

I. Introduction

The Tesoro and Shell Petitions raise an issue of broad importance to the public interest and to the Board's management of the interstate rail network: Can a landowner restrict the railroad's ability to move hazardous materials across the landowner's property to serve the needs of rail shippers? Tesoro and Shell filed their requests for a declaratory order on this question after a landowner, the Swinomish Indian Tribal Community, asked a federal court to enjoin BNSF's current and future movement of crude oil over the Tribe's land to the Tesoro and Shell refineries. The Swinomish Tribe sought the injunction in a case involving an easement agreement between BNSF and the Swinomish Tribe for use of the Tribe's land. Neither Tesoro nor Shell is a party to the federal court litigation or to the easement agreement, yet they face the prospect of crippling limitations on their refinery operations if BNSF is enjoined from providing crude oil rail service.

The Tribe's effort to enjoin BNSF's crude oil transportation for Tesoro and Shell requires a Board response notwithstanding that there is on-going federal court litigation between the Swinomish Tribe and BNSF on the contract dispute. Tesoro and Shell, non-parties to that suit, are not asking the Board to get into the details of the private contract dispute that is pending before the federal court. The Tesoro and Shell requests do not turn on any factual questions that are before the court. Tesoro and Shell seek protection from the Board without regard to the terms of the contract relationship between BNSF and the Swinomish Tribe that is before the federal court. Indeed, the shippers' argument – with which BNSF agrees – is that there are certain interests that are protected by ICCTA that cannot be superseded by private contract, regardless of the contract terms.

Moreover, Board action is necessary and appropriate because the Tribe itself has gone far beyond adjudication of a private dispute between BNSF and the Swinomish Tribe over a contract

by seeking an injunction that would prevent rail shippers from obtaining service. The Tribe is not simply asking the federal court to determine the rights of BNSF and the Tribe under a private contract. The Tribe's requested injunction goes much farther and seeks to override BNSF's federal law obligations to provide rail service in response to reasonable requests; it undermines interests and rights protected by ICCTA; and it directly challenges the Board's exclusive authority to regulate rail transportation. The procedural context of the Tribe's injunction request makes the issue ripe for a Board declaratory order and requires prompt attention by the Board. The Tribe has asked the federal court to enter summary judgment on the Tribe's claims, thus creating the potential for an imminent restraint on BNSF's transportation of crude oil to Tesoro and a restriction of rail service to Shell.

BNSF supports the Tesoro and Shell requests for a declaratory order. The injunction sought by the Tribe undermines the strong public interest in the unimpeded rail transportation of hazardous materials. The Tribe's injunction request is part of an increasingly troubling series of efforts by local communities and local interests to restrict hazardous materials transportation. The Board (as well as the courts, Congress and other federal agencies) recognizes that there is a national interest in the unimpeded rail transportation of hazardous materials that must be protected from local regulation. The movement of hazardous materials necessary for national commerce would become impossible if local communities could assert control over rail movements they do not like. To allow such local veto in this or other instances is tantamount to unwinding the primacy of federal regulation under ICCTA and allowing piecemeal regulation at the most local level.

The Tribe's injunction request also raises an issue of importance to the Board's management of the national rail network. Railroads cross thousands of land parcels. The

railroads own some of these parcels outright and on others operate pursuant to easements or some other type of grant or contractual arrangement. If the owners of property needed for rail transportation could leverage access to their property to control the transportation provided by the railroad over their property, the interstate rail network would be potentially subject to innumerable bottlenecks and local restrictions. Individual landowners could use their contracts with railroads to restrict rail movements of hazardous material over their property, thus interfering with transportation that is critical to national economic and commercial activity.

The legal basis for the requested declaratory order has been well established for decades. The Supreme Court has already ruled that contracts between landowners and railroads cannot be used to subvert interests protected by federal common carrier law. Moreover, the Board's predecessor, the ICC, concluded over 30 years ago that the Swinomish Tribe did not have the authority to override Interstate Commerce Act requirements when it previously sought to eliminate BNSF's ability to serve these same refineries by shutting down the rail line that crosses the Tribe's land. That conclusion applies equally here to the Tribe's current attempt to prevent BNSF's shippers from obtaining the rail service they need. The Board needs to reaffirm its predecessor's views on the need to protect federal interests under ICCTA from interference by the Tribe.

