

**BEFORE THE SURFACE TRANSPORTATION BOARD
DEPARTMENT OF TRANSPORTATION**

TESORO REFINING &
MARKETING COMPANY LLC
PETITION FOR
DECLARATORY ORDER

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STB Finance Docket No. 36041

**MOTION TO INTERVENE AS PETITIONER, PETITION FOR DECLARATORY
ORDER, AND REQUEST FOR EXPEDITED DECISION**

Equilon Enterprises LLC d/b/a Shell Oil Products US (“Shell”) moves to intervene as a Petitioner in proceedings initiated by Tesoro Refining & Marketing Company LLC (“Tesoro”).¹ Like Tesoro, Shell seeks a declaratory order under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 regarding the rights that shippers have under federal law to receive rail transportation over rail lines that are subject to Surface Transportation Board (“STB”) jurisdiction. An STB Declaratory Order is necessary to remove uncertainty that has been created by a dispute in federal court between the Swinomish Indian Tribal Community (“Tribe”) and BNSF Railway Company (“BNSF”) over the terms of an easement relating to BNSF’s use of the Tribe’s reservation land to provide rail transportation to Shell.²

¹ *Petition of Tesoro Refining & Marketing Company, LLC for Declaratory Order* - STB Finance Docket No. 36041 (June 3, 2016). Shell conferred with Tesoro regarding this Motion and Tesoro does not object to Shell intervening as a Petitioner.

² *Swinomish Indian Tribal Community v. BNSF Railway Co.*, No. 2:15-cv-00543 (W.D. Wash. filed Apr. 7, 2015). A copy of the Tribe’s Complaint is attached as Exhibit A to Tesoro’s Petition for Declaratory Order (“Tribe’s Complaint”). A copy of the Tribe’s pending Motion for Summary Judgment is attached as Exhibit A hereto (“Tribe’s Motion for Summary Judgment”).

The Tribe claims that it has the right under the disputed easement to prevent BNSF from serving Shell's rail transportation needs and has asked the federal court to enjoin BNSF from providing additional services to Shell, even if Shell has a commercial need and the request for service is reasonable. Specifically, the Tribe has asked the court to "[e]nter a permanent injunction against BNSF prohibiting it (i) from running more than one train of twenty-five cars or less in each direction over the Right-of-Way per day, and (ii) from shipping Bakken Crude over the Reservation."³ Briefing of the Tribe's request for injunctive relief to the U.S. District Court for the Western District of Washington is scheduled to be completed on June 20, 2016. Shell is not a party to the disputed easement and is not a party in the pending federal court litigation. However, Shell's interests will be significantly and adversely affected by the court's issuance of the injunctive relief requested by the Tribe. Therefore, Shell hereby moves to intervene in this proceeding and seeks expedited consideration of this Petition for Declaratory Order in conjunction with the Board's consideration of Tesoro's petition.

I. Background

Shell owns and operates the Puget Sound Refinery (PSR) near Anacortes, Washington. PSR has been in existence for 58 years.⁴ PSR has received rail service from BNSF Railway Company (BNSF) and its predecessors since the refinery went online in 1958. Given the location of PSR, the only way to provide rail service to PSR is on BNSF's rail line, which crosses a portion of the Tribe's reservation.

PSR has the capacity to process 145,000 barrels of crude each day. Shell provides jobs for roughly 700 employees and contractors, and Shell supports \$80 million per year in salaries

³ Tribe's Complaint, at p. 13, Paragraph VIII.C.

⁴ See Exhibit B, Verified Statement of Michael A. Carr at ¶ 5.

and wages. Shell is the largest taxpayer in Skagit County, Washington, a community of approximately 121,000⁵.

PSR refines crude petroleum into a variety of products including gasoline, diesel, fuel oil, propane, aviation fuels and petroleum coke. Crude arrives at PSR primarily by marine vessel and some by pipeline. The single existing crude oil pipeline serving PSR is at capacity. PSR receives material necessary for the operation of the refinery by rail, including normal butane, isobutene, vacuum gas oil (VGO) and long residue. PSR also ships products made at the refinery by rail, including normal butane, propylene tetramer, nonene, propane and petroleum coke. On average, PSR receives manifest train rail service six times per week. Shell has invested heavily in people and facilities at PSR in reliance on access to the national rail system. Without access to rail service, PSR would not be able to function efficiently or compete with other refineries that have unfettered access to rail service.⁶

In addition, Shell has filed applications to construct and operate rail unloading facilities that would enable Shell to pursue future opportunities to receive crude oil by unit trains at PSR.⁷ Shell has invested over two years of time and effort and over \$20 million in this process. Access to crude by rail has future value for PSR, especially in light of the fact that the other refineries in Washington State have crude rail service from BNSF. Decisions on Shell's applications are pending completion of additional environmental studies required by the State of Washington and Skagit County.⁸ In November 2015, the Tribe submitted comments on the scope of the

⁵ <http://www.census.gov/quickfacts/table/PST045215/53057>

⁶ Exhibit B at ¶ 22.

⁷ Exhibit B at ¶¶ 22 - 25.

⁸ *Equilon Enterprises LLC v. RE SOURCES et al.*, Skagit County Superior Court Cause No. 15-2-00368-5.

environmental review under the State Environmental Policy Act⁹, and claimed that if the Tribe prevails in its litigation against BNSF and obtains its desired injunctive relief “there will be no need for the development of [PSR’s] rail off-loading facility to accommodate additional cars, and therefore no need to develop this EIS” because the Tribe seeks to foreclose additional rail traffic or any movement of Bakken crude across the BNSF line.¹⁰ Shell seeks to affirm its right to rail service necessary to meet its current and future business needs, whether by receipt of unit trains or other rail opportunities not yet foreseen.

II. Argument

Shell’s Petition for a Declaratory Order regarding the Tribe’s request for injunctive relief rests on several basic principles of federal transportation law that are well supported in the case law.

A. Shippers located on rail lines have a right to receive rail transportation on reasonable request.

For over 100 years, federal law governing railroads has been based on the principle that the Interstate Commerce Commission, now the STB, authorizes railroads to provide service over an interstate network of rail lines in exchange for a requirement that the railroads provide rail service to shippers located on those rail lines in response to reasonable requests. This foundation principle of rail regulation law is set out in the Interstate Commerce Commission Termination Act (“ICCTA”) at 49 U.S.C. § 11101(a). The rail line at issue here, known as the Anacortes Subdivision, is part of the national network of rail lines subject to the STB’s jurisdiction.

⁹ Title 43, Chapter 21C, Revised Code of Washington

¹⁰ A copy of the Tribe’s letter to the State of Washington and Skagit County is attached hereto as Exhibit C.

Shippers are the beneficiaries of the federal requirement that railroads provide service on reasonable request. This mandate makes it possible for shippers to locate facilities along the national rail network with assurance that they will receive rail transportation in the future. An efficient rail network, free of local restraints, is critical to the smooth functioning of the nation's economy.

Under this long-established federal regulatory scheme, once a railroad is authorized to provide service on a line, it cannot cease providing service without obtaining the STB's authorization. 49 U.S.C. § 10903. A railroad may temporarily suspend or embargo operations on a rail line when the railroad is physically unable to provide service, such as during a natural disaster. Otherwise, a railroad authorized to operate over a rail line must provide service in response to reasonable requests by customers such as Shell. This is important for economic development, as rail customers would not invest in new facilities without some assurance that rail service will not be interrupted by state or local objections or based on the type of commodity the customer needs to ship.

B. Shell's request for service is reasonable.

Shell needs regular rail service to receive normal butane, isobutene, VGO and long residue. These articles of commerce are critical to the continued operation and maintenance of PSR. Normal butane is a refinery feedstock that is blended into gasoline. Isobutene is a refinery feedstock that is used to produce a high octane gasoline. VGO and long residue are intermediate feedstocks that supplement primary crude oil and ensure optimal operation of downstream

processing units.¹¹ It is reasonable for Shell to request and to continue to receive regular rail service for delivery of these articles of commerce.

Shell also needs regular rail service to ship products to Shell's customers, such as normal butane, propylene tetramer, nonene, propane and petroleum coke. Normal butane is shipped out of PSR into third party storage and sometimes sold to customers to make isobutane. Nonene and propylene tetramer are both chemical intermediates sold to commercial/industrial customers, to be used in a broad range of applications including plasticizers, detergents and cleaners, lubricants oil additives and polymerization modifiers. Propane is sold primarily as fuel to customers in Mexico. Petroleum coke is a solid carbon material which is a by-product of the refining process and is sold primarily to aluminum manufacturers outside the United States.¹² It is reasonable for Shell to request and to continue to receive regular rail service for shipping these articles of commerce, and to be able to vary the number of rail cars based on Shell and client commercial needs.

Additionally, in December 2013, Shell filed applications for local, state and federal permits necessary to construct an offloading facility that would receive mid-continent crude oil by rail at PSR.¹³ A draft environmental impact statement is being prepared and is scheduled to be released

¹¹ Exhibit B at ¶¶ 12 - 15. Shell has simultaneously filed a Motion for Protective Order under 49 C.F.R. § 1104.14 to apply to the redacted material in Exhibit B. This protective order is necessary to preserve the confidentiality of commercially sensitive information regarding Shell's operations.

¹² Exhibit B at ¶¶ 16 - 19.

¹³ This new crude offloading facility would receive unit trains of 102 tank cars delivered by BNSF over the Anacortes Subdivision. In order to reach PSR, the unit trains must use approximately 1,000 feet of the BNSF line which crosses the Tribe's reservation. Shell has committed to use only DOT-117 rail cars (new or retrofitted), which were recently approved by the U.S. Department of Transportation in response to concerns about the safety of crude transport by rail.

for public comment in October 2016. The crude received by rail would supplement or replace portions of crude received at PSR by marine vessel and pipeline.

C. Contracts between landowners and a railroad cannot restrict the rail transportation that shippers are entitled to receive under ICCTA.

The Tribe is seeking to enforce a 1991 easement agreement between it and BNSF that would effectively allow it to set the terms of service that BNSF may provide to Shell, not only in terms of the frequency and number of trains that may run across the main line, but also as to the types of materials that may be transported. This is fundamentally at odds with longstanding jurisprudence.

The interpretation of the 1991 easement is an issue before the federal court, and Shell is not asking the STB to resolve the dispute between BNSF and the Tribe. Rather, Shell is requesting the STB to make clear that Shell's rights as a shipper cannot be restricted by an agreement between a railroad and a landowner. Regardless of how the easement is interpreted, the U.S. Supreme Court has already determined that contracts between railroads and property owners cannot over-ride the rights and obligations that are created under federal law governing railroads. *See U.S. v. Baltimore*, 333 U.S. 169 (1948).

The rule in *U.S. v. Baltimore* is consistent with well established law that contracts may not override regulatory obligations. *See, e.g., Railroad Ventures, Inc. v. STB*, 299 F.3d 523, 560-61 (6th Cir. 2002) (STB properly invalidated settlement agreement on public policy grounds because its enforcement would unreasonably interfere with the railroad's future fulfillment of common carrier obligations); *Hanson Natural Resources Co. — Non-Common Carrier Status — Petition for a Declaratory Order*, FD No. 32248, 1994 MCC LEXIS 111, at *4 (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.”).

The easement at issue here was apparently entered into to settle prior litigation between BNSF and the Tribe. But the case law holds that settlement agreements, like other types of contracts, cannot be used to limit rail operations if those limitations prevent a railroad from complying with its statutory common carrier obligations. See *Railroad Ventures, Inc.*, 299 F.3d at 560-61; *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”).

There is an important policy reason for not allowing landowners whose property is needed to provide rail service to use contracts with railroads to restrict the service that railroads can provide. Railroads cross hundreds of individual land parcels across their network. Restrictions on the use of a single parcel could impact numerous movements and severely interfere with interstate transportation. This is the same public policy that prevents state or local governments from adopting preclearance requirements or regulations that interfere with rail transportation. Congress granted the STB “exclusive jurisdiction” over rail transportation in order to prevent a patchwork of restrictions that impedes the free flow of interstate commerce over the nation’s rail system. The Tribe’s request for an injunction, if granted, would create just such a restriction.

Shell’s right to receive the rail transportation service at PSR is protected by federal law. This protection is important even in the face of private contracts between a railroad and a landowner.

If a common carrier could contract individually with landowners to restrict or preclude certain services, interstate rail transportation would be jeopardized.

D. The Tribe's reading of the 1991 easement would function more as local regulation than an ordinary property interest.

The Tribe contends the 1991 easement gives it the right to withhold permission, on a case-by-case basis, to any increase in the number of rail cars BNSF operates on the easement.¹⁴ The Tribe's assertion that it can effectively veto additional rail traffic, whether needed by Shell to operate PSR or to meet the needs of Shell's customers, would function more as a governmental preclearance or approval rather than a typical real property easement. The Tribe's assertion of a veto should, therefore, be reviewed and found to be preempted by ICCTA¹⁵. In this instance, the Tribe's effort to foreclose Shell's request for additional rail service before the environmental impact statement is complete is an even more egregious intrusion into the STB's exclusive jurisdiction over interstate rail transportation.

E. An injunction restricting rail service at PSR would violate the STB's exclusive authority to regulate rail transportation.

