the Western Washington Agency, the Agency
27 which directly administers the Nisqually Indian Reservation;
28 these officials participated in the refusal to file and process
29 the application of plaintiff for right of way as hereafter set
30 forth. Defendant Peter P. Threestore is the Superintendent of

31 COMPLAINT FOR DECLARATORY
32 JUDGMENT & INJUNCTIVE RELIEF - 7

1 The Western Washington Agency, the official who made the initial
 2 decision refusing to file and process Plaintiff's application, and
 3 the official charged with the responsibility for the direct ad-
 4 ministration of the Swinomish Indian Reservation.

5 Burlington Northern Inc. tendered for filing on or about
 6 September 27, 1977, with the Western Washington Agency of the
 7 Bureau of Indian Affairs, an application for a railroad right of
 8 way under the Act of 1895 through Tribal lands claimed to be
 9 within the Swinomish Indian Reservation. Duplicate originals of
 10 the application, original tracing lines and reproductions of the
 11 map of definite location, other documents, and voucher for pay-
 12 ment of estimated compensation were tendered to the Western
 13 Washington Agency and were available to all officials considering
 14 and making decisions on the filing and granting of the application.
 15 These documents will be offered to the Court in this proceeding by
 16 means other than attaching them to this Complaint because of
 17 their bulky and unwieldy nature. The application is for a 60 foot
 18 right of way, 3450 feet, more or less, in length, and for telephone
 19 and telegraph lines on the right of way, all as authorized under
 20 the Act of 1895. The application was regular, correct and
 21 complete in all respects. All conditions precedent to the grant
 22 were satisfied. By letter dated October 17, 1978, the Superin-
 23 tendent of the Western Washington Agency, denied the application
 24 on the ground that the Swinomish Tribal Community refuses to
 25 consent to the right of way. Upon administrative appeal being
 26 taken in accordance with the Department's regulation on or about
 27 November 22, 1978, the Acting Area Director of the Portland Area
 28 affirmed the decision of the Superintendent. Upon further ad-
 29 ministrative appeal being taken, on or about June 26, 1979, the
 30 Acting Deputy Commissioner, Bureau of Indian Affairs, purporting

31
 32 COMPLAINT FOR DECLARATORY
 JUDGMENT & INJUNCTIVE RELIEF - 3

1 to make a final decision for the Department, affirmed the decision
 2 of the Acting Area Director. A true copy of the letter setting
 3 forth the decision is marked Exhibit "B" and attached and made a
 4 part hereof. Plaintiff has fully exercised its right to adminis-
 5 trative appeal within the Department, and no further right of
 6 review or appeal or other remedy is available to Plaintiff before
 7 the Department of Interior or any subdivision thereof.

8 3. An actual, justiciable dispute or controversy within the
 9 purview of the Declaratory Judgment Act has arisen and now exists
 10 between Plaintiff and Defendants, and each of them in that:

11 a. Plaintiff contends that its application
 12 is regular, correct and complete, that all conditions
 13 precedent required by the Act of 1899 have been per-
 14 formed, and that the Act of 1899 confers on plaintiff
 15 a present property interest. Plaintiff contends it
 16 is entitled to file, have processed, and have formal
 17 approval given to its legislative grant.

18 b. Plaintiff contends that the Act of 1899 does
 19 not require, no other statute requires, and no
 20 validly imposed regulation requires Tribal consent to
 21 the grant of right of way, and that the requirement of
 22 such consent, either as a condition precedent or
 23 otherwise, cannot lawfully be imposed.

24 Defendants, and each of them, deny each of the foregoing conten-
 25 tions. The Defendants, and each of them contend that:

26 a. Sec. 16 of the Indian Reorganization Act, Act
 27 of 1934 48 Stat. 987, 25 USC sec. 476 requires
 28 Tribal consent to the right of way.

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 31
 32 COMPLAINT FOR DECLARATORY
 JUDGMENT & INJUNCTIVE RELIEF - 4

1 c. The so-called "rail bypassed" right of way
 2 Act of 1948, Act of February 5, 1948, 62 Stat. 17,
 3 25 USC sec. 323, et seq. implicitly repeals or amends
 4 the Act of 1897 and requires Tribal consent.

5 d. Administrative regulations set forth in
 6 25 CFR part 161, and in particular 25 CFR sec. 161.3,
 7 require Tribal consent.

8 Plaintiff denies each of these contentions.

9 a. By reason of the foregoing it was the duty of Defendants
 10 to receive and act upon said application, and to issue all formal
 11 instruments and approvals necessary to confirm the legislative
 12 grants, the performance of which duties the law especially enjoins
 13 on them by virtue of the Act of 1899 and their office, trust and
 14 station. The Defendants, and each of them, have wrongfully and
 15 without just cause or excuse refused and failed to file the
 16 application and confirm the grant of right of way.

17 b. Plaintiff has no other means to secure the right of way
 18 other than the Act of 1899, in that the Sisseton Indian Tribal
 19 Community has continuously since 1970 and does now refuse to
 20 consent to the railroad right of way and, has sued Plaintiff in
 21 this Court demanding, among other things, that the railroad be
 22 removed from the reservation.

23 10. If the Defendants are allowed to continue their wrongful
 24 refusal to file the application and confirm the grant of right
 25 of way, Plaintiff will be subjected to continuing exposure to
 26 damages and may ultimately be deprived of the right to provide
 27 railroad common carrier service between points west and east of
 28 the reservation and thereby be deprived of revenue from railroad
 29 operations. In addition, Plaintiff may ultimately lose its in-
 30 vestment in rail facilities on and west of the reservation. More-
 31 over, other persons have made large investments in plant and

32 COMPLAINT FOR DECLARATORY
 33 JUDGMENT & INJUNCTIVE RELIEF - 5

1 facilities located on the rail line west of the reservation and
 2 require for their economic viability continued rail service.
 3 Such persons may lose their investments and businesses. Other
 4 persons are employed by the firms having plants along the railroad
 5 line. These persons may lose their permanent source of employment.
 6 This railroad line provides the only rail service to Anacortes,
 7 Washington. No other rail service exists, and none can be reason-
 8 ably anticipated to be supplied. If said right of way grant is
 9 refused, the Plaintiff's common carrier railway service at and
 10 west of the Swinomish reservation will be abandoned contrary to
 11 law. Even a temporary interruption of rail service will result
 12 in irreparable loss to Plaintiff and shippers.

13 11. By reason of all the foregoing, Plaintiff is entitled to
 14 have its rights in this matter adjudged and declared herein.

15 12. Unless Plaintiff's rights are declared herein and the
 16 Defendants ordered and enjoined to receive, file, process and
 17 confirm the grant of right of way under the Act of 1899 as re-
 18 quested in this action, Plaintiff will have no other remedy at
 19 law or by other proceedings, or at all, nor will the public have
 20 such remedy, to avoid the present and future irreparable in-
 21 juries and losses as previously set forth.

22 WHEREFORE, Plaintiff prays that:

23 1. The Defendants, and each of them, be ordered to receive
 24 and file Plaintiff's application for right of way.

25 2. The rights of the parties be adjudged in this action,
 26 and that Plaintiff's contentions as previously set forth be
 27 sustained and Defendants' contentions be denied.

28 3. The Defendants, and each of them, be ordered to
 29 execute and deliver all necessary approvals and instruments to
 30 confirm in Plaintiff the legislative grant of right of way set
 31 forth in the Act of 1899.

32 COMPLAINT FOR ENJOINMENT
 33 ENJOINMENT & INJUNCTIVE RELIEF - 6

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4. This Court declare and adjudge that Plaintiff is the holder of such a grant and is entitled to all the foregoing relief.

5. For the costs of suit herein.

6. For such other and further relief as the Court may order.

DATED this 12th day of October, 1979

Lawrence D. Silvernale

Lawrence D. Silvernale
Of Attorneys for Plaintiff

COMPLAINT FOR DECLARATORY
JUDGMENT & INJUNCTIVE RELIEF - 7



United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
WASHINGTON, D. C. 20245

SECRETARY'S OFFICE
Trust Services
Policy & Management

SEP 1 1978

CERTIFIED RETURN RECEIPT REQUESTED

Burlington Northern Railroad Company
Attention: Lawrence D. Silverdale
Associate Regional Counsel
300 Federal Building
Seattle, Washington 98104

Gentlemen:

This is an appeal by the Burlington Northern Railroad Company, through its Associate Regional Counsel, Lawrence D. Silverdale, from a May 4 decision of the Acting Area Director of the Portland Area Office, affirming the October 17, 1976 decision of the Superintendent, Western Washington Agency, denying the Burlington Northern's application for a widened right-of-way across tribal trust lands on the Swinomish Indian Reservation. The decision from which the appeal is taken denies the application of the Burlington Northern Railroad Company (hereinafter "appellant") because prior consent of the Swinomish Indian Senate had not been obtained.

A review of the file indicates the following relevant facts: The appellant filed an application on September 27, 1977, for a widened right-of-way under the Act of March 3, 1899 (25 U.S.C. § 312, et seq.). The application is for a 40-foot right-of-way 1,529 feet long, plus a right-of-way over the Swinomish Slough and for telephone and telegraph lines along the right-of-way across the tidelands and channel of the Swinomish Slough within the Swinomish Reservation. On October 17, 1976, the Agency Superintendent denied the application, stating: "The Swinomish Indian Senate in session on October 3, 1976, resolved that the Swinomish Indian Tribal Community refuses to authorize the Secretary of the Interior to grant an easement for right-of-way applied for by the Burlington Northern Railroad Company."

The appellant contends that the Superintendent was in error in failing to approve its application, claiming that its application for a right-of-way under the Act of March 3, 1899, 25 U.S.C. § 312, et seq., is a grant in perpetuity and tribal consent is not required. It also claims that if the Superintendent had discretion to deny the grant, it would be an abuse of discretion for him to do so. It is noted that the Superintendent's decision denying the application was based solely on the failure of the appellant to obtain tribal consent holding that such consent was "required under both the law and regulations." The Superintendent did not otherwise review or determine the merits of the application. Therefore, the decision turns solely on whether tribal consent is a prerequisite to the review of an application for a right-of-way under the 1899 Act.

EXHIBIT A

SITC000005911

On May 4 the Acting Area Director affirmed the agency's decision to deny the application because of lack of tribal consent. On June 29 the appellant filed an appeal with the Assistant Secretary for Indian Affairs. This appeal was received June 29 in the office of the Acting Deputy Commissioner of Indian Affairs.

The appellant argues that the rights granted under the 1899 Act are exclusive and compliance with the provisions of that act is the only requirement. To avoid the application of Section 2 of the Act of 1944, 25 U.S.C. § 324, which prohibits the grant of a right-of-way across lands belonging to a tribe organized under the Indian Reorganization Act without the consent of the proper tribal officials, it relies upon Section 4, 25 U.S.C. § 326, which provides that the act does not repeal any existing authority. The Spicowish Tribal Community was organized under 25 U.S.C. § 476 and its constitution was approved by the Secretary on January 27, 1936.

The application of 25 U.S.C. § 324 to all grants of tribal trust land of tribes organized under the Indian Reorganization Act came before the Assistant Secretary, Indian Affairs, in the Appeal of the Southern Pacific Transportation Company. By decision dated June 29, 1970, the Assistant Secretary held that Congress had made it clear that the consent of tribes organized under the Indian Reorganization Act was essential before the United States could alienate interests in those tribes' trust lands, and that it was immaterial whether the application was under the 1899 or the 1943 Act. He held that the consent requirement was not "an arbitrary act of the Secretary's power or discretion". The facts and issues presented in that matter are almost identical with the facts and issues here presented. The appellant has presented no other persuasive authority than that considered by the Assistant Secretary. Therefore, that decision is controlling here. A copy of the Assistant Secretary's June 19, 1970 decision was furnished the appellant by the Portland Area Director with his May 4 decision.

In its argument, appellant has argued that it is entitled to file its application under the 1899 Act, and that requiring tribal consent is inconsistent with the terms of the 1899 Act. Appellant argues that the 1899 Act provides for an immediate grant and that requiring tribal consent cannot therefore be imposed afterwards as a condition of such a grant. Alternatively, the appellant argues that applying the 25 U.S.C. 161.3 consent requirement to applications filed pursuant to the 1899 Act is a denial of due process because the regulations do not state it clearly that 161.3 is a pertinent section, applicable to applications under the 1899 Act. The appellant argues the Assistant Secretary should in this case exercise his discretion to waive the consent requirement.

It is concluded that it is immaterial whether the subject application is filed pursuant to the 1948 or the 1958 Act, since Congress has made it clear that the consent of tribes organized under the 1934 Indian Reorganization Act is essential before the United States can alienate interests in their trust lands. This requirement flows from 25 U.S.C. § 476, which guarantees IRA tribes the power to prevent the sale, disposition, lease or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe. In other words, the consent requirement is not, in our view, an attribute of the Secretary's power or discretion but is a statutory element of a tribe's sovereign power which the Secretary does not have the discretion to waive.

The 1948 Right-of-Way Act specifically bars the Secretary's ability to abrogate a tribe's prerogative in such matters. "No grant of a right-of-way over and across any lands belonging to a tribe organized under articles 461-473 and 474-479 of this title . . . shall be made without the consent of the proper tribal officials." 25 U.S.C. § 326. (See also 1948 U.S. Code Cong. Service, p. 1031.)

"[I]f Congress fully understood and intended such a policy to clear from a 1958 report of the House Committee on Government Operations (H. Rep. 81-73, 91st Cong. 1st sess.), concerning this Department's revised rights-of-way regulations which would have allowed the Secretary to waive the consent requirement in the case of non-IRA tribes.

"We believe the Department's obligation to protect the rights of the Indian tribes should be concluded in regulations which clearly and unequivocally preclude any possible misuse of rights-of-way grants to alienate Indian land without the consent of the Indians or to evade the various terms of years fixed in the acts of Congress authorizing land leasing.

Not all of these reasons, it would appear best to retain the present section 161.3 without any change, and to announce unambiguously that your Department intends to observe its own regulations."

(Letter to the Secretary of the Interior from Chairman, Natural Resources and Power Subcommittee, February 16, 1968.)

Appellant argues that since 25 U.S.C. § 326 preserves the Secretary's authority under prior rights-of-way statutes, the Secretary has continuing authority under the 1958 Act to grant rights-of-way without regard to the consent requirement of § 326. We reject such an interpretation of § 326. The legislative history states that the purpose of the § 326 provision was to ". . . avoid any possible confusion which may arise, particularly in the period of transition from the old system to

the new" That counters the inference that § 326 was intended to maintain separate procedures apart from the consent requirement of the 1948 Act.

Also, § 326 must be read together with other sections of the same act. While § 325 evidences Congress' awareness of continuing authority under the statutes to grant rights-of-way, § 324 categorically and unequivocally states that "no right-of-way" shall be granted without tribal consent. Thus, the language of § 324 excludes rights-of-way granted under § 326. Furthermore, the precise language of § 326 creates an important distinction. It states that the Federal Water Power Act is neither repealed nor amended by the 1948 Act; but, it merely states that prior rights-of-way statutes are not repealed. In other words, if imposition of the § 324 consent requirement can be construed as a quasi-amendment of the 1939 Right-of-Way Act, such an amendment is not barred by § 326. We do not think that either the language of § 326, or its legislative history, warrant an abridgment of the application of § 324 to all rights-of-way granted after 1948.

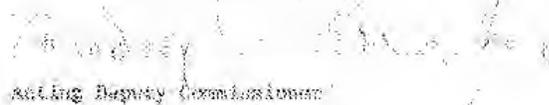
We also conclude that, contrary to appellant's assertions, 25 CFR 161.9 and 25 CFR 161.22 make it clear that tribal consent must be obtained before any right-of-way can be granted. Therefore, appellant is not denied procedural due process. 25 CFR 161.24, the section applying to applications filed under the 1948 Act, provides that such applications shall also be subject to ". . . other pertinent sections of this Part 161." Because the consent requirement in 161.9 is so all-inclusive, "(a) no right-of-way shall be granted over and across any tribal land . . ." we do not see any room for question but that such a requirement is pertinent. Also, 161.15, the provision concerning action on applications, states that the grant of a right-of-way shall be evidenced in a conveyance instrument which incorporates the conditions or restrictions set out in the required consent. Moreover, 161.14 requires that the consideration and damage deposit filed with the application shall in no event be less than the amount specified in the consent. In other words, the consent requirement is pervasive in the Part 161 application scheme.

It is our conclusion that the Acting Deputy Commissioner cannot grant a right-of-way across the lands of a tribe which is subject to the provisions of the Indian Reorganization Act, without written evidence in the application of tribal consent--whether such application be submitted under the 1948 or the 1939 Act.

5

Accordingly, the decision of the Acting Area Director dated May 4, 1973, is hereby affirmed. This decision, having been made in the capacity of Acting Deputy Commissioner, is final for the Department and not subject to the provisions of 23 CFR 2.17(c).

Sincerely,



Acting Deputy Commissioner

Enclosure

COPIES SENT CERTIFIED--RETURN RECEIPT REQUESTED TO THE FOLLOWING:

Area Director
Portland Area Office
Bureau of Indian Affairs
P.O. Box 3785
Portland, Oregon 97208

Board of Indian Appeals
2015 Wilson Boulevard, Room 1105
Arlington, Virginia 22203

Ms. Sharon V. Kade
Native American Rights Fund
1500 Broadway
Boulder, Colorado 80302

Mr. J. P. Wike
Squamish Tribal Community
P.O. Box 217
Bainbridge, Washington 98257

Exhibit No. 23

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JAN 28 1980
OFFICE OF THE CLERK
U. S. DISTRICT COURT
SEATTLE, WASHINGTON

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

BURLINGTON NORTHERN, INC.,
Plaintiff,
vs.
CECIL D. ANDRUS, Secretary of the
Interior, THEODORE C. KRENZKE,
Acting Deputy Commissioner, Bureau
of Indian Affairs, W.D. BARRY,
Acting Area Director, Portland
Area, Bureau of Indian Affairs;
PETER P. TREBESTANS, Superintendent,
Western Washington Agency,
Defendants.

No. C79-1199V

FILED IN THE
UNITED STATES DISTRICT COURT
Western District of Washington

FEB 21 1980

JOE R. ROMANE, Clerk
By.....Deputy

*Original
Copy to Clerk*

ORDER

The Swinomish Tribal Community has moved to intervene as a party defendant in Civil Action No. C79-119V, Burlington Northern, Inc. v. Andrus, et al. Upon consideration of the Tribe's Motion To Intervene and Memorandum Of Points and Authorities In Support Of Motion, and good cause appearing,

IT IS HEREBY ORDERED that the Swinomish Tribal Community be joined as a party defendant in Civil Action No. C79-1199V, Burlington Northern, Inc. v. Andrus pursuant to Fed.P.Civ.P. 24(a)(2).

Dated: *February 21, 1980.*

Donald S. [Signature]
United States District Judge

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Exhibit No. 24

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

HOPELINGTON NORTHERN, INC.
Plaintiff

vs.

NO. 15-1187

CECEL D. ANRUS, Secretary
of the Interior, et al.,
Defendants

ORDER ON MOTION FOR
SUMMARY JUDGMENT

and

ANTHONY L. WYMAN, Trustee

Defendant-Intervenor

Having considered the cross-motions of the parties for summary judgment, along with the memoranda submitted by counsel, the Court now finds and rules as follows:

1. The issue presented on these cross-motions is purely legal: Is tribal consent required prior to the granting of a railroad right-of-way across tribal lands? This issue was recently addressed and ruled upon in Southern Pacific Transportation Co. v. Anaya, Civ. No. 15-0216 BHT (D. Nev. July 21, 2015). The Court has been informed by counsel that a notice of appeal to the Court of Appeals for the Ninth Circuit has been filed in that case.

2. The Court finds that consideration of the summary judgment motions before the Court should be deferred until the
ORDER ON MOTION FOR
SUMMARY JUDGMENT - 1

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Court of Appeals has considered and ruled upon the controlling issue in the Southern Pacific appeal.

Accordingly, the cross-motions for summary judgment are DETERMINED pending decision of the appeal in Southern Pacific. Counsel for defendants shall promptly inform the Court of the resolution of that appeal.

The Clerk of this Court is instructed to send uncertified copies of this order to all counsel of record.

DATED this 10 day of October, 1988.

/s/ Donald H. Wickham
United States District Judge

ORDER ON MOTION FOR
SUMMARY JUDGMENT - 2

Exhibit No. 25

FILED
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AUG 16 1983

AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

C dec.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

BURLINGTON NORTHERN, INC.,)	
)	
Plaintiff,)	No. C79-1199V
)	
vs.)	ORDER
)	
CECIL D. ANDRUS, et al.,)	
)	
Defendants,)	
)	
and)	
)	
SWINOMISH INDIAN TRIBE,)	
)	
Defendant-Intervenor.)	

18 Having considered the motions of the United States and the
 19 Swinomish Tribal Community ("Swinomish") to lift the stay
 20 previously entered in this action and for summary judgment,
 21 together with the memoranda submitted by counsel, the Court now
 22 finds and rules as follows:

23 1. Plaintiff filed this action on October 12, 1979 seeking
 24 review of the Department of Interior's denial of a right-of-way

25
26 ORDER - 1

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1 application. The application had been denied because of
2 plaintiff's failure to obtain the consent of the Swinomish tribe.
3 Plaintiff contended that it was not required to obtain the consent
4 of the tribe.

5 2. After oral argument on cross-motions for summary
6 judgment, the Court was advised that the issues raised here had
7 been decided in a nearly identical case brought in the District of
8 Nevada and that that case, entitled Southern Pacific
9 Transportation Co. v. Cecil Andrus, had been appealed to the Ninth
10 Circuit Court of Appeals. Accordingly, proceedings in this action
11 were stayed pending the decision of the Ninth Circuit in Southern
12 Pacific.

13 3. The Court of Appeals rendered a decision in Southern
14 Pacific on March 1, 1983 in favor of the United States. It held
15 that Congress had authorized the Secretary to make tribal consent
16 a condition precedent to granting approval of an application for a
17 railroad right-of-way. 700 F.2d 550 (9th Cir. 1983). On June 9,
18 1983, the Ninth Circuit denied Southern Pacific's motion for
19 rehearing and rehearing en banc. The United States and the
20 Swinomish tribe then brought this motion to lift the stay and for
21 summary judgment.

22 4. Plaintiff concedes that "the holding of the Ninth Circuit
23 Court in the Southern Pacific case dated March 1, 1983 is
24 definitely contrary to Burlington Northern's position and, if
25

1 followed, would result in summary judgment in favor of defendant
2 Secretary of the Interior and intervenor Swinomish Tribal
3 Community" (memorandum in opposition). This Court is, of course,
4 bound by the decisions of the Ninth Circuit.

5 Accordingly, the motions of the United States and the
6 Swinomish Tribal Community to lift the stay and for summary
7 judgment are GRANTED.

8 Counsel for defendants shall prepare and present a final
9 judgment in this cause.

10 The Clerk of this Court is instructed to send uncertified
11 copies of this order to all counsel of record.

12 DATED this 16 day of August, 1983.

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15 _____
16 United States District Judge
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26 ORDER - 3

Exhibit No. 26

STATE OF WASHINGTON

COUNTY OF KING

The undersigned being first duly sworn, on oath states that on this day signed documents in the name of the United States contained a properly prepared and addressed envelope directed to the following address of record of Swinomish Indian Tribe, consisting of the document to which this notice is attached.

Sienna Wilson

Hon. Donald S. Voorhees

Subscribed and sworn to before me this 15th day of Sept.

at Seattle

Maris J. Bates
Notary Public for Washington
County of King

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BURLINGTON NORTHERN, INC.)
)
) Plaintiff,)
)
) v.)
)
) CECIL D. ANDRUS, et al.,)
)
) Defendants,)
)
) and)
)
) SWINOMISH INDIAN TRIBE,)
)
) Defendant-Intervenor.)

NO. C79-1199V

NOTICE OF APPEAL

FILED
LOGGED
RECEIVED

OCT 23 1983

BY L. D. Silvernale
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
DEPUTY

Notice is hereby given that Burlington Northern Railroad Company, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment entered in this action on the 2nd day of September, 1983.

DATED this 15th day of September, 1983.

L. D. Silvernale
Lawrence D. Silvernale
Of Attorneys for Defendant
Burlington Northern Railroad Company

LAWRENCE D. SILVERNALE
350 Central Building
Seattle, Washington 98104
Telephone: (206) 525-6444

NOTICE OF APPEAL

87715
Case of A. Andrus

58

Exhibit No. 27

FILED

FEB 22 1984

PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BORLINGTON NORTHERN, INC.,
Plaintiff/Appellant,

-vs-

JAMES WHEAT, Secretary of the
Interior, et al.,
Defendant/Appellee,

and

SWINOMISH INDIAN TRIBE,
Defendant/Intervenor-Appellee,

U.S.C.A. No. 83-4255

U.S.D.C. No. CV 79-1199V

District Court WASHINGTON
(Seattle)

ENTRY OF DISMISSAL

Pursuant to Rule 42(b), Federal Rules of Appellate Procedure, and the stipulation submitted by the parties, dismissal of this appeal is herewith entered.

(XXX) Each party to bear its own costs.

() Costs to be apportioned as agreed in the submitted stipulation.

Phillip B. Winberry
Clerk of Court

by: R. Orite, Deputy Clerk

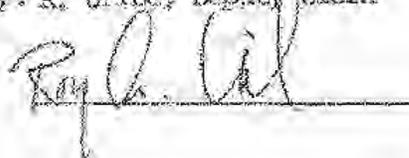


Exhibit No. 28

CONFIDENTIAL

SETTLEMENT AGREEMENT
SWINOMISH - BURLINGTON NORTHERN 122 731

The Swinomish Tribal Community (hereinafter "Tribe") as the duly constituted governing body of the Swinomish Indian Reservation, the United States Department of the Interior, Bureau of Indian Affairs ("the BIA"), and Burlington Northern Railroad Company (hereinafter "Burlington Northern" or "BN"), in order to settle those matters in dispute between the Tribe and BIA and Burlington Northern in the consolidated actions entitled Burlington Northern Railroad Company vs. Swinomish Tribal Community et al., Western District of Washington cause C76-550V, and to resolve other matters between Burlington Northern and the Tribe and BIA, agree as follows:

1. **Application for Easement.** BN will submit to the BIA an application for a right-of-way easement in the form attached hereto as Exhibit "A". The Tribe shall immediately upon execution of this Settlement Agreement advise the BIA in writing of the Tribe's consent to the granting to BN by the BIA of the right-of-way easement attached to said application as Attachment "A". Both BN and the Tribe shall take whatever other steps are reasonably necessary promptly to obtain the approval by the BIA of said right-of-way easement, the approval of the attorney for the United States of this Settlement Agreement and the stipulation referred to in paragraph 3, and the full consummation of this agreement.

2. **Payment.** (a). As partial consideration for this Settlement, BN will deposit with the BIA along with said

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application the sum of \$5,000 in the form of a check payable to the BIA. Upon the BIA's delivery to BN of the approved, executed easement, BN shall immediately deliver to Allan Olson, or his successor as named by the Tribe ("Tribal Attorney"), as attorney for the Tribe, a check payable to the Tribe in the sum of \$120,000. The sum of these checks, \$125,000, shall reflect payment in full for all rent, damages and compensation of any sort, due for past occupancy of the right-of-way from date of construction in 1889 until January 1, 1989. The BIA and the Tribal attorney shall hold said \$125,000, which they are to deliver or return as provided in paragraphs 9 and 10 below.