The Tribe nevertheless argues in its summary judgment motion (which is attached to Shell's Petition at Exhibit A) that any interests protected by ICCTA are subservient to the rights supposedly conferred on Indian tribes under a federal statute, the Indian Right-of-Way Act ("IRWA"). But the Tribe has it exactly backwards. Under IRWA, rights-of-way on Indian land must respect all applicable federal laws, which for railroad rights-of-way includes ICCTA. IRWA did not give Indian tribes the right to ignore federal law or to violate the rights and

interests of non-Indians that are protected under ICCTA. And IRWA certainly did not give Indian tribes the right to regulate interstate rail transportation. Moreover, the fundamental purpose of ICCTA preemption is to avoid local, patchwork regulation of interstate rail movements, regardless of whether that patchwork regulation arises under state or federal law. Even if rights conferred under IRWA were relevant here (and they are not), ICCTA would preempt any attempt to use IRWA to justify local regulation of interstate rail transportation of crude oil to prevent shippers from receiving the rail transportation they need to conduct their business.

II. Background: The Federal Court Litigation

Tesoro and Shell are not asking the Board to address the private dispute between the Swinomish Tribe and BNSF that is pending in federal court. However, the Tesoro and Shell Petitions arise out of the Tribe's request for injunctive relief in that litigation and it is therefore important for the Board to understand what is and is not at issue in that litigation. It is also important for the Board to understand the procedural context of the federal court litigation since the Tribe is seeking summary judgment on its claims. It is the Tribe's summary judgment strategy that makes the Tesoro and Shell Petitions ripe and that requires urgent action by the Board. BNSF sets out below a brief overview of the federal court litigation.

The Tribe's complaint (attached to Tesoro's Petition at Exhibit A) focuses on an easement granting BNSF's predecessor (referred to herein as BNSF) a right-of-way to provide rail service over a strip of land at the northern edge of the Tribe's Reservation. The easement was signed in 1990 as part of the settlement of claims brought by the Tribe several years earlier alleging that BNSF had been trespassing on the Tribe's Reservation for over 100 years and seeking the termination of BNSF's service over the line.

BNSF's position in the litigation resulting in the easement agreement was that the land on which the rail line is located was not part of the Tribe's Reservation when the line was constructed. Accordingly, BNSF was not trespassing on Tribal land by continuing to provide service over the line. BNSF also argued that the Tribe could not lawfully prohibit BNSF from continuing to operate a rail line that had long been part of the national rail network subject to federal regulation. The ICC agreed with BNSF on the latter question and it sought to intervene in the prior litigation and further sought dismissal of the Tribe's effort to discontinue rail service over an active rail line. The court found the ICC's motion to intervene and for dismissal to be premature, since the lawsuit had not reached the stage where potential remedies were being litigated.¹

The prior litigation settled in 1990 before the remedies issue was reached, thus avoiding the need to address the ICC's objections to the Tribe's claims. As part of the settlement, BNSF agreed to pay the Tribe for past use of the land and agreed to pay an annual rental for the continued use of the land. Under the easement agreement that resulted from the settlement, the annual rental payments would be subject to periodic adjustments and to additional adjustments if future traffic increased. On the subject of traffic volumes, the Tribe had originally proposed a strict limit on traffic over the right-of-way to one train per day in each direction with no more than 25 cars – a level of traffic consistent with historical volumes. But BNSF advised the Tribe that it was not legally able to agree to a cap on traffic if shipper needs required an increase in the future, and the parties therefore agreed to easement terms that preserved BNSF's ability to increase traffic levels *if required by shipper needs*.²

¹ The court's order is attached to this pleading at Attachment A.