A federal court injunction would violate ICCTA's express grant of exclusive jurisdiction to the STB to regulate rail transportation. 49 U.S.C. § 10501. A court order restricting the transportation services that BNSF provides to PSR would clearly amount to the regulation of rail transportation, which Congress delegated exclusively to the STB.

¹⁴ Tribe's Complaint, at p. 10, Paragraphs 3.12 - 3.16, and 3.32.

¹⁵ *Association of American Railroads v. South Coast Air Quality Management District*, 622 F.3d 1094, 1097 (9th Cir 2010); *Franks Inv. Co. v. Union Pac. RR Co.*, 593 F.3d 404, 410 (5th Cir 2010); *NY Susquehanna & W. Ry Corp v. Jackson*, 500 F.3d 238, 252 (3rd Cir 2007); *Green Mountain Railroad Corp. v. Vermont*, 404 F.3d 638, 642 (2nd Cir 2005); *Fla. E. Coast Ry Co v. City of W. Palm Beach*, 266 F.3d 1324, 1337 (11th Cir 2001); and, *Auburn v. United States*, 154 F.3d 1025, 1030-1031 (9th Cir 1998).

A number of cases have recognized that federal law restricts the power of federal courts to issue orders to railroads restricting their rail operations. See, e.g., *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439, 443 (5th Cir. 2001) (“it is beyond peradventure that regulation of KCS train operations, as well as the construction and operation of the KCS side tracks is under the exclusive jurisdiction of the STB”); *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); *Boston & Maine Corp. & Springfield Terminal R.R. Co. – Petition for Declaratory Order*, STB Docket No. FD 35749, 2013 WL 3788140, at *3 (STB served July 19, 2013) (“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).”); *Wichita Terminal Association, BNSF Railway Co. & Union Pacific Railroad Co. – Petition for Declaratory Order*, STB Docket No. FD 35765 (served June 23, 2015) (“any court order or state or local regulation requiring a crossing at Emporia Court is preempted under § 10501(b) because it would have the effect of managing or governing property that is part of the national rail network”).

The Tribe has argued in the federal court proceeding¹⁶ that the rights and obligations created by ICCTA are inapplicable to an easement that is governed by the Indian Right-of-Way Act (“IRWA”), 25 U.S.C. §§ 323-328. In effect, the Tribe asserts that the remedies provided in the IRWA take priority over the remedies provided in the ICCTA.

¹⁶ Exhibit A, Tribe’s Motion for Summary Judgment at p. 18 (“There is nothing in the ICCTA that suggests Congress intended to abrogate the IRWA in favor of deferring to shipper needs.”)

Shell is not asking the STB to address how, or whether, the IRWA applies to the dispute between the Tribe and BNSF that is pending before the federal court. What is important here is that the rail line that serves Shell's PSR is part of the national rail network, and STB has exclusive authority to regulate rail transportation over rail lines that form the national rail network. Congress did not give Indian Tribes the right to regulate rail transportation. Further, the issue presented by Shell here is very simple, since Shell is focused only on the Tribe's request for an injunction blocking rail transportation to PSR. ICCTA expressly preempts remedies under other federal laws that seek to regulate rail transportation. See 49 U.S.C. § 10501(b). There could be no clearer example of a remedy that seeks to regulate rail transportation than an injunction prohibiting BNSF from providing rail transportation service to PSR.

F. Shell has standing.

The Board has made clear that it is "not bound by the strict requirements of standing that govern judicial proceedings."¹⁷ In this Petition, Shell seeks an order from the Board protecting the rail service BNSF provides to Shell from an injunction. Shell has standing to make this request. Adverse consequences from the loss of flexibility of rail service for incoming raw materials and outgoing products would affect Shell if BNSF's rail service is enjoined or limited as requested by the Tribe. One of the fundamental purposes of the ICCTA is to support and protect the nation's rail system upon such shippers such as Shell relies. The Board has a

¹⁷ *Diana Del Grosso, Ray Smith, et al.*, STB Docket No. FD 35652, at p. 3 (Dec. 4, 2014); and, *James Riffin - Petition for Declaratory Order*, STB Docket No. FD 34501, at p. 5 (Feb. 23, 2005).

“statutory duty to preserve and promote continued rail service.”¹⁸ For these reason’s, Shell has standing to file this Petition.

III. Prayer for Relief

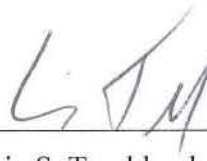
Based upon the foregoing, Shell respectfully requests that the Board exercise its authority under 5 U.S.C. § 554 and 49 U.S.C. § 721(a) to issue a declaratory order affirming that:

1. ICCTA protects Shell’s right to rail service from BNSF for the delivery and shipment of feedstocks and intermediate and finished products, including crude oil, to and from the Puget Sound Refinery; and,
2. Shell’s right may not be infringed on the basis of the Right-of-Way Easement Agreement.

Such relief is necessary to give effect to ICCTA and to ensure that Shell may continue to rely upon the rail services it reasonably requests on BNSF’s Anacortes Subdivision. Shell requests expedited consideration of the Petition.

Dated: June 17, 2016

Respectfully submitted,



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*Attorneys for Equilon Enterprises LLC d/b/a
Shell Oil Products US*

¹⁸ *New York Cross Harbor Railroad v. STB*, 374 F.3d 1177, 1187 (D.C. Cir 2004)(citation omitted).

CERTIFICATE OF SERVICE

I hereby certify that I served the Board and Tesoro Refining & Marketing Company LLC copies of the foregoing Motion to Intervene and Petition of Equilon Enterprises LLC d/b/a Shell Oil Products US for Declaratory Order on June 17, 2016, and there are no other parties to this proceeding. As a courtesy, copies of the foregoing Motion and Petition have also been provided to BNSF Railway Company and the Swinomish Indian Tribal Community.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'C. Trueblood', is written over a horizontal line.

Craig S. Trueblood

LIST OF EXHIBITS

- Exhibit A: Motion for Summary Judgment, Case No. 2:15-cv-00543, *Swinomish Indian Tribal Community v. BNSF Railway Company* (W.D. Wash filed March 3, 2016), including Praecipe Regarding Plaintiff's Motion for Summary Judgment (filed June 2, 2016).
- Exhibit B: Verified Statement of Michael A. Carr (June 15, 2016) with Attachments 1 - 3.
- Exhibit C: Letter from Swinomish Indian Tribal Community filed with Washington State Department of Ecology and Skagit County, Washington, regarding scope of environmental impact statement for proposed rail off-loading facility at Shell PSR (dated November 4, 2015).

EXHIBIT A

Motion for Summary Judgment, Case No. 2:15-cv-00543, *Swinomish Indian Tribal Community v. BNSF Railway Company* (W.D. Wash filed March 3, 2016) including Praecipe Regarding Plaintiff's Motion for Summary Judgment (filed June 2, 2016).

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
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

TO: CLERK OF THE COURT;

AND TO: ALL COUNSEL OF RECORD

YOU ARE HEREBY requested to replace pages seven (7) and eight (8) of Plaintiff's Motion for Summary Judgment, originally filed on March 10, 2016 (Dkt #31), under the above-referenced cause number, with the attached pages. The purpose of this praecipe is as follows:

1. To remove the reference to Paragraph 6 of the Declaration of Allan Olson in Support of Plaintiff's Motion for Summary Judgment, in accordance with the Court's May 6, 2016 Order Regarding BNSF's Motion To Compel Discovery, and substitute same with a reference to Paragraph 7 of Mr. Olson's Declaration; and

2. To include reference to Exhibit 31(a) to the Declaration of Christopher I. Brain, which is being submitted under cover of the Praeipce Regarding Declaration of Christopher I. Brain, filed concurrently herewith.

Other than the foregoing changes, no changes have been made to Plaintiff's motion.

DATED this 2nd day of June, 2016.

TOUSLEY BRAIN STEPHENS PLLC

By: /s/ Christopher I. Brain

By: /s/ Paul W. Moomaw

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Attorneys for Plaintiff

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

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Attorneys for Plaintiff

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Tel: 206.682.5600

1 Thereafter, the disclosure shall be updated periodically as different products, or
2 commodities, are added or deleted. Such updates shall occur at least annually. The
3 disclosure updates shall identify any previously shipped cargo that is different in
4 nature, identity or quantity from the cargo described in previous disclosures.

5 *Id.* at Ex. 29, ¶ 7(b).

6 Under the Easement Agreement, the initial term of the Right-of-Way grant is forty
7 years, along with two 20-year option periods. *Id.* at Ex. 29. Thus, it will terminate in
8 accordance with its own terms no later than 2071.

9 The Settlement Agreement and Easement Agreement were the result of painstaking
10 negotiation. Limiting the numbers of trains and railcars on the Right-of-Way and knowing the
11 trains' contents were major issues for the Tribe. At the time, the Tribe was contemplating
12 significant economic development in the area adjacent to the right-of-way. *Id.* at Ex. 30.
13 (While development did not occur exactly as the Tribe envisioned at the time, there is no
14 dispute that development of the Tribe's economic hub took place in close proximity to the
15 Right-of-Way.) The Tribe originally demanded that the number of trains and railcars be
16 strictly limited. *Id.* at Ex. 31. *See also* Ex. 31(a), at pg. 10. BN, on the other hand, wanted the
17 flexibility to increase rail traffic if it became necessary. *Id.* at Ex. 32. Ultimately, BN proposed
18 the language contained in the final version of the Easement Agreement, which allowed BN to
19 request an increase based on shipper needs, but also allowed the Tribe to refuse, as long as its
20 decision was not arbitrary. *Id.* at Ex. 33. (In contrast, one of the terms of the Settlement
21 Agreement BNSF relies on in support of the argument that the ICCTA governs this dispute —
22 that "[n]othing in . . . [the] Right-of-Way Easement shall supersede any federal law or
23 regulation as they now exist or as they may be amended or changed from time to time" — was
24 proposed by *the Tribe* to ensure it was compensated in accordance with federal law. *Id.* at
25 Ex. 31.) Once the parties had agreed on the terms of the Settlement Agreement and Easement
26 Agreement, the Tribe approved both by resolution dated August 1, 1989. *Id.* at Ex. 36.

27 Never once did BN indicate to the Tribe that it might not be able to comply with the
28 limitations contained in the Easement Agreement due to its common carrier obligations. *See*

1 Olson Decl. at ¶ 7. If it had done so, the Tribe would never have consented to the Right of
 2 Way. *Id.*

3 **G. The IRWA Governs the Easement Agreement**

4 The Right-of-Way and the Easement Agreement are governed by the IRWA (25 U.S.C.
 5 §§ 323–28) and its implementing regulations (25 C.F.R. Part 169). As discussed at more
 6 length below, the IRWA and the regulations impose a number of obligations on the railroad
 7 with respect to maintenance of and compensation for the Right-of-Way, along with an ongoing
 8 obligation to comply with the terms of the Right-of-Way grant. Significantly, under 25 C.F.R.
 9 § 169.20(a), a right-of-way is terminable by the Secretary of the Interior for any “[f]ailure to
 10 comply with any term or condition of the grant or the applicable regulations.”

11 Under the Settlement Agreement and the regulations, BN was required to, and did,
 12 apply to the BIA for formal approval of the Right-of-Way. *See* Brain Decl., at Ex. 37. On
 13 November 27, 1990, the Interior Department granted its approval. *Id.* at Ex. 38. In contrast,
 14 nothing in the Settlement Agreement or Easement Agreement required approval by the
 15 Interstate Commerce Commission (“ICC”). Although the ICC had moved to intervene in the
 16 trespass action (a motion that was denied as premature), *Id.* at Exs. 34 and 35, it was not
 17 involved in the negotiation of the Easement Agreement, and had no input into its terms and
 18 conditions. Moreover, BN never indicated to the Tribe that it considered the terms of the
 19 Easement Agreement to be subordinate to ICC or common carrier obligations. Olson Decl., at
 20 ¶ 7. If it had done so, the Tribe would never have granted its consent. *Id.* Likewise, BN’s
 21 Answer and Counterclaim to the Tribe’s trespass lawsuit did not allege any defenses based on
 22 Federal preemption. *See* Brain Decl., at Ex. 16.

23 **H. BNSF Ignores the Terms and Conditions of the Right-of-Way Grant**

24 The Tribe learned in 2012 that BNSF was running “unit trains” of 100 cars or more
 25 over the Right-of-Way to reach the Tesoro refinery at March Point, near Anacortes,
 26 Washington. Olson Decl., at ¶ 8. BNSF did not notify the Tribe or seek its agreement to
 27 exceed the Easement Agreement’s limitations, and the Tribe has never granted BNSF

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

**MOTION FOR SUMMARY
JUDGMENT**

**NOTE ON MOTION CALENDAR:
Friday, April 1, 2016**

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

Plaintiff Swinomish Indian Tribal Community (the “Tribe”) and Defendant BNSF Railway Company (“BNSF”) are parties to a right-of-way easement agreement (the “Easement Agreement”) that grants BNSF a right-of-way (the “Right-of-Way”) over part of the Tribe’s Treaty-reserved trust lands. The Easement Agreement’s purpose was to resolve a dispute relating to the railroad’s decades-long trespass over the Tribe’s trust lands. Despite persistent efforts and numerous appeals, BNSF’s predecessor could not obtain a lawfully-recognized right-of-way without Tribal consent, and the Tribe was pursuing a lawsuit to enjoin the railroad’s trespass. To procure the Tribe’s consent, BNSF’s predecessor agreed to include in the Easement Agreement a number of well-defined limitations on its use of the Tribe’s lands. The Tribe would not have consented to the Right-of-Way without those limitations.