(b). BN will pay an annual rental ("rental") commencing on the 1st day of January 1989, totaling a minimum of TEN THOUSAND DOLLARS (\$10,000) per year, and a like or adjusted sum on each January 1st thereafter during the term of the Right-of-Way Easement granted under this Agreement.

1. CPI-U Adjustment. On each January 1st after January 1, 1989, the rental shall be increased by a percentage equal to the percentage change in the All Items Consumer Price Index of the United States Department of Labor, Bureau of Labor Statistics for All Urban Consumers in the Seattle-Tacoma, Washington area ("CPI-U") based on the 1982-1984 base = 100 (or, if not available, the most nearly comparable index), from the CPI-U used to calculate the previous year's adjustment to the most recent calculation of the CPI-U. The annual rental

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commencing on January 1, 1989 is based on the CPI-U for the first half of 1988 (CPI-U = 111.9).

ii. Appraisal Adjustment. In addition to the annual CPI-U adjustments, described in subparagraph (b)(1) of this paragraph, the rental shall be increased at five (5) year intervals to reflect changes in property values such as, but not limited to, changes in the real estate market, the acquisition of applicable permits for the development of nearby property, proposed or actual marina construction or other land development near said right-of-way. The rental shall be increased to an amount equal to TWELVE PERCENT (12%) of the sum of the "right-of-way value" which is the value of the property subject to the right-of-way, and the "remainder damage" which is the severance damage to Reservation lands north of State Highway 20 as determined by normal real estate appraisal methods considering the highest and best use of such adjacent lands.

Development proposed for the property north and south of the Railroad is anticipated to include several separate and distinct land uses including a marina boat basin (with approximately 800 boat slips) to the north, upland commercial development to the south, and in the event the "South Lagoon" (adjacent to and south of the Railroad) is developed, an additional marina basin providing additional boat slip moorage facilities. The Railroad right-of-way is located between and adjacent to these land areas and uses. Acreage values used to calculate the right-of-way value shall be based on the use and

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development of lands either to the north or south of the Railroad, whichever has the higher appraised value.

iii. Proposal. Either the Tribe or BN may initiate an appraisal adjustment by a written proposal forwarded by U.S. Mail prior to end of the five (5) year increment or any time thereafter until an appraisal adjustment is made and a new 5 year increment is commenced. The Tribe may initiate an appraisal adjustment at any time after receiving all necessary federal permits for the development of all or part of the Reservation lands north of State Highway 20. The Tribe may also initiate an appraisal adjustment under paragraph 7.c. of the Right-of-Way Easement. If a party chooses to initiate an appraisal adjustment before the last six months of any five (5) year period, a new five (5) year increment will begin when the new rental begins.

If the parties are unable to agree upon a rental adjustment, such adjustment shall be determined in accordance with the Commercial Arbitration Rules of the American Arbitration Association and the provisions set forth herein by binding arbitration. Arbitration shall be initiated when one party, or the other, nominates an arbitrator in writing, and requests that the other party nominate an arbitrator. The other party shall nominate an arbitrator within 20 days of receipt of the written notice. Both arbitrators must be residents of the State of Washington and shall not be subject to disqualification. Thereafter, both arbitrators nominated shall meet and select a neutral third arbitrator. If they are unable to agree, a third

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arbitrator will be selected under applicable rules of the American Arbitration Association. Arbitration proceedings shall be conducted informally with each party presenting evidence as may be appropriate to its proposed annual rental payment. The arbitration award shall not be subject to judicial review or other appeal unless it be determined that the arbitrators have ignored, or failed to enforce, any of the provisions of this Settlement Agreement.

iv. South Lagoon. In the event that the Tribe determines that it would be profitable to construct additional marina facilities in the area described as the South Lagoon on attached Exhibit A, and in the further event the Tribe secures the necessary Federal permits for such construction, the BN shall either provide a fifty (50) foot wide boat access at a location acceptable to the Tribe to said Lagoon with an appropriate bridge, which will admit at tide levels of mean higher high water boats with masts sixty (60) feet high, or as damage to that portion of remaining lands, compensate the Tribe for net income loss attributable to the inability to construct the South Lagoon portion of the marina. Such loss shall be compensated on the basis of expected rental or other income less costs of planning, development, construction, management, and operation.

3. Stipulated Order of Dismissal. At the time of execution of this Settlement Agreement, the Tribe and BN shall cause their attorneys to execute, and shall request that the attorney for the United States execute, a stipulation in the form

attached hereto as Exhibit "B". The Tribal attorney shall hold said executed stipulation for the Tribe and shall deliver it as provided in paragraph 10 below.

4. **Easement.** It is the intention of the Tribe and BN that BN be granted a forty (40) year easement covering the operation, maintenance and replacement of BN's existing railroad and all facilities ancillary thereto across all lands within the Swinomish Indian Reservation ("the Reservation") and in which the Tribe or the BIA have or claim to have an ownership or beneficial interest.

BN shall have the option to extend the term of this easement and any additional easements for two successive periods of twenty years each. The manner of exercise of the options and the consideration to be paid are set out in the easement that is Attachment "A" to Exhibit "A".

5. **Tribal Resolution.** Attached hereto as Exhibit "C" is a certified copy of a resolution of the Tribe authorizing this Settlement Agreement.

6. **BN Resolution.** Attached hereto as Exhibit "D" is a certified copy of a corporate resolution of BN authorizing this Settlement Agreement.

7. **BN Release As To The Tribe.** For the valuable consideration in the form provided by the terms of this Settlement Agreement, upon completion of each of the undertakings required by paragraphs 1 through 3 and 9 hereof and unless this Agreement is voided pursuant to paragraph 10 hereof, BN hereby

releases and forever discharges the Tribe and its predecessors, successors, assigns, or related or affiliated persons or entities, its and their officers, agents, representatives, employees, insurers, and sureties, jointly and severally, from any and all liability, claims, demands, damages, debts, dues, accounts, cause or causes of action of whatever kind or nature, whether for cash, securities, property or otherwise, which exist by reason of or which are in any way related to or arise out of the location by BN of its pipeline across and through lands claimed by the United States and the Tribe or out of the claims asserted in the Actions, whether known or unknown, that BN now has or has had; provided that the obligations undertaken by each party to this Settlement Agreement shall survive. This release shall not be effective unless and until the parties have completed their respective undertakings pursuant to paragraphs 1 through 3 and 9 hereof or if this Agreement is voided pursuant to paragraph 10 hereof.

8. Tribal Release As To BN. For the valuable consideration in the form provided by the terms of this Settlement Agreement, upon completion of each of the undertakings required by paragraphs 1 through 3 and 9 hereof and unless this Agreement is voided pursuant to paragraph 10 hereof, the Tribe hereby releases and forever discharges BN and its predecessors, successors, assigns, or related or affiliated persons or entities, its and their officers, agents, representatives, employees, insurers, and sureties, jointly and severally, from

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any and all liability, claims, demands, damages, debts, dues, accounts, cause or causes of action of whatever kind or nature, whether for cash, securities, property or otherwise, which exist by reason of or which are in any way related to or arise out of the location by BN of its railroad across and through lands claimed by the United States and the Tribe or out of the claims asserted in the Actions, whether known or unknown, that either party now has or has had; provided that the obligations undertaken by each party in this Settlement Agreement shall survive. This release shall not be effective unless and until the parties have completed their respective undertakings pursuant to paragraphs 1 through 3 and 9 hereof or if this Agreement is voided pursuant to paragraph 10 hereof.

(a). **Releases As Between The United States And BN.** The United States of America and BN in order to settle those matters in dispute between them in the Actions agree as follows:

BN Release As To United States. For the valuable consideration in the form provided by the terms of this Settlement Agreement, upon completion of each of the undertakings required by paragraphs 1 through 3 and 9 hereof and unless this Agreement is voided pursuant to paragraph 10 hereof, BN hereby releases and forever discharges the United States of America and its predecessors, successors, assigns, or related or affiliated persons or entities, its and their officers, agents representatives, employees, insurers, and sureties, jointly and severally, from any and all liability, claims, demands, damages,

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debts, dues, accounts, cause or causes of action of whatever kind or nature, whether for cash, securities, property or otherwise, which exist by reason of or which are in any way related to the claims asserted in the Actions, whether known or unknown, that BN now has or has had or may hereafter have; provided that the obligations undertaken by each party to this Settlement Agreement shall survive. This release shall not be effective unless and until the parties have completed their respective undertakings pursuant to paragraphs 1 through 3 and 9 hereof or if this Agreement is voided pursuant to paragraph 10 hereof.

United States Release As To BN. For the valuable consideration in the form provided by the terms of this Settlement Agreement, upon completion of each of the undertakings required by paragraphs 1 through 3 and 9 hereof and unless this Agreement is voided pursuant to paragraph 10 hereof, the United States of America hereby releases and forever discharges BN and its predecessors, successors, assigns, or related or affiliated persons or entities, its and their officers, agents representatives, employees, insurers, and sureties, jointly and severally, from any and all liability, claims, demands, damages, debts, dues, accounts, cause or causes of action of whatever kind or nature, whether for cash, securities, property or otherwise, which exist by reason of or which are in any way related to the claims asserted in the Actions, whether known or unknown, that BN now has or has had or may hereafter have; provided that the obligations undertaken by each party to this Settlement Agreement

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shall survive. This release shall not be effective unless and until the parties have completed their respective undertakings pursuant to paragraphs 1 through 3 and 9 hereof or if this Agreement is voided pursuant to paragraph 10 hereof.

9. **Execution and Delivery of Easement.** Upon the BIA's delivery to BN of the approved and executed easement in the form attached as Attachment "A" to Exhibit "A" to this Agreement, the Tribal Attorney shall deliver to BN the executed stipulated Order of dismissal ("Order") referred to in paragraph 3 in exchange for the check for \$120,000 referred to in paragraph 2. BN shall forthwith file said stipulation with the United States District Court with a request that the Order contemplated by the stipulation be entered forthwith. Upon being advised by the Court that said Order has been entered, the Tribal attorney shall deliver the \$120,000 check provided for in paragraph 2 above to the Tribe, and BN shall record the easement.

10. **Failure to Complete Undertakings.** Should the BIA fail or refuse to execute the right-of-way easement in the form attached as Attachment "A" to Exhibit "A" to this Agreement, or should the attorney for the United States fail or refuse to execute the stipulated Order of dismissal ("Order") attached hereto as Exhibit "B", or should the United States District Court fail or refuse to enter a Order substantially similar in terms and effect to the Order provided for in said stipulation, then in any such event this Settlement Agreement, upon 30 days written notice by any party sent by certified mail to the addresses

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provided below, shall be null and void and all settlement funds will be forthwith returned to BN and all executed documents attached hereto will be forthwith returned to the party executing the same.

11. **Insurance.** BN agrees to maintain reasonable limits of insurance to protect itself against liability for damage resulting from the operation of the railroad, and if requested by the Tribe, BN will advise the Tribe of the amount of the insurance coverage then in effect.

12. **Integration, Governing Laws, Miscellaneous.** This Settlement Agreement shall be governed by federal law. The terms of this Agreement, (excluding section subtitles) are contractual and not mere recitals. No promise or inducement has been offered except as herein set forth. This Agreement has been executed following advise of counsel and without reliance upon any representation or statement by the persons released or their representatives other than as set forth herein. It is intended as and reflects the complete agreement of the parties and no modification hereof shall be effective unless made in writing duly executed by the parties. This Settlement Agreement shall be binding upon and inure to the benefit of the parties and their respective legal representatives, successors and assigns.

Nothing in this Settlement Agreement or the associated Right-of-Way Easement shall supersede any federal law or regulation as they now exist or as they may be amended or changed from time to time. Specifically, the annual rental shall not be

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less than that required by federal law in effect at any time during BN's occupancy of the right-of-way. BN shall comply with all applicable federal laws and regulations pertaining to BN's activities within the Swinomish Reservation.

13. Notice. Any notice (other than process) required or contemplated by the terms of the Settlement Agreement shall be sent to the following addresses:

(a) Swinomish Tribal Community:

Tribal Attorney
Swinomish Indian Tribal Community
P.O. Box 817 - 950 Moorage Way
LaConner, Washington 98257

(b) United States of America:

Department of Interior
Bureau of Indian Affairs
Puget Sound Agency
Federal Building
Everett, Washington 98201

(c) BN:

Burlington Northern Railroad Company
General Manager
2200 First Interstate Center
999 Third Avenue
Seattle, WA 98104

Any party may by written notice to other parties change the address to which subsequent notice shall be sent.

14. Nothing in the Settlement Agreement shall waive, affect or bar any claim or defense except those specifically covered by the Settlement Agreement.

DATED this 24th day of September, 198⁹⁰5.

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UNITED STATES OF AMERICA

Charles E. O'Connell, Jr.

BURLINGTON NORTHERN RAILROAD
COMPANY

BY D. A. Francis

Its VICE PRESIDENT, NORTHERN REGION

The SWINOMISH INDIAN TRIBAL
COMMUNITY hereby consents to
the foregoing Right-of-Way
Easement this 24th day, of
September, 1980.

SWINOMISH INDIAN TRIBAL COMMUNITY

BY Robert J. J.

Its CHAIRMAN

Exhibit No. 29

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ORIGINAL
3701617

RIGHT-OF-WAY EASEMENT - BURLINGTON NORTHERN

This Right-of-Way Easement is between the United States of America, the Swinomish Indian Tribal Community and Burlington Northern Railroad Company, a Delaware corporation.

R E C I T A L S

A. Burlington Northern ("BN"), the Swinomish Indian Tribal Community (the "Tribe"), and the United States have been engaged in a dispute concerning whether or not the existing line of railroad of BN passes through lands forming part of the Swinomish Indian Reservation held in trust by the United States for the benefit of the Tribe, without appropriate permission or easements having been granted to BN.

B. The dispute has taken the form of a lawsuit entitled: Swinomish Tribal Community v. Burlington Northern Railroad, et al., United States District Court for the Western District of Washington, Cause Number: C76-550V (the "Action").

C. Burlington Northern, the Tribe and the United States have now settled the dispute among them pursuant to the Settlement Agreement dated September 24, 1990 (the "Settlement Agreement"). The Settlement Agreement provides, among other things, for the dismissal of the Action by and against BN and the granting of a forty (40) year right-of-way easement with two twenty (20) year options to Burlington Northern for its existing railroad, or successor methods provided by paragraph 6 herein, over and across any and all lands of the Tribe held in trust for its benefit by the United States that such railroad crosses.

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D. This right-of-way easement is intended to grant and convey to BN, despite any questions of survey, or any uncertainty as to the location of (a) the boundaries of the Swinomish Indian Reservation, and (b) any lands within the Reservation (whether tidelands, submerged lands, or uplands) held in trust by the United States for the benefit of the Tribe, a forty (40) year easement with two twenty (20) options over any and all lands comprising part of the Swinomish Indian Reservation and held in trust by the United States for the benefit of the Tribe over which the existing railway of BN passes.

NOW THEREFORE, in consideration of the sum deposited with the application for this right-of-way easement and the agreement and covenants contained in said application and in this agreement, the United States hereby grants and conveys to BN, under authority of the Act of February 5, 1948 (62 Stat. 17; 25 U.S.C. 323-328) and the regulations in 25 C.F.R. 169 promulgated thereunder, a right-of-way easement as follows:

1. Legal Description: The easement hereby conveyed shall be sixty (60) feet in width, being thirty (30) feet on the North Side and thirty (30) feet on the South Side of the center line described in Exhibit "A" hereto, located in Skagit County, Washington.

2. Term: The term of this easement is forty (40) years from the date hereof.

3. Payment: (a). As partial consideration for this Settlement, BN will deposit with the BIA along with said

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application the sum of \$5,000 in the form of a check payable to the BIA. Upon the BIA's delivery to BN of the approved, executed easement, BN shall immediately deliver to Allan Olson, or his successor as named by the Tribe ("Tribal Attorney"), as attorney for the Tribe, a check payable to the Tribe in the sum of \$120,000. The sum of these checks, \$125,000, shall reflect payment in full for all rent, damages and compensation of any sort, due for past occupancy of the right-of-way from date of construction in 1989 until January 1, 1989. The BIA and the Tribal attorney shall hold said \$125,000, which they are to deliver or return as provided in paragraphs 9 and 10 of the Settlement Agreement.

(b). Pay an annual rental ("rental") commencing on the 1st day of January 1989, totaling a minimum of TEN THOUSAND DOLLARS (\$10,000) per year, and a like or adjusted sum on each January 1st thereafter during the term of the Right-of-Way Easement granted under this Agreement.

i. CPI-U Adjustment. On each January 1st after January 1, 1989, the rental shall be increased by a percentage equal to the percentage change in the All Items Consumer Price Index of the United States Department of Labor, Bureau of Labor Statistics for All Urban Consumers in the Seattle-Tacoma, Washington area ("CPI-U") based on the 1982-1984 base = 100 (or, if not available, the most nearly comparable index), from the CPI-U used to calculate the previous year's adjustment to the most recent calculation of the CPI-U. The annual rental

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commencing on January 1, 1989 is based on the CPI-U for the first half of 1988 (CPI-U = 111.9).

ii. Appraisal Adjustment. In addition to the annual CPI-U adjustments, described in subparagraph (b)(i) of this paragraph, the rental shall be increased at five (5) year intervals to reflect changes in property values such as, but not limited to, changes in the real estate market, the acquisition of applicable permits for the development of nearby property, proposed or actual marina construction or other land development near said right-of-way. The rental shall be increased to an amount equal to TWELVE PERCENT (12%) of the sum of the "right-of-way value" of the property which is the value of the property subject to the right-of-way, and the "remainder damage" which is the severance damage to Reservation lands north of State Highway 20 as determined by normal real estate appraisal methods considering the highest and best use of such adjacent lands.

Development proposed for the property north and south of the Railroad is anticipated to include several separate and distinct land uses including a marina boat basin (with approximately 800 boat slips) to the north, upland commercial development to the south, and in the event the "South Lagoon" (adjacent to and south of the Railroad) is developed, an additional marina basin providing additional boat slip moorage facilities. The Railroad right-of-way is located between and adjacent to these land areas and uses. Acreage values used to calculate the right-of-way value shall be based on the use and

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development of lands either to the north or south of the Railroad, whichever has the higher appraised value.

iii. Proposal. Either the Tribe or BN may initiate an appraisal adjustment by a written proposal forwarded by U.S. Mail prior to the end of the five (5) year increment or any time thereafter until an appraisal adjustment is made and a new 5 year increment is commenced. The Tribe may initiate an appraisal adjustment at any time after receiving all necessary federal permits for the development of all or part of the Reservation lands north of State Highway 20. The Tribe may also initiate an appraisal adjustment under paragraph 7.c. of this Right-of-Way Easement. If a party chooses to initiate an appraisal adjustment before the last six months of any five (5) year period, a new five (5) year increment will begin when the new rental begins.

If the parties are unable to agree upon a rental adjustment, such adjustment shall be determined in accordance with the Commercial Arbitration Rules of the American Arbitration Association and the provisions set forth herein by binding arbitration. Arbitration shall be initiated when one party, or the other, nominates an arbitrator in writing, and requests that the other party nominate an arbitrator. The other party shall nominate an arbitrator within 20 days of receipt of the written notice. Both arbitrators must be residents of the State of Washington and shall not be subject to disqualification. Thereafter, both arbitrators nominated shall meet and select a neutral third arbitrator. If they are unable to agree, a third

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arbitrator will be selected under applicable rules of the American Arbitration Association. Arbitration proceedings shall be conducted informally with each party presenting evidence as may be appropriate to its proposed annual rental payment. The arbitration award shall not be subject to judicial review or other appeal unless it be determined that the arbitrators have ignored, or failed to enforce, any of the provisions of this Settlement Agreement.

iv. South Lagoon. In the event that the Tribe determines that it would be profitable to construct additional marina facilities in the area described as the South Lagoon on attached Exhibit A, and in the further event the Tribe secures the necessary Federal permits for such construction, the BN shall either provide a fifty (50) foot wide boat access at a location acceptable to the Tribe to said Lagoon with an appropriate bridge, which will admit at tide levels of mean higher high water boats with masts sixty (60) feet high, or as damage to that portion of remaining lands, compensate the Tribe for net income loss attributable to the inability to construct the South Lagoon portion of the marina. Such loss shall be compensated on the basis of expected rental or other income less costs of planning, development, construction, management, and operation.

4. Holdover: In the event that Burlington Northern fails to surrender and vacate the lands covered by this agreement, pursuant to the provisions herein, after expiration of either the

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original term of this right of way or of any extended term, except pursuant to an option to extend, Burlington Northern shall pay to the Tribe a monthly rent in an amount equal to one-twelfth (1/12th) of the yearly rental in effect at the expiration of the preceding term adjusted upward but not downward by the percentage change in the CPI-U, as defined in paragraph 3(b), from the CPI-U in effect at the time of the most recent rental adjustment to the most recent calculation of the CPI-U prior to the date the payment is due. Payments under this paragraph will not be less than \$1000 a month. The payment shall be due monthly on the last day of every month following the expiration of the preceding term. .

In any proceeding brought by the Tribe to evict Burlington Northern and/or seek damages for Burlington Northern's failure to surrender, the Tribe shall be entitled to payment for the holdover period in an amount equal to the fair rental value of the right of way so used by Burlington Northern; provided that such fair rental value shall not be less than the monthly payments provided for in the preceding sub-paragraph. Should Burlington Northern refuse or fail to make said monthly payments to the Tribe, the Tribe shall be entitled to apply to any court of competent jurisdiction for injunctive relief to compel such payments and shall be entitled to reasonable attorney fees therefor.

5. Options: In addition to the forty (40) year term, BN shall have an option to extend such term twenty (20) years. Each

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option may be exercised by giving written notice to the United States and the Tribe as provided in paragraph 9 below; no later than thirty (30) days prior to the expiration of the prior term.

6. Rights of BN: Under this easement BN, its successors and assigns: (a) shall have the right to maintain, operate, inspect, repair, protect, and remove the existing line of railroad and to replace the existing line with another line for the transportation of general commodities by railroad or other comparable successor methods of transportation; to keep the right-of-way easement clear of underbrush and trees; to have the right of ingress and egress to and from the same for the aforesaid purposes; to construct and reconstruct bridges, culverts and other facilities necessary for the operation of the railroad; said right-of-way easements and privileges herein granted being assignable or transferable; and (b) shall have an exclusive easement across and over said right-of-way easement and no further easements maybe granted on said strip except as provided in paragraph 7 following. Upon discontinuance of the right-of-way granted under this Agreement, BN or its successors, may at its option, leave the railroad or other installations provided for herein on the ground or may pick up and remove said railroad.

7. Rights of the United States and the Tribe:

a. The United States and the Tribe may permit the construction, operation, repair and maintenance of utility lines, streets, or roadways under, across or along said

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right-of-way easement. Should the United States or the Tribe wish to place or alter any body of water over the right-of-way easement, it will first present to BN, for review and comment, detailed plans and drawings of any proposal. If any such crossing or changes in any body of water are made in the future, it is agreed that the United States and the Tribe will reimburse, or cause BN to be reimbursed, for all of the reasonable and necessary costs for labor and materials incurred by BN in altering, or protecting, said railroad from said activities. Should the United States or the Tribes cause any damages to the railroad, they shall indemnify and hold BN harmless from any and all actual damages caused to said railroad by the United States or the Tribe. It is agreed that neither the United States nor the Tribe will permit any permanent buildings, or other structures, trees, underbrush, or any other unreasonable obstructions, to be placed upon the right-of-way easement without BN's consent. Should the United States or the Tribe wish to have the railroad relocated within the Reservation, BN will relocate the railroad provided the United States or the Tribe provides or secures for BN an alternate, feasible right-of-way with all necessary permits that gives BN all the rights it enjoys under this right-of-way easement at no additional cost to BN and with no interruption of service and provided further that the United States or the Tribe pays all costs directly, or indirectly, associated with said relocation.

b. Burlington Northern will keep the Tribe informed as to

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the nature and identity of all cargo transported by Burlington Northern across the Reservation. Initially, Burlington Northern shall prepare a summary of all such commodities expected to cross the Reservation and the quantities of such commodities. Thereafter, the disclosure shall be updated periodically as different products, or commodities, are added or deleted. Such updates shall occur at least annually. The disclosure updates shall identify any previously shipped cargo that is different in nature, identity or quantity from the cargo described in previous disclosures. Burlington Northern will comply strictly with all Federal and State Regulations regarding classifying, packaging and handling of rail cars so as to provide the least risk and danger to persons, property and the natural environment of the Reservation.

c. Burlington Northern agrees that, unless otherwise agreed in writing, only one eastern bound train, and one western bound train, (of twenty-five (25) cars or less) shall cross the Reservation each day. The number of trains and cars shall not be increased unless required by shipper needs. The Tribe agrees not to arbitrarily withhold permission to increase the number of trains or cars when necessary to meet shipper needs. It is understood and agreed that if the number of crossings or the number of cars is increased, the annual rental will be subject to adjustment in accordance with paragraph 3(b)iii of this Right-of-Way Easement and paragraph 2(b)iii of the Settlement Agreement. Train speeds over Reservation grade crossings shall not exceed

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ten (10) miles per hour.

d. Burlington Northern will cooperate fully with the Tribe in providing appropriate landscaping on either side of Burlington Northern's railroad tracks in order to make Burlington Northern's facilities compatible with the Tribe's development of adjacent lands. It is understood and agreed that Burlington Northern requires an area clear of brush and flammables to a distance of at least 15 feet on either side of the center line of the railroad.

8. Liability of BN: BN will protect, indemnify and hold harmless the United States and the Tribe against any loss, damage or expense that may be incurred, suffered or had by either of them, resulting from the death or injury to any person or persons or any loss, damage or injury to property, from any intentional or negligent acts or omissions of BN its agents, servants or employees.

9. Notices: Any notices provided for in this agreement shall be given as follows:

(a) Swinomish Tribal Community:

Tribal Attorney
Swinomish Indian Tribal Community
P.O. Box 817 - 950 Moorage Way
LaConner, Washington 98257

(b) United States of America:

Department of Interior
Bureau of Indian Affairs
Puget Sound Agency
Federal Building
Everett, Washington 98201

(c) BN:

Burlington Northern Railroad Company
General Manager
2200 First Interstate Center
999 Third Avenue
Seattle, WA 98104

Any party may by written notice to other parties change the address to which subsequent notice shall be sent.

DATED this 19 day of July, 1999.

UNITED STATES OF AMERICA

RECEIVED ON FILED
FOR TITLON APPS.
PUNJAB AREA OFFICE

122 731

AUG 13 PM 53

William A. Black
for William A. Black, Superintendent
BURLINGTON NORTHERN RAILROAD
COMPANY

By *[Signature]*
Its _____

GRAND COUNTY REALTY
TITLES & RECORDS
SECTION

-122 731

The SWINOMISH INDIAN TRIBAL
COMMUNITY hereby consents to
the foregoing Right-of-Way
Easement this 24th day, of
September, 1980.

SWINOMISH INDIAN TRIBAL COMMUNITY

By Robert J. S.
Its CHAIRMAN

STATE OF WASHINGTON)
COUNTY OF Wash)

ss.

122 731

On this 19 day of July, 1991, before me personally appeared Donald Carter, of the UNITED STATES OF AMERICA DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, to me known to be the individual who executed this within instrument and acknowledged that he signed the same as his free and voluntary act and deed for the uses and purposes herein mentioned.

IN WITNESS WHEREOF I have hereunto set my hand and affixed by official seal the day and year first above written.

P. Teresa Melton
NOTARY PUBLIC in and for the State
of Washington, residing at Swinomish
My commission expires 8-20-91

[SEAL]

STATE OF WASHINGTON)
COUNTY OF SKAGIT)

ss.

