



# THE SUQUAMISH TRIBE

## OFFICE OF THE TRIBAL ATTORNEY

Post Office Box 498  
Suquamish, WA 98392-0498  
Phone (360) 598-3311  
Legal Dept. Fax (360) 598-4293

### E-FILED AND REGULAR MAIL

241103

July 13, 2016

Chairman Daniel R. Elliott II  
Vice Chairman Deb Miller  
Member Ann D. Begeman  
United States Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20423

**ENTERED**  
**Office of Proceedings**  
**July 13, 2016**  
**Part of**  
**Public Record**

RE: Docket No. 36041 Petition of Tesoro Refining & Marketing Company, LLC for  
Declaratory Order

Dear Chairman Elliott, Vice Chairman Miller, and Member Begeman:

The Suquamish Tribe ("Tribe") submits this letter to raise an important jurisdictional issue associated with the petition for Declaratory Order filed by Tesoro Refining & Marketing Company, LLC that is pending before the Surface Transportation Board (STB).<sup>1</sup> The Tribe urges the Surface Transportation Board to decline jurisdiction in this matter consistent with the United States District Court's Order in *Swinomish Indian Tribal Community v. BNSF Railway Company*.<sup>2</sup> The above referenced petition relies on similar assertions that were rejected by the District Court.

In *Swinomish Indian Tribal Community v. BNSF Railway Company*, BNSF moved for dismissal or a stay, arguing that the Tribe's claims are preempted by the Interstate Commerce Commission Termination Act (49 U.S.C. § 10501(b)), and that the Surface Transportation Board had primary jurisdiction. The District Court denied the motion:

In the context of this case, referral to the STB is neither efficient nor necessary. The preemption issue can be decided by this Court: it is, at base, a legal question that can be resolved without the delay of initiating a separate agency action. Defendant offers no reason to believe that the relevant facts related to its operations are complex or that an intimate knowledge of transportation policy is required to adjudicate the preemption issue. If plaintiff's breach of contract claim and request for injunctive relief are not

<sup>1</sup> Equilon Enterprises LLC (Shell Oil) and Burlington Northern Santa Fe Railway Company have filed motions to intervene in support of this petition for Declaratory Order.

<sup>2</sup> *Swinomish Indian Tribal Community v. BNSF Railway Company*, Order Denying Motion to Dismiss, No. C15-543RSL, Doc. 19 (WA WD, Sept. 11, 2015)

July 13, 2016

Page 2 of 2

preempted, their resolution will require a thorough knowledge of Washington contract law and a balancing of the various interests represented by the ICCTA and the Indian Right-of-Way Act of 1948. Based on defendant's arguments here, it may also be necessary to evaluate whether defendant could have obtained a right to use Reservation land from any source other than the Easement Agreement (which may require an evaluation of various right-of-way enactments dating back more than a century), the resolution of disputes regarding easements granted by the Bureau of Indian Affairs, and the effect of representations made to the Honorable Walter T. McGovern when settling the first action between the parties. While the STB would be able to shed light on the nature of the common carrier's obligations and the importance of uniformity in the regulation of rail transportation, those issues are addressed in the statute and published agency decisions.<sup>1</sup> The STB has no expertise in the other areas of law that will govern the outcome of this case, and in fact has recognized the primacy of the Bureau of Indian Affairs in handling disputes regarding rights-of-way granted by that agency. Because the STB is not better equipped to handle the variety of issues that will arise in this action, the Court will not decline the exercise of jurisdiction.<sup>3</sup>

The U.S. District Court correctly ruled that jurisdiction is proper in federal court where its expertise lies in the specific areas of law at issue: Federal Indian Law; the Indian Right-of-Way Act, 25 U.S.C. §§ 323–28; easement regulations, 25 C.F.R. Part 169; and Washington contract law. Petitioner Tesoro and Intervenors Equilon and BNSF urge the STB to engage in duplicative agency proceedings while a live controversy of a similar nature lies in federal District Court. A duplicative agency proceeding does not support judicial efficiency and may give rise to conflicting agency adjudicated and court adjudicated outcomes and that may fuel unnecessary litigation and appeal.

For all of the above reasons, the Tribe requests that the STB decline jurisdiction in Docket No. 36041.

Sincerely,



Melody Allen  
Attorney for Suquamish Tribe

---

<sup>3</sup> *Id.* at 4-5.

### Certificate of Service

I hereby certify that on the 14<sup>th</sup> day of July, 2016, I caused a copy of the foregoing letter to be served by U.S. mail to the following parties of record:

Anthony J. Larocca  
1330 Connecticut Avenue NW  
Washington, DC 20036-1795  
Representing BNSF Railway Company

Brittany M. Pemberton  
2001 M Street NW, Suite 900  
Washington, DC 20036  
Representing Tesoro Refining & Marketing Company, LLC

Christopher I. Brain  
1700 Seventh Avenue, Suite 2200  
Seattle, WA 98101  
Representing the Swinomish Indian Tribal Community

Craig S. Trueblood  
925 Fourth Avenue, Suite 2900  
Seattle, WA 98104  
Representing Equilon Enterprises LLC DBA Shell Oil Products US

Kevin A. Ewing  
2001 M Street NW  
Washington, DC 20036  
Representing Tesoro Refining & Marketing Company, LLC

Stephen T. Lecuyer  
11404 Moorage Way  
Laconner, WA 98257  
Representing the Swinomish Indian Tribal Community



Melody Allen, Attorney  
Suquamish Tribe Legal Department  
PO Box 498  
Suquamish, WA 98392-0498