Now, BNSF is running many more trains and railcars across the Right-of-Way than are permitted under the Easement Agreement, and failing to report the contents of the railcars as required by the agreement. The Tribe filed this lawsuit to compel BNSF to comply with the Easement Agreement. BNSF contends that the Tribe’s lawsuit is preempted by the Interstate Commerce Commission Termination Act (“ICCTA”) because enforcement of the Easement Agreement would interfere with BNSF’s railroad operations. BNSF’s argument is meritless. First, it is well-settled that the ICCTA does not preempt actions to enforce a railroad’s voluntary contractual commitments. Second, the ICCTA cannot “preempt” the Tribe’s rights and remedies under the Indian Right-of-Way Act (“IRWA”), which governs the Right-of-Way. While a later enacted statute may impliedly repeal an earlier one, courts require a clear statement of congressional intent before finding an implied repeal. Nothing in the ICCTA remotely suggests that it was intended to abrogate tribal rights under IRWA, particularly considering that statutes are to be liberally construed in favor of protecting Indian rights. But this is exactly what BNSF argues: that its common carrier obligations, protected by the ICCTA, override its duties under the IRWA and its implementing regulations, including the duty to comply with the conditions of the Right-of-Way grant. BNSF’s argument, if accepted,

1 would eviscerate the protections afforded by the IRWA, because no railroad would ever be
 2 required to adhere to the conditions of a right-of-way grant, as long as it could claim that doing
 3 so would run afoul of its common carrier obligations or interfere with interstate commerce.
 4 This is not, and cannot be, the law. The Tribe respectfully requests that the Court enter
 5 summary judgment in its favor, concluding that this action is not preempted by the ICCTA.

6 **II. FACTS**

7 **A. The Tribe and the Reservation**

8 The Tribe is a Federally-recognized Indian tribe organized under the Indian
 9 Reorganization Act of 1934, 25 U.S.C § 476. *See* Declaration of Allan E. Olson (“Olson
 10 Decl.”) at ¶ 3. The Tribe is a successor to signatories of the Treaty of Point Elliott of 1855, 12
 11 Stat. 927 (1855), which established the Swinomish Reservation (the “Reservation”) on the
 12 Southeastern end of Fidalgo Island in Skagit County, Washington. The lands on the
 13 Reservation that are the subject of this lawsuit are held in trust for the Tribe by the United
 14 States. *Id.* The Treaty set aside the Reservation for the Tribe’s “exclusive use.” *Id.*

15 **B. The Right-of-Way**

16 The Right-of-Way crosses a part of the Reservation that constitutes the heart of the
 17 Tribe’s economic development enterprises. *Id.* at ¶ 4. It is adjacent to many elements of the
 18 Tribe’s economic infrastructure, including the Swinomish Casino and Lodge, a Chevron
 19 station and convenience store, and an RV Park, as well as a Tribal waste treatment plant and a
 20 Tribal air quality monitoring facility. *Id.* Hundreds of guests and employees are present at
 21 these facilities at all times. *Id.* This infrastructure is the main source of Tribal funding for the
 22 Tribe’s governmental functions and programs. *Id.* The Right-of-Way also crosses a swing
 23 bridge over the Swinomish Channel and a trestle across Padilla Bay, both of which are within
 24 the Reservation and are many decades old. *Id.* at ¶ 5. These water bodies connect with the
 25 Puget Sound, in which the Tribe has usual and accustomed fishing grounds and stations, as
 26 recognized by this Court in *United States v. Washington*, 459 F. Supp. 1020, 1049 (W.D.
 27 Wash. 1978). Since time immemorial, the Tribe and its predecessors have benefited from these

bodies of water to support its fishing lifestyle, among other purposes, and salmon and other marine resources have played central and enduring roles in the Tribe's subsistence, culture, identity, and economy. *Id.*

C. Construction of the Railroad Across the Reservation Without Tribal Consent

The Seattle and Northern Railroad Company ("SNRC") built the original railroad tracks in the area of the Right-of-Way in around 1889, without the consent of the Tribe or the United States. The Tribe objected, and United States Indian Agent W.H. Talbot investigated the matter. *See* Declaration of Christopher I. Brain ("Brain Decl.") at Ex. 1. Mr. Talbot met with the U.S. District Attorney for Washington Territory to seek to institute injunction proceedings. *Id.* at Exs. 2–4. In response, SNRC petitioned the Secretary of the Interior, who advised SNRC that if a right-of-way was not granted by treaty or agreement, congressional legislation was necessary to procure it. *Id.* at Ex. 5. There is no record that SNRC obtained such legislation. However, the U.S. Attorney took no action to enjoin the construction or use of the railroad. *Id.* at Ex. 6. After construction, SNRC began using the tracks without permission from the Commissioner of Indian Affairs or the Tribe. *Id.* at Exs. 7 & 8.

D. Litigation Surrounding the Unauthorized Use of the Right-of-Way

This unauthorized use went on for nearly a century. In 1970, the Tribe attempted without success to reach a settlement with Burlington Northern Railroad Company ("BN"), a successor to SNRC and BNSF's immediate predecessor, regarding the use of the railroad. By resolutions dated August 2, 1977 and December 7, 1977, the Tribe requested that the United States bring a lawsuit against BN for ejectment and damages. *Id.* at Exs. 7–9.

In an effort to legitimize its unauthorized use of the railroad tracks, BN applied for a right-of-way with the Bureau of Indian Affairs ("BIA") on September 27, 1977. *Id.* at Ex. 10. The application was forwarded to the BIA's Portland Area Director on October 3, 1977. *Id.* at Ex. 11. On October 7, 1977, the Tribe filed an objection to the application, stating that no right-of-way could be issued without the Tribe's consent. *Id.* at Ex. 12. The Superintendent of BIA's Western Washington Agency denied the application in an October 17, 1978 decision.

1 The Superintendent observed that by resolution, the Tribe refused to consent to a right-of-way,
 2 and held that, “[a]s tribal consent is required under both the law and the regulations, we have
 3 no choice but to deny the application.” *Id.* at Ex. 13.

4 Meanwhile, in 1978, the Tribe renewed its resolution urging the United States, in its
 5 capacity as trustee, to take action to remove BN as a trespasser. *Id.* at Ex. 14. The Tribe then
 6 commenced a trespass action against BN to put an end to the railroad’s unlawful invasion and
 7 use of the Tribal trust lands. *Swinomish Tribal Community v. Burlington Northern, Inc.*, Case
 8 No. C78-429V (W.D. Wash. filed July 18, 1978). *Id.* at Ex. 15. BN filed its answer and
 9 counterclaim on September 11, 1978. *Id.* at Ex. 16.

10 On November 10, 1978, BN appealed the Superintendent’s decision to the BIA Area
 11 Director. *Id.* at Ex. 17. BN argued that Tribal consent was unnecessary under the Act of March
 12 2, 1899, 25 U.S.C. § 312 et seq. (the “1899 Act”), which BN contended governed its
 13 application. *Id.* BN did not argue that failure to grant the right-of-way would contravene its
 14 common carrier obligations or interfere with interstate commerce, nor did it claim that the
 15 matter implicated the Interstate Commerce Act (predecessor to the ICCTA). *Id.* Its sole
 16 argument was that Tribal consent was not required for a right-of-way grant. *Id.* The Tribe
 17 countered that Tribal consent is explicitly required under the Indian Right of Way Act of 1948,
 18 25 U.S.C. § 323 et seq., and its implementing regulations. *Id.* at Ex. 18. On May 4, 1979, the
 19 Area Director upheld the Superintendent’s decision, also concluding that the BIA could not
 20 grant a right-of-way over Tribal trust lands without Tribal consent. *Id.* at Ex. 19. As the Area
 21 Director held: “[I]f tribal consent as a prerequisite is imposed by Congress, the Superintendent
 22 has no authority to disregard the lack of consent or inquire into the reasonableness of the tribe
 23 in withholding its consent.” *Id.*

24 BN appealed to the Assistant Secretary for Indian Affairs of the Department of the
 25 Interior. *Id.* at Ex. 20. The Assistant Secretary agreed with the previous decisions:

26 We conclude that it is immaterial whether the subject application is filed pursuant to
 27 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. . . . [T]he consent

1 requirement is not, in our view, an attribute of the Secretary's power of discretion
 2 but is a statutory element of a tribe's sovereign power which the Secretary does not
have the power to waive.

3 *Id.* at Ex. 21 (emphasis added). As with the previous appeals, there was no discussion of
 4 whether termination of the unlawful right-of-way would interfere with BN's common carrier
 5 obligations or unreasonably burden interstate commerce. *Id.* The sole issue was whether
 6 Interior had the authority to grant a right-of-way without Tribal consent. *Id.*

7 On October 12, 1979, BN appealed again, this time to this Court. *Burlington Northern,*
 8 *Inc. v. Andrus et al.*, No C79-1199V (W.D. Wash. filed Oct. 15, 1979). *Id.* at Ex. 22. The Tribe
 9 intervened in the lawsuit, *Id.* at Ex. 23, and filed a motion for summary judgment on the issue
 10 of Tribal consent. However, the Court deferred ruling on the Tribe's motion until the Ninth
 11 Circuit decided the case of *Southern Pacific Transp. Co. v. Watt*, 700 F.2d 550 (9th Cir. 1983),
 12 *cert. den.* 464 U.S. 960 (1983). *Id.* at Ex. 24. In *Southern Pacific*, the Ninth Circuit was
 13 reviewing an identical issue. Southern Pacific had applied for a right-of-way over lands held in
 14 trust for Nevada's Walker River Paiute Tribe. *Watt*, 700 F.2d at 552. Just as here, Southern
 15 Pacific had operated a railroad over the trust lands since the late 1800s without tribal consent.
 16 *Id.* Just as here, the BIA denied Southern Pacific's right-of-way application due to lack of
 17 tribal consent, and the decision was upheld at all administrative levels. *Id.* However, the
 18 United States District Court for the District of Nevada erroneously determined that tribal
 19 consent was not required under the 1899 Act. The Ninth Circuit reversed, holding that the
 20 tribe's consent was required irrespective of which statute governed. As the court reasoned:

21 [The 1899 Act] authorizes the Secretary to establish, by regulation, grant
 22 preconditions, including one of tribal consent. The Secretary has exercised that
 authority and promulgated a regulation providing that '[n]o right-of-way shall be
 granted over and across any tribal land . . . without the prior consent of the tribe.'

23 *Id.* (citing 25 C.F.R. § 161.3(a)). The court observed that the 1899 Act was intended to protect
 24 tribal interests, and "must therefore be liberally construed in favor of the Indians." *Id.*
 25 (citations omitted). Just as with BN's appeals, Southern Pacific never once argued that
 26 terminating the right-of-way due to lack of tribal consent would be at odds with its common
 27

1 carrier obligations or interfere with interstate commerce. The only issue was whether tribal
2 consent was required for a right-of-way grant. *See generally id.*

3 In accordance with the Ninth Circuit's decision, on August 16, 1983, this Court entered
4 judgment against BN. Brain Decl. at Ex. 25. Undaunted, BN appealed to the Ninth Circuit on
5 September 13, 1983. *Id.* at Ex. 26. However, BN's appeal was dismissed by stipulation on
6 February 22, 1984, after the Supreme Court denied Southern Pacific's petition for certiorari.
7 *Id.* at Ex. 27. BN was left to the inescapable conclusion that it needed the Tribe's consent to
8 maintain a right-of-way across the Reservation, and that that consent was not forthcoming.

9 **E. Resolution of the Trespass Lawsuit**

10 Once the consent issue was resolved in its favor, the Tribe moved forward with its
11 trespass suit. The litigation went on for over a decade, until the parties settled the case in 1990.
12 The resolution was formalized by a settlement agreement executed on September 24, 1990 (the
13 "Settlement Agreement"), and later, the Easement Agreement, executed on July 19, 1991. *Id.*
14 at Exs. 28 and 29. Pursuant to the parties' settlement, the Tribe finally consented to a right-of-
15 way grant in favor of BN. However, the Tribe did not give BN a blanket consent or an open-
16 ended easement. To the contrary, the consent was for a limited period of time, and was
17 premised on a number of carefully defined conditions, as set forth in the Easement Agreement.

18 **F. The Easement Agreement**

19 Specifically, the Easement Agreement places limitations on the number of trains —
20 and the number of cars attached to those trains — that may cross the Right-of-Way each day:

21 Burlington Northern agrees that, unless otherwise agreed in writing, only one
22 eastern bound train, and one western bound train, (of twenty-five (25) cars or less)
23 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.

24 *Id.* at Ex. 29, ¶ 7(c) (emphasis added).

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

27 Initially, Burlington Northern shall prepare a summary of all such commodities
expected to cross the Reservation and the quantities of such commodities.

1 Thereafter, the disclosure shall be updated periodically as different products, or
 2 commodities, are added or deleted. Such updates shall occur at least annually. The
 3 disclosure updates shall identify any previously shipped cargo that is different in
 4 nature, identity or quantity from the cargo described in previous disclosures.

5 *Id.* at Ex. 29, ¶ 7(b).