On this 24th day of September, 1990, before me personally appeared Robert Joe, Sr., to me known to be the CHAIRMAN of the SWINOMISH TRIBAL COMMUNITY that executed this within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument.

IN WITNESS WHEREOF I have hereunto set my hand and affixed by official seal the day and year first above written.

Alla Olson
NOTARY PUBLIC in and for the State
of Washington, residing at LACONNER WA
My commission expires 4-6-94

[SEAL]

STATE OF WASHINGTON)
)
COUNTY OF KING)

122 731

ss.

On this 20th day of NOVEMBER, 1989, before me personally appeared J.H. ILKKA, of BURLINGTON NORTHERN RAILROAD COMPANY, the corporation that executed this within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument and that seal affixed is the corporate seal of said corporation.

IN WITNESS WHEREOF I have hereunto set my hand and affixed by official seal the day and year first above written.



NOTARY PUBLIC in and for the State of Washington, residing at SEATTLE, WA

My commission expires 1-9-1993



APPLICATION FOR RIGHT-OF-WAY

122 731

Date: July 2, 1990

BURLINGTON NORTHERN RAILROAD COMPANY (applicant) hereby makes application pursuant to the Act of February 5, 1948 (62 Stat. 17, 18; 25 USC 323-328), and in accordance with Department Regulations 25 CFR 169, as amended, for a right-of-way easement for railroad purposes crossing certain lands in Skagit County, Washington claimed by the Swinomish Tribal Community. The location of said right-of-way and its extent are more particularly shown and delineated on the accompanying map which has been prepared in compliance with 25 CFR 169.6 and by this reference is made a part hereof. Burlington Northern Railroad Company agrees to comply with the following stipulations in the event the right-of-way herein applied for is granted.

- (a) To construct and maintain the right-of-way in a workman-like manner.
- (b) To pay promptly all damages and compensation, in addition to the deposit made pursuant to 25 CFR 169.14 determined by the Secretary to be due the landowners and authorized users and occupants of the land on account of the survey, granting construction and maintenance of the right-of-way.
- (c) To indemnify the landowners and authorized users and occupants against any liability for loss of life, personal injury and property damage arising from the construction, maintenance, occupancy or use of the lands by the applicant, his employees, contractors and their employees, or subcontractors and their employees.
- (d) To restore the lands as nearly as may be possible to their original condition upon the completion of construction to the extent compatible with the purpose for which the right-of-way was granted.
- (e) To clear and keep the lands within the right-of-way to the extent compatible with the purpose of the right-of-way; and to dispose of all vegetative and other material cut, uprooted, or otherwise accumulated during construction and maintenance of the project.
- (f) To take soil and resource conservation and protection measures, including weed control, on the land covered by the right-of-way.

SITC000005533

- (g) To do everything reasonably within its power to prevent and suppress fires on or near the lands to be occupied under the right-of-way.
- (h) To build and repair such roads, fences, and trails as may be destroyed or injured by construction work and to build and maintain necessary and suitable crossings for all roads and trails that interest the works constructed, maintained, or operated under the right-of-way.
- (i) That upon revocation or termination of the right-of-way, the applicant shall, so far as is reasonably possible, restore the land to its original condition.
- (j) To at all times keep the Secretary informed of its address, and in case of address of its principal place of business and of the names and addresses of its principal officers.
- (k) That the applicant will not interfere with the use of the lands by or under the authority of the landowners for any purpose not inconsistent with the primary purpose for which the right-of-way is granted.
- (l) If at anytime, there is determined to be a conflict between the above stipulations and the terms of that Settlement Agreement between Swinomish-Burlington Northern, dated November 22, 1989, negotiated between the Swinomish Tribal Community, the United States and Burlington Northern, and which is attached hereto and incorporated herein by express reference, the terms of that agreement shall in all circumstances control.



(Applicant)

DIVISION GENERAL MANAGER

BURLINGTON NORTHERN RAILROAD COMPANY

(Address)

2200 First Interstate Center

Seattle, WA, 98104 - 1105

CONFIDENTIAL

SETTLEMENT AGREEMENT
SWINOMISH - BURLINGTON NORTHERN 122 731

The Swinomish Tribal Community (hereinafter "Tribe") as the duly constituted governing body of the Swinomish Indian Reservation, the United States Department of the Interior, Bureau of Indian Affairs ("the BIA"), and Burlington Northern Railroad Company (hereinafter "Burlington Northern" or "BN"), in order to settle those matters in dispute between the Tribe and BIA and Burlington Northern in the consolidated actions entitled Burlington Northern Railroad Company vs. Swinomish Tribal Community et al., Western District of Washington cause C76-550V, and to resolve other matters between Burlington Northern and the Tribe and BIA, agree as follows:

1. Application for Easement. BN will submit to the BIA an application for a right-of-way easement in the form attached hereto as Exhibit "A". The Tribe shall immediately upon execution of this Settlement Agreement advise the BIA in writing of the Tribe's consent to the granting to BN by the BIA of the right-of-way easement attached to said application as Attachment "A". Both BN and the Tribe shall take whatever other steps are reasonably necessary promptly to obtain the approval by the BIA of said right-of-way easement, the approval of the attorney for the United States of this Settlement Agreement and the stipulation referred to in paragraph 3, and the full consummation of this agreement.

2. Payment. (a). As partial consideration for this Settlement, BN will deposit with the BIA along with said

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application the sum of \$5,000 in the form of a check payable to the BIA. Upon the BIA's delivery to BN of the approved, executed easement, BN shall immediately deliver to Allan Olson, or his successor as named by the Tribe ("Tribal Attorney"), as attorney for the Tribe, a check payable to the Tribe in the sum of \$120,000. The sum of these checks, \$125,000, shall reflect payment in full for all rent, damages and compensation of any sort, due for past occupancy of the right-of-way from date of construction in 1889 until January 1, 1989. The BIA and the Tribal attorney shall hold said \$125,000, which they are to deliver or return as provided in paragraphs 9 and 10 below.

(b). BN will pay an annual rental ("rental") commencing on the 1st day of January 1989, totaling a minimum of TEN THOUSAND DOLLARS (\$10,000) per year, and a like or adjusted sum on each January 1st thereafter during the term of the Right-of-Way Easement granted under this Agreement.

1. CPI-U Adjustment. On each January 1st after January 1, 1989, the rental shall be increased by a percentage equal to the percentage change in the All Items Consumer Price Index of the United States Department of Labor, Bureau of Labor Statistics for All Urban Consumers in the Seattle-Tacoma, Washington area ("CPI-U") based on the 1982-1984 base = 100 (or, if not available, the most nearly comparable index), from the CPI-U used to calculate the previous year's adjustment to the most recent calculation of the CPI-U. The annual rental

122 731

commencing on January 1, 1989 is based on the CPI-U for the first half of 1988 (CPI-U = 111.9).

ii. Appraisal Adjustment. In addition to the annual CPI-U adjustments, described in subparagraph (b)(i) of this paragraph, the rental shall be increased at five (5) year intervals to reflect changes in property values such as, but not limited to, changes in the real estate market, the acquisition of applicable permits for the development of nearby property, proposed or actual marina construction or other land development near said right-of-way. The rental shall be increased to an amount equal to TWELVE PERCENT (12%) of the sum of the "right-of-way value" which is the value of the property subject to the right-of-way, and the "remainder damage" which is the severance damage to Reservation lands north of State Highway 20 as determined by normal real estate appraisal methods considering the highest and best use of such adjacent lands.

Development proposed for the property north and south of the Railroad is anticipated to include several separate and distinct land uses including a marina boat basin (with approximately 800 boat slips) to the north, upland commercial development to the south, and in the event the "South Lagoon" (adjacent to and south of the Railroad) is developed, an additional marina basin providing additional boat slip moorage facilities. The Railroad right-of-way is located between and adjacent to these land areas and uses. Acreage values used to calculate the right-of-way value shall be based on the use and

122 731

development of lands either to the north or south of the Railroad, whichever has the higher appraised value.

iii. Proposal. Either the Tribe or BN may initiate an appraisal adjustment by a written proposal forwarded by U.S. Mail prior to end of the five (5) year increment or any time thereafter until an appraisal adjustment is made and a new 5 year increment is commenced. The Tribe may initiate an appraisal adjustment at any time after receiving all necessary federal permits for the development of all or part of the Reservation lands north of State Highway 20. The Tribe may also initiate an appraisal adjustment under paragraph 7.c. of the Right-of-Way Easement. If a party chooses to initiate an appraisal adjustment before the last six months of any five (5) year period, a new five (5) year increment will begin when the new rental begins.

If the parties are unable to agree upon a rental adjustment, such adjustment shall be determined in accordance with the Commercial Arbitration Rules of the American Arbitration Association and the provisions set forth herein by binding arbitration. Arbitration shall be initiated when one party, or the other, nominates an arbitrator in writing, and requests that the other party nominate an arbitrator. The other party shall nominate an arbitrator within 20 days of receipt of the written notice. Both arbitrators must be residents of the State of Washington and shall not be subject to disqualification. Thereafter, both arbitrators nominated shall meet and select a neutral third arbitrator. If they are unable to agree, a third

122 731

arbitrator will be selected under applicable rules of the American Arbitration Association. Arbitration proceedings shall be conducted informally with each party presenting evidence as may be appropriate to its proposed annual rental payment. The arbitration award shall not be subject to judicial review or other appeal unless it be determined that the arbitrators have ignored, or failed to enforce, any of the provisions of this Settlement Agreement.

iv. South Lagoon. In the event that the Tribe determines that it would be profitable to construct additional marina facilities in the area described as the South Lagoon on attached Exhibit A, and in the further event the Tribe secures the necessary Federal permits for such construction, the BN shall either provide a fifty (50) foot wide boat access at a location acceptable to the Tribe to said Lagoon with an appropriate bridge, which will admit at tide levels of mean higher high water boats with masts sixty (60) feet high, or as damage to that portion of remaining lands, compensate the Tribe for net income loss attributable to the inability to construct the South Lagoon portion of the marina. Such loss shall be compensated on the basis of expected rental or other income less costs of planning, development, construction, management, and operation.

3. Stipulated Order of Dismissal. At the time of execution of this Settlement Agreement, the Tribe and BN shall cause their attorneys to execute, and shall request that the attorney for the United States execute, a stipulation in the form

attached hereto as Exhibit "B". The Tribal attorney shall hold said executed stipulation for the Tribe and shall deliver it as provided in paragraph 10 below.

4. **Easement.** It is the intention of the Tribe and BN that BN be granted a forty (40) year easement covering the operation, maintenance and replacement of BN's existing railroad and all facilities ancillary thereto across all lands within the Swinomish Indian Reservation ("the Reservation") and in which the Tribe or the BIA have or claim to have an ownership or beneficial interest.

BN shall have the option to extend the term of this easement and any additional easements for two successive periods of twenty years each. The manner of exercise of the options and the consideration to be paid are set out in the easement that is Attachment "A" to Exhibit "A".

5. **Tribal Resolution.** Attached hereto as Exhibit "C" is a certified copy of a resolution of the Tribe authorizing this Settlement Agreement.

6. **BN Resolution.** Attached hereto as Exhibit "D" is a certified copy of a corporate resolution of BN authorizing this Settlement Agreement.

7. **BN Release As To The Tribe.** For the valuable consideration in the form provided by the terms of this Settlement Agreement, upon completion of each of the undertakings required by paragraphs 1 through 3 and 9 hereof and unless this Agreement is voided pursuant to paragraph 10 hereof, BN hereby

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releases and forever discharges the Tribe and its predecessors, successors, assigns, or related or affiliated persons or entities, its and their officers, agents, representatives, employees, insurers, and sureties, jointly and severally, from any and all liability, claims, demands, damages, debts, dues, accounts, cause or causes of action of whatever kind or nature, whether for cash, securities, property or otherwise, which exist by reason of or which are in any way related to or arise out of the location by BN of its pipeline across and through lands claimed by the United States and the Tribe or out of the claims asserted in the Actions, whether known or unknown, that BN now has or has had; provided that the obligations undertaken by each party to this Settlement Agreement shall survive. This release shall not be effective unless and until the parties have completed their respective undertakings pursuant to paragraphs 1 through 3 and 9 hereof or if this Agreement is voided pursuant to paragraph 10 hereof.

8. **Tribal Release As To BN.** For the valuable consideration in the form provided by the terms of this Settlement Agreement, upon completion of each of the undertakings required by paragraphs 1 through 3 and 9 hereof and unless this Agreement is voided pursuant to paragraph 10 hereof, the Tribe hereby releases and forever discharges BN and its predecessors, successors, assigns, or related or affiliated persons or entities, its and their officers, agents, representatives, employees, insurers, and sureties, jointly and severally, from

122 731

any and all liability, claims, demands, damages, debts, dues, accounts, cause or causes of action of whatever kind or nature, whether for cash, securities, property or otherwise, which exist by reason of or which are in any way related to or arise out of the location by BN of its railroad across and through lands claimed by the United States and the Tribe or out of the claims asserted in the Actions, whether known or unknown, that either party now has or has had; provided that the obligations undertaken by each party in this Settlement Agreement shall survive. This release shall not be effective unless and until the parties have completed their respective undertakings pursuant to paragraphs 1 through 3 and 9 hereof or if this Agreement is voided pursuant to paragraph 10 hereof.

(a). Releases As Between The United States And BN.

The United States of America and BN in order to settle those matters in dispute between them in the Actions agree as follows:

BN Release As To United States. For the valuable consideration in the form provided by the terms of this Settlement Agreement, upon completion of each of the undertakings required by paragraphs 1 through 3 and 9 hereof and unless this Agreement is voided pursuant to paragraph 10 hereof, BN hereby releases and forever discharges the United States of America and its predecessors, successors, assigns, or related or affiliated persons or entities, its and their officers, agents representatives, employees, insurers, and sureties, jointly and severally, from any and all liability, claims, demands, damages,

122 731

debts, dues, accounts, cause or causes of action of whatever kind or nature, whether for cash, securities, property or otherwise, which exist by reason of or which are in any way related to the claims asserted in the Actions, whether known or unknown, that BN now has or has had or may hereafter have; provided that the obligations undertaken by each party to this Settlement Agreement shall survive. This release shall not be effective unless and until the parties have completed their respective undertakings pursuant to paragraphs 1 through 3 and 9 hereof or if this Agreement is voided pursuant to paragraph 10 hereof.

United States Release As To BN. For the valuable consideration in the form provided by the terms of this Settlement Agreement, upon completion of each of the undertakings required by paragraphs 1 through 3 and 9 hereof and unless this Agreement is voided pursuant to paragraph 10 hereof, the United States of America hereby releases and forever discharges BN and its predecessors, successors, assigns, or related or affiliated persons or entities, its and their officers, agents representatives, employees, insurers, and sureties, jointly and severally, from any and all liability, claims, demands, damages, debts, dues, accounts, cause or causes of action of whatever kind or nature, whether for cash, securities, property or otherwise, which exist by reason of or which are in any way related to the claims asserted in the Actions, whether known or unknown, that BN now has or has had or may hereafter have; provided that the obligations undertaken by each party to this Settlement Agreement

122 731

provided below, shall be null and void and all settlement funds will be forthwith returned to BN and all executed documents attached hereto will be forthwith returned to the party executing the same.

11. **Insurance.** BN agrees to maintain reasonable limits of insurance to protect itself against liability for damage resulting from the operation of the railroad, and if requested by the Tribe, BN will advise the Tribe of the amount of the insurance coverage then in effect.

12. **Integration, Governing Laws, Miscellaneous.** This Settlement Agreement shall be governed by federal law. The terms of this Agreement, (excluding section subtitles) are contractual and not mere recitals. No promise or inducement has been offered except as herein set forth. This Agreement has been executed following advise of counsel and without reliance upon any representation or statement by the persons released or their representatives other than as set forth herein. It is intended as and reflects the complete agreement of the parties and no modification hereof shall be effective unless made in writing duly executed by the parties. This Settlement Agreement shall be binding upon and inure to the benefit of the parties and their respective legal representatives, successors and assigns.

Nothing in this Settlement Agreement or the associated Right-of-Way Easement shall supersede any federal law or regulation as they now exist or as they may be amended or changed from time to time. Specifically, the annual rental shall not be

122 731

UNITED STATES OF AMERICA

Charles E. O'Connell, Jr.

BURLINGTON NORTHERN RAILROAD
COMPANY

By A. J. Francis

Its VICE PRESIDENT, NORTHERN REGION

The SWINOMISH INDIAN TRIBAL
COMMUNITY hereby consents to
the foregoing Right-of-Way
Easement this 24th day, of
September, 1980.

SWINOMISH INDIAN TRIBAL COMMUNITY

By Robert G. S.

Its CHAIRMAN

- 122 731

EXHIBITS:

Exhibit A - BN Application for Right-of-Way Easment
Attachment A - Tribal Consent to ROW

Exhibit B - Stipulated Order of Dismissal

Exhibit C - Tribal Resolution Authorizing Settlement

Exhibit D - BN Corp. Resolution Authorizing Settlement



U.S. Department of Justice

Environment and Natural Resources Division

HM:CEO/CONNELL:gpt
90-6-8-11

122 731

Washington, D.C. 20530

December 18, 1990

Allan Olson, Esquire
Tribal Attorney
Swinomish Tribal Community
950 Moorage Way
P.O. Box 817
LaConnor, Washington 98257

Dear Mr. Olson:

Re: United States v. Cascade Natural Gas Corp.,
et al., Civ. No. C82-1443, USDC, W.D. WA;
United States and the Swinomish Tribal
Community v. Burlington Northern, Inc.,
Trans Mountain Oil Pipeline Corp., et al.,
Civ. Nos. C76-550V, C77-117V, C78-429V,
C90-386V, USDC, W.D. WA, CONSOLIDATED.

Enclosed is the Settlement Agreement that has been executed between the Swinomish Tribal Community and Burlington Northern Railroad Company. The agreement has received the approval of the Department of the Interior's Deputy Solicitor and the endorsement of the undersigned. It is assumed that a stipulated order of dismissal will be forwarded to the undersigned.

Briefly, this settlement provides, in part, that Burlington Northern will be awarded a 40-year right-of-way easement for that part of its railroad that crosses the Swinomish Indian Reservation with two additional 20-year options in exchange for an annual rental of \$10,000 to be readjusted annually and an initial payment of \$125,000 to be paid as consideration of all past occupancy and damages from the date of construction in 1889 until January 1, 1989.

Please advise the undersigned if this office can be of further assistance with regard to this matter.

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- 2 -

122 731

Sincerely,



Charles E. O'Connell, Jr.,
Attorney
Indian Resources Section
Environment and Natural Resources
Division

Enclosures

cc: Richard Dauphinais, Esquire (w/o encl.)
Michael Mason, Esquire (w/encl.)

SITC000005548



United States Department of the Interior



OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

RIA.PN.0313

NOV 27 1991

Honorable Richard B. Stewart
Assistant Attorney General
Land and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

122 731

Attn: Charles E. O'Connell, Jr.
Indian Resources Section

Re: United States v. Cascade Natural Gas Corp.
No. C-82-1443 (W.D. Wash.)

Dear Mr. Stewart:

This responds to the request of Charles O'Connell of the Indian Resources Section for our recommendation on whether to accept the proposed settlement agreement in the above-captioned case.

Under the terms of the settlement agreement, Burlington Northern Railroad Company is awarded a 40-year right-of-way easement across the Swinomish Indian Reservation with two additional 20-year options in exchange for an initial payment of \$125,000. This amount also represents consideration for all past damages in connection with the right-of-way. The agreement also provides for an annual rental of at least \$10,000, with increases tied to the consumer price index for the Seattle-Tacoma area.

We believe the settlement agreement is fair and reasonable. The parties have solved possible jurisdictional problems with respect to disputes under this agreement by agreeing to arbitration with judicial review if necessary. Accordingly, we recommend that the United States approve the settlement.

Enclosed are the original settlement documents.

Sincerely,

Martin J. Striberg
Deputy Solicitor

Enclosure

cc: Regional Solicitor, Pacific Northwest Region

ROSENOW, HALE & JOHNSON
LAWYERS

JACK G. ROSENOW
JEFFREY F. HALE
A. CLARKE JOHNSON
JOHN D. GRAPPE
CHRISTOPHER W. KEAY
JEFFREY F. SMITH
DONNA M. MONTGOMERY
LYNNAN E. POMEROY
MARLYN W. SCHULTHEIS
PEGGY E. BRODT

MCCASPER SQUARE
3115 NORTH 30TH AVE #101
TACOMA, WASHINGTON 98403
TELEPHONE (206) 872-5323
FROM SEATTLE (888) 1757
FAX (206) 872-5413

1111 THIRD AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TELEPHONE (206) 428-4770
FAX (206) 366-7844

REPLY TO: **Seattle Office**

July 6, 1990

122 731

Mr. William A. Black
Superintendent
Bureau of Indian Affairs
Puget Sound Agency
3006 Colby Avenue
Federal Building
Everett, Washington 98201

Re: Application of Burlington Northern Railroad Company
for Right-of-Way Over Lands Claimed by the Swinomish
Tribal Community

Dear Mr. Black:

This application for right-of-way is made on behalf of Burlington Northern Railroad Company for a railway right-of-way over lands to which the Swinomish Tribal Community (the "Tribe") and the United States of America assert certain ownership and/or possessory rights. Burlington Northern makes this application pursuant to The Act of March 2, 1899 as amended by various subsequent statutes including The Act of February 5, 1948, 25 U.S.C. 323-328, and in accordance with the Department of Interior's regulations 25 CFR, Part 169.

This application arises from the proposed settlement of lengthy and long standing litigation which is currently pending before the United States District Court for the Western District of Washington. That litigation concerns whether Burlington Northern's right-of-way, which is currently in place over certain lands in Skagit County, Washington, is in trespass over Tribal lands. To resolve this dispute, the Tribe and Burlington Northern have entered into extensive negotiations resulting in an agreement upon the terms of a right-of-way easement providing, among other things, compensation to the Tribe for an easement allowing Burlington Northern's right-of-way to remain in place. Such compensation includes the value of past occupancy rights and a lease of right-of-way for the future. This application is made to

Mr. William A. Black
July 6, 1990
Page - 3 -

122 731

execution of the proposed easement document, and related settlement materials.

8. A copy of the Certified Resolution of the Swinomish Indian Senate approving the proposed right-of-way easement provided under cover of Tribal counsel's transmission letter.

9. A check, in the amount of \$5,000, to serve as an initial deposit toward the full payment of the negotiated right-of-way consideration.

10. An independent appraisal of the value of the proposed right-of-way.

In reference to certain additional items mentioned in the Regulations, Burlington Northern's right-of-way has existed at this location for over 100 years. Burlington Northern has not submitted an environmental assessment of the consequences of constructing such a new right-of-way. Further, we do not believe there are any Indian allottees that would be affected by the proposed right-of-way as the only land to which the proposed right-of-way pertains is asserted to be Tribal land. Burlington Northern and the Tribe have negotiated for, and included in the settlement agreement and easement, extensive provisions for the adjustment of rental to reflect future changes in property value and provisions for the computation of damages if the location of the railway should in the future result in income loss to the Tribe by restricting further development of its claimed lands.

We hope the foregoing allows the United States to consider and approve Burlington Northern's application. Please notify me at the address above if you require further information or clarification.

Very truly yours,

ROSENOW, HALE & JOHNSON



Lawrence D. Silvernale

LDS:kmt
Enclosures

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STIPULATION

122 731

IT IS HEREBY STIPULATED by and between the plaintiffs United States of America and the Swinomish Tribal Community and defendant Burlington Northern Railroad Company ("BN"), through their undersigned counsel, that all claims of plaintiffs herein against defendant BN and the counterclaims against plaintiffs in these consolidated actions have been settled and compromised in full and that those claims may be dismissed with prejudice and without costs to plaintiffs or BN

Dated: 7-10-91 Allan E. Olson

Allan E. Olson
Attorney for the Swinomish Tribal Community

Dated: 7-11-91 Charles E. O'Connell

Attorney for the United States of America

Dated: 6-10-91 L. D. Silvernale
Lawrence D. Silvernale
Attorney for the Burlington Northern Railroad Company

RECEIVED OR FILED
SOP INDIAN AFFAIRS
SOUTHWEST AREA OFFICE

122 731

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RECEIVED OR FILED
SOP INDIAN AFFAIRS
SOUTHWEST AREA OFFICE

APR 13 12 53

BRANCH OF REALTY
TITLES & RECORDS
SECTION

BRANCH OF REALTY
TITLES & RECORDS
SECTION

CERTIFICATION

THIS IS TO CERTIFY THAT the attached R/W Easement ^{370/617} is in conformity with existing laws and regulations. All realty records have been checked as to description, ownership and proper identification of Grantor / Grantee and conformity extends to include all supporting documents and other materials as may be specified and required in the Code of Federal Regulations.

Cressell Porter
Realty Officer

Approved: 7/19/81

Jessica M. Green
SUPERINTENDENT
for William A. Black

122 731

ORDER

Pursuant to the foregoing stipulation,

IT IS HEREBY ORDERED that all claims of plaintiffs herein against defendant Burlington Northern Railroad Company and all counterclaims herein of defendant Burlington Northern Railroad Company against plaintiffa are hereby dismissed with prejudice and without costs to any party.

DATED this ___ day of _____, 1991

UNITED STATES DISTRICT JUDGE

Presented by:

Allan E. Olson

Allan E. Olson

Attorney for the Swinomish Tribal Community

Charles E. O'Connell, Jr.