² The relevant easement provision, set out in ¶7.c of the easement, states that:

BNSF expects that the Tribe will argue here, as it has argued in the federal court, that BNSF is trying to hide behind ICCTA preemption to get out of an agreement it made to limit traffic on the line when the prior litigation was settled. The claim is false. The parties did not agree to a strict cap on traffic, which they could not have done in any event. Nor did they agree that the Tribe could veto BNSF's compliance with federal common carrier requirements, which they also could not have done. Moreover, BNSF has made it clear that the Tribe may be entitled to a rental adjustment under the easement in light of the traffic increase. But the Tribe has held firm to its position that no crude oil unit trains will be permitted to cross the Reservation. The Tribe has chosen to stand on a principled objection to crude oil transportation that flies in the face of ICCTA and the public interest.

On March 10, 2016, the Tribe filed a summary judgment motion, which it modified slightly and refiled on June 2, 2016. In its motion, the Tribe asked the court to “grant summary judgment in its favor, finding and concluding that this action to enforce the terms of the Easement Agreement is not preempted by the ICCTA.”³ The “action to enforce” the Easement includes the Tribe’s request that BNSF be enjoined from providing crude oil transportation for Tesoro and Shell. It is the prospect of an imminent restraint on BNSF’s rail transportation

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 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.

See Exhibit C to Tesoro’s Petition (emphasis added). Moreover, the settlement agreement leading to the easement expressly provides that “nothing in . . . [the] 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.” *See* Motion for Summary Judgment, Exhibit A to Shell’s Petition, at 7.

³ *See* Motion for Summary Judgment, Exhibit A to Shell’s Petition, at 25.

through the Tribe's summary judgment strategy that requires urgent action by the Board in this proceeding.

III. Landowners Cannot Regulate Rail Movements Over Their Land Through Easements Or Right Of Way Agreements With Railroads.

The legal basis for the requested declaratory order is well established. Landowners like the Tribe cannot use contracts with a railroad to interfere with the rights of shippers under ICCTA to receive rail service on reasonable request. ICCTA is a public interest statute that promotes the national interest in an efficient rail transportation network unencumbered by restrictions on rail service imposed by local interests. Private agreements between landowners and railroads cannot supersede the public interest as reflected in ICCTA requirements. This legal principle is based on solid Supreme Court precedent that long predates ICCTA.

In *United States v. Baltimore & O.R. Company*, 333 U.S. 169 (1948), a case having striking similarities to the present matter, the Court ruled that the owner of land used by a railroad to provide rail service cannot force the railroad to violate its federal law obligations as a common carrier. The Court defined the issue in the case as follows:

Can the noncarrier owner of a segment of railroad track who contracts for an interstate railroad's use of the segment as part of its line reserve a right to regulate the type of commodities that the railroad may transport over the segment, or would such a reservation be invalid under the Interstate Commerce Act?

Id. at 175. The Court's answer was resoundingly clear: "ownership of Track 1619 [the track segment at issue] does not vest [the landowner] with power to compel the railroads to operate in a way which violates the Interstate Commerce Act." *Id.* at 177-78. As the Court explained, "[p]roperty can be used even by its owner only in accordance with the law, and conditions its owner places on its use by another are subject to like limitations." *Id.* at 177. Because the

railroad's statutory obligations to the public are paramount, those obligations prevail over a private agreement with the property owner.

The courts and the STB have repeatedly acknowledged the validity and importance of the *Baltimore* rule. In *Boyton v. Com. of Va.*, 364 U.S. 454, 460 (1960), the Supreme Court reiterated that “a railroad cannot escape its statutory duty to treat its shippers alike either by use of facilities it does not own or by contractual arrangement with the owner of those facilities.” The Sixth Circuit has held that the STB properly invalidated a settlement agreement on public policy grounds because its enforcement would unreasonably interfere with the railroad's future fulfillment of common carrier obligations. See *Railroad Ventures, Inc. v. Surface Transp. Bd.*, 299 F.3d 523, 560-61 (6th Cir. 2002).⁴