6 Under the Easement Agreement, the initial term of the Right-of-Way grant is forty
 7 years, along with two 20-year option periods. *Id.* at Ex. 29. Thus, it will terminate in
 8 accordance with its own terms no later than 2071.

9 The Settlement Agreement and Easement Agreement were the result of painstaking
 10 negotiation. Limiting the numbers of trains and railcars on the Right-of-Way and knowing the
 11 trains' contents were major issues for the Tribe. At the time, the Tribe was contemplating
 12 significant economic development in the area adjacent to the right-of-way. *Id.* at Ex. 30.
 13 (While development did not occur exactly as the Tribe envisioned at the time, there is no
 14 dispute that development of the Tribe's economic hub took place in close proximity to the
 15 Right-of-Way.) The Tribe originally demanded that the number of trains and railcars be
 16 strictly limited. *Id.* at Ex. 31. BN, on the other hand, wanted the flexibility to increase rail
 17 traffic if it became necessary. *Id.* at Ex. 32. Ultimately, BN proposed the language contained in
 18 the final version of the Easement Agreement, which allowed BN to request an increase based
 19 on shipper needs, but also allowed the Tribe to refuse, as long as its decision was not arbitrary.
 20 *Id.* at Ex. 33. (In contrast, one of the terms of the Settlement Agreement BNSF relies on in
 21 support of the argument that the ICCTA governs this dispute — that "[n]othing in . . . [the]
 22 Right-of-Way Easement shall supersede any federal law or regulation as they now exist or as
 23 they may be amended or changed from time to time" — was proposed by *the Tribe* to ensure it
 24 was compensated in accordance with federal law. *Id.* at Ex. 31.) Once the parties had agreed
 25 on the terms of the Settlement Agreement and Easement Agreement, the Tribe approved both
 26 by resolution dated August 1, 1989. *Id.* at Ex. 36.

27 Absent the conditions contained in the Easement Agreement, the Tribe would not have
 28 consented to a right-of-way grant. *See* Olson Decl. at ¶ 6. Had the Tribe known that BNSF

1 would later assert that the conditions were unenforceable due to BNSF's common carrier
2 obligations, it would not have consented. *Id.*

3 **G. The IRWA Governs the Easement Agreement**

4 The Right-of-Way and the Easement Agreement are governed by the IRWA (25 U.S.C.
5 §§ 323–28) and its implementing regulations (25 C.F.R. Part 169). As discussed at more
6 length below, the IRWA and the regulations impose a number of obligations on the railroad
7 with respect to maintenance of and compensation for the Right-of-Way, along with an ongoing
8 obligation to comply with the terms of the Right-of-Way grant. Significantly, under 25 C.F.R.
9 § 169.20(a), a right-of-way is terminable by the Secretary of the Interior for any “[f]ailure to
10 comply with any term or condition of the grant or the applicable regulations.”

11 Under the Settlement Agreement and the regulations, BN was required to, and did,
12 apply to the BIA for formal approval of the Right-of-Way. *See* Brain Decl., at Ex. 37. On
13 November 27, 1990, the Interior Department granted its approval. *Id.* at Ex. 38. In contrast,
14 nothing in the Settlement Agreement or Easement Agreement required approval by the
15 Interstate Commerce Commission (“ICC”). Although the ICC had moved to intervene in the
16 trespass action (a motion that was denied as premature), *Id.* at Exs. 34 and 35, it was not
17 involved in the negotiation of the Easement Agreement, and had no input into its terms and
18 conditions. Moreover, BN never indicated to the Tribe that it considered the terms of the
19 Easement Agreement to be subordinate to ICC or common carrier obligations. Olson Decl., at
20 ¶ 7. If it had done so, the Tribe would never have granted its consent. *Id.* Likewise, BN's
21 Answer and Counterclaim to the Tribe's trespass lawsuit did not allege any defenses based on
22 Federal preemption. *See* Brain Decl., at Ex. 16.

23 **H. BNSF Ignores the Terms and Conditions of the Right-of-Way Grant**

24 The Tribe learned in 2012 that BNSF was running “unit trains” of 100 cars or more
25 over the Right-of-Way to reach the Tesoro refinery at March Point, near Anacortes,
26 Washington. Olson Decl., at ¶ 8. BNSF did not notify the Tribe or seek its agreement to
27 exceed the Easement Agreement's limitations, and the Tribe has never granted BNSF

1 permission to do so. *Id.* Although the Tribe reminded BNSF of the terms of the Easement
2 Agreement, and demanded that BNSF cease the unauthorized use, BNSF ignored the Tribe's
3 requests. *Id.* BNSF acknowledges the terms of the Easement Agreement and the Tribe's
4 demands, but has informed the Tribe that it will continue running trains over the Right-of-Way
5 at current levels regardless of the parties' agreement. *Id.* See also BNSF's Answer, at ¶ 3.15.

6 Currently, in addition to the trains already crossing the Reservation prior to 2012
7 pursuant to the Easement Agreement, BNSF is running an additional six 100-car unit trains per
8 week over the Right-of-Way in each direction. *Id.* at ¶¶ 3.14, 3.16. This is twice as many train
9 trips and more than four times as many railcars per day as are permitted under the explicit
10 terms of the Easement Agreement. BNSF has admitted that the number of tank cars crossing
11 the Reservation may be increased upon completion of a proposed new crude oil off-loading
12 facility at the Shell Oil Refinery located at March Point. *Id.* at ¶ 3.17. BNSF has also not
13 complied with its reporting requirements under the Easement Agreement. Since at least 1999,
14 the Tribe regularly requested that BNSF provide an annual summary of all materials it has
15 transported across the Reservation. Olson Decl., at ¶ 9. BNSF has provided the Tribe with just
16 four of the required annual updates. *Id.*

17 The increase in train traffic across the Right-of-Way is due to BNSF transporting
18 "Bakken" crude oil to the Tesoro refinery (and, in the future, to the Shell refinery). The 100-
19 car unit trains are dedicated entirely to crude oil, and each one carries around 700,000 barrels.
20 See BNSF's Answer, at ¶ 3.18. As the Tribe's complaint avers, shipping Bakken crude by rail
21 is notoriously dangerous, and has resulted in many catastrophic derailments, resulting in
22 extensive environmental damage, and sometimes in loss of life.

23 The Tribe filed this lawsuit to compel BNSF to honor its obligations under the
24 Easement Agreement, which it has simply ignored since at least 2012. Now, BNSF contends
25 that the express terms and conditions of the Easement Agreement — which were the very basis
26 for the Tribe's willingness to give its required consent to the Right-of-Way — are
27 unenforceable and that the Tribe's claims are preempted by the ICCTA.

III. ARGUMENT

A. The ICCTA's Preemption Provision

The ICCTA declares its preemptive effect as follows:

The jurisdiction of the Board over-

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

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

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. § 10501(b).

This provision is interpreted broadly with respect to state and local attempts to regulate railroads. “It is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over railroad operations.” *City of Auburn v. U. S. Government*, 154 F.3d 1025, 1030 (9th Cir. 1998) (quoting *CSX Transp., Inc. v. Georgia Pub. Serv. Comm’n*, 944 F.Supp. 1573, 1581 (N.D. Ga. 1996)). *City of Auburn* dealt with local municipalities’ imposition of environmental permitting regulations on railroads. The court stated: “We believe the congressional intent to preempt this kind of state and local regulation of rail lines is explicit in the plain language of the ICCTA and the statutory framework surrounding it.” *Id.* at 1031. Thus, there is little dispute that state and local efforts to *regulate* railroads are preempted. “Congress narrowly tailored the ICCTA preemption provision to displace only ‘regulation,’ i.e., those state laws that may reasonably be said to have the effect of ‘managing’ or ‘governing’ rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation.” *PCS Phosphate Co. v. Norfolk S. Corp.*, 559 F.3d 212, 218 (4th Cir. 2009) (quoting *Florida East Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001)).

In addition to regulatory acts, state and local actions may be preempted “as applied” “if they have the effect of unreasonably burdening or interfering with rail transportation.” *Franks*

1 *Inv. Co. LLC v. Union Pac. R.R. Co.*, 593 F.3d 404, 414 (5th Cir. 2010). Based on its earlier
 2 Motion to Dismiss, BNSF appears to contend that the Tribe's effort to enforce the explicit
 3 terms of the Easement Agreement is barred by this type of "as applied" preemption.

4 **B. The ICCTA Does Not Preempt Actions To Enforce Contracts**

5 On the other hand, the courts and the Surface Transportation Board ("STB") (the
 6 administrative body that oversees the ICCTA) have uniformly held that actions to enforce a
 7 railroad's voluntary contractual undertakings are not preempted by the ICCTA, because such
 8 voluntary commitments are themselves an admission by the railroad that their enforcement
 9 would not unreasonably interfere with railroad operations.

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

17 Here, Conrail voluntarily entered into an agreement to resolve a dispute. It then
 18 submitted the agreement to the court and had it memorialized in the form of the
 19 Stipulation and Order of Settlement and a later Consent Order. Significantly, the
 20 railroad then expressly reaffirmed and renewed the original agreement after [an
 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.

21 *Woodbridge*, 2000 WL 1771044, at *3 (emphasis added). Thus, the STB held that "Conrail's
 22 own commitments (as reflected in the contracts that it entered into voluntarily) are not
 23 preempted." *Id.* As the Board observed: "It would be inappropriate for us to rule on the
 24 merits of the contract disputes in this case. Such matters are best addressed by the courts. The
 25 courts can fashion appropriate remedies, such as damage awards, when required." *Id.*

26 Federal courts have also held that actions to enforce railroads' contractual undertakings
 27 are not preempted by the ICCTA. For example, in *PCS Phosphate Co. v. Norfolk S. Corp.*,

1 *supra*, the defendant railroad argued that an action to enforce an easement agreement requiring
 2 the railroad to relocate a rail line was preempted by the ICCTA. However, observing that the
 3 ICCTA's preemption provision is primarily meant to deal with regulation, the court disagreed:

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

10 *PCS Phosphate*, 559 F.3d at 218–19. The court noted that “[t]he STB itself has emphasized the
 11 courts, not the STB, are the proper forum for contract disputes, even when those contracts
 12 cover subjects that seem to fit within the definition of ‘rail transportation.’” *Id.* at 220 (citing
 13 cases). The court found that, by having entered into the agreement to begin with, the railroad
 14 admitted that enforcement of the agreement would not interfere with interstate commerce:

15 In this case, the factual assessment is simple because the remedy sought is
 16 enforcement of a voluntary agreement. The relocation agreements were freely
 17 negotiated between sophisticated business parties. The agreements envision this
 18 exact circumstance — that many years after the agreements were made, the railroad
 would have to pay to relocate this portion of the line. We can assume, therefore, that
 the agreements reflect the market calculation that the benefits of operating the rail
 line for many years would be worth the cost of paying to relocate the line in the
 future.

19 *Id.* at 221.

20 Similarly, in *Pejepscot Indus. Park, Inc. v. Maine Cent. R. Co.*, 297 F.Supp.2d 326 (D.
 21 Me. 2003), the plaintiff asserted that the defendant railroad breached a contract for shipping
 22 services. The railroad argued that the claim was preempted by the ICCTA. The court
 23 disagreed: “To the extent that Defendants have in fact entered into such a [voluntary] contract,
 24 they cannot hide behind the shield of section 10501(b) to avoid the commitments”
 25 *Pejepscot*, 297 F.Supp.2d at 333. *See also Cedarapids, Inc. v. Chicago, Cent. & Pac. R.R. Co.*,
 26 265 F.Supp.2d 1005, 1014–15 (N.D. Iowa 2003) (concluding plaintiff's state law lease claims
 27 preempted to the extent they sought to bar railroad from using railroad tracks, but not

1 preempted to the extent plaintiff sought determination of its rights under lease). Thus, it is well
 2 settled that contract enforcement actions are not preempted by the ICCTA.¹

3 BNSF entered into a voluntary agreement to resolve the parties' dispute. It cannot now
 4 hide behind the preemptive shield of the ICCTA to avoid its commitments. The Easement
 5 Agreement was negotiated by sophisticated parties, to resolve hard-fought litigation. Plainly,
 6 the parties envisioned a scenario wherein the Tribe might not consent to a traffic increase on
 7 the Right-of-Way. BNSF was willing to take the risk, knowing it could not obtain a right-of-
 8 way without Tribal consent, and making the market calculation that obtaining a lawful right-
 9 of-way was worth any potential future downside. By expressly limiting the number of trains
 10 permitted to cross the Easement to no more than two trains of twenty-five cars per day, BNSF
 11 acknowledged that this limitation would not unreasonably interfere with its operations.

12 For its part, the Tribe entered into the Easement Agreement relying on BNSF to honor
 13 its commitments. The Tribe gave up valuable property rights in reliance on the limitations in
 14 the Agreement. Now, BNSF is essentially arguing that those limitations, which were the sole
 15 reason the Tribe consented to any Right-of-Way at all, were illusory. In effect, BNSF's
 16 position is that it could induce the Tribe to consent, knowing all along it could pull out a trump
 17 card in the form of "common carrier obligations." Indeed, based on BNSF's reasoning, even
 18 though the Easement Agreement will terminate in accordance with its own terms no later than
 19 2071, any such termination would likewise be in BNSF's eyes an impermissible interference
 20 with its common carrier obligations and would be preempted by the ICCTA. As the Court
 21 observed at the hearing on BNSF's motion to dismiss, "[y]ou're not going to abide by the
 22 termination agreement in the lease either." BNSF's counsel did not dispute the point.