Charles O'Connell

Attorney for the United States

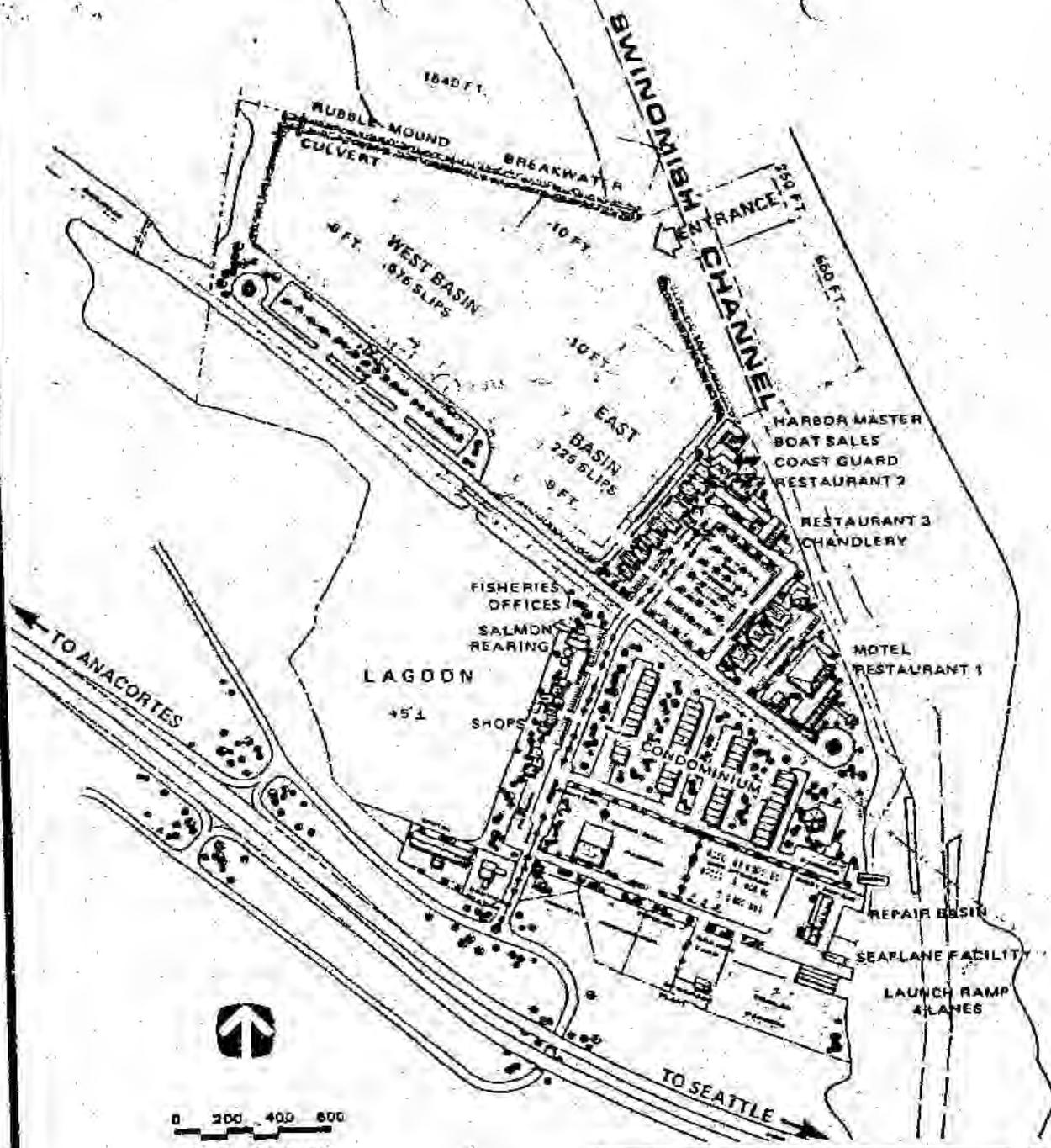
L. D. Silvernale

Lawrence D. Silvernale

Attorney for the Burlington Northern Railroad Company

Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
(303) 447-8700

Exhibit No. 30



CONCEPTUAL DEVELOPMENT PLAN

PURPOSE: DEVELOP RECREATIONAL 800-SLIP MARINA COMPLEX AND PROMOTE TRIBAL ECONOMIC DEVELOPMENT

DATUM: MLLW - 0.0'

ADJACENT PROPERTY OWNERS:
LIST AVAILABLE FROM CORPS OF ENGINEERS

071-0YB-2-010671

PROPOSED: DREDGING, FILL, RIPRAP, RAMPS, PILING, FLOATS, OUTFALL, PIER

IN: SWINOMISH CHANNEL AND PADILLA BAY, PUGET SOUND

NEAR: ANACORTES

COUNTY OF: SKAGIT **STATE:** WA
APPLICANT: SWINOMISH TRIBAL COMMUNITY
SHEET 3 OF 17 **DATE:** MAY 15 1987

Exhibit No. 31

NATIVE AMERICAN RIGHTS FUND

1506 Broadway
Boulder, Colorado 80302-6296
(303) 447-8760
Fax # (303) 443-7776

TELECOPIER COVER SHEET

Date: 6-5

COVER SHEET + 17 PAGES

ATTENTION: Arthur Olson

FIRM: _____

FROM: Patricia Thompson

RR: _____

If you do not receive all pages specified above, please call back as soon as possible. Thank you.

Telephone No. (303) 447-8760

Telecopier operator [Signature]

NOTES:

MEMORANDUM

TO: Allan Olson
FROM: RD
RE: BN
DATE: June 5, 1989



Executive Director
John F. Schaback

Deputy Director
Richard Daughinis

Attorneys
Eliel J. Abella
Robert T. Anderson
Joseph DeCesena
Walter B. Schenckel
Kim Jerome Gottschalk
Yvonne T. Knight
Heidi L. McCoy
Don B. Miller
Donald C. Moore
Robert M. Peregoy
Donald S. Wharton

Development Officer
Mary Hineswell

Controller
John R. Post

Native American Rights Fund

1506 Broadway • Boulder, Colorado 80302-6236 • (303) 447-0760 • Fax (303) 443-7776

Washington Office
1712 N Street, N.W.
Washington, D.C. 20036-2577
(202) 716-2819

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(Also a member of
New Mexico bar)
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Anchorage Office
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(907) 271-1550

Attorneys
Lorraine A. Aichenbrenner
Bart K. Garber

Of Counsel
Richard S. Collins
Charles F. Wickman

5 June 1989

Lawrence D. Silvernale
Rosenow, Hale & Johnson
1620 Key Tower
1000 2nd Ave.
Seattle, WA 98104

Re: Swinomish

Dear Mr. Silvernale:

I am sorry that we were unable to respond sooner. As indicated in our last letter there are a few items we would like to add to the Settlement Agreement and Right-of-Way. Enclosed are revised versions of those documents including our changes (additions are shaded and deletions are struck through). The following is a brief description of the changes.

RIGHT-OF-WAY EASEMENT

1. In paragraph 2 setting out the Term of the easement, we have added a holdover clause.

2. In paragraph 5 we have added two sub-paragraphs. The first sets up a system by which the Railroad notifies the Tribe of the substances being carried across the Reservation. The second deals with scheduling of the Reservation crossings.

SETTLEMENT AGREEMENT

In paragraph 2 we have added a sub-paragraph that states that nothing in the Settlement Agreement or Right-of-Way supercedes any federal law.

Finally, there is one matter that we need to discuss although there is probably no need to deal with in the settlement documents. We would like the Railroad to withdraw its adverse comments to federal agencies on the Tribe's marina project.

Perhaps the easiest way to wrap this up is to set up a conference call sometime next week after you have had a chance to review the revised documents.

Sincerely,

Richard Dauphinais

RD/ger

SETTLEMENT AGREEMENT - BURLINGTON NORTHERN

This Settlement Agreement by and between the UNITED STATES OF AMERICA, the SWINOMISH INDIAN TRIBAL COMMUNITY and BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware corporation, is executed this _____ day of _____, 1988.

R E C I T A S

A. Burlington Northern ("BN"), The Swinomish Indian Tribal Community (the "Tribe") and the United States of America (the "United States") have been engaged in a dispute concerning whether or not the existing line of railroad of BN passes through lands forming part of the Swinomish Indian Reservation held in trust by the United States for the benefit of the Tribe, without appropriate permission or easements having been granted to BN.

B. The dispute has taken the form of a lawsuit entitled Swinomish Tribal Community vs. Burlington Northern Railroad, et al., United States District Court for the Western District of Washington, Cause No. C76-550V (the Action).

C. The parties hereto desire to agree upon a settlement of all differences, dismissal of the lawsuit and issuance by the United States and the Tribe of a Right-of-Way Easement to BN on the terms and conditions herein agreed upon.

D. As used in this agreement "land" or "lands" shall include submerged lands, tidelands and uplands.

The United States of America and the Tribe will:

1. Issue a Right-of-Way Easement to Burlington Northern for a period of forty (40) years for land shown and

described on attached Exhibit A. Such right-of-way, 60 feet wide, shall extend across the Northerly tidelands claimed by the Tribe from the Easterly line of the Swinomish Channel, Northwesterly to the Westerly boundary of the Reservation, all as shown on attached Exhibit A.

2. The Right-of-Way Easement shall be issued in the form of Right-of-Way Easement as attached to this Agreement and marked as Exhibit B.

3. The Tribe and the United States will promptly process and obtain necessary approvals of The Department of Interior required under Federal law.

The BN will:

1. Pay the sum of ONE HUNDRED TWENTY FIVE THOUSAND DOLLARS (\$125,000), upon execution and approval of the U.S. Department of the Interior hereof, reflecting payment in full for all rent, damages and compensation of any sort, due for past occupancy of the right-of-way from date of construction in 1989 until January 1, 1989.

2. Pay an annual rental commencing on the 1st day of January 1989, totaling a minimum of TEN THOUSAND DOLLARS (\$10,000) per year, or a like or adjust sum on each January 1st thereafter during the term of this easement.

a. On each January 1st after January 1, 1989, the rental will be increased by an amount equal to the increase above the previous year's rental resulting from the application to the previous year's rental of the percentage change in the All Urban,

Consumers - All Item Index of the United States Department of Labor, Bureau of Labor Statistics for the Seattle - Tacoma, WA area (or, if not available, the most nearly comparable index) of the previous year. Should the index not be computed for that month, the most recent computation of the index should be used.

b. In addition to the annual increases described in part (a) of this paragraph, the rental shall be subject to adjustment at five (5) year intervals to reflect changes in property values reflected by the market, the acquisition of applicable permits for the improvement of nearby property and/or by proposed, or actual, marina construction, or other land development adjacent to said right-of-way. Such annual rental shall be increased to an amount equal to TWELVE PERCENT (12%) of the value of land immediately adjacent to the right-of-way, such value to be determined by normal real estate appraisal methods.

An additional sum shall also be paid annually to reflect damage to remaining lands which amount shall be based upon 12% of the actual damages as determined by normal real estate appraisal methods considering the highest and best use of such adjacent lands.

Development proposed for the property north and south of the Railroad may include several separate and distinct land uses including a marina boat basin (with approximately 800 boat slips) to the north and to the south an upland commercial development, and in the event the "South Lagoon" (adjacent to and south of the Railroad) is developed, an additional marina basin

providing additional boat slip poorage facilities. The Railroad right-of-way is located between and adjacent to these land areas and uses. Acreage values used to calculate rental adjustments shall be based on the use and development of lands either to the north or south of the Railroad, whichever has the higher appraised value.

In the event it becomes profitable to construct additional marina facilities in the area described as the South Lagoon on attached Exhibit A, and in the further event the Tribe secures the necessary Federal permits for such construction, the BN shall either provide a ____ foot wide boat access at a location acceptable to the Tribe to said Lagoon with an appropriate bridge, which will admit at tide levels of mean higher high water boats with masts of sixty (60) feet or less, or as damage to that portion of remaining lands, compensate the Tribe for net income loss attributable to the inability to construct the South Lagoon portin of the marina. Such loss shall be compensated on the basis of expected rental less costs of planning, development, construction, management, and operation.

c. Either the Tribe or BN may initiate changes in the annual rental payment by a written proposal forwarded by U.S. Mail during the last six months or any five (5) year increment or the Tribe at any tin safter receiving all necessary federal permits for the development of thalands adjacent to the right-of-way. If a party chooses to initiate changes inthe rental before the last six months of any five (5) year period, a

new five (5) year increment will begin when the new rental begins.

If a proposal for a change in the rental is made but the parties are unable to agree upon a rental adjustment, such adjustment shall be determined in accordance with the principles determined herein by binding arbitration. Arbitration shall be initiated when one party, or the other, nominates an arbitrator in writing, and requests that other party nominate any member of the American Arbitration Association residing in the State of Washington. Thereafter, ~~both~~ arbitrators nominated shall meet and select a third arbitrator. If they are unable to agree, a third arbitrator will be selected under applicable rules of the American Arbitration Association. Arbitration proceedings shall be conducted informally with each party presenting evidence as may be appropriate to its proposed annual rental payment. The arbitration award shall be in effect for the ensuing five (5) year period and shall not be subject to judicial review or other appeal unless it be determined that the arbitrators have ignored, or failed to enforce, any of the provisions of this Settlement Agreement.

All Notices shall be forwarded to the parties at the addresses shown below.

Burlington Northern
General Manager
2200 First Interstate Center
999 Third Avenue
Seattle, WA 98104

Swinomish Tribal Community
950 Moorage Way
P.O. Box 817
LaConner, WA 98257

d. Notwithstanding any other provisions in this agreement, the right-of-way rental shall not be less than that prescribed by applicable federal laws or regulations as they may now exist or may hereafter be changed.

[REDACTED]

3. Nothing in this Settlement Agreement shall waive, affect or bar any claim or defense except those specifically covered by the Settlement Agreement.

SUBSCRIBED AND SWORN this ____ day of _____, 1988.

By _____
RICHARD DAUPHINAIS
Native American Right Fund

By _____
ALLAN OLSON
Swinomish Tribal Community
Attorneys for the Swinomish
Tribal Community

By _____
LAWRENCE D. SILVERNALE
Burlington Northern Railroad
Company

By _____
KURT W. KNOBCHEL
Burlington Northern Railroad

Company

By

UNITED STATES OF AMERICA

RIGHT-OF-WAY EASEMENT - BURLINGTON NORTHERN

This Right-of-Way Easement is between the United States of American, the Swinomish Indian Tribal Community and Burlington Northern Railroad Company, a Delaware corporation.

P R E C I D E

A. Burlington Northern ("BN"), the Swinomish Indian Tribal Community (the "Tribe"), and the United States have been engaged in a dispute concerning whether or not the existing line of railroad of BN passes through lands forming part of the Swinomish Indian Reservation held in trust by the United States for the benefit of the Tribe, without appropriate permission or easements having been granted to BN.

B. The dispute has taken the form of a lawsuit entitled: Swinomish Tribal Community v. Burlington Northern Railroad, et al., United States District Court for the Western District of Washington, Cause Number: C76-550V (the "Action").

C. Burlington Northern, the Tribe and the United States have now settled the dispute among them pursuant to the settlement agreement dated _____ (the "Settlement Agreement"). The Settlement Agreement provides, among other things, for the dismissal of the Action by and against BN and the granting of a forty (40) year right-of-way easement with a forty (4) year option to Burlington Northern for its existing railroad over and across any and all lands of the Tribe held in trust for its benefit by the United States that such railway crosses.

D. This right-of-way easement is intended to grant and

convey to BN, despite any questions of survey, or any uncertainty as to the location of (a) the boundaries of the Swinomish Indian Reservation, and (b) any lands within the Reservation (whether tidelands, submerged lands, or uplands) held in trust by the United States for the benefit of the Tribe, a forty (4) year easement with a forty (40) year option over any and all lands comprising part of the Swinomish Indian Reservation and held in trust by the United States for the benefit of the Tribe over which the existing railway of BN passes.

NOW THEREFORE, in consideration of the sum deposited with the application for this right-of-way easement and the agreement and covenants contained in said application and in this agreement, the United States hereby grants and conveys to BN, under authority of the Act of February 5, 1949 (62 Stat. 17; 25 U.S.C. 323-328) and the regulations in 26 C.F.R. 161 promulgated thereunder, a right-of-way easement as follows:

1. Legal Description: The easement hereby conveyed shall be sixty (60) feet in width, being thirty (30) feet on the North Side and thirty (30) feet on the South Side of the center line described in Exhibit "A" hereto, located in Skagit County, Washington.

2. Term: The term of this easement is forty (40) years from the date hereof.

~~_____~~
~~_____~~
~~_____~~

§ _____ as adjusted (upward but not downward) based upon the change in the Consumer Price Index for the Seattle-Tacoma area issued by the U.S. Department of Labor, Bureau of Labor Statistics (or if not available, the most nearly comparable index), from the date of this lease to the date of the commencement of the option term.

4. Rights of BN: Under this easement BN, its successors and assigns: (a) shall have the right to maintain, operate, inspect, repair, protect, and remove the existing line of railroad and to replace the existing line with another line for the transportation of general commodities by railroad or other comparable successor methods of transportation; to keep the right-of-way easement clear of underbrush and trees; to have the right of ingress and egress to and from the same for the aforesaid purposes; to construct and reconstruct bridges, culverts and other facilities necessary for the operation of the railroad; said right-of-way easements and privileges herein granted being assignable or transferable; and (b) shall have an exclusive easement across and over said right-of-way easement and no further easements may be granted on said strip except as provided in paragraph 5 following. Upon discontinuance of the right-of-way granted under this Agreement, BN or its successors, may at its option, leave the railroad or other installations provided for herein on the ground or may pick up and remove said railroad.

5. Rights of the United States and the Tribe:

The United States and the Tribe may permit the construction, operation, repair and maintenance of utility lines, streets, or roadways across (as distinguished from running lengthwise along) said right-of-way easement. Should the United States or the Tribe wish to place or alter any body of water over the right-of-way easement, it will first present to BN, for review and comment, detailed plans and drawings of any proposal. If said crossing or changes in any body of water are made, it is agreed that the United States and the Tribe will reimburse, or cause BN to be reimbursed, for all of the reasonable and necessary costs for labor and materials incurred by BN in altering, or protecting, said railroad from said activities. Should the United States or the Tribes cause any damages to the railroad, they shall indemnify and hold BN harmless from any and all actual damages caused to said railroad by the United States or the Tribe. It is agreed that neither the United States or the Tribe will permit any permanent buildings, or other structures, trees, underbrush, or any other unreasonable obstructions, to be placed upon the right-of-way easement. Should the United States or the Tribe wish to have the railroad relocated within the Reservation, BN will relocate the railroad provided the United States or the Tribe provides or secures for BN an alternate, feasible right-of-way with all necessary permits that gives BN all the rights it enjoys under this right-of-way easement at no additional cost to BN and with no interruption of service and provided further that the United States or the Tribe pays all

costs directly, or indirectly, associated with said relocation.

[REDACTED]

[REDACTED]

[REDACTED]

5. Liability of BN: BN will protect, indemnify and hold harmless the United States and the Tribe against any loss, damage or expense that may be incurred, suffered or had by either of them, resulting from the death or injury to any person or

persons or any loss, damage or injury to property, from any negligent acts or omissions of BN its agents, servants or employees.

7. Notices: Any notices provided for in this agreement shall be given as follows:

TRIBE:

UNITED STATES:

BURLINGTON NORTHERN RAILROAD COMPANY:

DATED this _____ day of _____, 1987.

UNITED STATES OF AMERICA

BURLINGTON NORTHERN RAILROAD
COMPANY

By _____

Its _____

Exhibit No. 32

MEMORANDUM

TO: Allan
FROM: RD *RD*
RE: BN
DATE: June 28, 1989



ROSENOW, HALE & JOHNSON
LAWYERS

JACK G. ROSENOW
JEFFREY F. HALE
A. CLARKE JOHNSON
JOHN C. GRAFFE
WAYNE VAVRICHK
CHRISTOPHER W. KEAT
PATRICIA I. MCCOTTER
MARILYN W. SCHULTHEIS

LAWRENCE D. SILVERHALE
OF COUNSEL

SUITE 301
TACOMA WALL OFFICE BUILDING
4831 SOUTH PINE STREET
TACOMA, WASHINGTON 98409
TELEPHONE (206) 473-0725
FROM SEATTLE 898-1767

1620 KEY TOWER
1002 SECOND AVENUE
SEATTLE, WASHINGTON 98104
TELEPHONE (206) 233-6770

REPLY TO: Seattle Office

June 22, 1989

Mr. Richard Dauphinais
Deputy Director
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302-6296

Re: Swinomish Tribal Community v. Burlington Northern, et al.

Dear Mr. Dauphinais:

Your letter of June 8, 1989 with enclosures has generated a strong feeling of discouragement that we have lost all of the progress made in settling this matter. Previously, we seem to have gotten down to the question as to the width and height of the bridge opening to be required. You can image therefore, how surprised and disappointed I was to have a number of issues re-raised which I thought we had thoroughly discussed and disposed of.

Nonetheless, I will make the following response. In the Settlement Agreement I do not object to the changes in the periodic rental language, nor the added release language. You will want to change the word pipeline to railroad on Page 7, Paragraph 7.

On the new matters proposed in the Right-of-Way Agreement, specifically Paragraph 7b, at Page 10, requiring BN to inform the Tribe in advance of the shippers and contents of railroad cars crossing Reservation lands. It is virtually impossible for BN to accomplish this. In the nature of railroading shipping documents often do not arrive until the car is ready for delivery. Often the car will be transported on a shipping order with the bill of lading to follow. BN is well aware of the nature of the commodities which are routinely handled to and from the refineries in question, and we are willing to make a full disclosure as to current and anticipated shipments. You are aware the basic hazardous materials

SITC000011049

Mr. Richard Dauphinais
June 22, 1989
Page - 2 -

handled are propane tank cars, both loaded and empty. I do not believe that we will be handling any exotic materials to and from the refineries, but we have no objection to making a disclosure to the Tribe as to the nature of the commodities. We simply cannot provide this information on a shipper and car by car basis in advance of shipment since we do not have the knowledge until the train is actually made up, just before departure. I am sure that you are aware that all cars handled have to be classified, packaged, and loaded, in accordance with the DOT-FRA Rules and Regulations. These rules and regulations for handling hazardous materials have been developing for more than 140 years and as a common carrier railroad, Burlington Northern is obliged to handle such cars properly classified, package and loaded to all destinations. I cannot imagine what the Tribe would want to do with this information and we have long felt that widespread dissemination of such information increases the risk of sabotage. In any event, can't we work out some kind of an arrangement by which we will make a periodic disclosure to the Tribe as to the nature of the commodities being handled, without going to some form of individual car and commodity notification?

We cannot agree to a single train limitation, or to a limitation on the number of cars. At times, depending upon business at the refineries, we must have flexibility with regard to the number of cars, which may exceed twenty-five or thirty. On occasion, I can image that more than one movement will be necessary depending upon a number of factors in railroad operations. It seems to me that our current level is one train each way per day. If more trains should start operating (which we doubt) it would seem to me that this could be the subject of a rent adjustment based upon the greater burden to the property adjacent to the right-of-way.

You also provide that trains shall not travel at speeds in excess of 5 miles per hour. This limitation is extremely undesirable and in fact, will create serious hazards. It is undesirable because the transit time across the Reservation will go from approximately 2 minutes to something in the vicinity of 7 minutes. This would mean that your grade crossings will be blocked 3 times as long during train operations. It has been my experience that most communities would prefer that trains move as fast as possible consistent with safety minimums, and that where slow switching movements exist over public crossings, the slowness of the movements create significantly greater problems to citizens than faster movements. We have found that where trains are moving very slow, such as 5 miles per hour, a speed we regard as switching speed, that pedestrians tend to take great risks in attempting to cross the tracks. We also get problems with youngsters attempting to board and ride trains moving at that speed. These are hazards

Mr. Richard Dauphinais
June 22, 1989
Page - 3 -

which we do not experience at speeds of 15 miles per hour or greater.

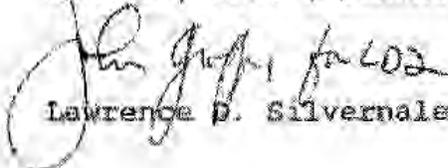
Finally, it is extremely difficult to operate a train at 5 miles per hour. The engineer has to carefully regulate both throttle and brakes. The braking in these circumstances would generate a greater fire risk and at least some risk that the train might go into emergency braking and come to a complete stop, thus blocking crossings until the train can get its air back. As you can see, we would strongly prefer to continue operating trains at our existing operation. This speed is based upon the limitations of the bridge over the slew and should provide maximum safety to people using crossings or for people who are on or about the right-of-way.

Lastly, you provide that BN will provide appropriate landscaping. We are not aware of what this implies, although we are willing to cooperate with you in appropriate landscaping at such time as your construction program is completed. We do require an area clear of brush and flammables to a distance of a minimum of 15 feet on either side of the center line of the railroad.

I will be gone until the 5th of July, but would like to get together with you and Tribal representatives promptly after that time to review these matters to see if prompt agreement cannot be reached.

Very truly yours,

ROSENOW, HALE & JOHNSON


Lawrence D. Silvernale

LDS:kmr

Exhibit No. 33

ROSENOW, HALE & JOHNSON
LAWYERS

JACK G. ROSENOW
JEFFREY F. HALE
A. CLARKE JOHNSON
JOHN C. GRAFFE
WAYNE VAVRICHEK
CHRISTOPHER W. KEAY
MARILYN W. SCHULTHEIS

LAWRENCE C. SILVERMALE
OF COUNSEL

SUITE 301
TACOMA MALL OFFICE BUILDING
4301 SOUTH PINE STREET
TACOMA, WASHINGTON 98409
TELEPHONE (206) 473-0728
FROM SEATTLE 838-1767
FAX (206) 473-0728

1600 427 TOWER
1000 SECOND AVENUE
SEATTLE, WASHINGTON 98104
TELEPHONE (206) 223-1770

REPLY TO: **Seattle Office**

July 10, 1989

Mr. Richard Dauphinais
Deputy Director
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302-6296

Alan Olson, Esquire
Swinomish Tribal Community
P.O. Box 817
950 Moorage Way
La Conner, Washington 98257

Re: **Swinomish Tribal Community v. Burlington Northern**

Gentlemen:

The following is the language proposed for Sections 7(b) and 7(c) of Page 10 of the Right of Way Easement:

"7(b)" Burlington Northern will keep the Tribe informed as to the nature and identity of contents of placarded cars crossing the Reservation. Initially, Burlington Northern shall prepare a summary of all such commodities expected to cross the Reservation. Thereafter, the disclosure shall be updated periodically as different products, or commodities, are added or deleted. Burlington Northern will comply strictly with all Federal and State Regulations regarding classifying, packaging and handling of placarded cars so as to provide the least risk and danger to persons, property and the natural environment of the Reservation.

"7(c)" Burlington Northern agrees that, unless otherwise agreed in writing, only one eastern bound train, and one western bound train, (of twenty-five (25) cars or less) shall cross the Reservation each day. The number of trains and cars shall not be increased unless required by shipper needs. The Tribe agrees not to arbitrarily withhold permission to increase the number of trains or cars when necessary to meet shipper needs. Train speeds over Reservation grade crossings shall not exceed ten (10) miles per hour.

SITC000007969

Mr. Richard Dauphinais
Alan Olson, Esquire
July 10, 1989
Page Two

I will initiate the conference call, scheduled for Wednesday,
July 19, 1989 at 2:00 p.m., to further discuss these matters.

Very truly yours,

ROSENOW, HALE & JOHNSON


Lawrence D. Silvernale

LDS:kmr

cc: Kurt W. Kroschel, Esquire
Mr. J.D. O'Dell

Exhibit No. 34

2-7-15

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

SWINOMISH TRIBAL COMMUNITY)	
)	
Plaintiff,)	
)	
v.)	CIVIL NO. C78-429V
)	
BURLINGTON NORTHERN, INC.)	
)	
Defendant.)	

MOTION OF THE
INTERSTATE COMMERCE COMMISSION
FOR LEAVE TO INTERVENE

Peter M. Shannon, Jr.
Michael L. Martin
Daniel S. Linhardt
Interstate Commerce Commission
12th and Constitution Ave., NW
Washington, D.C. 20423
Telephone (202) 275-7799

Robert S. Griswold, Jr.
Interstate Commerce Commission
Suite 500, 211 Main Street
San Francisco, CA 94105
Telephone (415) 556-5515

Stephen L. Day
Interstate Commerce Commission
858 Federal Building
915 Second Avenue
Seattle, WA 98174
Telephone (206) 44205480

Attorneys for the
Interstate Commerce Commission

1 The Interstate Commerce Commission (Commission)
 2 hereby moves this Court for leave to intervene as of right,
 3 pursuant to Fed. R. Civ. P. 24(a)(2), in the above-entitled
 4 action to preserve the exclusive jurisdiction of the
 5 Commission to determine whether the abandonment sought by
 6 plaintiff is in the public interest under Title 49, U.S.
 7 Code, § 10903 ^{1/} and to prevent an abandonment of a line of
 8 railroad in derogation of that section.

9 The Motion for Leave to Intervene is based upon the
 10 following grounds:

11 1. The Commission is an administrative agency of the
 12 United States created pursuant to Section 10301(a) of the
 13 Interstate Commerce Act (Act). 49 U.S.C. § 10301(a),
 14 formerly 49 U.S.C. § 11. Under the provisions of the
 15 National Transportation Policy, 49 U.S.C. § 10101, formerly
 16 49 U.S.C., section preceding § 1, the Commission is charged
 17 with ensuring "the development, coordination and preser-
 18 vation of a transportation system that meets the transpor-
 19 tation needs of the United States, including the United
 20 States Postal Service and national defense."