The *Baltimore* rule does not rely on ICCTA preemption, but the same result would obtain under an ICCTA preemption analysis. ICCTA states that “the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” 49 U.S.C. § 10501(b). The Tribe's attempt to enforce the easement through an injunction that would limit traffic that BNSF can handle over the right of way would amount to direct regulation of rail transportation that is preempted under the plain language of section 10501(b). “Regulating when and where particular products may be carried by rail . . . would constitute direct regulation of railroad activities.” *CSX Transp., Inc. – Petition for Declaratory Order*, FD No. 34662, 2005 WL 584026, at *8 (STB served Mar. 14, 2005), *pet. for recon. denied* (STB served May 3, 2005). Indeed, it is hard to imagine a more concrete form of

⁴ In the underlying Board decision, *Railroad Ventures, Inc. – Abandonment Exemption – Between Youngstown, OH and Darlington, PA*, 4 S.T.B. 467, 2000 WL 1125904, at *3 (STB 2000), the Board stated that “[w]hile the Board encourages privately negotiated agreements, any contractual restrictions that unreasonably interfere with common carrier operations are deemed void as contrary to public policy.”

regulation than an order limiting the traffic that BNSF can handle for its shippers. Such orders are particularly clear examples of regulation that is preempted by ICCTA.⁵

The Tribe has argued that ICCTA does not apply because BNSF voluntarily agreed to a cap on traffic. Even if this were true (and it is not), the Board and the courts have recognized that some contract commitments fall within the scope of ICCTA preemption. “The right to proceed under . . . contract law, . . . is conditioned upon that action not unreasonably burdening or interfering with rail transportation.” *Reading, Blue Mountain & Northern Railroad – Petition for Declaratory Order*, STB Docket No. 35956, slip op. at 5 (STB served June 6, 2016). The Board and its predecessor have repeatedly reaffirmed this principle. *See, e.g., Wichita Terminal Association, BNSF Railway Company and Union Pacific Railroad Company -Petition for Declaratory Order*, No. 35765, 2015 WL 3875937 (S.T.B. served June 23, 2015) (“voluntary agreements between rail carriers and state or local entities are not enforceable under § 10501(b) where, as here, the railroad later demonstrates that enforcement of its agreement would unreasonably interfere with the railroad's operations”); *Township of Woodbridge v. Consolidated Rail Corp.*, FD 42053, 2000 STB LEXIS 709 (Served Dec. 1, 2000), *clarified*, 2001 STB LEXIS 299, at *5 (Served Mar. 23, 2001) (noting the possibility that a breach of contract claim would be preempted if it is based on an interpretation of the contract that resulted in an “unreasonable interference with interstate commerce”); *Hanson Natural Resources Co. — Non-Common Carrier Status — Petition for a Declaratory Order*, FD No. 32248, 1994 MCC LEXIS 111, at *4

⁵ *Blanchard Sec. Co. v. Rahway Valley R.R. Co.*, No. 04-3040, 2004 U.S. Dist. LEXIS 25647, *18-20 (D.N.J. Dec. 22, 2004), *aff'd* 191 F. App'x 98, 100 (3d Cir. June 30, 2006) (injunctive relief claim that would restrict the railroad's use of the rail line to three round trips per week is not valid); *Rushing v. Kansas City S. Ry. Co.*, 194 F. Supp. 2d 493, 501 (S.D. Miss. 2001) (injunction relief claim preempted even if nuisance damages could be pursued). As this Board has explained when a town directed a railroad to cease operations on the line, “Such an attempt to prohibit common carrier rail transportation directly conflicts with the most fundamental common carrier rights and obligations provided by federal law and the Board's exclusive jurisdiction over that service. The Town's actions are therefore *plainly* preempted by § 10501(b).” *Boston and Maine Corp. and Springfield Terminal R.R. Co. — Petition for Declaratory Order*, No. FD 35749, 2013 WL 3788140 (STB Service Date: July 19, 2013) (emphasis added).