23 In essence, BNSF is taking the same position the railroad has taken since 1889: "We
 24 don't need your permission to run our trains across your sovereign lands." BNSF and its
 25

26 ¹ The Ninth Circuit Court of Appeals would likely defer to the STB and other federal circuit courts of appeals on
 27 the issue of whether contract claims are preempted by the ICCTA. "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).

predecessors have a long history of ignoring the Tribe's property rights and forcing their will upon the Swinomish people — from the original unauthorized construction of the railroad tracks to BN's strenuous efforts to impose a right-of-way without Tribal consent. Sadly, BNSF's new effort to shirk its voluntary contractual commitments is more of the same.

C. The ICCTA Does Not Preempt the IRWA

The rule that the ICCTA will not shield a railroad from its voluntary commitments applies with even more force to a contract that concerns a right-of-way across Tribal trust lands and is governed by the IRWA.

1. BNSF Has an Ongoing Obligation under the IRWA To Comply with the Terms and Conditions of the Right-of-Way Grant

When BNSF entered into the Easement Agreement, it agreed to be bound by the IRWA and its implementing regulations. *See* Brain Decl., at Ex. 37. Just as the railroad would never have procured a right-of-way at all if it had not agreed to submit to the Tribe's conditions, it also would not have obtained a right-of-way without agreeing to submit to the Federal laws governing the grant. BNSF has an ongoing obligation to abide by these laws.

Under 25 U.S.C. § 323, the Secretary of the Interior "is empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any [tribal trust lands]" (Emphasis added.) Under 25 U.S.C. § 324, "[n]o grant of a right-of-way over and across any lands belonging to a tribe organized under the [Indian Reorganization Act] shall be made without the consent of the proper tribal officials." Section 325 requires that the Tribe be justly compensated for any right-of-way granted under the act. And, 25 U.S.C. § 328 authorizes the Secretary of the Interior "to prescribe any necessary regulations for the purpose of administering" the act.

Those regulations are contained in 25 C.F.R. § 169.1 et seq. For example, Section 169.3 of the regulations reiterates that "[n]o right-of-way shall be granted over and across any tribal land . . . without the prior written consent of the tribe." Section 169.5 contains numerous maintenance and repair obligations a railroad has in connection with a right-of-way granted

1 under the act. Section 169.5(i) contemplates revocation or termination of a right-of-way, and
 2 provides that upon such revocation or termination, the railroad “shall restore the land to its
 3 original condition.” Under Section 169.12, a grantee of a right-of-way must pay no less than
 4 “the fair market value of the rights granted, plus severance damages, if any, to the remaining
 5 estate.” And, most importantly, Section 169.20(a) provides for compulsory termination of a
 6 right-of-way if a railroad fails to abide by the terms and conditions of the grant:

7 All rights-of-way granted under the regulations in this part may be terminated in
 8 whole or in part upon 30 days written notice from the Secretary . . . [for] [f]ailure to
 9 comply with any term or condition of the grant or the applicable regulations 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.

10 (Emphasis added.) Termination by the Interior Department under these circumstances is not
 11 discretionary. *Star Lake R. Co. v. Lujan*, 737 F. Supp. 103, 109 (D. D.C. 1990).

12 By entering into the Easement Agreement, BNSF subjected itself to the IRWA and all
 13 of the regulations promulgated thereunder, and has an ongoing obligation to abide by those
 14 federal laws. This includes an obligation to comply with the terms and conditions of the grant,
 15 lest the right-of-way be terminated by the Secretary of the Interior. In other words, to enforce
 16 the Easement Agreement is to enforce the Tribe’s rights under the IRWA.

17 Nevertheless, BNSF argues that its common carrier obligations override its duty to
 18 comply with the IRWA, and that complying with the express limitations of the right-of-way
 19 grant would interfere with its obligations under the ICCTA. But acceptance of this argument
 20 would eviscerate the IRWA and render it meaningless, at least as to railroads. If BNSF were
 21 correct, *no* railroad would *ever* have to comply with the terms and conditions of a right-of-way
 22 grant under the IRWA, as long as it could show that doing so would interfere with shipper
 23 needs. If BNSF were correct, the railroads’ common carrier obligations would *always* take
 24 precedence over the IRWA and the tribal property rights that statute is meant to protect.

25 2. The ICCTA Does Not “Preempt” Other Federal Enactments

26 In support of its argument, BNSF contends that the preemptive effect of the ICCTA
 27 extends to the federal laws governing rights-of-way over tribal trust lands. The argument has

no merit. It is true that the ICCTA itself states that it “preempts” other federal statutes. However, the ICCTA has never been held to do so. Even STB does not read the “federal preemption” provision literally. For example, in *BNSF Ry. Co. v. Albany & E. R.R. Co.*, 741 F.Supp.2d 1184, 1198 (D. Or. 2010), BNSF argued that the ICCTA preempted the remedies provided under the Sherman Act. As the court stated:

[A]lthough a literal reading of section 10501(b) might suggest that it supersedes other federal law, the Board and the courts have rejected such an interpretation as overbroad and unworkable. Instead, the Board and the courts have harmonized section 10501(b) with federal statutes. . . .

Albany & E., 741 F.Supp.2d at 1198 (quoting *CSX Trans., Inc. – Pet. for Decl. Order*, STB Fin. Docket No. 34662, 2005 WL 584026, at *8 (S.T.B. Mar. 14, 2005)). The court observed that many cases “support [the] assertion that despite its broad language, § 10501(b) does not preempt other federal statutes” *Id.* (citing cases). *See also United States v. St. Mary’s Ry. W., LLC*, 989 F.Supp.2d 1357, 1364 n.2 (S.D. Ga. 2013) (“There is “clear indication that the [STB] itself sees some difference in the preemptive scope of 49 U.S.C. s. 10501(b) between state law of general applicability and federal law of general applicability.”) (quoting *Holland v. Delray Connecting R.R. Co.*, 311 F.Supp.2d 744, 757 (N.D. Ind. 2004)).

Indeed, as many courts have observed, one federal statute cannot preempt another. *See, e.g., Baker v. IBP, Inc.*, 357 F.3d 685, 688 (7th Cir. 2004). This is because the rubric of preemption does not make sense when analyzing the effect of one federal statute upon another. “Federal preemption of state laws is a creature of the Supremacy Clause.” *Ray v. Spirit Airlines, Inc.*, 767 F.3d 1220, 1224 (11th Cir. 2014). Under the Supremacy Clause, state laws that conflict with federal law are “without effect.” *Altria Group v. Good*, 555 U.S. 70, 76 (2008). In contrast, two federal enactments have equal stature under the Supremacy Clause.

3. Where Two Acts Conflict, the Issue Is Whether One Impliedly Repeals the Other

Thus, when two federal statutes are in conflict with one another, the question the court considers is not preemption, but whether the later enactment impliedly repealed the earlier one. As one court put it: “One federal statute does not preempt another. . . . When two federal statutes address the same subject in different ways, the right question is whether one implicitly

1 repeals the other — and repeal by implication is a rare bird indeed.” *Randolph v. IMBS, Inc.*,
 2 368 F.3d 726, 730 (7th Cir. 2004) (citing *Branch v. Smith*, 538 U.S. 254, 273 (2003); *J.E.M.*
 3 *AG Supply, Inc. v. Pioneer Hi-Bred Int’l, Inc.*, 534 U.S. 124, 141–44 (2001)). In *Ray v. Spirit*
 4 *Airlines, Inc.*, *supra*, the court considered the effect of the Airline Deregulation Act on the
 5 plaintiffs’ claims under the Racketeer Influenced and Corrupt Organizations Act. The court
 6 made it clear that the doctrine of preemption did not apply:

7 But federal statutes do not *preempt* other federal statutes. Rather, this case involves
 8 the interplay between two statutory schemes created by Congress for different
 9 reasons and at different times. . . . ‘[T]he term for this dynamic is *repeal* –
 10 whether and how a later act of Congress modifies an earlier one.’”

11 *Ray*, 767 F.3d at 1224–25 (quoting *Miccousukee Tribe v. U.S. Army Corps of Eng’rs*, 619 F.3d
 12 1289, 1296 (11th Cir. 2010)) (emphasis in original) (internal citations omitted).

13 4. Repeals by Implication Are Strongly Disfavored

14 However, repeals by implication are “strongly disfavored on the ground that Congress
 15 is normally expected to be aware of its previous enactments and to provide a clear statement of
 16 repeal if it intends to extinguish an extant remedy.” *Id.* at 1225 (quoting *Samuels v. District of*
 17 *Columbia*, 770 F.2d 184, 194 n.7 (D.C. Cir. 1985)). As the United States Supreme Court has
 18 explained, “[w]hile a later enacted statute . . . can sometimes operate to amend or even repeal
 19 an earlier statutory provision . . . , ‘repeals by implication are not favored’ and will not be
 20 presumed unless the ‘intention of the legislature to repeal [is] clear and manifest.’” *Nat’l Ass’n*
 21 *of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (quoting *Watt v. Alaska*,
 22 451 U.S. 259, 267 (1981)). Similarly, as the Court has stated:

23 A new statute will not be read as wholly or even partially amending a prior one
 24 unless there exists a ‘positive repugnancy’ between the provisions of the new and
 25 those of the old that cannot be reconciled. . . . This principle rests on a sound
 26 foundation. Presumably Congress had given serious thought to the earlier
 27 statute Before holding that the result of the earlier consideration has been
 repealed or qualified, it is reasonable for a court to insist on the legislature’s using
 language showing that it has made a considered determination to that end.

28 *Blanchette v. Connecticut Gen. Ins. Co.*, 419 U.S. 102, 134 (1974) (quoting district court). See
 29 also *United States v. United Cont’l Tuna Corp.*, 425 U.S. 164, 168 (1976) (“It is . . . a cardinal
 30 principle of statutory construction that repeals by implication are not favored.”).

1 5. The Court Must Strive To Harmonize Seemingly Conflicting Statutes

2 Instead, when two federal enactments are seemingly in conflict, rather than find a
3 repeal by implication, the court strives to harmonize the two statutes and give effect to both.
4 “The courts are not at liberty to pick and choose among congressional enactments, and when
5 two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed
6 congressional intention to the contrary, to regard each as effective.” *Morton v. Mancari*, 417
7 U.S. 535, 551 (1974). This is the exact analysis the STB and the courts employ in considering
8 whether the ICCTA “preempts” another federal law. For example, in *Joint Petition for*
9 *Declaratory Order – Boston & Maine Corp. and Town of Ayer, MA*, Fed. Carr. Cas. P 38352
10 (S.T.B.), 2001 WL 458685, the question was whether the ICCTA “preempted” federal
11 environmental laws. The STB correctly framed the issue as whether there was an implied
12 repeal: “[I]f two Federal statutes are ‘capable of coexistence,’ the statutes should be
13 harmonized and each should be regarded as effective unless there is a ‘positive repugnancy’ or
14 an ‘irreconcilable conflict’ between the laws.” *Town of Ayer*, 2001 WL 458685, at *6, n.28
15 (quoting *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 381 (1998); *Blanchette*, 419
16 U.S. at 134). Similarly, as the Ninth Circuit Court of Appeals has stated: “If an apparent
17 conflict exists between ICCTA and a *federal* law, then the courts must strive to harmonize the
18 two laws, giving effect to both laws if possible.” *Assn. of Am. Railroads v. S. Coast Air*
19 *Quality Mgmt. Dist.*, 622 F.3d 1094 (9th Cir. 2010) (emphasis in original) (citing *In re Bos. &*
20 *Me. Corp. & Town of Ayer*, No. 33971, 2001 WL 458685, at *6 n. 28 (S.T.B. Apr. 30, 2001)).

21 6. The ICCTA and the IRWA Can Be Easily Read In Harmony

22 Thus, in short, the ICCTA did not “preempt” the IRWA or the Tribe’s right to enforce
23 the terms of the Easement Agreement thereunder. Nor did the ICCTA impliedly repeal the
24 IRWA, despite BNSF’s argument that the provisions of the IRWA that obligate a railroad to
25 comply with a right-of-way grant are null and void if they run afoul of the ICCTA. There is
26 nothing in the ICCTA that suggests that Congress intended to abrogate the IRWA in favor of
27 deferring to shipper needs. It is of course true that the ICCTA and the IRWA deal with similar

1 subject matter, albeit in different ways. Both enactments have provisions applicable to
2 railroads, even if the policies behind those provisions are very different. There is a
3 presumption that, in enacting the ICCTA, Congress was aware of, and had given serious
4 thought to, application of the IRWA to railroads. Before holding that Congress intended to
5 repeal the provisions of the IRWA relating to railroads, it is reasonable for the Court to insist
6 on Congress using explicit language to that effect. The fact that Congress did not do so
7 demonstrates that it intended for the IRWA to remain in full force and effect in its entirety.