21 2. The plaintiff, The Swinomish Tribal Community
 22 (Tribe), filed its Complaint in the instant case on July 26,
 23 1978, seeking inter alia, a permanent injunction against
 24 continued "trespass" by Burlington Northern, Inc. (BN), on
 25 its lands.

27 ^{1/} Many references in this pleading cite provisions of the
 28 Interstate Commerce Act prior to its recodification. The
 29 Act of October 13, 1978, Public Law 95-473, recodified the
 30 Interstate Commerce Act. However, as the preamble of the
 Revised Interstate Commerce Act states, no substantive
 changes occurred by the reenactment.

31 ...
 32 ...

1 3. Section 10903(a) provides the Commission with the
2 exclusive jurisdiction to determine whether the abandonment
3 of a line of railroad or discontinuance of rail transpor-
4 tation is in the national interest. If this Court grants
5 the Tribe's prayer for injunctive relief against continuing
6 trespass, BN will be forced to commit an abandonment of its
7 operations without giving the Commission an opportunity to
8 exercise its jurisdiction to weigh whether such abandonment
9 is in the national interest. Thus, as a practical matter,
10 the disposition of this matter could result in the loss of
11 the Commission's jurisdiction in a matter exclusively within
12 its domain, contrary to federal statute.

13 4. The BN, as a private litigant, represents only
14 its own parochial interest. Thus, the interest of the
15 Commission is not represented by any party to this pro-
16 ceeding. Adequate representation of the Commission's
17 interest requires that the Commission be permitted, as a
18 matter of right, to intervene in the instant case.

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32 LEAVE TO INTERVENE - 3

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WHEREFORE, the Commission prays that this Court grant it leave to intervene as a party defendant in the instant case, and for such other and further relief as this Court may deem just and proper. This motion is based upon an accompanying Memorandum of Points and Authorities.

Respectfully submitted,

Peter M. Shannon, Jr.
Director

Michael L. Martin
Chief
Section of Litigation

Daniel S. Linhardt
Senior Trial Attorney

By: *Daniel S. Linhardt*
Daniel S. Linhardt

Robert S. Griswold, Jr.
Regional Counsel

Stephen L. Day
Senior Trial Attorney

By: _____
Stephen L. Day

Attorneys for the
Bureau of Investigations and
Enforcement
Interstate Commerce Commission
858 Federal Building
Seattle, WA 98174

Dated this day of , 1980

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...

LEAVE TO INTERVENE - 4

Exhibit No. 35

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3-10-80

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FILED IN THE
UNITED STATES DISTRICT COURT
Western District of Washington

MAR 7 1980

JOE R. ROMANE, Clerk
By.....Deputy

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

SWINOMISH TRIBAL COMMUNITY,)

Plaintiff,)

vs.)

BURLINGTON NORTHERN, INC.,)

Defendant.)

No. C78-429V

ORDER

Having considered the motion of the Interstate Commerce Commission to intervene and dismiss, along with the memoranda and affidavits submitted by counsel, the Court now finds and rules as follows:

1. This matter has been bifurcated as to the liability and remedy portions of the case. The proceedings presently pending before the Court are concerned only with whether the presence of the defendant on the plaintiff's reservation is lawful. This determination is independent of the relief which might be ordered should the Court find that presence unlawful.

2. The Court finds the motion of the Interstate Commerce Commission to be premature. If, and when, the question of remedies arises, that motion might be renewed.

Accordingly, the motion of the Interstate Commerce Commission to Intervene and to Dismiss is DENIED without prejudice to its being renewed after the issue of liability

ORDER - 1

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has been resolved.

The Clerk of this Court is instructed to send uncertified copies of this order to all counsel of record.

DATED this 7th day of March, 1980.

/s/ Donald S. Voorhees
United States District Judge

ORDER - 2

Exhibit No. 36

RESOLUTION NO. 89-8-B

APPROVING SETTLEMENT AGREEMENT WITH
BURLINGTON NORTHERN RAILROAD

WHEREAS, the Swinomish Indian Tribal Community is a federally recognized Indian Tribe organized pursuant to Section 16 of the Indian Reorganization Act of 1934; and

WHEREAS, the Swinomish Indian Senate is the governing body of the Swinomish Indian Reservation located near the Town of LaConner, Washington; and

WHEREAS, the Tribe filed a lawsuit against Burlington Northern Railroad Company that was subsequently consolidated with other lawsuits filed by the Tribe entitled Burlington Northern Railroad Company v. Swinomish Indian Tribal Community et al., United States District Court for the Western District of Washington, Cause No. C76-550V; and

WHEREAS, the Tribe now desires to enter into the attached separate stipulated settlement agreement and right-of-way easement with Burlington Northern; NOW THEREFORE,

BE IT RESOLVED by the Swinomish Indian Senate, that the attached Settlement Agreement and Right-Of-Way Easement are hereby approved; and

BE IT FURTHER RESOLVED, that Robert Joe, Sr., Tribal Chairman; Alan Olson, Tribal Attorney and Richard Dauphinais, Tribal Attorney are hereby authorized to sign each of the documents on the Tribe's behalf.

Robert Joe, Sr.
Robert Joe, Sr., Chairman
Swinomish Indian Senate

C E R T I F I C A T I O N

As Secretary of the Swinomish Indian Senate, I hereby certify that the foregoing resolution was approved at a Reg Meeting of the Swinomish Indian Senate held on 7-1, 1989, at which time a quorum was present and the resolution was passed by a vote of 7 FOR, 0 AGAINST, and 0 ABSTENTIONS.

Chester Cayou, Sr.
Chester Cayou, Sr., Secretary
Swinomish Indian Senate

SETTLEMENT AGREEMENT
SWINOMISH - BURLINGTON NORTHERN

The Swinomish Tribal Community (hereinafter "Tribe") as the duly constituted governing body of the Swinomish Indian Reservation, the United States Department of the Interior, Bureau of Indian Affairs ("the BIA"), and Burlington Northern Railroad Company (hereinafter "Burlington Northern" or "BN"), in order to settle those matters in dispute between the Tribe and BIA and Burlington Northern in the consolidated actions entitled Burlington Northern Railroad Company vs. Swinomish Tribal Community et al., Western District of Washington cause C76-550V, and to resolve other matters between Burlington Northern and the Tribe and BIA, agree as follows:

1. Application for Easement. BN will submit to the BIA an application for a right-of-way easement in the form attached hereto as Exhibit "A". The Tribe shall immediately upon execution of this Settlement Agreement advise the BIA in writing of the Tribe's consent to the granting to BN by the BIA of the right-of-way easement attached to said application as Attachment "A". Both BN and the Tribe shall take whatever other steps are reasonably necessary promptly to obtain the approval by the BIA of said right-of-way easement, the approval of the attorney for the United States of this Settlement Agreement and the stipulation referred to in paragraph 3, and the full consummation of this agreement.

2. Payment. (a). As partial consideration for this Settlement, BN will deposit with the BIA along with said application the sum of \$5,000 in the form of a check payable to the BIA. Upon the BIA's delivery to BN of the approved, executed easement, BN shall immediately deliver to Allan Olson, or his successor as named by the Tribe ("Tribal Attorney"), as attorney for the Tribe, a check payable to the Tribe in the sum of \$120,000. The sum of these checks, \$125,000, shall reflect payment in full for all rent, damages and compensation of any sort, due for past occupancy of the right-of-way from date of construction in 1889 until January 1, 1989. The BIA and the Tribal attorney shall hold said \$125,000, which they are to deliver or return as provided in paragraphs 9 and 10 below.

(b). BN will pay an annual rental ("rental") commencing on the 1st day of January 1989, totaling a minimum of TEN THOUSAND DOLLARS (\$10,000) per year, and a like or adjusted sum on each January 1st thereafter during the term of the Right-of-Way Easement granted under this Agreement.

i. CPI-U Adjustment. On each January 1st after January 1, 1989, the rental shall be increased by a percentage equal to the percentage change in the All Items Consumer Price Index of the United States Department of Labor, Bureau of Labor Statistics for All Urban Consumers in the Seattle-Tacoma, Washington area ("CPI-U") based on the 1982-1984 base = 100 (or, if not available, the most nearly comparable index), from the CPI-U used to calculate the previous year's adjustment to the

most recent calculation of the CPI-U. The annual rental commencing on January 1, 1989 is based on the CPI-U for the first half of 1988 (CPI-U = 111.9).

ii. Appraisal Adjustment. In addition to the annual CPI-U adjustments, described in subparagraph (b)(i) of this paragraph, the rental shall be increased at five (5) year intervals to reflect changes in property values such as, but not limited to, changes in the real estate market, the acquisition of applicable permits for the development of nearby property, proposed or actual marina construction or other land development near said right-of-way. The rental shall be increased to an amount equal to TWELVE PERCENT (12%) of the sum of the "right-of-way value" which is the value of the property subject to the right-of-way, and the "remainder damage" which is the severance damage to Reservation lands north of State Highway 20 as determined by normal real estate appraisal methods considering the highest and best use of such adjacent lands.

Development proposed for the property north and south of the Railroad is anticipated to include several separate and distinct land uses including a marina boat basin (with approximately 800 boat slips) to the north, upland commercial development to the south, and in the event the "South Lagoon" (adjacent to and south of the Railroad) is developed, an additional marina basin providing additional boat slip moorage facilities. The Railroad right-of-way is located between and adjacent to these land areas and uses. Acreage values used to

calculate the right-of-way value shall be based on the use and development of lands either to the north or south of the Railroad, whichever has the higher appraised value.

iii. Proposal. Either the Tribe or BN may initiate an appraisal adjustment by a written proposal forwarded by U.S. Mail prior to end of the five (5) year increment or any time thereafter until an appraisal adjustment is made and a new 5 year increment is commenced. The Tribe may initiate an appraisal adjustment at any time after receiving all necessary federal permits for the development of all or part of the Reservation lands north of State Highway 20. The Tribe may also initiate an appraisal adjustment under paragraph 7.c. of the Right-of-Way Easement. If a party chooses to initiate an appraisal adjustment before the last six months of any five (5) year period, a new five (5) year increment will begin when the new rental begins.

If the parties are unable to agree upon a rental adjustment, such adjustment shall be determined in accordance with the Commercial Arbitration Rules of the American Arbitration Association and the provisions set forth herein by binding arbitration. Arbitration shall be initiated when one party, or the other, nominates an arbitrator in writing, and requests that the other party nominate an arbitrator. The other party shall nominate an arbitrator within 20 days of receipt of the written notice. Both arbitrators must be residents of the State of Washington and shall not be subject to disqualification. Thereafter, both arbitrators nominated shall meet and select a

neutral third arbitrator. If they are unable to agree, a third arbitrator will be selected under applicable rules of the American Arbitration Association. Arbitration proceedings shall be conducted informally with each party presenting evidence as may be appropriate to its proposed annual rental payment. The arbitration award shall not be subject to judicial review or other appeal unless it be determined that the arbitrators have ignored, or failed to enforce, any of the provisions of this Settlement Agreement.

iv. South Lagoon. In the event that the Tribe determines that it would be profitable to construct additional marina facilities in the area described as the South Lagoon on attached Exhibit A, and in the further event the Tribe secures the necessary Federal permits for such construction, the BN shall either provide a fifty (50) foot wide boat access at a location acceptable to the Tribe to said Lagoon with an appropriate bridge, which will admit at tide levels of mean higher high water boats with masts sixty (60) feet high, or as damage to that portion of remaining lands, compensate the Tribe for net income loss attributable to the inability to construct the South Lagoon portion of the marina. Such loss shall be compensated on the basis of expected rental or other income less costs of planning, development, construction, management, and operation.

3. Stipulated Order of Dismissal. At the time of execution of this Settlement Agreement, the Tribe and BN shall cause their attorneys to execute, and shall request that the

attorney for the United States execute, a stipulation in the form attached hereto as Exhibit "B". The Tribal attorney shall hold said executed stipulation for the Tribe and shall deliver it as provided in paragraph 10 below.

4. Easement. It is the intention of the Tribe and BN that BN be granted a forty (40) year easement covering the operation, maintenance and replacement of BN's existing railroad and all facilities ancillary thereto across all lands within the Swinomish Indian Reservation ("the Reservation") and in which the Tribe or the BIA have or claim to have an ownership or beneficial interest.

BN shall have the option to extend the term of this easement and any additional easements for two successive periods of twenty years each. The manner of exercise of the options and the consideration to be paid are set out in the easement that is Attachment "A" to Exhibit "A".

5. Tribal Resolution. Attached hereto as Exhibit "C" is a certified copy of a resolution of the Tribe authorizing this Settlement Agreement.

6. BN Resolution. Attached hereto as Exhibit "D" is a certified copy of a corporate resolution of BN authorizing this Settlement Agreement.

7. BN Release As To The Tribe. For the valuable consideration in the form provided by the terms of this Settlement Agreement, upon completion of each of the undertakings required by paragraphs 1 through 3 and 9 hereof and unless this

Agreement is voided pursuant to paragraph 10 hereof, BN hereby releases and forever discharges the Tribe and its predecessors, successors, assigns, or related or affiliated persons or entities, its and their officers, agents, representatives, employees, insurers, and sureties, jointly and severally, from any and all liability, claims, demands, damages, debts, dues, accounts, cause or causes of action of whatever kind or nature, whether for cash, securities, property or otherwise, which exist by reason of or which are in any way related to or arise out of the location by BN of its pipeline across and through lands claimed by the United States and the Tribe or out of the claims asserted in the Actions, whether known or unknown, that BN now has or has had; provided that the obligations undertaken by each party to this Settlement Agreement shall survive. This release shall not be effective unless and until the parties have completed their respective undertakings pursuant to paragraphs 1 through 3 and 9 hereof or if this Agreement is voided pursuant to paragraph 10 hereof.

8. Tribal Release As To BN. For the valuable consideration in the form provided by the terms of this Settlement Agreement, upon completion of each of the undertakings required by paragraphs 1 through 3 and 9 hereof and unless this Agreement is voided pursuant to paragraph 10 hereof, the Tribe hereby releases and forever discharges BN and its predecessors, successors, assigns, or related or affiliated persons or entities, its and their officers, agents, representatives,

employees, insurers, and sureties, jointly and severally, from any and all liability, claims, demands, damages, debts, dues, accounts, cause or causes of action of whatever kind or nature, whether for cash, securities, property or otherwise, which exist by reason of or which are in any way related to or arise out of the location by BN of its railroad across and through lands claimed by the United States and the Tribe or out of the claims asserted in the Actions, whether known or unknown, that either party now has or has had, provided that the obligations undertaken by each party in this Settlement Agreement shall survive. This release shall not be effective unless and until the parties have completed their respective undertakings pursuant to paragraphs 1 through 3 and 9 hereof or if this Agreement is voided pursuant to paragraph 10 hereof.

(a). Releases As Between The United States And BN.

The United States of America and BN in order to settle those matters in dispute between them in the Actions agree as follows:

BN Release As To United States. For the valuable consideration in the form provided by the terms of this Settlement Agreement, upon completion of each of the undertakings required by paragraphs 1 through 3 and 9 hereof and unless this Agreement is voided pursuant to paragraph 10 hereof, BN hereby releases and forever discharges the United States of America and its predecessors, successors, assigns, or related or affiliated persons or entities, its and their officers, agents, representatives, employees, insurers, and sureties, jointly and

severally, from any and all liability, claims, demands, damages, debts, dues, accounts, cause or causes of action of whatever kind or nature, whether for cash, securities, property or otherwise, which exist by reason of or which are in any way related to the claims asserted in the Actions, whether known or unknown, that BN now has or has had or may hereafter have; provided that the obligations undertaken by each party to this Settlement Agreement shall survive. This release shall not be effective unless and until the parties have completed their respective undertakings pursuant to paragraphs 1 through 3 and 9 hereof or if this Agreement is voided pursuant to paragraph 10 hereof.

United States Release As To BN. For the valuable consideration in the form provided by the terms of this Settlement Agreement, upon completion of each of the undertakings required by paragraphs 1 through 3 and 9 hereof and unless this Agreement is voided pursuant to paragraph 10 hereof, the United States of America hereby releases and forever discharges BN and its predecessors, successors, assigns, or related or affiliated persons or entities, its and their officers, agents representatives, employees, insurers, and sureties, jointly and severally, from any and all liability, claims, demands, damages, debts, dues, accounts, cause or causes of action of whatever kind or nature, whether for cash, securities, property or otherwise, which exist by reason of or which are in any way related to the claims asserted in the Actions, whether known or unknown, that BN now has or has had or may hereafter have; provided that the

obligations undertaken by each party to this Settlement Agreement shall survive. This release shall not be effective unless and until the parties have completed their respective undertakings pursuant to paragraphs 1 through 3 and 9 hereof or if this Agreement is voided pursuant to paragraph 10 hereof.

9. Execution and Delivery of Easement. Upon the BIA's delivery to BN of the approved and executed easement in the form attached as Attachment "A" to Exhibit "A" to this Agreement, the Tribal Attorney shall deliver to BN the executed stipulated Order of dismissal ("Order") referred to in paragraph 3 in exchange for the check for \$120,000 referred to in paragraph 2. BN shall forthwith file said stipulation with the United States District Court with a request that the Order contemplated by the stipulation be entered forthwith. Upon being advised by the Court that said Order has been entered, the Tribal attorney shall deliver the \$120,000 check provided for in paragraph 2 above to the Tribe, and BN shall record the easement.

10. Failure to Complete Undertakings. Should the BIA fail or refuse to execute the right-of-way easement in the form attached as Attachment "A" to Exhibit "A" to this Agreement, or should the attorney for the United States fail or refuse to execute the stipulated Order of dismissal ("Order") attached hereto as Exhibit "B", or should the United States District Court fail or refuse to enter a Order substantially similar in terms and effect to the Order provided for in said stipulation, then in any such event this Settlement Agreement, upon 30 days written

notice by any party sent by certified mail to the addresses provided below, shall be null and void and all settlement funds will be forthwith returned to BN and all executed documents attached hereto will be forthwith returned to the party executing the same.

11. **Insurance.** BN agrees to maintain reasonable limits of insurance to protect itself against liability for damage resulting from the operation of the railroad, and if requested by the Tribe, BN will advise the Tribe of the amount of the insurance coverage then in effect.

12. **Integration, Governing Laws, Miscellaneous.** This Settlement Agreement shall be governed by federal law. The terms of this Agreement, (excluding section subtitles) are contractual and not mere recitals. No promise or inducement has been offered except as herein set forth. This Agreement has been executed following advise of counsel and without reliance upon any representation or statement by the persons released or their representatives other than as set forth herein. It is intended as and reflects the complete agreement of the parties and no modification hereof shall be effective unless made in writing duly executed by the parties. This Settlement Agreement shall be binding upon and inure to the benefit of the parties and their respective legal representatives, successors and assigns.

Nothing in this Settlement Agreement or the associated Right-of-Way Easement shall supersede any federal law or regulation as they now exist or as they may be amended or changed.

from time to time. Specifically, the annual rental shall not be less than that required by federal law in effect at any time during BN's occupancy of the right-of-way. BN shall comply with all applicable federal laws and regulations pertaining to BN's activities within the Swinomish Reservation.

13. **Notice.** Any notice (other than process) required or contemplated by the terms of the Settlement Agreement shall be sent to the following addresses:

(a) Swinomish Tribal Community:

Tribal Attorney
Swinomish Indian Tribal Community
P.O. Box 817 - 950 Moorage Way
LaConner, Washington 98257

(b) United States of America:

Department of Interior
Bureau of Indian Affairs
Puget Sound Agency
Federal Building
Everett, Washington 98201

(c) BN:

Burlington Northern Railroad Company
General Manager
2200 First Interstate Center
999 Third Avenue
Seattle, WA 98104

Any party may by written notice to other parties change the address to which subsequent notice shall be sent.

14. Nothing in the Settlement Agreement shall waive, affect or bar any claim or defense except those specifically covered by the Settlement Agreement.

DATED this _____ day of _____, 1987.

UNITED STATES OF AMERICA

BURLINGTON NORTHERN RAILROAD
COMPANY

By _____

Its _____

The SWINOMISH INDIAN TRIBAL
COMMUNITY hereby consents to
the foregoing Right-of-Way
Easement this ___ day, of
_____, 198__.

SWINOMISH INDIAN TRIBAL COMMUNITY

By _____

Its _____

EXHIBITS:

- Exhibit A - BN Application for Right-of-Way Easment
Attachment A - Tribal Consent to ROW
- Exhibit B - Stipulated Order of Dismissal
- Exhibit C - Tribal Resolution Authorizing Settlement
- Exhibit D - BN Corp. Resolution Authorizing Settlement

RIGHT-OF-WAY EASEMENT - BURLINGTON NORTHERN

This Right-of-Way Easement is between the United States of America, the Swinomish Indian Tribal Community and Burlington Northern Railroad Company, a Delaware corporation.

R E C I T A L S

A. Burlington Northern ("BN"), the Swinomish Indian Tribal Community (the "Tribe"), and the United States have been engaged in a dispute concerning whether or not the existing line of railroad of BN passes through lands forming part of the Swinomish Indian Reservation held in trust by the United States for the benefit of the Tribe, without appropriate permission or easements having been granted to BN.

B. The dispute has taken the form of a lawsuit entitled: Swinomish Tribal Community v. Burlington Northern Railroad, et al., United States District Court for the Western District of Washington, Cause Number: C76-550V (the "Action").

C. Burlington Northern, the Tribe and the United States have now settled the dispute among them pursuant to the Settlement Agreement dated _____ (the "Settlement Agreement"). The Settlement Agreement provides, among other things, for the dismissal of the Action by and against BN and the granting of a forty (40) year right-of-way easement with two twenty (20) year options to Burlington Northern for its existing railroad, or successor methods provided by paragraph 6 herein, over and across any and all lands of the Tribe held in trust for its benefit by the United States that such railroad crosses.

D. This right-of-way easement is intended to grant and convey to BN, despite any questions of survey, or any uncertainty as to the location of (a) the boundaries of the Swinomish Indian Reservation, and (b) any lands within the Reservation (whether tidelands, submerged lands, or uplands) held in trust by the United States for the benefit of the Tribe, a forty (40) year easement with two twenty (20) options over any and all lands comprising part of the Swinomish Indian Reservation and held in trust by the United States for the benefit of the Tribe over which the existing railway of BN passes.

NOW THEREFORE, in consideration of the sum deposited with the application for this right-of-way easement and the agreement and covenants contained in said application and in this agreement, the United States hereby grants and conveys to BN, under authority of the Act of February 5, 1948 (62 Stat. 17; 25 U.S.C. 323-328) and the regulations in 25 C.F.R. 169 promulgated thereunder, a right-of-way easement as follows:

1. Legal Description: The easement hereby conveyed shall be sixty (60) feet in width, being thirty (30) feet on the North Side and thirty (30) feet on the South Side of the center line described in Exhibit "A" hereto, located in Skagit County, Washington.

2. Term: The term of this easement is forty (40) years from the date hereof.

3. Payment: (a). As partial consideration for this Settlement, BN will deposit with the BIA along with said

application the sum of \$5,000 in the form of a check payable to the BIA. Upon the BIA's delivery to BN of the approved, executed easement, BN shall immediately deliver to Allan Olson, or his successor as named by the Tribe ("Tribal Attorney"), as attorney for the Tribe, a check payable to the Tribe in the sum of \$120,000. The sum of these checks, \$125,000, shall reflect payment in full for all rent, damages and compensation of any sort, due for past occupancy of the right-of-way from date of construction in 1889 until January 1, 1989. The BIA and the Tribal attorney shall hold said \$125,000, which they are to deliver or return as provided in paragraphs 9 and 10 of the Settlement Agreement.

(b). Pay an annual rental ("rental") commencing on the 1st day of January 1989, totaling a minimum of TEN THOUSAND DOLLARS (\$10,000) per year, and a like or adjusted sum on each January 1st thereafter during the term of the Right-of-Way Easement granted under this Agreement.

i. CPI-U Adjustment. On each January 1st after January 1, 1989, the rental shall be increased by a percentage equal to the percentage change in the All Items Consumer Price Index of the United States Department of Labor, Bureau of Labor Statistics for All Urban Consumers in the Seattle-Tacoma, Washington area ("CPI-U") based on the 1982-1984 base = 100 (or, if not available, the most nearly comparable index), from the CPI-U used to calculate the previous year's adjustment to the most recent calculation of the CPI-U. The annual rental

commencing on January 1, 1989 is based on the CPI-U for the first half of 1988 (CPI-U = 111.9).

ii. Appraisal Adjustment. In addition to the annual CPI-U adjustments, described in subparagraph (b)(i) of this paragraph, the rental shall be increased at five (5) year intervals to reflect changes in property values such as, but not limited to, changes in the real estate market, the acquisition of applicable permits for the development of nearby property, proposed or actual marina construction or other land development near said right-of-way. The rental shall be increased to an amount equal to TWELVE PERCENT (12%) of the sum of the "right-of-way value" of the property which is the value of the property subject to the right-of-way, and the "remainder damage" which is the severance damage to Reservation lands north of State Highway 20 as determined by normal real estate appraisal methods considering the highest and best use of such adjacent lands.

Development proposed for the property north and south of the Railroad is anticipated to include several separate and distinct land uses including a marina boat basin (with approximately 800 boat slips) to the north, upland commercial development to the south, and in the event the "South Lagoon" (adjacent to and south of the Railroad) is developed, an additional marina basin providing additional boat slip moorage facilities. The Railroad right-of-way is located between and adjacent to these land areas and uses. Acreage values used to calculate the right-of-way value shall be based on the use and

development of lands either to the north or south of the Railroad, whichever has the higher appraised value.

iii. Proposal. Either the Tribe or BN may initiate an appraisal adjustment by a written proposal forwarded by U.S. Mail prior to the end of the five (5) year increment or any time thereafter until an appraisal adjustment is made and a new 5 year increment is commenced. The Tribe may initiate an appraisal adjustment at any time after receiving all necessary federal permits for the development of all or part of the Reservation lands north of State Highway 20. The Tribe may also initiate an appraisal adjustment under paragraph 7.c. of this Right-of-Way Easement. If a party chooses to initiate an appraisal adjustment before the last six months of any five (5) year period, a new five (5) year increment will begin when the new rental begins.

If the parties are unable to agree upon a rental adjustment, such adjustment shall be determined in accordance with the Commercial Arbitration Rules of the American Arbitration Association and the provisions set forth herein by binding arbitration. Arbitration shall be initiated when one party, or the other, nominates an arbitrator in writing, and requests that the other party nominate an arbitrator. The other party shall nominate an arbitrator within 20 days of receipt of the written notice. Both arbitrators must be residents of the State of Washington and shall not be subject to disqualification. Thereafter, both arbitrators nominated shall meet and select a neutral third arbitrator. If they are unable to agree, a third

arbitrator will be selected under applicable rules of the American Arbitration Association. Arbitration proceedings shall be conducted informally with each party presenting evidence as may be appropriate to its proposed annual rental payment. The arbitration award shall not be subject to judicial review or other appeal unless it be determined that the arbitrators have ignored, or failed to enforce, any of the provisions of this Settlement Agreement.

iv. South Lagoon. In the event that the Tribe determines that it would be profitable to construct additional marina facilities in the area described as the South Lagoon on attached Exhibit A, and in the further event the Tribe secures the necessary Federal permits for such construction, the BN shall either provide a fifty (50) foot wide boat access at a location acceptable to the Tribe to said Lagoon with an appropriate bridge, which will admit at tide levels of mean higher high water boats with masts sixty (60) feet high, or as damage to that portion of remaining lands, compensate the Tribe for net income loss attributable to the inability to construct the South Lagoon portion of the marina. Such loss shall be compensated on the basis of expected rental or other income less costs of planning, development, construction, management, and operation.

