



Confederated Tribes of Warm Springs, Oregon
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Cynthia T. Brown
Chief of the Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

**Re: COMMENT - Surface Transportation Board Docket No. Finance Docket 36369,
Association of American Railroads, Petition for Declaratory Order**

Dear Ms. Brown:

I am the Chairman of the Twenty-Eighth Tribal Council of The Confederated Tribes of the Warm Springs Reservation of Oregon ("Tribe"). I am an enrolled member of the Tribe, and my tribal heritage descends from the Tiah Band of the Icischkin-speaking Warm Springs People and the Wasco Band of the Kiksht-speaking Wasco People. I am writing on behalf of the Tribe and my people to provide comments to the Petition filed by the Association of American Railroads ("AAR") for a declaratory order.

The Petition requests that the Board issue an order declaring that 49 U.S.C. § 10501(b) ("ICCTA") preempts the Clean Water Act's ("CWA") discharge prohibition and NPDES permitting regime "as applied to discharges incidental to the normal operation of rail cars in transit." The Board should, in its sound discretion, not issue such an order, which asks it to reconcile distinct federal statutory regimes—that is, ICCTA and the CWA. Such reconciliation is a matter for the courts, not agencies. *See Epic Systems Corp. v. Lewis*, 138 S.Ct 1612, 1629 (2018) (reconciling distinct statutory regimes is for the judiciary).

I. The Tribe and its Interests.

The Tribe is a federally recognized, self-governing, sovereign Indian tribe. The Tribe consists of three Indian tribal groups: the Warm Springs, the Wasco and the Paiute. The Tribe is the legal successor in interest to the Indian signatories to the Treaty between the United States of America and the Tribes of Middle Oregon, which was executed on June 25, 1855, and ratified by Congress on March 8, 1859, 12 Stat. 963 ("1855 Treaty" or "Treaty"). Pursuant to the Treaty, the Tribe ceded approximately 10 million acres of land to the United States and reserved approximately 640,000 acres for exclusive use and occupation of the Tribe and its members as a



permanent homeland (“Warm Springs Reservation”). The 1855 Treaty recognizes the Tribe as a sovereign entity, possessing inherent rights to provide for the general welfare of its people, including the right to manage its natural resources for their benefit.¹ The Treaty expressly reserves rights to the Tribe for its members to go outside (or “off”) the Warm Springs Reservation to all of the lands and waters that it had used prior to the treaty to hunt, fish, gather roots and berries, and to pasture livestock.

We are, quite simply, a Columbia River salmon people, a fact which has been understood by the federal courts since the early twentieth century. *See, e.g., United States v. Winans*, 198 U.S. 371 (1905) (construing similar provision in the Yakama Nation treaty). In *Winans*, the Supreme Court of the United States rightly observed that the treaty-reserved right to fish is “not much less necessary to the existence of the Indians than the atmosphere they breathe[.]” *Id.* at 381.

Our teachings tell us water is the first gift of the Creator. Water is the well-spring of all life, including, especially, the salmon. For that reason, we and the other Columbia River treaty tribes have long-asserted that our treaty-reserved rights include an enforceable right to protect suitable salmon habitat in the Columbia River and its tributaries. The Ninth Circuit Court of Appeals concurs with our view. *See generally United States v. Washington*, 853 F.3d 946 (2017), *aff’d by equally divided court* 138 S.Ct. 1832 (2018) (construction and maintenance culverts, which created barriers to fish passage, violated tribal treaty-reserved rights).

II. The Board Should Not Issue an Order Declaring that ICCTA Preempts the CWA Discharge Prohibition and NPDES Permitting Regime.

ICCTA does not abrogate tribal treaty rights. *See generally Swinomish Indian Tribal Community v. BNSF Railway Company*, ___ F.3d ___, 2020 WL 1038679, *13-14 (9th Cir. 2020) (ICCTA does not abrogate right to exclude contained in Treaty of Point Elliot). In reaching that conclusion, the Ninth Court of Appeals in *Swinomish* noted 49 U.S.C. § 102(f)(2)(B), which provides:

¹ The Tribe exercises its sovereignty to achieve the highest of all goals: “to preserve our traditional cultural ways that have existed for so many centuries in harmony with our homeland; and to provide for the well-being of our people for the many centuries that lie ahead.” Declaration of Sovereignty, Confederated Tribes of the Warm Springs Reservation of Oregon, June 25, 1992.