8 Moreover, there is no “positive repugnancy” or “irreconcilable conflict” between the
9 two enactments. On the contrary, the two statutes are fully capable of coexistence. As BNSF
10 stated in its briefing on its motion to dismiss, the central purpose of the ICCTA is to prevent a
11 patchwork of state or local regulation relating to governance of rail commerce. *See* BNSF’s
12 Motion to Dismiss or Stay, at pg. 17. The central purpose of the IRWA is to protect the rights
13 and property of Indians. Given these disparate purposes, enforcement of the Tribe’s rights and
14 remedies under the IRWA in no way conflicts or interferes with the goals behind the ICCTA.
15 Therefore, the Court must strive to harmonize the two laws, giving effect to both.

16 The Court can easily do so in this case. To begin with, the specific language of the
17 ICCTA’s preemption clause is that “the remedies provided under this part with respect to
18 regulation of rail transportation are exclusive and preempt the remedies provided under
19 Federal or State law.” 49 U.S.C. § 10501(b) (emphasis added). But the ICCTA does not
20 contain any remedies for a railroad’s failure to abide by the terms and conditions of a right-of-
21 way granted under the auspices of the IRWA. Only the IRWA and the regulations promulgated
22 thereunder contain such a remedy: termination of the right-of-way. Therefore, on its face, the
23 ICCTA preemption provision does not address the situation at bar.

24 Giving effect to both statutes is also consistent with the logic behind the body of case
25 law holding that ICCTA preemption cannot be used as a shield to protect railroads from
26 contract enforcement actions. Again, in those cases, courts hold that voluntary contracts reflect
27 a railroad’s determination that their enforcement would not unreasonably interfere with rail

1 operations. Modern railroads are sophisticated entities, and enter into contracts knowing that
 2 their enforcement may result in future economic costs. *See, e.g., PCS Phosphate*, 559 F.3d at
 3 221. However, they can and plainly do deem such costs worthwhile in exchange for the benefit
 4 they will receive from the contract. *Id.*

5 Likewise, a railroad that applies for a right-of-way under the IRWA knows that certain
 6 conditions will be attached to the grant, but accepts those conditions as part of the tradeoff for
 7 the right-of-way itself. Acceptance of the conditions reflects the railroad's determination that
 8 their enforcement will not interfere with rail operations. This is especially so, given that the
 9 alternative would be a tribe's refusal to consent to any right-of-way to begin with. The Tribe
 10 would never have consented to the Right-of-Way but for BN's agreement to the limitations of
 11 the grant. Absent such consent, the Interior Department had no authority to grant a right-of-
 12 way at all. And a tribe's reasons for refusing to grant the consent are irrelevant, even if is
 13 acting arbitrarily or unreasonably. *See Brain Decl.*, at Ex. 21 (noting that "if tribal consent as a
 14 prerequisite is imposed by Congress, the Superintendent has no authority to disregard the lack
 15 of consent or inquire into the reasonableness of the tribe in withholding its consent"). BNSF
 16 made the market calculation that certain concessions were worth making to obtain the Right-
 17 of-Way. It cannot now use ICCTA preemption as a shield to prevent their enforcement.

18 7. The Federal Government Cannot Interfere with Interstate Commerce

19 There is another reason the two federal statutes are not in "irreconcilable conflict."
 20 BNSF bases its preemption argument on the idea that enforcement of the Easement Agreement
 21 will interfere with interstate commerce. But this is illogical given that enforcement of the
 22 Easement Agreement is in effect enforcement of the IRWA. BNSF owes its duty of
 23 compliance not only to the Tribe, but also to the United States government. It is illogical to
 24 suggest that the federal government can interfere with interstate commerce. For example, in
 25 *United States v. St. Mary's Ry. W., LLC*, 989 F.Supp.2d 1357, 1365 (S.D. Ga. 2013), the
 26 defendant railroad argued that the ICCTA preempted the federal Clean Water Act in that the
 27 latter unreasonably interfered with interstate commerce. The court disagreed:

Defendants have not provided one case limiting federal action, and the Court is aware of none. The Court construes the as-applied standard as implicitly based on state or local action, not federal action. The standard looks to whether there is an ‘undue burden’ on railroad operations or ‘unreasonable burden’ on interstate commerce. The focus on interstate commerce is inapposite to the federal government, as an effect on interstate commerce enables rather than limits the federal government’s ability to act.

St. Mary’s, 989 F.Supp.2d at 1365 (emphasis added) (citations omitted).² As the court went on to observe, “Similarly, the focus on whether enforcement is an ‘undue burden’ on railroad activity appears to be lifted from dormant Commerce Clause jurisprudence, which is applicable only against state and local entities.” *Id.* (citing cases).

8. Courts Routinely Hold That the ICCTA Does Not Preempt Other Federal Acts

Accordingly, it is not surprising that research revealed no cases in which a court or the STB determined that the ICCTA “preempted” another federal enactment. Instead, every court that has addressed the issue has ruled that the ICCTA did not impliedly repeal the other federal statute at issue. *See, e.g., Holland v. Delray Connecting R. Co.*, 311 F. Supp. 2d 744 (N.D. Ind. 2004) (ICCTA does not preempt Coal Industry Retiree Health Benefits Act); *BNSF Ry. Co. v. Albany & E. R.R. Co.*, 741 F. Supp. 2d 1184 (D. Or. 2010) (ICCTA does not preempt Sherman Anti-Trust Act); *Tyrrell v. Norfolk S. Ry. Co.*, 248 F.3d 517 (6th Cir. 2001) (ICCTA does not preempt Federal Employers’ Liability Act); *Lybrand v. Union Pac. R. Co.*, Fed. Carr. Cas. P 84726, 2012 WL 1436690 (E.D. Ark. 2012) (same). Likewise, enforcement of the Tribe’s federally protected rights under IRWA cannot be preempted by the ICCTA.

D. Both Statutes Must Be Construed Liberally in Favor of Tribal Rights

The presumption against preemption is even stronger in a case involving tribal rights. The analysis must be tailored in the Indian law context. As the Supreme Court has made clear, “the standard principles of statutory construction do not have their usual force in cases involving Indian law. . . . ‘The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians.’” *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985) (quoting *Oneida County v. Oneida Indian Nation*, 470 U.S.

² Of course, it is the regulation of Indian and not interstate commerce that underlies the IRWA, but this makes BNSF’s “interference” contention no more logical.

226, 247 (1985)). One of these important canons is that “statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.” *Id.*

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

Therefore, the ICCTA does not preempt, repeal, or diminish the rights of the Tribe relating to an easement over Treaty-reserved lands held in trust by the U.S. for the Tribe, or its rights and remedies under the IRWA, which was enacted to preserve and protect Indian interests in tribal lands.³ See *Watt*, 700 F.2d at 554. The Tribe agreed to consent to an easement, and to create a contractual exception to its Treaty right to exclusive use of the Reservation, by allowing BNSF’s to use and occupy the Right-of-Way for a limited period of time, in exchange for BNSF’s agreement to observe very specific limitations on its use and occupancy. But the Tribe’s rights in its property otherwise remain fully intact and enforceable. BNSF cannot use the ICCTA preemption to seek abrogation of those rights.

³ This litigation can and should be decided on the basis of the Easement Agreement, the IRWA and implementing regulations, but the Tribe notes that, under Article II of the Treaty, the Reservation was set aside 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 And, indeed, the few cases dealing with the interplay between a railroad's rights and
 2 tribal rights invariably resolve the matter in favor of tribal rights. For example, in *Star Lake R.*
 3 *Co. v. Lujan*, 737 F. Supp. 103 (D. D.C. 1990), the Star Lake Railroad Company ("Star Lake")
 4 had obtained a right-of-way over Navajo tribal lands in New Mexico. The right-of-way grant
 5 provided that it would be terminated if Star Lake did not use the right-of-way for a consecutive
 6 two-year period. *Star Lake*, 737 F. Supp. at 105. When Star Lake failed for two years to
 7 construct the rail line, the Navajo tribe requested that the BIA terminate the right-of-way. *Id.*
 8 The BIA gave Star Lake 30 days to correct the issue, then terminated the right-of-way when
 9 Star Lake failed to comply. *Id.* at 106. After Star Lake's administrative appeals were resolved
 10 in favor of the tribe and the BIA, it appealed to the United States District Court, which
 11 affirmed the result. The court held that, under 25 C.F.R. § 169.20, the BIA had no discretion
 12 not to terminate the right-of-way:

13 [A]s the Director, and then the IBIA, pointed out, the regulation recites that once a
 14 grantee has been notified and fails to correct a problem that is the basis for
 15 termination, the Secretary "shall" terminate the right-of-way. Nowhere, either on
 16 the face of the regulation, or even implied, is there room for excuse or tolling. The
 17 IBIA did not abuse its discretion by accepting this completely reasonable reading by
 18 the Navajo Area BIA of a regulation it administers.

19 *Id.* at 109 (emphasis in original). As the court observed, the BIA correctly considered "the
 20 weighty rule that statutes and regulations intended to benefit Indians be liberally construed in
 21 their favor." *Id.* (citing *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976); *Jicarilla Apache*
 22 *Tribe v. Andrus*, 687 F.2d 1324, 1332 (10th Cir.1982)). *See also New Mexico Navajo Ranchers*
 23 *Ass'n v. Interstate Commerce Comm'n*, 702 F.2d 227, 233 (D.C. Cir. 1983) (concluding that
 24 ICC's decision to grant Star Lake permission to build railroad pending investigation by
 25 Interior Department of alleged railroad misconduct in obtaining tribe members' consent was
 26 improper where factual determination was within ambit of Interior Department's, not ICC's,
 27 authority and ICC should have deferred to that agency).

28 **E. BNSF Is Estopped From Disavowing the Limitations in the Easement Agreement**

29 At the time BN negotiated and participated in drafting the Easement Agreement and
 30 Settlement Agreement, it was fully aware that the only way it could have access to a lawfully-

1 recognized right-of-way was to obtain the consent of the Tribe. If the Tribe did not consent —
 2 and even if the refusal to consent was arbitrary — Interior would not grant a right-of-way. BN
 3 tried for many years to acquire a right-of-way without Tribal consent, but was repeatedly
 4 rebuffed by Interior, this Court, and the Ninth Circuit. Therefore, BN knew that its
 5 acquiescence in the limitations contained in the Easement Agreement was a condition
 6 precedent to the Tribe consenting to the Right-of-Way. For its part, in finally granting its
 7 consent, the Tribe relied on BN's promise to abide by the limitations of the right-of-way grant,
 8 and substantially changed its position based on that reliance. Consequently, BNSF is now
 9 equitably estopped from disavowing those limitations and from taking the position that the
 10 Tribe's efforts to enforce them are preempted.

11 “Equitable estoppel prevents a party from assuming inconsistent positions to the
 12 detriment of another party.” *United States v. Georgia-Pacific Co.*, 421 F.2d 92, 96 (9th
 13 Cir.1970). The elements of equitable estoppel are as follows:

14 (1) The party to be estopped must know the facts; (2) he must intend that his conduct
 15 shall be acted on or must so act that the party asserting the estoppel has a right to
 16 believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he
 must rely on the former's conduct to his injury.

17 *Id.* (quoting *Hampton v. Paramount Pictures Corp.*, 279 F.2d 100, 104 (9th Cir. 1960)).

18 In persuading the Tribe to consent to the Right-of-Way, BN knew about the “common
 19 carrier” obligations on which it now premises its rejection of the limitations of the Easement
 20 Agreement. Yet, in an effort to get the Tribe's consent, it represented that it could honor those
 21 limitations, plainly intending that the Tribe should rely on that representation. The Tribe was
 22 of course ignorant that BNSF would later take the inconsistent position that the conditions of
 23 the Easement Agreement are unenforceable, and it granted its consent to the Right-of-Way in
 24 reliance on the railroad's representations. The Tribe is indisputably injured by BNSF's
 25 repudiation of those representations. Based on the principle of equitable estoppel, BNSF
 26 should not be permitted to disavow the terms and conditions of the Easement Agreement.

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IV. CONCLUSION

For the foregoing reasons, the Tribe respectfully requests that the Court 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.

DATED this 10th day of March, 2016.

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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 to all counsel of record.

DATED at Seattle, Washington, this 10th day of March 2016.

/s/ Christopher I. Brain

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Exhibit B

Verified Statement of Michael A. Carr (June 15, 2016) with Attachments 1 - 3.

BEFORE THE SURFACE TRANSPORTATION BOARD
DEPARTMENT OF TRANSPORTATION

STB Finance Docket No. 36041

VERIFIED STATEMENT OF MICHAEL A. CARR

I. Introduction

1. My name is Michael A. Carr and I am the Business Development Manager for Equilon Enterprises LLC d/b/a Shell Oil Products US (“Shell”) Puget Sound Refinery (“Shell PSR” or “the refinery”), located near Anacortes, Washington.
2. In my role as the Business Development Manager for Shell PSR, I ensure that the future direction of the refinery is established in a way that is consistent with industry trends, including crude oil feedstock and product markets, known/anticipated environmental regulations and technical developments in the industry.
3. I am knowledgeable about Shell PSR’s current and planned rail-related activities as this is part of Shell’s ongoing business, and one which, as part of my role as Business Development Manager, I seek to optimize for the long-term.
4. I am submitting this Verified Statement (“VS”) in support of Shell’s Motion to Intervene as Petitioner, Petition for Declaratory Order, and Request for Expedited Decision (“Petition”) to the Surface Transportation Board. The purpose of this VS is to provide factual information regarding Shell PSR, a proposed new rail unloading facility at Shell PSR (“CBR Facility”), the rail service provided by BNSF Railway Company (“BNSF”) for Shell PSR, and the impacts an interruption of that service would have on Shell PSR.