(ICC served Dec. 5, 1994) (“[O]nce common carrier operations commence over all or part of [a] line, any contractual restrictions that unreasonably interfere with those common carrier operations will be deemed void as contrary to public policy.”).

While some contracts are beyond ICCTA, it is because enforcement of those contracts does not affect interests protected by ICCTA. For example, in *PCS Phosphate Co. v. Norfolk S. Corp.*, 559 F.3d 212, 218-19 (4th Cir. 2009), the Fourth Circuit found no preemption in enforcing the railroad’s agreement to pay for a track relocation only because such enforcement “will not affect the ability of [the railroad] to comply with its legal obligation to serve any existing customer then on the line.” *Id.* at 222 (quoting contract). But other contracts with railroads, particularly contracts for access to land for use in rail transportation, involve “phases of the public interest.” *Pinelawn Cemetery—Petition for Declaratory Order*, STB Docket No. FD 35468, slip op. at 9 (STB served Apr. 21, 2015) (quoting *Thompson v. Tex. Mexican Ry.*, 328 U.S. 134, 143 (1946)). ICCTA preempts railroad contracts that interfere with rights and interests of non-contract parties that are protected by ICCTA.

These ICCTA preemption principles apply with particular force to contracts between landowners and railroads for the use of the landowner’s property. Access restrictions in a single contract for a small parcel of land could affect transportation across a large portion of a railroad’s network and could, as here, severely undermine the interests of particular shippers that rely on the national rail network. Even if the Tribe were correct that the easement at issue here gave it power to control BNSF’s crude oil transportation (which BNSF strongly denies), ICCTA would not permit its enforcement through an injunction ordering BNSF to restrict its movement of crude oil to meet Tesoro’s and Shell’s rail transportation needs. The Board should make it clear

that landowners cannot use contracts with railroads to interfere with the needs of shippers located on the national rail network.

IV. IRWA Does Not Give the Tribe The Right To Regulate Hazardous Materials Transportation Over Reservation Land.

In its summary judgment motion, the Tribe has argued that another federal law, the Indian Right of Way Act or IRWA, takes priority over the rights and interests protected by ICCTA. *See* Motion for Summary Judgment, Exhibit A to the Shell Petition, at 18 (“ICCTA did not ‘preempt’ the IRWA or the Tribe’s right to enforce the terms of the Easement Agreement thereunder”). The Tribe’s argument here that statutory requirements under ICCTA are inferior to Indian rights supposedly arising under IRWA is similar to the argument the Tribe made in the earlier litigation, discussed above, that the Tribe had the right to force BNSF to cease all operations on the rail line that crosses the Tribe’s land regardless of the ICC’s exclusive authority over rail line abandonments.⁶ As noted above, the ICC disagreed with the Tribe’s position, concluding that rail shippers on active rail lines should be able to assume they will obtain rail service on reasonable request unless or until the ICC, now the STB, approves abandonment of the line. The Board should not undermine shippers’ expectations by reaching a different conclusion now or by remaining silent.

The Tribe’s reliance on IRWA to justify violation of rights protected by ICCTA is misplaced. The right-of-way created by the easement at issue here is the product of IRWA. But the fact that the easement is the product of IRWA does not allow the easement to be used to violate rights and interests of non-Indians protected by ICCTA or to regulate interstate rail

⁶ The Tribe continues to make thinly veiled threats to seek to exclude BNSF altogether from providing rail service over its land. *See* Motion for Summary Judgment, Exhibit A to the Shell Petition, at 15 (BNSF has “an obligation to comply with the terms and conditions of the grant, lest the right-of-way be terminated by the Secretary of the Interior”).

movements. IRWA empowers the Secretary of the Interior, as the trustee of Indian land, to grant rights-of-way across Indian land, and it further requires that consent of appropriate Indian officials be obtained for the right-of-way.⁷ But nothing in IRWA gives Indian tribes the authority to regulate interstate rail movements occurring over tribal land. IRWA simply provides that a right-of-way cannot be granted without the consent of appropriate Indian officials. The parties followed IRWA requirements in obtaining the right-of-way at issue here.