4. Holdover: In the event that Burlington Northern fails to surrender and vacate the lands covered by this agreement, pursuant to the provisions herein, after expiration of either the

original term of this right of way or of any extended term, except pursuant to an option to extend, Burlington Northern shall pay to the Tribe a monthly rent in an amount equal to one-twelfth (1/12th) of the yearly rental in effect at the expiration of the preceding term adjusted upward but not downward by the percentage change in the CPI-U, as defined in paragraph 3(b), from the CPI-U in effect at the time of the most recent rental adjustment to the most recent calculation of the CPI-U prior to the date the payment is due. Payments under this paragraph will not be less than \$1000 a month. The payment shall be due monthly on the last day of every month following the expiration of the preceding term.

In any proceeding brought by the Tribe to evict Burlington Northern and/or seek damages for Burlington Northern's failure to surrender, the Tribe shall be entitled to payment for the holdover period in an amount equal to the fair rental value of the right of way so used by Burlington Northern; provided that such fair rental value shall not be less than the monthly payments provided for in the preceding sub-paragraph. Should Burlington Northern refuse or fail to make said monthly payments to the Tribe, the Tribe shall be entitled to apply to any court of competent jurisdiction for injunctive relief to compel such payments and shall be entitled to reasonable attorney fees therefor.

5. Options: In addition to the forty (40) year term, BN shall have an option to extend such term twenty (20) years. Each

option may be exercised by giving written notice to the United States and the Tribe as provided in paragraph 9 below; no later than thirty (30) days prior to the expiration of the prior term.

6. Rights of BN: Under this easement BN, its successors and assigns: (a) shall have the right to maintain, operate, inspect, repair, protect, and remove the existing line of railroad and to replace the existing line with another line for the transportation of general commodities by railroad or other comparable successor methods of transportation; to keep the right-of-way easement clear of underbrush and trees; to have the right of ingress and egress to and from the same for the aforesaid purposes; to construct and reconstruct bridges, culverts and other facilities necessary for the operation of the railroad; said right-of-way easements and privileges herein granted being assignable or transferable; and (b) shall have an exclusive easement across and over said right-of-way easement and no further easements may be granted on said strip except as provided in paragraph 7 following. Upon discontinuance of the right-of-way granted under this Agreement, BN or its successors, may at its option, leave the railroad or other installations provided for herein on the ground or may pick up and remove said railroad.

7. Rights of the United States and the Tribe:

a. The United States and the Tribe may permit the construction, operation, repair and maintenance of utility lines, streets, or roadways under, across or along said

right-of-way easement. Should the United States or the Tribe wish to place or alter any body of water over the right-of-way easement, it will first present to BN, for review and comment, detailed plans and drawings of any proposal. If any such crossing or changes in any body of water are made in the future, it is agreed that the United States and the Tribe will reimburse, or cause BN to be reimbursed, for all of the reasonable and necessary costs for labor and materials incurred by BN in altering, or protecting, said railroad from said activities. Should the United States or the Tribes cause any damages to the railroad, they shall indemnify and hold BN harmless from any and all actual damages caused to said railroad by the United States or the Tribe. It is agreed that neither the United States nor the Tribe will permit any permanent buildings, or other structures, trees, underbrush, or any other unreasonable obstructions, to be placed upon the right-of-way easement without BN's consent. Should the United States or the Tribe wish to have the railroad relocated within the Reservation, BN will relocate the railroad provided the United States or the Tribe provides or secures for BN an alternate, feasible right-of-way with all necessary permits that gives BN all the rights it enjoys under this right-of-way easement at no additional cost to BN and with no interruption of service and provided further that the United States or the Tribe pays all costs directly, or indirectly, associated with said relocation.

b. Burlington Northern will keep the Tribe informed as to

the nature and identity of all cargo transported by Burlington Northern across the Reservation. Initially, Burlington Northern shall prepare a summary of all such commodities expected to cross the Reservation and the quantities of such commodities. Thereafter, the disclosure shall be updated periodically as different products, or commodities, are added or deleted. Such updates shall occur at least annually. The disclosure updates shall identify any previously shipped cargo that is different in nature, identity or quantity from the cargo described in previous disclosures. Burlington Northern will comply strictly with all Federal and State Regulations regarding classifying, packaging and handling of rail cars so as to provide the least risk and danger to persons, property and the natural environment of the Reservation.

c. Burlington Northern agrees that, unless otherwise agreed in writing, only one eastern bound train, and one western bound train, (of twenty-five (25) cars or less) shall cross the Reservation each day. The number of trains and cars shall not be increased unless required by shipper needs. The Tribe agrees not to arbitrarily withhold permission to increase the number of trains or cars when necessary to meet shipper needs. It is understood and agreed that if the number of crossings or the number of cars is increased, the annual rental will be subject to adjustment in accordance with paragraph 3(b)iii of this Right-of-Way Easement and paragraph 2(b)iii of the Settlement Agreement. Train speeds over Reservation grade crossings shall not exceed

ten (10) miles per hour.

d. Burlington Northern will cooperate fully with the Tribe in providing appropriate landscaping on either side of Burlington Northern's railroad tracks in order to make Burlington Northern's facilities compatible with the Tribe's development of adjacent lands. It is understood and agreed that Burlington Northern requires an area clear of brush and flammables to a distance of at least 15 feet on either side of the center line of the railroad.

8. Liability of BN: BN will protect, indemnify and hold harmless the United States and the Tribe against any loss, damage or expense that may be incurred, suffered or had by either of them, resulting from the death or injury to any person or persons or any loss, damage or injury to property, from any intentional or negligent acts or omissions of BN its agents, servants or employees.

9. Notices: Any notices provided for in this agreement shall be given as follows:

(a) Swinomish Tribal Community:

Tribal Attorney
Swinomish Indian Tribal Community
P.O. Box 817 - 950 Moorage Way
LaConner, Washington 98257

(b) United States of America:

Department of Interior
Bureau of Indian Affairs
Puget Sound Agency
Federal Building
Everett, Washington 98201

(c) BN:

Burlington Northern Railroad Company
General Manager
2200 First Interstate Center
999 Third Avenue
Seattle, WA 98104

Any party may by written notice to other parties change the address to which subsequent notice shall be sent.

DATED this ____ day of _____, 1987.

UNITED STATES OF AMERICA

BURLINGTON NORTHERN RAILROAD
COMPANY

By _____
its _____

The SWINOMISH INDIAN TRIBAL
COMMUNITY hereby consents to
the foregoing Right-of-Way
Easement this ____ day, of
_____, 198__.

SWINOMISH INDIAN TRIBAL COMMUNITY

By _____

Its _____

STATE OF WASHINGTON)
)
) ss.
COUNTY OF _____)

On this _____ day of _____, 19____, before me personally appeared _____, of the UNITED STATES OF AMERICA DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, to me known to be the individual who executed this within instrument and acknowledged that he signed the same as his free and voluntary act and deed for the uses and purposes herein mentioned.

IN WITNESS WHEREOF I have hereunto set my hand and affixed by official seal the day and year first above written.

NOTARY PUBLIC in and for the State
of Washington, residing at _____

My commission expires _____

[SEAL]

STATE OF WASHINGTON)
)
) ss.
COUNTY OF _____)

On this _____ day of _____, 19____, before me personally appeared _____, to me known to be the _____ of the SWINOMISH TRIBAL COMMUNITY that executed this within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument.

IN WITNESS WHEREOF I have hereunto set my hand and affixed by official seal the day and year first above written.

NOTARY PUBLIC in and for the State
of Washington, residing at _____

My commission expires _____

[SEAL]

STATE OF WASHINGTON)
)
COUNTY OF _____) ss.

On this _____ day of _____, 19____, before me personally appeared _____, of BURLINGTON NORTHERN RAILROAD COMPANY, the corporation that executed this within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument and that seal affixed is the corporate seal of said corporation.

IN WITNESS WHEREOF I have hereunto set my hand and affixed by official seal the day and year first above written.

NOTARY PUBLIC in and for the State
of Washington, residing at _____
My commission expires _____

[SEAL]

Exhibit No. 37

ROSENOW, HALE & JOHNSON
LAWYERS

JACK G. ROSENOW
JEFFREY S. HALE
W. CLARKE JOHNSON
JOHN C. GRAFFE
CHRISTOPHER W. KEAY
BARRY F. SMITH
DONNA M. MONIZ
DIANE E. POMEROY
MARILYN W. SCHULTHEIS
PEGGY S. AMDOT

MC CARTER SQUARE
2215 NORTH 20TH STREET
TACOMA, WASHINGTON 98405
TELEPHONE (206) 572-8323
FROM SEATTLE (36) 1787
FAX (206) 572-5473
1111 THIRD AVENUE, SUITE 2400
SEATTLE, WASHINGTON 98101
TELEPHONE (206) 223-4770
FAX (206) 266-7344

SENT TO: Seattle Office

July 6, 1990

Alan Olson, Esquire
Swinomish Tribal Community
P.O. Box 817
950 Moorage Way
La Connor, Washington 98257

Re: Swinomish Tribal Community v. Burlington Northern

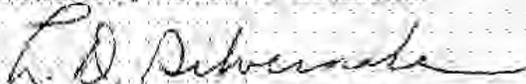
Dear Mr. Olson:

I am forwarding under separate cover the original and three copies of the Application to the Department of Interior for approval of our settlement agreement. It is my understanding that you will attach the Tribe's consent, our check in the amount of \$5,000 which was previously submitted, and make the filing with the Bureau of Indian Affairs in Everett.

I would appreciate receiving a copy of the letter of transmittal to the Bureau of Indian Affairs for my files. Thank you for your cooperation in this regard.

Very truly yours,

ROSENOW, HALE & JOHNSON


Lawrence D. Silvernale

LDS/kmc
Enclosures

cc: Mr. Richard Dauphinais
(w/out enclosures)

APPLICATION FOR RIGHT-OF-WAY

Date: July 2, 1990

BURLINGTON NORTHERN RAILROAD COMPANY (applicant) hereby makes application pursuant to the Act of February 5, 1948 (62 Stat. 17, 18; 25 USC 323-328), and in accordance with Department Regulations 25 CFR 169, as amended, for a right-of-way easement for railroad purposes crossing certain lands in Skagit County, Washington claimed by the Swinomish Tribal Community. The location of said right-of-way and its extent are more particularly shown and delineated on the accompanying map which has been prepared in compliance with 25 CFR 169.6 and by this reference is made a part hereof. Burlington Northern Railroad Company agrees to comply with the following stipulations in the event the right-of-way herein applied for is granted.

- (a) To construct and maintain the right-of-way in a workman-like manner.
- (b) To pay promptly all damages and compensation, in addition to the deposit made pursuant to 25 CFR 169.14 determined by the Secretary to be due the landowners and authorized users and occupants of the land on account of the survey, granting construction and maintenance of the right-of-way.
- (c) To indemnify the landowners and authorized users and occupants against any liability for loss of life, personal injury and property damage arising from the construction, maintenance, occupancy or use of the lands by the applicant, his employees, contractors and their employees, or subcontractors and their employees.
- (d) To restore the lands as nearly as may be possible to their original condition upon the completion of construction to the extent compatible with the purpose for which the right-of-way was granted.
- (e) To clear and keep the lands within the right-of-way to the extent compatible with the purpose of the right-of-way; and to dispose of all vegetative and other material cut, uprooted, or otherwise accumulated during construction and maintenance of the project.
- (f) To take soil and resource conservation and protection measures, including weed control, on the land covered by the right-of-way.

- (g) To do everything reasonably within its power to prevent and suppress fires on or near the lands to be occupied under the right-of-way.
- (h) To build and repair such roads, fences, and trails as may be destroyed or injured by construction work and to build and maintain necessary and suitable crossings for all roads and trails that interest the works constructed, maintained, or operated under the right-of-way.
- (i) That upon revocation or termination of the right-of-way, the applicant shall, so far as is reasonably possible, restore the land to its original condition.
- (j) To at all times keep the Secretary informed of its address, and in case of address of its principal place of business and of the names and addresses of its principal officers.
- (k) That the applicant will not interfere with the use of the lands by or under the authority of the landowners for any purpose not inconsistent with the primary purpose for which the right-of-way is granted.
- (l) If at anytime, there is determined to be a conflict between the above stipulations and the terms of that Settlement Agreement between Swinomish-Burlington Northern, dated November 22, 1989, negotiated between the Swinomish Tribal Community, the United States and Burlington Northern, and which is attached hereto and incorporated herein by express reference, the terms of that agreement shall in all circumstances control.



(Applicant)

DIVISION GENERAL MANAGER

BURLINGTON NORTHERN RAILROAD COMPANY

(Address)

2200 First Interstate Center

Seattle, WA, 98104 - 1105

122 731

ORIGINAL
370/617

RIGHT-OF-WAY EASEMENT - BURLINGTON NORTHERN

This Right-of-Way Easement is between the United States of America, the Swinomish Indian Tribal Community and Burlington Northern Railroad Company, a Delaware corporation.

R E C I T A L S

A. Burlington Northern ("BN"), the Swinomish Indian Tribal Community (the "Tribe"), and the United States have been engaged in a dispute concerning whether or not the existing line of railroad of BN passes through lands forming part of the Swinomish Indian Reservation held in trust by the United States for the benefit of the Tribe, without appropriate permission or easements having been granted to BN.

B. The dispute has taken the form of a lawsuit entitled: Swinomish Tribal Community v. Burlington Northern Railroad, et al., United States District Court for the Western District of Washington, Cause Number: C76-550V (the "Action").

C. Burlington Northern, the Tribe and the United States have now settled the dispute among them pursuant to the Settlement Agreement dated September 24, 1990 (the "Settlement Agreement"). The Settlement Agreement provides, among other things, for the dismissal of the Action by and against BN and the granting of a forty (40) year right-of-way easement with two twenty (20) year options to Burlington Northern for its existing railroad, or successor methods provided by paragraph 6 herein, over and across any and all lands of the Tribe held in trust for its benefit by the United States that such railroad crosses.

122 731

D. This right-of-way easement is intended to grant and convey to BN, despite any questions of survey, or any uncertainty as to the location of (a) the boundaries of the Swinomish Indian Reservation, and (b) any lands within the Reservation (whether tidelands, submerged lands, or uplands) held in trust by the United States for the benefit of the Tribe, a forty (40) year easement with two twenty (20) options over any and all lands comprising part of the Swinomish Indian Reservation and held in trust by the United States for the benefit of the Tribe over which the existing railway of BN passes.

NOW THEREFORE, in consideration of the sum deposited with the application for this right-of-way easement and the agreement and covenants contained in said application and in this agreement, the United States hereby grants and conveys to BN, under authority of the Act of February 5, 1948 (62 Stat. 17; 25 U.S.C. 323-328) and the regulations in 25 C.F.R. 169 promulgated thereunder, a right-of-way easement as follows:

1. Legal Description: The easement hereby conveyed shall be sixty (60) feet in width, being thirty (30) feet on the North Side and thirty (30) feet on the South Side of the center line described in Exhibit "A" hereto, located in Skagit County, Washington.

2. Term: The term of this easement is forty (40) years from the date hereof.

3. Payment: (a). As partial consideration for this Settlement, BN will deposit with the BIA along with said

application the sum of \$5,000 in the form of a check payable to the BIA. Upon the BIA's delivery to BN of the approved, executed easement, BN shall immediately deliver to Allan Olson, or his successor as named by the Tribe ("Tribal Attorney"), as attorney for the Tribe, a check payable to the Tribe in the sum of \$120,000. The sum of these checks, \$125,000, shall reflect payment in full for all rent, damages and compensation of any sort, due for past occupancy of the right-of-way from date of construction in 1889 until January 1, 1989. The BIA and the Tribal attorney shall hold said \$125,000, which they are to deliver or return as provided in paragraphs 9 and 10 of the Settlement Agreement.

(b). Pay an annual rental ("rental") commencing on the 1st day of January 1989, totaling a minimum of TEN THOUSAND DOLLARS (\$10,000) per year, and a like or adjusted sum on each January 1st thereafter during the term of the Right-of-Way Easement granted under this Agreement.

i. CPI-U Adjustment. On each January 1st after January 1, 1989, the rental shall be increased by a percentage equal to the percentage change in the All Items Consumer Price Index of the United States Department of Labor, Bureau of Labor Statistics for All Urban Consumers in the Seattle-Tacoma, Washington area ("CPI-U") based on the 1982-1984 base = 100 (or, if not available, the most nearly comparable index), from the CPI-U used to calculate the previous year's adjustment to the most recent calculation of the CPI-U. The annual rental

122 731

commencing on January 1, 1989 is based on the CPI-U for the first half of 1988 (CPI-U = 111.9).

ii. Appraisal Adjustment. In addition to the annual CPI-U adjustments, described in subparagraph (b)(i) of this paragraph, the rental shall be increased at five (5) year intervals to reflect changes in property values such as, but not limited to, changes in the real estate market, the acquisition of applicable permits for the development of nearby property, proposed or actual marina construction or other land development near said right-of-way. The rental shall be increased to an amount equal to TWELVE PERCENT (12%) of the sum of the "right-of-way value" of the property which is the value of the property subject to the right-of-way, and the "remainder damage" which is the severance damage to Reservation lands north of State Highway 20 as determined by normal real estate appraisal methods considering the highest and best use of such adjacent lands.

Development proposed for the property north and south of the Railroad is anticipated to include several separate and distinct land uses including a marina boat basin (with approximately 800 boat slips) to the north, upland commercial development to the south, and in the event the "South Lagoon" (adjacent to and south of the Railroad) is developed, an additional marina basin providing additional boat slip moorage facilities. The Railroad right-of-way is located between and adjacent to these land areas and uses. Acreage values used to calculate the right-of-way value shall be based on the use and

122 731

development of lands either to the north or south of the Railroad, whichever has the higher appraised value.

iii. Proposal. Either the Tribe or BN may initiate an appraisal adjustment by a written proposal forwarded by U.S. Mail prior to the end of the five (5) year increment or any time thereafter until an appraisal adjustment is made and a new 5 year increment is commenced. The Tribe may initiate an appraisal adjustment at any time after receiving all necessary federal permits for the development of all or part of the Reservation lands north of State Highway 20. The Tribe may also initiate an appraisal adjustment under paragraph 7.c. of this Right-of-Way Easement. If a party chooses to initiate an appraisal adjustment before the last six months of any five (5) year period, a new five (5) year increment will begin when the new rental begins.

If the parties are unable to agree upon a rental adjustment, such adjustment shall be determined in accordance with the Commercial Arbitration Rules of the American Arbitration Association and the provisions set forth herein by binding arbitration. Arbitration shall be initiated when one party, or the other, nominates an arbitrator in writing, and requests that the other party nominate an arbitrator. The other party shall nominate an arbitrator within 20 days of receipt of the written notice. Both arbitrators must be residents of the State of Washington and shall not be subject to disqualification. Thereafter, both arbitrators nominated shall meet and select a neutral third arbitrator. If they are unable to agree, a third

122 731

arbitrator will be selected under applicable rules of the American Arbitration Association. Arbitration proceedings shall be conducted informally with each party presenting evidence as may be appropriate to its proposed annual rental payment. The arbitration award shall not be subject to judicial review or other appeal unless it be determined that the arbitrators have ignored, or failed to enforce, any of the provisions of this Settlement Agreement.

iv. South Lagoon. In the event that the Tribe determines that it would be profitable to construct additional marina facilities in the area described as the South Lagoon on attached Exhibit A, and in the further event the Tribe secures the necessary Federal permits for such construction, the BN shall either provide a fifty (50) foot wide boat access at a location acceptable to the Tribe to said Lagoon with an appropriate bridge, which will admit at tide levels of mean higher high water boats with masts sixty (60) feet high, or as damage to that portion of remaining lands, compensate the Tribe for net income loss attributable to the inability to construct the South Lagoon portion of the marina. Such loss shall be compensated on the basis of expected rental or other income less costs of planning, development, construction, management, and operation.

4. Holdover: In the event that Burlington Northern fails to surrender and vacate the lands covered by this agreement, pursuant to the provisions herein, after expiration of either the

122 731

original term of this right of way or of any extended term, except pursuant to an option to extend, Burlington Northern shall pay to the Tribe a monthly rent in an amount equal to one-twelfth (1/12th) of the yearly rental in effect at the expiration of the preceding term adjusted upward but not downward by the percentage change in the CPI-U, as defined in paragraph 3(b), from the CPI-U in effect at the time of the most recent rental adjustment to the most recent calculation of the CPI-U prior to the date the payment is due. Payments under this paragraph will not be less than \$1000 a month. The payment shall be due monthly on the last day of every month following the expiration of the preceding term.

In any proceeding brought by the Tribe to evict Burlington Northern and/or seek damages for Burlington Northern's failure to surrender, the Tribe shall be entitled to payment for the holdover period in an amount equal to the fair rental value of the right of way so used by Burlington Northern; provided that such fair rental value shall not be less than the monthly payments provided for in the preceding sub-paragraph. Should Burlington Northern refuse or fail to make said monthly payments to the Tribe, the Tribe shall be entitled to apply to any court of competent jurisdiction for injunctive relief to compel such payments and shall be entitled to reasonable attorney fees therefor.

5. Options: In addition to the forty (40) year term, BN shall have an option to extend such term twenty (20) years. Each

122 731

option may be exercised by giving written notice to the United States and the Tribe as provided in paragraph 9 below; no later than thirty (30) days prior to the expiration of the prior term.

6. Rights of BN: Under this easement BN, its successors and assigns: (a) shall have the right to maintain, operate, inspect, repair, protect, and remove the existing line of railroad and to replace the existing line with another line for the transportation of general commodities by railroad or other comparable successor methods of transportation; to keep the right-of-way easement clear of underbrush and trees; to have the right of ingress and egress to and from the same for the aforesaid purposes; to construct and reconstruct bridges, culverts and other facilities necessary for the operation of the railroad; said right-of-way easements and privileges herein granted being assignable or transferable; and (b) shall have an exclusive easement across and over said right-of-way easement and no further easements maybe granted on said strip except as provided in paragraph 7 following. Upon discontinuance of the right-of-way granted under this Agreement, BN or its successors, may at its option, leave the railroad or other installations provided for herein on the ground or may pick up and remove said railroad.

7. Rights of the United States and the Tribe:

a. The United States and the Tribe may permit the construction, operation, repair and maintenance of utility lines, streets, or roadways under, across or along said

122 731

right-of-way easement. Should the United States or the Tribe wish to place or alter any body of water over the right-of-way easement, it will first present to BN, for review and comment, detailed plans and drawings of any proposal. If any such crossing or changes in any body of water are made in the future, it is agreed that the United States and the Tribe will reimburse, or cause BN to be reimbursed, for all of the reasonable and necessary costs for labor and materials incurred by BN in altering, or protecting, said railroad from said activities. Should the United States or the Tribes cause any damages to the railroad, they shall indemnify and hold BN harmless from any and all actual damages caused to said railroad by the United States or the Tribe. It is agreed that neither the United States nor the Tribe will permit any permanent buildings, or other structures, trees, underbrush, or any other unreasonable obstructions, to be placed upon the right-of-way easement without BN's consent. Should the United States or the Tribe wish to have the railroad relocated within the Reservation, BN will relocate the railroad provided the United States or the Tribe provides or secures for BN an alternate, feasible right-of-way with all necessary permits that gives BN all the rights it enjoys under this right-of-way easement at no additional cost to BN and with no interruption of service and provided further that the United States or the Tribe pays all costs directly, or indirectly, associated with said relocation.

b. Burlington Northern will keep the Tribe informed as to

122 731

the nature and identity of all cargo transported by Burlington Northern across the Reservation. Initially, Burlington Northern shall prepare a summary of all such commodities expected to cross the Reservation and the quantities of such commodities. Thereafter, the disclosure shall be updated periodically as different products, or commodities, are added or deleted. Such updates shall occur at least annually. The disclosure updates shall identify any previously shipped cargo that is different in nature, identity or quantity from the cargo described in previous disclosures. Burlington Northern will comply strictly with all Federal and State Regulations regarding classifying, packaging and handling of rail cars so as to provide the least risk and danger to persons, property and the natural environment of the Reservation.

c. Burlington Northern agrees that, unless otherwise agreed in writing, only one eastern bound train, and one western bound train, (of twenty-five (25) cars or less) shall cross the Reservation each day. The number of trains and cars shall not be increased unless required by shipper needs. The Tribe agrees not to arbitrarily withhold permission to increase the number of trains or cars when necessary to meet shipper needs. It is understood and agreed that if the number of crossings or the number of cars is increased, the annual rental will be subject to adjustment in accordance with paragraph 3(b)iii of this Right-of-Way Easement and paragraph 2(b)iii of the Settlement Agreement. Train speeds over Reservation grade crossings shall not exceed

122 731

ten (10) miles per hour.

d. Burlington Northern will cooperate fully with the Tribe in providing appropriate landscaping on either side of Burlington Northern's railroad tracks in order to make Burlington Northern's facilities compatible with the Tribe's development of adjacent lands. It is understood and agreed that Burlington Northern requires an area clear of brush and flammables to a distance of at least 15 feet on either side of the center line of the railroad.

8. Liability of BN: BN will protect, indemnify and hold harmless the United States and the Tribe against any loss, damage or expense that may be incurred, suffered or had by either of them, resulting from the death or injury to any person or persons or any loss, damage or injury to property, from any intentional or negligent acts or omissions of BN its agents, servants or employees.

9. Notices: Any notices provided for in this agreement shall be given as follows:

(a) Swinomish Tribal Community:

Tribal Attorney
Swinomish Indian Tribal Community
P.O. Box 817 - 950 Moorage Way
LaConner, Washington 98257

(b) United States of America:

Department of Interior
Bureau of Indian Affairs
Puget Sound Agency
Federal Building
Everett, Washington 98201

(c) BN:

Burlington Northern Railroad Company
General Manager
2200 First Interstate Center
999 Third Avenue
Seattle, WA 98104

Any party may by written notice to other parties change the address to which subsequent notice shall be sent.

DATED this 19 day of July, 1991.

UNITED STATES OF AMERICA

RECEIVED OR FILED
INDIAN AFFAIRS
PORTLAND AREA OFFICE

122 731

AUG 13 12 53

SEARCH OF REALTY
TITLES & RECORDS
SECTION

James M. Green
for William A. Black, Superintendent
BURLINGTON NORTHERN RAILROAD
COMPANY

By J. A. [Signature]
Its _____

- 122 731

The SWINOMISH INDIAN TRIBAL
COMMUNITY hereby consents to
the foregoing Right-of-Way
Easement this 24th day, of
September, 1980.

SWINOMISH INDIAN TRIBAL COMMUNITY

By Robert J. S.
its CHAIRMAN

STATE OF WASHINGTON)
COUNTY OF Wash)

ss.

122 731

On this 19 day of July, 1991, before me personally appeared Trond Green, of the UNITED STATES OF AMERICA DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, to me known to be the individual who executed this within instrument and acknowledged that he signed the same as his free and voluntary act and deed for the uses and purposes herein mentioned.

IN WITNESS WHEREOF I have hereunto set my hand and affixed by official seal the day and year first above written.

P. Teresa Melton
NOTARY PUBLIC in and for the State
of Washington, residing at Snahomish
My commission expires 8-20-91

[SEAL]

STATE OF WASHINGTON)
COUNTY OF SKAGIT)

ss.

On this 24th day of September, 1990, before me personally appeared Robert Joe, Sr., to me known to be the CHAIRMAN of the SWINOMISH TRIBAL COMMUNITY that executed this within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument.