II. Shell PSR and Rail Service

5. Shell PSR, a refinery which was originally owned by Texaco, commenced operation in September, 1958. Currently, Shell PSR processes as much as 145,000 barrels (5.7 million gallons) of crude oil per day. Although it receives crude from Central and Western Canada, today much of the refinery's feedstock arrives by tanker from oilfields on Alaska's North Slope. From this crude oil, the refinery produces many useful products including multiple grades of gasoline, fuel oil, diesel fuel, jet fuel, propane, butane, petroleum coke, sulfur, and a petrochemical called nonene.
6. Shell PSR is the single-largest taxpayer in Skagit County, and also one of the area's largest employers. Shell supports approximately \$80 million in salaries and wages per year for the roughly 700 employees and contractors at the refinery.
7. Shell PSR depends on reliable and uninterrupted rail service from BNSF; it is an integral part of the refinery's supply and distribution chain. The refinery is configured to load, unload, accept and move feedstock and commodities by rail, and there are a number of rail tracks and a rail unloading facility at Shell PSR for this purpose. The internal tracks are owned and maintained by Shell.
8. To the best of my knowledge, the tracks at Shell PSR were constructed around 1957, with routine improvements and additions having been made over the years as Shell's business evolved. The latest addition is an unloading rack for receipt by rail of long residue and vacuum gas oil ("VGO") constructed in 2015.
9. There are tracks owned and maintained by BNSF which connect to Shell PSR and to BNSF's Mainline in Burlington. The track serving Shell PSR (and a neighboring refinery owned by Tesoro Refining & marketing Company LLC) is known as the Anacortes Subdivision. Attachment 1 to this Verified Statement details the location of the Shell PSR, the Anacortes Subdivision, and the BNSF Mainline. BNSF's Anacortes Subdivision is part of the interstate rail network that connects Shell PSR to suppliers and customers across the United States, Canada and Mexico.
10. BNSF or its predecessors have been providing rail service to Shell PSR since the refinery commenced operations in 1958. BNSF manifest trains service the refinery

every day from Monday to Saturday, with Sunday service being available to the refinery, although not typically required.

11. BNSF is the only rail carrier that serves Shell PSR.

III. Inbound Feedstock

12. Shell PSR relies on rail transportation provided by BNSF to move some of its important feedstock into, and products out of, the refinery. These feedstock and product streams are essential to refinery operations and the refinery could not operate without the ability to cost-effectively receive or ship these products.

13. In the period April 1, 2013 – March 31, 2016 (the “Three Year Period”), the following feedstocks were delivered by BNSF over the BNSF Mainline to Shell PSR: normal butane, isobutane, VGO and long residue.

14. Normal butane is a refinery feedstock that is blended into gasoline, mostly during winter months. Isobutene is a refinery feedstock that is used to produce a high octane gasoline blending component called alkylate. VGO and long residue are intermediate feedstocks that supplement the primary crude oil slate and ensure optimal operation of downstream processing units. They are processed in various units at the refinery and made into the products listed above.

15. Attachment 3 to this Verified Statement details the number of rail cars per month, as well as over the Three Year Period, for each of normal butane, isobutane, VGO and long residue.

IV. Outbound Products

16. Shell PSR ships a number of products by rail from the refinery over the BNSF Anacortes Subdivision and Mainline to a variety of commercial and industrial customers.

17. In the Three Year Period, the following products were shipped out the refinery by BNSF over the BNSF Mainline: normal butane, propylene tetramer, nonene, propane and petroleum coke.

18. In addition to being a feedstock that is blended into gasoline at the refinery, normal butane is also shipped out of Shell PSR by rail into third party storage, and sometimes sold to customers to make isobutane. Nonene and propylene tetramer are both chemical intermediates sold to commercial/industrial customers, to be used in a broad range of applications including plasticizers, detergents and cleaners, lubricants, oil additives and polymerization modifiers. Propane from Shell PSR is sold primarily as fuel to customers in Mexico. Petroleum coke is a solid carbon material which is a by-product of the refining process and is sold primarily into aluminum manufacture outside the U.S.
19. Attachment 3 details the number of rail cars per month, as well as over the Three Year Period, for each of normal Butane, nonene, propylene tetramer, propane and petroleum coke.

V. Shell PSR and Current Crude Supply

20. Shell PSR is one of five major petroleum refineries in Washington State; it accounts for approximately 27 percent of the state's fuel production. Shell PSR's principal products are automotive gasoline, ultra-low sulfur diesel fuel, and jet fuel. Gasoline manufactured at Shell PSR is distributed by pipeline and truck rack to consumers in Washington State and by pipeline to consumers elsewhere in the Pacific Northwest.
21. Shell PSR's current primary source of crude is from the Alaska North Slope ("ANS") via marine vessel delivery, with additional crude brought into Shell PSR from Canada by pipeline. Shell PSR requires a steady and reliable supply of crude oil to remain competitive and economically viable in the long term. Such sources must be commercially viable and able to be processed by Shell PSR's existing equipment and under its environmental permits.

VI. CBR Facility and Midcontinent Crude Supply

22. Crude production from the Bakken area of North Dakota and Montana is a potential source of alternative or additional crude supply to Shell PSR. Bakken crude is now a significant portion of overall domestic production, and Washington State refineries are advantageously located to compete with other refineries across the country for access to Bakken crude oil. There is no pipeline access to Washington State for Bakken crude. Transporting Bakken crude oil from the mid-continent via truck would not be economically practicable and would be less safe than transport by rail. The only practicable means for transporting crude oil from the mid-continent to Shell PSR is via unit trains.
23. The construction of the CBR Facility would include new rail unloading facilities and a rail spur at the refinery, which would enable Shell PSR to pursue future opportunities to receive crude oil from the Bakken region via unit trains, supplementing or replacing a portion of the crude received by the refinery by vessel and pipeline. Access to crude by rail has future value for Shell PSR, especially in light of the fact that the other refineries in Washington State already have crude rail service from BNSF. Shell has already invested in excess of \$20 million dollars designing and developing the CBR Facility.
24. The proposed location of the CBR Facility, the spur, and BNSF Anacortes Subdivision, are shown on Attachment 2 to this Verified Statement.

VII. Effect of Loss or Curtailment of Rail Service by BNSF

25. A portion of the BNSF Anacortes Subdivision adjacent to Shell PSR traverses land held in trust by the United States government for the Swinomish Indian Tribal Community (the "Tribe"). I understand that the Tribe granted BNSF a right-of-way (Easement) over a portion of the reservation pursuant to a right-of-way easement agreement signed by BNSF and the Tribe in 1991 ("Easement Agreement")
26. I understand that the Tribe has brought suit against BNSF in federal court, and has asked the court to prohibit BNSF from shipping crude oil by rail over the Easement, and limit the number of rail cars over the Easement to 25 cars each way, per day.

27. A limit on the number of rail cars moving over the Easement to 25 a day each way would have a significant impact on the refinery. Attachment 3 shows that over the Three Year Period, [redacted] rail cars of product were delivered to or shipped from Shell PSR, resulting in an approximate average of [redacted] rail cars per month, or [redacted] rail cars per week. It is important to note, however, that the number of rail cars that move over the BNSF Anacortes Subdivision to and from Shell PSR is not ratable, as the import and export of product can have a high variability for a number of reasons, including seasonality, customer demands, and business drivers. Attachment 3 shows the variability that can occur from month to month with respect to the numbers of rail cars of certain products. For example, over the Three Year Period, there was a monthly high of [redacted] cars, and a low of [redacted] cars. In October 2015 there were [redacted] rail cars of Normal Butane that moved in or out of the refinery, but there were [redacted] such cars in January of 2016 and [redacted] in March of 2016. In addition, while there have been only [redacted] rail cars of VGO and Long Residue delivered to the refinery over the Three Year Period, a change in the current crude oil market environment could see the refinery import as many as [redacted] rail cars of such products each day. It is therefore likely, both today and in the future, that the number of rail cars moving over the Easement each way on any particular day would exceed 25, particularly when taking into account both Shell PSR's need for rail service and the needs of Tesoro's adjacent refinery¹.
28. The effects of curtailing rail service to and from Shell PSR would be immediate and severe, as detailed below.
29. BNSF is the only rail carrier that serves Shell PSR. Should rail service be suspended or curtailed, Shell PSR would have no other rail transportation options to make up any loss in availability.
30. Any curtailment in BNSF's rail services over the Anacortes Subdivision would impact Shell PSR's ability to respond to seasonal and business changes. A flexible

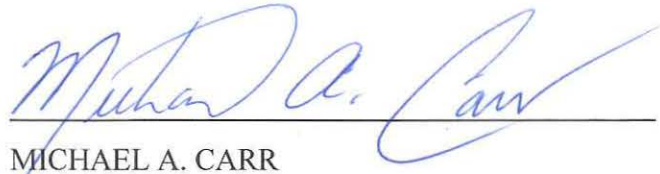
¹ These figures do not include unit trains carrying crude oil to the adjacent Tesoro refinery.

supply system is critical to the refinery, and rail is an integral part of that system. Shell has historically required flexibility to increase or decrease the volume of products it receives into, and exports from, the refinery, and continues to require such flexibility today. In addition to the seasonal variability referenced above, there are changes in business that require Shell to adjust the amount of product it requires to be moved by rail.

31. A reduction or cessation of BNSF rail service **to** the refinery would impact the ability of the refinery to produce gasoline, as critical feedstocks used as, or used to produce, gasoline blending components would be curtailed.
32. In the event of a reduction or cessation of BNSF rail service **from** the refinery, it would be unlikely that Shell PSR could immediately continue to deliver products to customers for the same cost, on time, or at all. Shell's relationship with those customers could be irreparably harmed as a result. Customers would have to turn to competitors to obtain products that could not be supplied by Shell PSR or not as efficiently or for the same cost. It would be challenging and costly, if not impossible, to regain their business once lost. Moreover, moving these products out of the refinery is critical, as the refinery could not operate without the ability to move these products off the refinery property quickly and cost effectively, advantages which rail provides.
33. The practical effect of BNSF being prohibited from moving crude oil by rail over the Easement is that Shell PSR may not be able to pursue future opportunities to receive crude oil by unit trains, which opportunities play an important role in maintaining steady and reliable sources of crude supply for the refinery, and flexibility in that supply. Depending on crude oil commodity prices and availability of alternative crude oil sources, Shell PSR may be competitively disadvantaged in the regional and global marketplace in which it is a key supplier of industrial, commercial and consumer products.

VERIFICATION

I, Michael A. Carr, verify under penalty of perjury that I have read the foregoing Verified Statement, that I know the contents thereof, and that the same are true and correct to the best of my knowledge. Further, I certify that I am qualified and authorized to file this statement.



MICHAEL A. CARR

Attachment 1

Location of Shell PSR, BNSF Anacortes Subdivision, and BNSF Mainline



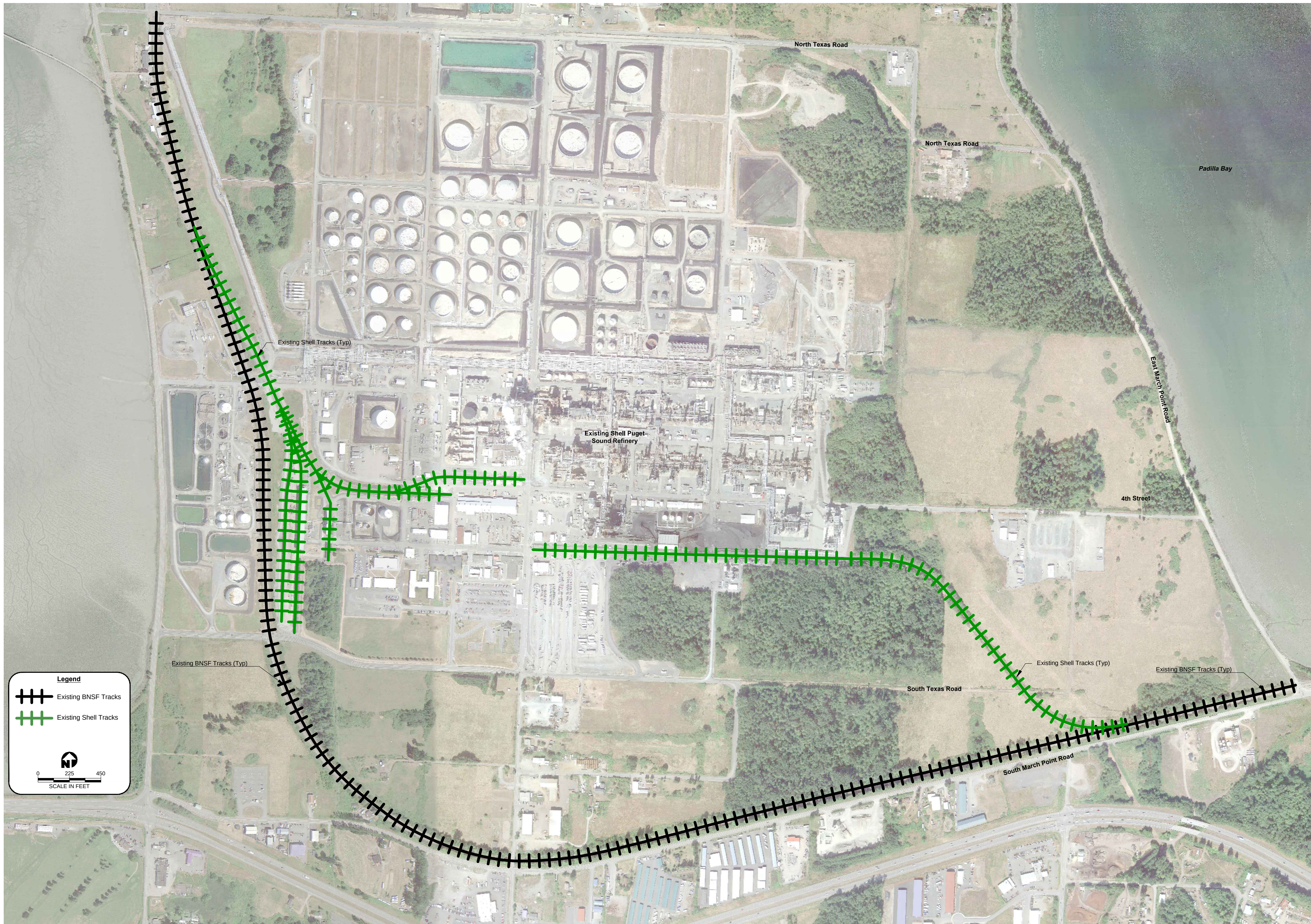
Note: The Swinomish Reservation boundary data is from the Washington State Department of Transportation:
<http://www.wsdot.wa.gov/mapsdata/geodatacatalog>