Nor does IRWA give Indian tribes the power to use their required consent as leverage to avoid federal law requirements that would otherwise apply to a right-of-way agreement. To the contrary, the federal regulations implementing IRWA expressly provide that “rights-of-way approved under [IRWA] . . . [a]re subject to all applicable Federal laws.” 25 C.F.R. §169.9 (2015). This regulation reflects long-standing case law recognizing that easements under IRWA are subject to federal law and that IRWA was not intended to displace other federal law requirements.⁸ As noted previously, the settlement agreement resolving the prior litigation expressly provided that nothing in the easement would supersede federal law.⁹

The right-of-way at issue here was approved under IRWA, and therefore it is subject to applicable federal law, not the other way around as the Tribe would have it. Since the right-of-way is for use by an interstate railroad, one of those applicable federal laws is ICCTA, which

⁷ See 25 U.S.C. 323 (“The Secretary of the Interior be, and he is empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations, or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians or Indian tribes, communities, bands, or nations, including the lands belonging to the Pueblo Indians in New Mexico, and any other lands heretofore or hereafter acquired or set aside for the use and benefit of the Indians”); 25 U.S.C. 324 (“No grant of a right-of-way over and across any lands belonging to a tribe organized under the Act of June 18, 1934 (48 Stat. 984), as amended [25 U.S.C. 461 et seq.]; the Act of May 1, 1936 (49 Stat. 1250) [25 U.S.C. 473a, 496]; or the Act of June 26, 1936 (49 Stat. 1967) [25 U.S.C. 501 et seq.], shall be made without the consent of the proper tribal officials”).

⁸ See *Star Lake v. Lujan*, 737 F.Supp. 103, 109 (D.D.C. 1990) (upholding Bureau of Indian Affairs decision to terminate a right of way agreement, noting that the decision “does not conflict with federal statutes, policies, or case law”).

⁹ See footnote 2 above.

governs railroad obligations and shipper rights on rail lines that are subject to the jurisdiction of the Board. Railroads operating on rail lines that are part of the national rail network, like the line at issue here, are required under ICCTA to provide rail service upon reasonable request.

Similarly, on rail lines subject to the Board's authority, shippers have the right under ICCTA to receive the requested service. Under IRWA itself, the Tribe never had the authority to condition access to its property on the violation by BNSF of its federal law obligations to provide service on reasonable request.

Accordingly, there is no conflict between IRWA and ICCTA. Easements granted under IRWA are subject to applicable federal law, including ICCTA. Whatever rights were granted to the Tribe under IRWA are, by definition, subject to ICCTA requirements. But even if federal law constraints and requirements were not built into IRWA, ICCTA would preempt any effort by the Tribe to restrict BNSF's transportation to meet shipper needs through purported enforcement of an IRWA-approved easement agreement. ICCTA expressly states that the STB's authority over the regulation of rail transportation "preempt[s] the remedies provided under *Federal* or State law." 49 U.S.C. 10501(b) (emphasis added). In *Grafton & Upton R.R. Co.—Petition for Declaratory Order*, FD 35779, 2014 STB LEXIS 12 at *15 (Served Jan. 27, 2014), the Board stated that federal environmental law would be preempted if the "federal environmental laws are being used to regulate rail operations." In *U.S. EPA—Pet. for Declaratory Order*, F.D. No. 35803 (STB served Dec. 30, 2014), the Board reiterated this conclusion, noting that the EPA's adoption under the federal Clean Air Act of local government rules regulating locomotive emissions would likely be preempted since those local rules would conflict directly with the goal of uniform regulation of rail transportation.