IN WITNESS WHEREOF I have hereunto set my hand and affixed by official seal the day and year first above written.

Allan Olson
NOTARY PUBLIC in and for the State
of Washington, residing at LACONNER WA
My commission expires 4-6-94

[SEAL]

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

122 731

On this 20th day of NOVEMBER, 1989, before me personally appeared J.H. ILKKA, of BURLINGTON NORTHERN RAILROAD COMPANY, the corporation that executed this within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument and that seal affixed is the corporate seal of said corporation.

IN WITNESS WHEREOF I have hereunto set my hand and affixed by official seal the day and year first above written.



NOTARY PUBLIC in and for the State of Washington, residing at SEATTLE, WA

My commission expires 1-9-1993



Exhibit No. 38



United States Department of the Interior



OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

BIA.FN.0313

Honorable Richard B. Stewart
Assistant Attorney General
Land and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

Attn: Charles E. O'Connell, Jr.
Indian Resources Section

Re: United States v. Cascade Natural Gas Corp.,
No. C-82-1443 (W.D. Wash.)

Dear Mr. Stewart:

This responds to the request of Charles O'Connell of the Indian Resources Section for our recommendation on whether to accept the proposed settlement agreement in the above-captioned case.

Under the terms of the settlement agreement, Burlington Northern Railroad Company is awarded a 40-year right-of-way easement across the Swinomish Indian Reservation with two additional 20-year options in exchange for an initial payment of \$125,000. This amount also represents consideration for all past damages in connection with the right-of-way. The agreement also provides for an annual rental of at least \$10,000, with increases tied to the consumer price index for the Seattle-Tacoma area.

We believe the settlement agreement is fair and reasonable. The parties have solved possible jurisdictional problems with respect to disputes under this agreement by agreeing to arbitration with judicial review if necessary. Accordingly, we recommend that the United States approve the settlement.

Enclosed are the original settlement documents.

Sincerely,

A handwritten signature in black ink, appearing to read "Martin J. Suenberg".

Martin J. Suenberg
Deputy Solicitor

Enclosure

cc: Regional Solicitor, Pacific Northwest Region

EXHIBIT No. 10

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SWINOMISH INDIAN TRIBAL
COMMUNITY, a federally recognized Indian
tribe,

Plaintiff,

v.

BNSF RAILWAY COMPANY, a Delaware
corporation,

Defendant.

NO. 2:15-cv-00543 - RSL

PRAECIPE REGARDING
DECLARATION OF CHRISTOPHER
I. BRAIN IN SUPPORT OF
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

TO: CLERK OF THE COURT;
AND TO: ALL COUNSEL OF RECORD

YOU ARE HEREBY requested to replace page five (5) of the Declaration of
Christopher I. Brain in Support of Plaintiff's Motion for Summary Judgment, originally filed
on March 10, 2016 (Dkt #33), under the above-referenced cause number, with the attached
page 5, and to append the attached Exhibit 31(a) to said declaration as Exhibit 31(a). Other
than the foregoing changes, no changes have been made to Mr. Brain's declaration.

//
//
//

DATED this 2nd day of June, 2016.

TOUSLEY BRAIN STEPHENS PLLC

By: /s/ Christopher I. Brain

By: /s/ Paul W. Moomaw

Christopher I. Brain, WSBA #5054
cbrain@tousley.com

Paul W. Moomaw, WSBA #32728
pmoomaw@tousley.com

1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101-1332
T: 206.682.5600
F: 206.682.2992

**OFFICE OF THE TRIBAL ATTORNEY,
SWINOMISH INDIAN TRIBAL
COMMUNITY**

By: /s/ Stephen T. LeCuyer

Stephen T. LeCuyer, WSBA #36408
slecuyer@swinomish.nsn.us

11404 Moorage Way
LaConner, WA 98257
T: 360.466.1058
F: 360.466.5309

Attorneys for Plaintiff

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CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system will send notification of such filing to all parties of record.

DATED at Seattle, Washington, this 2nd day of June, 2016.

/s/ Paul W. Moomaw
Paul W. Moomaw, WSBA #32728
pmoomaw@tousley.com
Attorneys for Plaintiff
TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, WA 98101
Tel: 206.682.5600

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1 Exhibit 27: Entry of Dismissal of Right of Way Request Litigation entered
2 February 22, 1984.

3 Exhibit 28: Settlement Agreement dated September 24, 1990 in the Trespass
4 Litigation.

5 Exhibit 29: Right of Way Easement - Burlington Northern dated July 19, 1991.

6 Exhibit 30: Conceptual Development Plan for Tribe's economic development
7 dated May 15, 1987.

8 Exhibit 31: June 5, 1989 letter from Richard Dauphinais to Lawrence Silvernale
9 with draft copies of the Settlement Agreement and Right of Way Easement.

10 Exhibit 31(a): June 8, 1989 letter from Richard Dauphinais to Lawrence
11 Silvernale with draft copies of the Settlement Agreement and Right of Way Easement.

12 Exhibit 32: June 22, 1989 letter from Lawrence Silvernale to Richard Dauphinais.

13 Exhibit 33: July 10, 1989 letter from Lawrence Silvernale to Richard Dauphinais
14 and Allan Olson.

15 Exhibit 34: Motion of the Interstate Commerce Commission for Leave to
16 Intervene in the Trespass Litigation.

17 Exhibit 35: Order entered March 7, 1980 denying Motion to Intervene.

18 Exhibit 36: Swinomish Tribal Senate Resolution No. 89-8-73 dated August 1,
19 1989 approving and attaching copies of the Settlement Agreement and Right of Way
20 Easement.

21 Exhibit 37: July 6, 1990 letter and Application for Right of Way by Burlington
22 Northern.

23 Exhibit 38: Letter dated November 27, 1990 from the U.S. Department of Interior
24 Deputy Solicitor recommending the United States approve the settlement.

25 ///

26 ///

Exhibit No. 31(a)

Executive Director
John E. Echohawk

Deputy Director
Richard Dauphinais

Attorneys
Ethel J. Abeita
Robert T. Anderson
Jeryllyn DeCoteau
Walter R. Echo-Hawk
Kim Jerome Gottschalk
Yvonne T. Knight
Melody L. McCoy
Don B. Miller
Steven C. Moore
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Native American Rights Fund

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Of Counsel
Richard B. Collins
Charles F. Wilkinson

FOR YOUR INFORMATION
ALL JOHNSON--TRIBAL ATTORNEY

June 8, 1989

Lawrence D. Silvernale
Rosenow, Hale and Johnson
1620 Key Tower
1000 2nd Avenue
Seattle, Washington 98104

Re: Swinomish

Dear Mr. Silvernale:

Enclosed are revised versions of the Settlement Agreement (SA) and Right-of-Way Easement (ROW). The changes from our last set of documents are summarized below.

We have put both documents in the form of the Cascade and Trans Mountain papers in order to provide a mechanism for approval of the ROW before final payment is made and the case dismissed. These changes are mostly in the SA. We do not think that those revisions are substantive.

Settlement Agreement

1. In paragraph 2(b) we have revised the periodic rental language without changing the substance.
2. In paragraphs 7 and 8 we have added release language. Again, this is taken from the TM and Cascade documents.

Right-of-Way

1. In paragraph 3 we have copied the past damages and rental language from the SA.
2. In paragraphs 4 and 7(b)-(d) we have added the provisions described in my letter of June 5, 1989.

SITC000007939

Please call Allan or me after you have had a chance to review the documents so that we can set up a conference call or meeting. If you have any questions, do not hesitate to contact me.

Sincerely,

Richard Dauphinais

RIGHT-OF-WAY EASEMENT - BURLINGTON NORTHERN

This Right-of-Way Easement is between the United States of America, the Swinomish Indian Tribal Community and Burlington Northern Railroad Company, a Delaware corporation.

R E C I T A L S

A. Burlington Northern ("BN"), the Swinomish Indian Tribal Community (the "Tribe"), and the United States have been engaged in a dispute concerning whether or not the existing line of railroad of BN passes through lands forming part of the Swinomish Indian Reservation held in trust by the United States for the benefit of the Tribe, without appropriate permission or easements having been granted to BN.

B. The dispute has taken the form of a lawsuit entitled: Swinomish Tribal Community v. Burlington Northern Railroad, et al., United States District Court for the Western District of Washington, Cause Number: C76-550V (the "Action").

C. Burlington Northern, the Tribe and the United States have now settled the dispute among them pursuant to the Settlement Agreement dated _____ (the "Settlement Agreement"). The Settlement Agreement provides, among other things, for the dismissal of the Action by and against BN and the granting of a forty (40) year right-of-way easement with two twenty (20) year options to Burlington Northern for its existing railroad, or successor methods of transportation provided by paragraph 6 herein, over and across any and all lands of the Tribe held in trust for its benefit by the United States that

such railroad crosses.

D. This right-of-way easement is intended to grant and convey to BN, despite any questions of survey, or any uncertainty as to the location of (a) the boundaries of the Swinomish Indian Reservation, and (b) any lands within the Reservation (whether tidelands, submerged lands, or uplands) held in trust by the United States for the benefit of the Tribe, a forty (40) year easement with two twenty (20) options over any and all lands comprising part of the Swinomish Indian Reservation and held in trust by the United States for the benefit of the Tribe over which the existing railway of BN passes.

NOW THEREFORE, in consideration of the sum deposited with the application for this right-of-way easement and the agreement and covenants contained in said application and in this agreement, the United States hereby grants and conveys to BN, under authority of the Act of February 5, 1948 (62 Stat. 17; 25 U.S.C. 323-328) and the regulations in 25 C.F.R. 169 promulgated thereunder, a right-of-way easement as follows:

1. Legal Description: The easement hereby conveyed shall be sixty (60) feet in width, being thirty (30) feet on the North Side and thirty (30) feet on the South Side of the center line described in Exhibit "A" hereto, located in Skagit County, Washington.

2. Term: The term of this easement is forty (40) years from the date hereof.

3. Payment: (a). As partial consideration for this

Settlement, BN will deposit with the BIA along with said application the sum of \$5,000 in the form of a check payable to the BIA. Upon the BIA's delivery to BN of the approved, executed easement, BN shall immediately deliver to Allan Olson, or his successor as named by the Tribe ("Tribal Attorney"), as attorney for the Tribe, a check payable to the Tribe in the sum of \$120,000. The sum of these checks, \$125,000, shall reflect payment in full for all rent, damages and compensation of any sort, due for past occupancy of the right-of-way from date of construction in 1889 until January 1, 1989. The BIA and the Tribal attorney shall hold said \$125,000, which they are to deliver or return as provided in paragraphs 9 and 10 of the Settlement Agreement.

(b). BN will pay an annual rental ("rental") commencing on the 1st day of January 1989, totaling a minimum of TEN THOUSAND DOLLARS (\$10,000) per year, and a like or adjusted sum on each January 1st thereafter during the term of the Right-of-Way Easement granted under this Agreement.

i. CPI-U Adjustment. On each January 1st after January 1, 1989, the rental shall be increased by a percentage equal to the percentage change in the All Items Consumer Price Index of the United States Department of Labor, Bureau of Labor Statistics for All Urban Consumers in the Seattle-Tacoma, Washington area ("CPI-U") based on the 1982-1984 base = 100 (or, if not available, the most nearly comparable index), from the CPI-U used to calculate the previous year's adjustment to the

most recent calculation of the CPI-U. The annual rental commencing on January 1, 1989 is based on the CPI-U for the first half of 1988 (CPI-U = 111.9).

ii. Appraisal Adjustment. In addition to the annual CPI-U adjustments, described in subparagraph (b)(i) of this paragraph, the rental shall be increased at five (5) year intervals to reflect changes in property values such as, but not limited to, changes in the real estate market, the acquisition of applicable permits for the development of nearby property, proposed or actual marina construction or other land development near said right-of-way. The rental shall be increased to an amount equal to TWELVE PERCENT (12%) of the sum of the "right-of-way value", which is the value of the property subject to the right-of-way, and the "severance damage", which is the decrease in value to Reservation lands north of State Highway 20 attributable to BN, as determined by normal real estate appraisal methods considering the highest and best use of such adjacent lands.

Development proposed for the property north and south of the Railroad is anticipated to include several separate and distinct land uses including a marina boat basin (with approximately 800 boat slips) to the north, upland commercial development to the south, and in the event the "South Lagoon" (adjacent to and south of the Railroad) is developed, an additional marina basin providing additional boat slip moorage facilities. The Railroad right-of-way is located between and

adjacent to these land areas and uses. Acreage values used to calculate the right-of-way value shall be based on the use and development of lands either to the north or south of the Railroad, whichever has the higher appraised value.

iii. Proposal. Either the Tribe or BN may initiate an appraisal adjustment by a written proposal forwarded by U.S. Mail during the last six months of any five (5) year interval. The appraisal adjustment to the rental shall be effective on the day following the end of the previous five year interval. If an appraisal adjustment is not initiated during a five year interval, the Tribe or BN may initiate an appraisal adjustment any time thereafter until an appraisal adjustment is made and a new five year interval is commenced. In the event the adjusted rate has not been finally determined prior to the date the next rental payment is due, BN shall make the payment otherwise required with the CPI-U adjustment when due, and the appraisal adjustment shall be applied retroactively to payment(s) due after the adjustment was proposed.

The Tribe may initiate an appraisal adjustment at any time after receiving all necessary federal permits for the development of all or part of the Reservation lands north of State Highway 20. If a party chooses to initiate an appraisal adjustment before the end of any five (5) year period, a new five (5) year increment will begin when the new rental begins.

If the parties are unable to agree upon a rental adjustment, such adjustment shall be determined in accordance with the

Commercial Arbitration Rules of the American Arbitration Association and the provisions set forth herein by binding arbitration. Arbitration shall be initiated when one party, or the other, nominates an arbitrator in writing, and requests that the other party nominate an arbitrator. The other party shall nominate an arbitrator within 20 days of receipt of the written notice. Both arbitrators must be residents of the State of Washington and shall not be subject to disqualification. Thereafter, both arbitrators nominated shall meet and select a neutral third arbitrator. If they are unable to agree, a third arbitrator will be selected under applicable rules of the American Arbitration Association. Arbitration proceedings shall be conducted informally with each party presenting evidence as may be appropriate to its proposed annual rental payment. The arbitration award shall not be subject to judicial review or other appeal unless it be determined that the arbitrators have ignored, or failed to enforce, any of the provisions of this Settlement Agreement.

iv. South Lagoon. In the event that the Tribe determines that it would be profitable to construct additional marina facilities in the area described as the South Lagoon on attached Exhibit A, and in the further event the Tribe secures the necessary Federal permits for such construction, the BN shall either provide a fifty (50) foot wide boat access at a location acceptable to the Tribe to said Lagoon with an appropriate bridge, which will admit at tide levels of mean higher high water

boats with masts sixty (60) feet high, or as damage to that portion of remaining lands, compensate the Tribe for net income loss attributable to the inability to construct the South Lagoon portion of the marina. Such loss shall be compensated on the basis of expected rental or other income less costs of planning, development, construction, management, and operation.

4. Holdover: In the event that Burlington Northern fails to surrender and vacate the lands covered by this agreement, pursuant to the provisions herein, after expiration of either the original term of this right of way or in the event that the term is extended including BN's exercise of the options provided herein, Burlington Northern shall pay to the Tribe a monthly rent in an amount equal to one-twelfth (1/12th) of the yearly rental in effect at the expiration of the preceding term adjusted upward but not downward by the percentage change in the CPI-U, as defined in paragraph 3(b), from the CPI-U in effect at the time of the most recent rental adjustment to the most recent calculation of the CPI-U prior to the date the payment is due. Payments under this paragraph shall not be less than \$1000 a month. The payment shall be due monthly on the last day of every month following the expiration of the preceding term.

In any proceeding brought by the Tribe to evict Burlington Northern and/or seek damages for Burlington Northern's failure to surrender, the Tribe shall be entitled to payment for the holdover period in an amount equal to the fair rental value of the right of way so used by Burlington Northern; provided that

such fair rental value shall not be less than the monthly payments provided for in the preceding sub-paragraph. Should Burlington Northern refuse or fail to make said monthly payments to the Tribe, the Tribe shall be entitled to apply to any court of competent jurisdiction for injunctive relief to compel such payments and shall be entitled to reasonable attorney fees therefor.

5. Options: In addition to the forty (40) year term, BN shall have the option to extend the term of this easement and any additional easements for two successive periods of twenty years each. Each option may be exercised by giving written notice to the United States and the Tribe as provided in paragraph 9 below; no later than thirty (30) days prior to the expiration of the prior term.

6. Rights of BN: Under this easement BN, its successors and assigns: (a) shall have the right to maintain, operate, inspect, repair, protect, and remove the existing line of railroad and to replace the existing line with another line for the transportation of general commodities by railroad or other comparable successor methods of transportation; to keep the right-of-way easement clear of underbrush and trees; to have the right of ingress and egress to and from the same for the aforesaid purposes; to construct and reconstruct bridges, culverts and other facilities necessary for the operation of the railroad; said right-of-way easements and privileges herein granted being assignable or transferable; and (b) shall have an exclusive easement across and over said right-of-way easement and

no further easements maybe granted on said strip except as provided in paragraph 7 following. Upon discontinuance of the right-of-way granted under this Agreement, BN or its successors, may at its option, leave the railroad or other installations provided for herein on the ground or may pick up and remove said railroad.

7. Rights of the United States and the Tribe:

a. The United States and the Tribe may permit the construction, operation, repair and maintenance of utility lines, streets, or roadways under, across or along said right-of-way easement. Should the United States or the Tribe wish to place or alter any body of water over the right-of-way easement, it will first present to BN, for review and comment, detailed plans and drawings of any proposal. If any such crossing or changes in any body of water are made in the future, it is agreed that the United States and the Tribe will reimburse, or cause BN to be reimbursed, for all of the reasonable and necessary costs for labor and materials incurred by BN in altering, or protecting, said railroad from said activities. Should the United States or the Tribes cause any damages to the railroad, they shall indemnify and hold BN harmless from any and all actual damages caused to said railroad by the United States or the Tribe. It is agreed that neither the United States nor the Tribe will permit any permanent buildings, or other structures, trees, underbrush, or any other unreasonable obstructions, to be placed upon the right-of-way easement without

BN's consent. Should the United States or the Tribe wish to have the railroad relocated within the Reservation, BN will relocate the railroad provided the United States or the Tribe provides or secures for BN an alternate, feasible right-of-way with all necessary permits that gives BN all the rights it enjoys under this right-of-way easement at no additional cost to BN and with no interruption of service and provided further that the United States or the Tribe pays all costs directly, or indirectly, associated with said relocation.

b. Burlington Northern will inform the Tribe in advance of the names of the shippers and the contents of railroad cars crossing Reservation lands. Burlington Northern shall notify the Tribe at least 72 hours in advance of any shipments of toxic or hazardous materials across the Reservation and such shipments shall be made with maximum safeguards and in a manner that presents the least risk and danger to person, property and the natural environment of the Reservation. Notice under this paragraph may be provided by bill of lading, other satisfactory documentation or agreement between the parties regarding amounts and types of standard cargo.

c. Burlington Northern agrees that, unless otherwise agreed in writing, only one westbound and one eastbound train, of 25 cars or less, shall cross the Reservation each day. The schedule and timing of trains crossing the Reservation shall be determined by the Tribe and trains shall not travel at speeds in excess of five miles per hour (5 MPH).

d. Burlington Northern will provide appropriate landscaping on either side of its railroad tracks in order to make Burlington Northern's facilities compatible, to the maximum extent possible, with the Tribe's development of adjacent lands.

8. Liability of BN: BN will protect, indemnify and hold harmless the United States and the Tribe against any loss, damage or expense that may be incurred, suffered or had by either of them, resulting from the death or injury to any person or persons or any loss, damage or injury to property, from any intentional or negligent acts or omissions of BN its agents, servants or employees.

9. Notices: Any notices provided for in this agreement shall be given as follows:

(a) Swinomish Tribal Community:

Tribal Attorney
Swinomish Indian Tribal Community
P.O. Box 817 - 950 Moorage Way
LaConner, Washington 98257

(b) United States of America:

Department of Interior
Bureau of Indian Affairs
Puget Sound Agency
Federal Building
Everett, Washington 98201

(c) BN:

Burlington Northern Railroad Company
General Manager
2200 First Interstate Center
999 Third Avenue
Seattle, WA 98104

Any party may by written notice to other parties change the address to which subsequent notice shall be sent.

DATED this ____ day of _____, 1987.

UNITED STATES OF AMERICA

BURLINGTON NORTHERN RAILROAD
COMPANY

By _____

Its _____

The SWINOMISH INDIAN TRIBAL
COMMUNITY hereby consents to
the foregoing Right-of-Way
Easement this ____ day, of
_____, 198__.

SWINOMISH INDIAN TRIBAL COMMUNITY

By _____

Its _____

STATE OF WASHINGTON)
)
COUNTY OF _____) ss.

On this _____ day of _____, 19____, before me personally appeared _____, of the UNITED STATES OF AMERICA DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, to me known to be the individual who executed this within instrument and acknowledged that he signed the same as his free and voluntary act and deed for the uses and purposes herein mentioned.

IN WITNESS WHEREOF I have hereunto set my hand and affixed by official seal the day and year first above written.

NOTARY PUBLIC in and for the State
of Washington, residing at _____

My commission expires _____

[SEAL]

STATE OF WASHINGTON)
)
COUNTY OF _____) ss.

On this _____ day of _____, 19____, before me personally appeared _____, to me known to be the _____ of the SWINOMISH TRIBAL COMMUNITY that executed this within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument.

IN WITNESS WHEREOF I have hereunto set my hand and affixed by official seal the day and year first above written.

NOTARY PUBLIC in and for the State
of Washington, residing at _____

My commission expires _____

[SEAL]

STATE OF WASHINGTON)
)
COUNTY OF _____) ss.

On this _____ day of _____, 19____, before me personally appeared _____, of BURLINGTON NORTHERN RAILROAD COMPANY, the corporation that executed this within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument and that seal affixed is the corporate seal of said corporation.

IN WITNESS WHEREOF I have hereunto set my hand and affixed by official seal the day and year first above written.

NOTARY PUBLIC in and for the State
of Washington, residing at _____

My commission expires _____

[SEAL]

SETTLEMENT AGREEMENT
SWINOMISH - BURLINGTON NORTHERN

The Swinomish Tribal Community (hereinafter "Tribe") as the duly constituted governing body of the Swinomish Indian Reservation, the United States Department of the Interior, Bureau of Indian Affairs ("the BIA"), and Burlington Northern Railroad Company (hereinafter "Burlington Northern" or "BN"), in order to settle those matters in dispute between the Tribe and BIA and Burlington Northern in the consolidated actions entitled Burlington Northern Railroad Company vs. Swinomish Tribal Community et al., Western District of Washington cause C76-550V, and to resolve other matters between Burlington Northern and the Tribe and BIA, agree as follows:

1. **Application for Easement.** BN will submit to the BIA an application for a right-of-way easement in the form attached hereto as Exhibit "A". The Tribe shall immediately upon execution of this Settlement Agreement advise the BIA in writing of the Tribe's consent to the granting to BN by the BIA of the right-of-way easement attached to said application as Attachment "A". Both BN and the Tribe shall take whatever other steps are reasonably necessary promptly to obtain the approval by the BIA of said right-of-way easement, the approval of the attorney for the United States of this Settlement Agreement and the stipulation referred to in paragraph 3, and the full consummation of this agreement.

2. Payment. (a). As partial consideration for this Settlement, BN will deposit with the BIA along with said application the sum of \$5,000 in the form of a check payable to the BIA. Upon the BIA's delivery to BN of the approved, executed easement, BN shall immediately deliver to Allan Olson, or his successor as named by the Tribe ("Tribal Attorney"), as attorney for the Tribe, a check payable to the Tribe in the sum of \$120,000. The sum of these checks, \$125,000, shall reflect payment in full for all rent, damages and compensation of any sort, due for past occupancy of the right-of-way from date of construction in 1889 until January 1, 1989. The BIA and the Tribal attorney shall hold said \$125,000, which they are to deliver or return as provided in paragraphs 9 and 10 below.

(b). BN will pay an annual rental ("rental") commencing on the 1st day of January 1989, totaling a minimum of TEN THOUSAND DOLLARS (\$10,000) per year, and a like or adjusted sum on each January 1st thereafter during the term of the Right-of-Way Easement granted under this Agreement.

i. CPI-U Adjustment. On each January 1st after January 1, 1989, the rental shall be increased by a percentage equal to the percentage change in the All Items Consumer Price Index of the United States Department of Labor, Bureau of Labor Statistics for All Urban Consumers in the Seattle-Tacoma, Washington area ("CPI-U") based on the 1982-1984 base = 100 (or, if not available, the most nearly comparable index), from the CPI-U used to calculate the previous year's adjustment to the

most recent calculation of the CPI-U. The annual rental commencing on January 1, 1989 is based on the CPI-U for the first half of 1988 (CPI-U = 111.9).

ii. Appraisal Adjustment. In addition to the annual CPI-U adjustments, described in subparagraph (b)(i) of this paragraph, the rental shall be increased at five (5) year intervals to reflect changes in property values such as, but not limited to, changes in the real estate market, the acquisition of applicable permits for the development of nearby property, proposed or actual marina construction or other land development near said right-of-way. The rental shall be increased to an amount equal to TWELVE PERCENT (12%) of the sum of the "right-of-way value", which is the value of the property subject to the right-of-way, and the "severance damage", which is the decrease in value to Reservation lands north of State Highway 20 attributable to BN, as determined by normal real estate appraisal methods considering the highest and best use of such adjacent lands.

Development proposed for the property north and south of the Railroad is anticipated to include several separate and distinct land uses including a marina boat basin (with approximately 800 boat slips) to the north, upland commercial development to the south, and in the event the "South Lagoon" (adjacent to and south of the Railroad) is developed, an additional marina basin providing additional boat slip moorage facilities. The Railroad right-of-way is located between and

adjacent to these land areas and uses. Acreage values used to calculate the right-of-way value shall be based on the use and development of lands either to the north or south of the Railroad, whichever has the higher appraised value.

iii. Proposal. Either the Tribe or BN may initiate an appraisal adjustment by a written proposal forwarded by U.S. Mail during the last six months of any five (5) year interval. The appraisal adjustment to the rental shall be effective on the day following the end of the previous five year interval. If an appraisal adjustment is not initiated during a five year interval, the Tribe or BN may initiate an appraisal adjustment any time thereafter until an appraisal adjustment is made and a new five year interval is commenced. In the event the adjusted rate has not been finally determined prior to the date the next rental payment is due, BN shall make the payment otherwise required with the CPI-U adjustment when due, and the appraisal adjustment shall be applied retroactively to payment(s) due after the adjustment was proposed.

The Tribe may initiate an appraisal adjustment at any time after receiving all necessary federal permits for the development of all or part of the Reservation lands north of State Highway 20. If a party chooses to initiate an appraisal adjustment before the end of any five (5) year period, a new five (5) year increment will begin when the new rental begins.