Nothing in this title shall absolve the United States from any responsibility to Indians and Indian tribes, including responsibilities derived from the trust relationship and any treaty, executive order, or agreement between the United States and an Indian tribe.

Congress has also provided that the Secretary of Transportation is “responsible to exercise trust obligations of the United States to Indians and Indian tribes to ensure that the rights of the tribe or individual Indian are protected.” 49 U.S.C. § 102(f)(2)(B). In light of the Tribe’s enforceable treaty-reserved rights to take fish—and to protect suitable habitat—in the Columbia River and its tributaries and the United States’ trust responsibility that it owes Indian tribes, the Board should decline to issue an order broadly declaring that ICCTA preempts the CWA discharge prohibition and NPDES permitting regime “as applied to discharges incidental to the normal operation of rail cars in transit” unless it can be assured that those discharges do not violate tribal treaty-reserved fishing rights.

I also note that Federal laws do not preempt other federal laws in the Constitutional sense. See *Swinomish*, 2020 WL 1038679, *10. When an action involves the “interplay between two statutory schemes created by Congress for different reasons and at different times,” courts usually “ask whether the later statute repeals the prior one.” *Id.* at *8 (internal quotations omitted; emphasis in original). While it enacted ICCTA after the CWA, there is no express statement by Congress that it intended to repeal the CWA. The question thus becomes whether Congress intended to implicitly repeal the CWA. Such implied repeals are disfavored and are justified only when the statutes are not reconcilable. *Id.* at *10.

Despite the preemption language in ICCTA, courts and the Board have regularly determined that ICCTA does not repeal particular federal statutes and their associated remedies. *See id.* at *11 (providing examples). Indeed, the Board has previously concluded that ICCTA need not be construed to preempt valid regulation under the CWA where such regulation, fairly enforced, does not unreasonably interfere with railroad operations. *See Bos. & Me. Corp. & Town of Ayer, Mass.*, 2001 WL 458685, at *6 n. 28; *see also Auburn & Kent, WA*, 1997 WL 362017, at *2, n. 7, *aff’d sub nom. City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998) (noting that railroad must comply CWA NPDES program relating to spills).

The Board should also be mindful of the United States Supreme Court’s admonition in *Epic Systems Corp.* 138 S.Ct. at 1629. Reconciliation of distinct statutory regimes is a matter for the judiciary, not executive agencies. *Id.* The Court observed that to “preserve the balance Congress struck in its statutes, courts must exercise independent judgment.” *Id.*

III. Conclusion.

The Tribe appreciates the opportunity provide written comments on this important issue affecting our treaty-reserved fishing rights. For the reasons set forth in this letter, we ask that the Board not issue the declaratory order sought by AAR, which asks the Board to reconcile ICCTA with the CWA in a manner that risks violating our treaty-reserved rights to take fish and to have fish to take. Thank you.

Very truly yours,

s/ Raymond Tsumpti

RAYMOND TSUMPTI
Tribal Council Chairman
The Confederated Tribes of the Warm Springs
Reservation of Oregon

CERTIFICATE OF SERVICE

I, Josh Newton, hereby certify that on March 18, 2020, a true and correct copy of the letter from the Confederated Tribes of the Warm Springs Reservation of Oregon, as signed by Tribal Council Chairman Raymond Tsumpti, regarding the Petition for Declaratory Order in Finance Docket No. 36369 was served on all parties of record via email to the email addresses shown on the Service List as of March 18, 2020, for STB Finance Docket No. 36369 at <https://prod.stb.gov/proceedings-actions/dockets-and-service-lists/>.

s/ Josh Newton

Josh Newton

*Of attorneys for the Confederated Tribes of
the Warm Springs Reservation of Oregon*