IRWA could not be used to justify the regulation of rail movements over a tribe's land. Such local restrictions on rail service would be repugnant to ICCTA. There would be no way to "harmonize" local regulation of interstate rail transportation under IRWA with exclusive federal regulation of rail transportation by the Board under ICCTA. A fundamental purpose of ICCTA preemption is to prevent the interests of local communities from interfering with the strong national interest in efficient rail transportation. As the Board noted in the *EPA* decision, the objectives of ICCTA would be frustrated by local, patchwork regulation of rail operations whether or not the local regulation was attempted under color of federal law. Like other landowners, the Tribe may have a local interest in the rail traffic that moves over the Tribe's land, but that local interest cannot justify interference with interstate movements of crude oil. ICCTA preempts any attempt to impose local interests on the interstate rail network through regulation of rail transportation.

Moreover, Congress, the federal agencies and the courts have made it abundantly clear that Indian tribes *do not* have the right to use access to their lands to regulate the interstate rail movement of hazardous material. The federal Hazardous Materials Transportation Act (codified at 49 U.S.C. 5101 et seq.) expressly preempts any "requirement of a State . . . *or Indian Tribe*" that differs from the Act's regulations governing the transportation of hazardous materials. 49 U.S.C. § 5125(b) (emphasis added). Federal regulations expressly prohibit interference by Indian tribes in the transportation of hazardous materials. *See* 49 C.F.R. § 172.822 ("A law, order, or other directive of . . . *an Indian tribe* that designates, limits, or prohibits the use of a rail line . . . for the transportation of hazardous materials . . . is preempted") (emphasis added). The Eighth Circuit has held that an Indian tribe could not interfere with the use of a railroad line through the reservation despite concerns about the hazardous nature of the cargo being shipped.

See Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community, 991 F.2d 458, 463-64 (8th Cir. 1993).

The Tribe's desire to restrict crude oil transportation across the Reservation cannot justify restrictions on rail movements of crude oil to shippers who need the rail transportation for their business. The national interest in unfettered rail transportation, expressed through ICCTA, does not permit such patchwork regulation of rail transportation.

V. Conclusion

The Board should grant Tesoro's and Shell's request for a declaratory order and make it clear that landowners, including the Swinomish Tribe, are not permitted to use contracts with railroads to restrict rail transportation over their property. ICCTA protects Tesoro's and Shell's right to request and receive rail transportation over a rail line that is part of the national rail network. The Board should also grant BNSF intervention in this case.

Respectfully submitted,



Anthony J. LaRocca
Alice Loughran
Cynthia Taub
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 429-3000

ATTORNEYS FOR
BNSF RAILWAY COMPANY

Jill Mulligan
David Rankin
Tyler R. White
Suzanne Wellen
BNSF RAILWAY COMPANY
2500 Lou Menk Drive
Fort Worth, TX 76131
(817) 352-2322

June 23, 2016

Certificate of Service

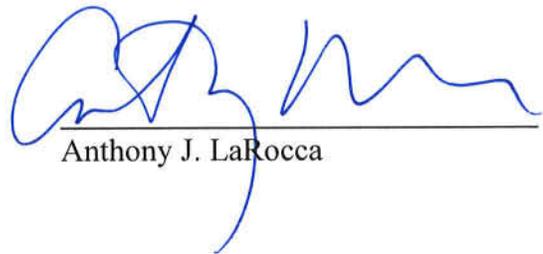
I hereby certify that on this 23rd day of June, 2016, I have served a copy of BNSF's Motion to Intervene in Support of Petitions for Declaratory Order by first class mail on the following:

Kevin A Ewing
Sandra Y. Snyder
Bracewell LLP
2001 M St N.W.
Washington, D.C. 20036
Tesoro Refining and Marketing Company, LLC

Craig Trueblood
K&L Gates
925 4111 A venue, Suite 2900
Seattle WA 98104
Attorney for Equilon Enterprises, LLC

Christopher I. Brain
Paul W. Moomaw
Tousley Brain Stephens PLLC
1700 Seventh A venue, Suite 2200
Seattle, WA 98101

Stephen T. LeCuyer
Office of the Tribal Attorney
Swinomish Indian Tribal Community
11404 Moorage Way
LaConner, WA 98257



Anthony J. LaRocca

Attachment A

XV: *01/16/80*
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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