If the parties are unable to agree upon a rental adjustment, such adjustment shall be determined in accordance

with the Commercial Arbitration Rules of the American Arbitration Association and the provisions set forth herein by binding arbitration. Arbitration shall be initiated when one party, or the other, nominates an arbitrator in writing, and requests that the other party nominate an arbitrator. The other party shall nominate an arbitrator within 20 days of receipt of the written notice. Both arbitrators must be residents of the State of Washington and shall not be subject to disqualification. Thereafter, both arbitrators nominated shall meet and select a neutral third arbitrator. If they are unable to agree, a third arbitrator will be selected under applicable rules of the American Arbitration Association. Arbitration proceedings shall be conducted informally with each party presenting evidence as may be appropriate to its proposed annual rental payment. The arbitration award shall not be subject to judicial review or other appeal unless it be determined that the arbitrators have ignored, or failed to enforce, any of the provisions of this Settlement Agreement.

iv. South Lagoon. In the event that the Tribe determines that it would be profitable to construct additional marina facilities in the area described as the South Lagoon on attached Exhibit A, and in the further event the Tribe secures the necessary Federal permits for such construction, the BN shall either provide a fifty (50) foot wide boat access at a location acceptable to the Tribe to said Lagoon with an appropriate bridge, which will admit at tide levels of mean higher high water

boats with masts sixty (60) feet high, or as damage to that portion of remaining lands, compensate the Tribe for net income loss attributable to the inability to construct the South Lagoon portion of the marina. Such loss shall be compensated on the basis of expected rental or other income less costs of planning, development, construction, management, and operation.

3. **Stipulated Order of Dismissal.** At the time of execution of this Settlement Agreement, the Tribe and BN shall cause their attorneys to execute, and shall request that the attorney for the United States execute, a stipulation in the form attached hereto as Exhibit "B". The Tribal attorney shall hold said executed stipulation for the Tribe and shall deliver it as provided in paragraph 10 below.

4. **Easement.** It is the intention of the Tribe and BN that BN be granted a forty (40) year easement covering the operation, maintenance and replacement of BN's existing railroad and all facilities ancillary thereto across all lands within the Swinomish Indian Reservation ("the Reservation") and in which the Tribe or the BIA have or claim to have an ownership or beneficial interest.

BN shall have the option to extend the term of this easement and any additional easements for two successive periods of twenty years each. The manner of exercise of the options and the consideration to be paid are set out in the easement that is Attachment "A" to Exhibit "A".

5. **Tribal Resolution.** Attached hereto as Exhibit "C" is a certified copy of a resolution of the Tribe authorizing this Settlement Agreement.

6. **BN Resolution.** Attached hereto as Exhibit "D" is a certified copy of a corporate resolution of BN authorizing this Settlement Agreement.

7. **BN Release As To The Tribe.** For the valuable consideration in the form provided by the terms of this Settlement Agreement, upon completion of each of the undertakings required by paragraphs 1 through 3 and 9 hereof and unless this Agreement is voided pursuant to paragraph 10 hereof, BN hereby releases and forever discharges the Tribe and its predecessors, successors, assigns, or related or affiliated persons or entities, its and their officers, agents, representatives, employees, insurers, and sureties, jointly and severally, from any and all liability, claims, demands, damages, debts, dues, accounts, cause or causes of action of whatever kind or nature, whether for cash, securities, property or otherwise, which exist by reason of or which are in any way related to or arise out of the location by BN of its pipeline across and through lands claimed by the United States and the Tribe or out of the claims asserted in the Actions, whether known or unknown, that BN now has or has had; provided that the obligations undertaken by each party to this Settlement Agreement shall survive. This release shall not be effective unless and until the parties have completed their respective undertakings pursuant to paragraphs 1

through 3 and 9 hereof or if this Agreement is voided pursuant to paragraph 10 hereof.

8. Tribal Release As To BN. For the valuable consideration in the form provided by the terms of this Settlement Agreement, upon completion of each of the undertakings required by paragraphs 1 through 3 and 9 hereof and unless this Agreement is voided pursuant to paragraph 10 hereof, the Tribe hereby releases and forever discharges BN and its predecessors, successors, assigns, or related or affiliated persons or entities, its and their officers, agents, representatives, employees, insurers, and sureties, jointly and severally, from any and all liability, claims, demands, damages, debts, dues, accounts, cause or causes of action of whatever kind or nature, whether for cash, securities, property or otherwise, which exist by reason of or which are in any way related to or arise out of the location by BN of its railroad across and through lands claimed by the United States and the Tribe or out of the claims asserted in the Actions, whether known or unknown, that either party now has or has had; provided that the obligations undertaken by each party in this Settlement Agreement shall survive. This release shall not be effective unless and until the parties have completed their respective undertakings pursuant to paragraphs 1 through 3 and 9 hereof or if this Agreement is voided pursuant to paragraph 10 hereof.

(a). Releases As Between The United States And BN.

The United States of America and BN in order to settle those matters in dispute between them in the Actions agree as follows:

BN Release As To United States. For the valuable consideration in the form provided by the terms of this Settlement Agreement, upon completion of each of the undertakings required by paragraphs 1 through 3 and 9 hereof and unless this Agreement is voided pursuant to paragraph 10 hereof, BN hereby releases and forever discharges the United States of America and its predecessors, successors, assigns, or related or affiliated persons or entities, its and their officers, agents representatives, employees, insurers, and sureties, jointly and severally, from any and all liability, claims, demands, damages, debts, dues, accounts, cause or causes of action of whatever kind or nature, whether for cash, securities, property or otherwise, which exist by reason of or which are in any way related to the claims asserted in the Actions, whether known or unknown, that BN now has or has had or may hereafter have; provided that the obligations undertaken by each party to this Settlement Agreement shall survive. This release shall not be effective unless and until the parties have completed their respective undertakings pursuant to paragraphs 1 through 3 and 9 hereof or if this Agreement is voided pursuant to paragraph 10 hereof.

United States Release As To BN. For the valuable consideration in the form provided by the terms of this Settlement Agreement, upon completion of each of the undertakings

required by paragraphs 1 through 3 and 9 hereof and unless this Agreement is voided pursuant to paragraph 10 hereof, the United States of America hereby releases and forever discharges BN and its predecessors, successors, assigns, or related or affiliated persons or entities, its and their officers, agents representatives, employees, insurers, and sureties, jointly and severally, from any and all liability, claims, demands, damages, debts, dues, accounts, cause or causes of action of whatever kind or nature, whether for cash, securities, property or otherwise, which exist by reason of or which are in any way related to the claims asserted in the Actions, whether known or unknown, that BN now has or has had or may hereafter have; provided that the obligations undertaken by each party to this Settlement Agreement shall survive. This release shall not be effective unless and until the parties have completed their respective undertakings pursuant to paragraphs 1 through 3 and 9 hereof or if this Agreement is voided pursuant to paragraph 10 hereof.

9. Execution and Delivery of Easement. Upon the BIA's delivery to BN of the approved and executed easement in the form attached as Attachment "A" to Exhibit "A" to this Agreement, the Tribal Attorney shall deliver to BN the executed stipulated Order of dismissal ("Order") referred to in paragraph 3 in exchange for the check for \$120,000 referred to in paragraph 2. BN shall forthwith file said stipulation with the United States District Court with a request that the Order contemplated by the stipulation be entered forthwith. Upon being advised by the

Court that said Order has been entered, the Tribal attorney shall deliver the \$120,000 check provided for in paragraph 2 above to the Tribe, and BN shall record the easement.

10. **Failure to Complete Undertakings.** Should the BIA fail or refuse to execute the right-of-way easement in the form attached as Attachment "A" to Exhibit "A" to this Agreement, or should the attorney for the United States fail or refuse to execute the stipulated Order of dismissal ("Order") attached hereto as Exhibit "B", or should the United States District Court fail or refuse to enter a Order substantially similar in terms and effect to the Order provided for in said stipulation, then in any such event this Settlement Agreement, upon 30 days written notice by any party sent by certified mail to the addresses provided below, shall be null and void and all settlement funds will be forthwith returned to BN and all executed documents attached hereto will be forthwith returned to the party executing the same.

11. **Insurance.** BN agrees to maintain reasonable limits of insurance to protect itself against liability for damage resulting from the operation of the railroad, and if requested by the Tribe, BN will advise the Tribe of the amount of the insurance coverage then in effect.

12. **Integration, Governing Laws, Miscellaneous.** This Settlement Agreement shall be governed by federal law. The terms of this Agreement, (excluding section subtitles) are contractual and not mere recitals. No promise or inducement has been offered

except as herein set forth. This Agreement has been executed following advise of counsel and without reliance upon any representation or statement by the persons released or their representatives other than as set forth herein. It is intended as and reflects the complete agreement of the parties and no modification hereof shall be effective unless made in writing duly executed by the parties. This Settlement Agreement shall be binding upon and inure to the benefit of the parties and their respective legal representatives, successors and assigns.

Nothing in this Settlement Agreement or the associated Right-of-Way Easement shall supersede any federal law or regulation as they now exist or as they may be amended or changed from time to time. Specifically, the annual rental shall not be less than that required by federal law in effect at any time during BN's occupancy of the right-of-way. BN shall comply with all applicable federal laws and regulations pertaining to BN's activities within the Swinomish Reservation.

13. Notice. Any notice (other than process) required or contemplated by the terms of the Settlement Agreement shall be sent to the following addresses:

(a) Swinomish Tribal Community:

Tribal Attorney
Swinomish Indian Tribal Community
P.O. Box 817 - 950 Moorage Way
LaConner, Washington 98257

(b) United States of America:

Department of Interior
Bureau of Indian Affairs
Puget Sound Agency

Federal Building
Everett, Washington 98201

(c) BN:

Burlington Northern Railroad Company
General Manager
2200 First Interstate Center
999 Third Avenue
Seattle, WA 98104

Any party may by written notice to other parties change the address to which subsequent notice shall be sent.

14. Nothing in the Settlement Agreement shall waive, affect or bar any claim or defense except those specifically covered by the Settlement Agreement.

DATED this ____ day of _____, 1989

SWINOMISH TRIBAL COMMUNITY

By _____

Its _____

Approved

Attorney for the Swinomish
Tribal Community

BURLINGTON NORTHERN RAILROAD

By _____

Its _____

Approved

Attorney for the Burlington
Northern Railroad

UNITED STATES OF AMERICA

By _____

EXHIBITS:

- Exhibit A - BN Application for Right-of-Way Easment
Attachment A - Tribal Consent to ROW
- Exhibit B - Stipulated Order of Dismissal
- Exhibit C - Tribal Resolution Authorizing Settlement
- Exhibit D - BN Corp. Resolution Authorizing Settlement

EXHIBIT No. 11

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SWINOMISH INDIAN TRIBAL
COMMUNITY, a federally recognized Indian
tribe,

Plaintiff,

v.

BNSF RAILWAY COMPANY, a Delaware
corporation,

Defendant.

NO. 2:15-cv-00543 - RSL

PRAECIPE REGARDING
DECLARATION OF ALLAN OLSON
IN SUPPORT OF PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

TO: CLERK OF THE COURT;
AND TO: ALL COUNSEL OF RECORD

YOU ARE HEREBY requested to replace pages two (2) and three (3) of the
Declaration of Allan Olson in Support of Motion for Summary Judgment, originally filed on
March 10, 2016 (Dkt #32), under the above-referenced cause number, with the attached pages.
This praecipe is submitted pursuant to the Court's May 6, 2016 Order Regarding BNSF's
Motion To Compel Discovery, pursuant to which the Court provided Plaintiff Swinomish
Indian Tribal Community with the opportunity to withdraw Paragraph 6 of Mr. Olson's
declaration. Other than the deletion of Paragraph 6, no changes have been made to the
declaration.

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DATED this 7th day of May, 2016.

TOUSLEY BRAIN STEPHENS PLLC

By: /s/ Christopher I. Brain

By: /s/ Paul W. Moomaw

Christopher I. Brain, WSBA #5054
cbrain@tousley.com

Paul W. Moomaw, WSBA #32728
pmoomaw@tousley.com

1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101-1332
T: 206.682.5600
F: 206.682.2992

**OFFICE OF THE TRIBAL ATTORNEY,
SWINOMISH INDIAN TRIBAL
COMMUNITY**

By: /s/ Stephen T. LeCuyer

Stephen T. LeCuyer, WSBA #36408
slecuyer@swinomish.nsn.us

11404 Moorage Way
LaConner, WA 98257
T: 360.466.1058
F: 360.466.5309

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system will send notification of such filing to all parties of record.

DATED at Seattle, Washington, this 13th day of May, 2016.

/s/ Paul W. Moomaw
Paul W. Moomaw, WSBA #32728
pmoomaw@tousley.com
Attorneys for Plaintiff
TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, WA 98101
Tel: 206.682.5600

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1 3. The Tribe is a Federally-recognized Indian tribe organized pursuant to the Indian
2 Reorganization Act of 1934, 25 U.S.C. § 476. The Tribe is a successor to signatories of the
3 Treaty of Point Elliott of 1855, 12 Stat. 927 (1855), which established the Swinomish Reservation
4 (the “Reservation”), located on the Southeastern end of Fidalgo Island in Skagit County,
5 Washington. The lands on the Reservation that are the subject of this lawsuit are held in trust for
6 the Tribe by the United States. The Treaty set aside the Reservation for the Tribe’s “exclusive
7 use.”

8 4. The right-of-way established by the Easement Agreement (the “Right-of-Way”)
9 crosses a part of the Reservation that constitutes the heart of the Tribe’s economic development
10 area. The Right-of-Way is adjacent to many elements of the Tribe’s economic infrastructure,
11 including the Swinomish Casino and Lodge, a Chevron station and convenience store, and an
12 RV Park, as well as a Tribal waste treatment plant and a Tribal air quality monitoring facility.
13 Hundreds of guests and employees are present at these facilities 24 hours a day, seven days a
14 week. This infrastructure is the primary source of Tribal funding for the Tribe’s essential
15 governmental functions and programs.

16 5. The Right-of-Way also crosses a BNSF swing bridge over the Swinomish
17 Channel and a BNSF trestle across Padilla Bay, both of which are within the Reservation and are
18 many decades old. These water bodies connect with other waters of Puget Sound in which the
19 Tribe has usual and accustomed fishing grounds and stations, as recognized by this Court in
20 *United States v. Washington*, 459 F.Supp. 1020, 1049 (W.D. Wash. 1978). Since time
21 immemorial, the Tribe and its predecessors have benefited from these bodies of water to support
22 its fishing lifestyle, among other purposes, and salmon and other marine resources have played
23 central and enduring roles in the Tribe’s subsistence, culture, identity, and economy.

24 6. *Intentionally Deleted.*
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1 7. Never once did BN indicate to the Tribe that it might not be able to comply with
2 the limitations contained in the Easement Agreement due to common carrier obligations, or that
3 it considered the terms of the Easement Agreement to be subordinate to ICC or common carrier
4 obligations. If BN had done so, the Tribe would never have granted its consent to the Right-of-
5 Way.

6 8. The Tribe learned in 2012 from a media report that BNSF was running “unit
7 trains” of 100 cars or more over the Right-of-Way to reach the Tesoro refinery at March Point,
8 near Anacortes, Washington. BNSF did not notify the Tribe or seek its agreement to exceed the
9 limitations of the Easement Agreement before it began doing so. Although the Tribe promptly
10 reminded BNSF of the limitations of the Easement Agreement, and repeatedly demanded that
11 BNSF cease the unauthorized use, BNSF ignored the Tribe’s requests. The Tribe has never
12 granted BNSF permission to exceed the limitations contained in the Agreement. BNSF
13 acknowledges the terms of the Easement Agreement and the Tribe’s demands, but has informed
14 the Tribe that it will continue running trains over the Right-of-Way at current levels regardless
15 of the terms of the parties’ agreement.

16 9. BNSF has also not complied with its reporting requirements under the Easement
17 Agreement. Since at least 1999, the Tribe regularly requested that BNSF provide an annual
18 summary of all materials transported by BNSF across the Reservation, as required by Paragraph
19 7(b) of the Easement Agreement. Despite these regular requests, BNSF provided the Tribe with
20 just four of the required annual update reports.

21
22 I declare under penalty of perjury of the laws of the state of Washington and the United
23 States that the foregoing is true and correct.

EXHIBIT No. 12

THE HONORABLE ROBERT S. LASNIK

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SWINOMISH INDIAN TRIBAL
COMMUNITY, a federally recognized Indian
Tribe,

Plaintiff,

v.

BNSF RAILWAY COMPANY, a Delaware
corporation,

Defendant.

NO. 2:15-cv-00543-RSL

**JOINT MOTION TO STRIKE
TRIAL DATE AND RELATED
DATES AND SET A BRIEFING
SCHEDULE ON THE PARTIES'
CROSS-MOTIONS FOR SUMMARY
JUDGMENT**

**NOTE ON MOTION CALENDAR:
Friday, July 8, 2016**

I. RELIEF REQUESTED

Plaintiff Swinomish Indian Tribal Community (the “Tribe”) and Defendant BNSF Railway Company (“BNSF”) jointly move this Court for an order (i) striking the existing trial date of January 9, 2017 and all related dates established by the Minute Order Setting Trial Date and Related Dates entered October 28, 2015 and (ii) requiring a scheduling conference to set a new Trial Date and Related Dates to occur promptly after this Court’s ruling on the Swinomish Motion for Summary Judgment and the Cross-Motion for Summary Judgment that BNSF intends to file pursuant to the proposed schedule set forth herein.

1 **II. STATEMENT OF FACTS**

2 1. Attached hereto as Exhibit 1 is a copy of the Court’s October 28, 2015 Minute
3 Order Setting Trial Date and Related Dates (the “Scheduling Order”).

4 2. On March 10, 2016, the Tribe filed a Motion for Summary Judgment regarding
5 BNSF’s contention that this lawsuit is pre-empted by the Interstate Commerce Commission
6 Termination Act (“ICCTA”), which was initially noted for consideration on April 1, 2016.

7 3. On March 17, 2016, BNSF filed a motion for a Rule 56(d) continuance so it
8 could complete certain necessary discovery. By Order entered April 4, 2016, this Court
9 granted BNSF’s Rule 56(d) motion and found that the Tribe’s summary judgment motion must
10 be noted for at least sixty days after the Tribe produced all documents in its possession related
11 to the prior litigation and negotiation of the Easement Agreement to allow BNSF to serve
12 follow-up discovery, conduct depositions and submit its opposition.

13 4. The Tribe represents that it has completed its production of “historical”
14 documents and BNSF has been provided additional documentation and taken its requested
15 depositions. By agreement of the parties, the Tribe re-noted its Motion for Summary Judgment
16 for consideration on August 12, 2016. *See* ECF No. 51.

17 5. BNSF intends to file its own related Cross-Motion for Summary Judgment, and,
18 consistent with LCR 7(k), has met and conferred with the Tribe on a proposed briefing
19 schedule for the parties’ cross-motions. As a result, the parties agree to the following schedule
20 and submit it to the Court for its approval:

- 21 • August 8, 2016: BNSF will file a combined brief that contains its opposition to
22 the Tribe’s Motion for Summary Judgment and BNSF’s Cross-Motion for
23 Summary Judgment. The page limit for the combined brief shall be 30 pages.
- 24 • August 24, 2016: The Tribe will file a combined brief that contains its reply in
25 support of its Motion for Summary Judgment and its opposition to BNSF’s
26

1 Cross-Motion for Summary Judgment. The page limit for the combined brief
2 shall be 30 pages.

- 3 • September 2, 2016: BNSF will file its reply brief in support of its Cross-Motion
4 for Summary Judgment. The page limit for the reply shall be 18 pages. Both
5 parties' motions for summary judgment shall be noted for consideration as of
6 this date.

7 5. The Scheduling Order sets July 13, 2016 as the date for expert witness
8 disclosures and reports and September 11, 2016 as the discovery cutoff date. Based on the
9 present status of this case and the impact that a ruling on the parties' cross-motions for
10 summary judgment may have on the scope of this case, the parties submit the current case
11 schedule is no longer appropriate, is not reasonably achievable, and will result in pre-trial
12 preparation that may not be necessary for the issues that remain to be tried.

13 6. The scope of discovery and expert testimony may be significantly different
14 based on the Court's decisions on the parties' Motions for Summary Judgment. If the Tribe
15 prevails on its Motion for Summary Judgment, then the Tribe believes that the remaining
16 liability issues in the case likely will relate to whether or not the Tribe's refusal to consent to
17 the increased rail traffic and shipment of Bakken Crude oil across the Right of Way was
18 "arbitrary." But if BNSF prevails on its Cross-Motion for Summary Judgment, then BNSF
19 believes this would defeat the Tribe's trespass-related claims, leaving only the issue of past rent
20 due to the Tribe from BNSF based on the increased rail traffic that has occurred since 2012 —
21 an issue that BNSF maintains must be arbitrated pursuant to the settlement agreement and
22 right-of-way easement that arose from the prior litigation. And if neither party prevails on its
23 summary judgment motion, then the scope of the liability phase of this case is significantly
24 expanded, which affects both the areas and subject matters for remaining discovery as well as
25 potential expert testimony.

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DLA PIPER LLP

By: /s/ Stellman Keehnel

By: /s/ Andrew Escobar

By: /s/ Jeffrey DeGroot

Stellman Keehnel, WSBA #9309

Andrew Escobar, WSBA #42733

Jeffrey DeGroot, WSBA #45839

701 5th Avenue, Suite 7000

Seattle WA 98104

Tel: (206) 839.4800

Fax: (206) 839.4801

Attorneys for Defendant BNSF

CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Stellman Keehnel, WSBA #9309
Stellman.keehnel@dlapiper.com
Patsy.howson@dlapiper.com
Andrew Escobar, WSBA #42793
Andrew.escobar@dlapiper.com
Karen.hanson@dlapiper.com
Jeffrey DeGroot, WSBA #46839
Jeff.degroot@dlapiper.com
DLA Piper LLP
701 Fifth Avenue, Suite 7000
Seattle WA 98104

DATED at Seattle, Washington, this 8th day of July, 2016.

/s/ Christopher I. Brain
Christopher I. Brain, WSBA #5054
cbrain@tousley.com
Attorneys for Plaintiff
TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
Tel: 206.682.5600
Fax: 206.682.2992

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SWINOMISH INDIAN TRIBAL
COMMUNITY,

Plaintiff,

v.

BNSF RAILWAY COMPANY,

Defendant.

Case No. C15-543RSL

**MINUTE ORDER SETTING
TRIAL DATE & RELATED DATES**

TRIAL DATE	January 9, 2017
Deadline for joining additional parties	November 25, 2015
Deadline for amending pleadings	July 13, 2016
Reports from expert witnesses under FRCP 26(a)(2) due	July 13, 2016
All motions related to discovery must be noted on the motion calendar no later than the Friday before discovery closes pursuant to LCR 7(d) or LCR 37(a)(2)	
Discovery completed by	September 11, 2016
Settlement conference held no later than	September 25, 2016
All dispositive motions must be filed by and noted on the motion calendar no later than the fourth Friday thereafter (see LCR 7(d)(3))	October 11, 2016
All motions in limine must be filed by and noted on the motion calendar no earlier than the <u>second</u> Friday thereafter. Replies will be accepted.	December 12, 2016

1	Agreed pretrial order due	December 28, 2016
2	Pretrial conference to be scheduled by the Court	
3	Trial briefs and trial exhibits due	January 4, 2017
4	Length of Trial: 10 days	Non Jury

5
6 These dates are set at the direction of the Court after reviewing the joint status report and
7 discovery plan submitted by the parties. All other dates are specified in the Local Civil Rules. If
8 any of the dates identified in this Order or the Local Civil Rules fall on a weekend or federal
9 holiday, the act or event shall be performed on the next business day. These are firm dates that
10 can be changed only by order of the Court, not by agreement of counsel or the parties. The
11 Court will alter these dates only upon good cause shown; failure to complete discovery within
12 the time allowed is not recognized as good cause.

13 If the trial date assigned to this matter creates an irreconcilable conflict, counsel must
14 notify Teri Roberts, the judicial assistant, at 206-370-8810 within 10 days of the date of this
15 Order and must set forth the exact nature of the conflict. A failure to do so will be deemed a
16 waiver. Counsel must be prepared to begin trial on the date scheduled, but it should be
17 understood that the trial may have to await the completion of other cases.

18 The settlement conference conducted between the close of discovery and the filing of
19 dispositive motions requires a face-to-face meeting or a telephone conference between persons
20 with authority to settle the case. The settlement conference does not have to involve a third-
21 party neutral.

22 ALTERATIONS TO ELECTRONIC FILING PROCEDURES AND LOCAL RULES

23 Information and procedures for electronic filing can be found on the Western District of
24

1 Washington's website at www.wawd.uscourts.gov. *Pro se* litigants may file either
2 electronically or in paper form. The following alterations to the Electronic Filing Procedures
3 apply in all cases pending before Judge Lasnik:

4 – Alteration to LCR 10(e)(9) - Effective July 1, 2014, the Western District of
5 Washington will no longer accept courtesy copies in 3-ring binders. All courtesy copies must be
6 3-hole punched, tabbed, and bound by rubber bands or clips. If any courtesy copies are delivered
7 to the intake desk or chambers in 3-ring binders, the binders will be returned immediately. This
8 policy does **NOT** apply to the submission of trial exhibits.

9 – Alteration to Section III, Paragraph M of the Electronic Filing Procedures - Unless the
10 proposed order is stipulated, agreed, or otherwise uncontested, the parties need not e-mail a copy
11 of the order to the judge's e-mail address.

12 – Pursuant to LCR 10(e)(10), all references in the parties' filings to exhibits should be as
13 specific as possible (*i.e.*, the reference should cite the specific page numbers, paragraphs, line
14 numbers, etc.). All exhibits must be marked to designate testimony or evidence referred to in the
15 parties' filings. Filings that do not comply with LCR 10(e) may be rejected and/or returned to
16 the filing party, particularly if a party submits lengthy deposition testimony without highlighting
17 or other required markings.

18 – Alteration to LCR 7(d)(4) - Any motion *in limine* must be filed by the date set forth
19 above and noted on the motion calendar no earlier than the second Friday thereafter. Any
20 response is due on or before the Wednesday before the noting date. Parties may file and serve
21 reply memoranda, not to exceed nine pages in length, on or before the noting date.

22 PRIVACY POLICY

23 Pursuant to Federal Rule of Civil Procedure 5.2 and LCR 5.2, parties must redact the
24

1 following information from documents and exhibits before they are filed with the court:

- 2 * Dates of Birth - redact to the year of birth
- 3 * Names of Minor Children - redact to the initials
- 4 * Social Security Numbers and Taxpayer Identification Numbers - redact in their entirety
- 5 * Financial Accounting Information - redact to the last four digits
- 6 * Passport Numbers and Driver License Numbers - redact in their entirety

7 All documents filed in the above-captioned matter must comply with Federal Rule of
8 Civil Procedure 5.2 and LCR 5.2.

9 COOPERATION

10 As required by LCR 37(a), all discovery matters are to be resolved by agreement if
11 possible. Counsel are further directed to cooperate in preparing the final pretrial order in the
12 format required by LCR 16.1, except as ordered below.

13 TRIAL EXHIBITS

14 The original and one copy of the trial exhibits are to be delivered to chambers five days
15 before the trial date. Each exhibit shall be clearly marked. Exhibit tags are available in the
16 Clerk's Office. The Court hereby alters the LCR 16.1 procedure for numbering exhibits:
17 plaintiff's exhibits shall be numbered consecutively beginning with 1; defendant's exhibits shall
18 be numbered consecutively beginning with 500. Duplicate documents shall not be listed twice:
19 once a party has identified an exhibit in the pretrial order, any party may use it. Each set of
20 exhibits shall be submitted in a three-ring binder with appropriately numbered tabs.

21 SETTLEMENT

22 Should this case settle, counsel shall notify the Deputy Clerk as soon as possible.
23 Pursuant to LCR 11(b), an attorney who fails to give the Deputy Clerk prompt notice of
24

1 settlement may be subject to such discipline as the Court deems appropriate.

2

3 DATED this 28th day of October, 2015.

4

s/Kerry Simonds
Kerry Simonds, Deputy Clerk to
Robert S. Lasnik, Judge
206-370-8519

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