J:\GIS\Projects\SHELL\Puget Sound Refinery\SubTasks\Crude Rail\Wetland\Delineation\GIS\Mxd\BNSF Railroad.mxd
Date: 5/31/2016 | sharon_hou

BNSF Railroad

Crude by Rail East Gate
Shell Puget Sound Refinery





Attachment 2

Location of Proposed CBR Facility at Shell PSR



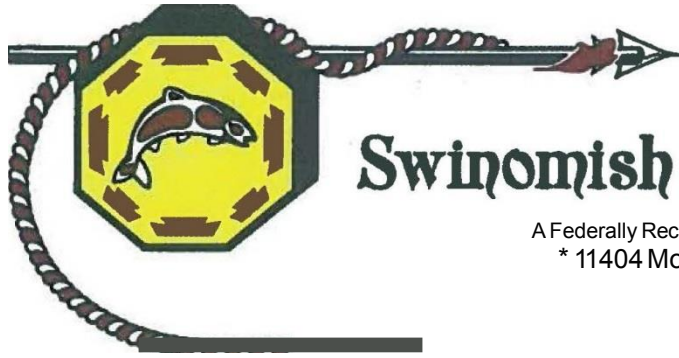
Attachment 3

Products and Number of Rail Cars to/from Shell PSR over the Three Year Period

[redacted]

Exhibit C

**Letter from Swinomish Indian Tribal Community
filed with Washington State Department of Ecology and Skagit County, Washington,
regarding scope of environmental impact statement for proposed rail off-loading facility
at Shell PSR (dated November 4, 2015).**



Main Office: 360.466.3163
Facsimile: 360.466.5309

Swinomish Indian Tribal Community

A Federally Recognized Indian Tribe Organized Pursuant to 25 U.S.C. §476
* 11404 Moorage Way * La Conner, Washington 98257 *

November 4, 2015

VIA EMAIL TO:

comment@ShellRailEIS.com

Re: Shell Crude-by Rail Oil Unloading Facility

The Swinomish Indian Tribal Community ("Swinomish") submits these comments in response to the request for scoping comments associated with the proposed Shell Crude by Rail Unloading Facility at March Point. This project calls for the construction of a rail spur and crude oil loading and unloading facility with appurtenant features at Shell's refinery on March Point on Fidalgo Island in Puget Sound. We are deeply concerned about a number of issues that require more study and analysis. We therefore would like to provide the following scoping comments.

As a preface to the comments provided below, it is our view that the development of an EIS is premature since there is ongoing litigation regarding BNSF's easement across the Swinomish Indian Reservation. The easement provides that the number of trains per day is limited to one train each day, each direction, of 25 cars or less, and that the number of trains and cars cannot be increased unless required by shipper needs and that the Tribe would not arbitrarily withhold its consent to such a request by BNSF. It is the Tribe's position that in 2012, without providing any advance notice or request to the Tribe, in addition to the one train per day each way of 25 cars or less, BNSF materially breached the easement by commencing to ship up to an additional six trains a week of approximately 100 cars per train each direction which contain Bakken Crude in the west direction. BNSF also intends to ship another six unit trains per week to the Shell Refinery if it obtains the permits discussed in this letter to construct a receiving facility. In the litigation, the Tribe requests that BNSF be enjoined by the Court from shipping the Bakken Crude unit trains across the easement. If the Swinomish Tribe prevails in this pending litigation, there will be no need for the development of this rail off-loading facility to accommodate additional cars, and therefore no need to develop this EIS. We suggest that this analysis be suspended until this easement issue has been adjudicated.

Swinomish has vital interests at stake concerning the proposed project and the

increased rail traffic to and from it. The facility is located within the boundaries of the Swinomish Reservation established in the Treaty of Point Elliott, 12 Stat. 927. The railcars traverse tribal land immediately adjacent to crucial Swinomish enterprises – our lodge, casino, and gas station/convenience store. The rail line crosses a bridge over the Swinomish Channel where a spill could devastate Swinomish marine fishing areas to the north and south of the bridge and effectively render our treaty fishing areas closest to the Reservation off-limits for a generation or more. Any problem at the refinery or in transit could have devastating consequences to Swinomish economic activity and treaty fishing rights as well as the health and wellbeing of Swinomish members and other guests and residents on our Reservation.

Below are listed additional Swinomish concerns about the proposed project that have been inadequately addressed or not addressed at all. These concerns must be studied, analyzed and addressed in an EIS.

Concern 1: Environmental Justice.

DOE and Skagit County should analyze whether this proposed project will result in disproportionate adverse environmental effects on a minority population, a low-income population, or an Indian tribe. As noted above, the proposed project is located in the Swinomish Reservation established by treaty and the rail line serving the proposed project crosses the Reservation. The Swinomish community is the concentration of population closest to the proposed project, and its major enterprises are closer still. The particular impacts on Swinomish must therefore be studied. In addressing this issue, the EIS should determine whether the proposed project would disproportionately affect the Swinomish community through its effects on 1) environmental conditions such as quality of air, water and other environmental media; 2) degradation of esthetics, loss of open space, and nuisance concerns such as odor, noise, and dust; 3) human health; 4) public welfare in terms of social conditions such as reduced access to hospitals, safe drinking water, public transportation, and the like; or 5) public welfare in terms of economic conditions such as changes in employment, income, the cost of housing, or other metrics. Many of the concerns that follow play directly into the concern for environmental justice.

Concern 2: Safety of Oil by Rail.

Catastrophic risk. The dramatic increase in the shipment of oil by rail has undeniably generated an increase of the risk of accidents and oil spills, and a disproportionate increase of the risk of catastrophic events due to explosions. Oil spills by rail have risen dramatically. In 2013 there were more oil by rail spills than occurred in the previous 38 years for which statistics are available. A single year exceeded almost four decades of oil traffic – and by a significant margin. Moreover, the light Bakken crude coming primarily from North Dakota has proven to be explosive – literally. The last few years have seen a number of catastrophic explosions caused by derailment of rail cars loaded with Bakken crude, from the Lac-Mégantic explosion in Quebec Province that killed 47 and nearly flattened a town to the fireball in Lynchburg, Virginia. These catastrophes can apparently occur at any speed and under any track conditions, as the recent derailment in Seattle, at a speed of no more than five miles per hour involving apparently safe track and train, has demonstrated. The danger is compounded by the use of outmoded and unsafe tanker cars, which may be in use for years under current regulatory proposals. Such an explosion on or near the Swinomish Reservation could injure tribal members and business guests and destroy the Swinomish economic base.

Other oil spill risks. Less catastrophic, but more likely, rising to virtual certainty over time, are oil spills caused by derailment or leakage into the Puget Sound watershed. Swinomish has treaty fishing rights under the Treaty of Point Elliott that include the marine areas from the environs of Seattle to the Canadian border, and a spill anywhere along the rail route (which runs right along the shore for long stretches north of Seattle and along Chuckanut Drive) will adversely affect treaty fishing. Closer to home, a spill into the Skagit River, the Swinomish Channel or Padilla Bay due to derailment or an accident at the refinery will disperse into other waters within or surrounding the Swinomish Reservation. Such spills also cause environmental problems generally, affect the already fragile aquatic ecosystem, and impact human health and wellbeing.

Fire and Response Plan. Given the risk of accidents and spills, fire and response plans are critical to containment of an incident. The EIS must examine information sufficient to determine whether Shell has an adequate plan to respond to a spill. There has been much attention paid to the fact that Bakken crude and Alberta tar sands oil each pose distinct response problems that are not addressed by current oil spill response technology or protocols. Since Shell has not foreclosed the shipment of Alberta tar sands oil or other forms of crude besides Bakken, Shell should be required to demonstrate that it is prepared to respond to a spill by train derailment involving any type of crude it might receive. There must be an adequate plan, adequately trained emergency responders, and adequate equipment.

Concern 3: Environmental Impacts.

a) Impacts on aquatic environment. In addition to the impacts of an oil spill noted under Concern 2, Swinomish adopts the comments on the particular impacts on the aquatic environment at or near the project site that were previously submitted by the Skagit River System Cooperative associated with this project.(attached)

b) Impacts on air quality. The impact of rail traffic on air quality is an area about which very little information is available, so further study is especially important here. Swinomish has an EPA certified air quality monitoring station at the north end of the Reservation near the rail line. Our monitoring has documented instances of ozone pollution levels exceeding the National Ambient Air Quality Standards (NAAQS). Emissions from the refinery and from train engines contribute to the ozone pollution. Monitoring of the NOx emissions shows levels of up to 80% of the allowable NAAQS. Emissions from train engines can be a major source of elevated NOx levels locally. Swinomish has documented instances in which NOx levels spiked just as a train crossed the Reservation. This is of particular concern to Swinomish because it increases air pollution exposure to our employees and guests at the Swinomish Lodge and Casino and especially in the RV park adjacent to the tracks. Ongoing noncompliance with clean air standards at the adjacent Tesoro refinery's oil by rail facility also indicates that increased attention to this area is needed. A Notice of Violation from the Northwest Clean Air Agency faults Tesoro's rail offloading facility for hydrocarbon releases from its wastewater system during an 11 month period beginning November 2012.

c) Types of crude oil. In addition to the problems with spill response discussed above, there are other reasons to assess the impacts from different types of crude oil. Crude oil has been shown to have serious pernicious toxic properties when released into the air, water and soil, with potential serious impacts upon fish, wildlife, and the aquatic environment. All crude oil poses greater risks of harm and more difficult containment and cleanup than refined oil products. But Alberta tar sands crude is even more difficult to deal with, especially in an aquatic environment, because it is heavier and can sink to the bottom. Shell has not limited the type or source of crude it may use. All aspects of shipping and introducing the different types of crude oil into the marine and terrestrial environment must be addressed. In addition, any permit should require Shell to notify Swinomish prior to shipment of the types of crude oil contained in the shipment.

Concern 4. Cumulative Impacts.

a) Increased rail traffic. The effect of increased rail traffic cannot be assessed for this proposed project standing alone, in isolation from consideration of other relevant activities. There must be an examination of the impacts of increased rail traffic in combination with current and proposed oil by rail and coal by rail projects in Washington. The overall cumulative rail traffic increase is likely to lead to growth of the risk of accidents and spills and the harm to the environment. Recently studies have been released documenting various other negative impacts of rail traffic increase, including such items as the increased risk of accidents

involving automobiles, the increased wait time at railroad crossings, and other negative economic impacts of increased rail traffic. All of these impacts, along with the risk of spill and other environmental impacts, have not been addressed and must be studied, for this project alone but

more importantly in conjunction with other current and proposed rail activities.

b) Effect on vessel traffic. The Puget Sound Partnership's Vessel Traffic Risk Assessment (VTRA), the Cherry Point BP Dock Draft EIS, and the Glosten Associates vessel traffic analysis contained in a draft prepared for the Gateway Pacific Project all document marked increases in vessel traffic in Puget Sound due to various proposed projects in Washington and British Columbia. These projects will increase the risk of oil spills and interference with the exercise of treaty fishing rights. It initially appears that the proposed project would decrease vessel traffic to the Shell refinery through oil by rail shipments that substitute for oil by tanker. However, oil by rail could increase vessel traffic, in some circumstances, such as if crude or refined oil were to be exported from the refinery. Any increase in vessel traffic will increase the physical interference with the exercise of treaty fishing rights and thus violate those rights. If the project is to go forward the permit should contain conditions preventing an increase of vessel traffic at the refinery.

Concern 5. Impact on Reservation Health

There are a number of issues of public health that should be studied that will affect the health of the residents of the Swinomish Reservation as well as countless others who live in proximity to the railroad tracks. These issues include diesel pollution over the projected lifetime of the rail facility (along the route traveled as well as at or near the facility), fugitive emissions from tank cars and loading/unloading equipment, soil and water contamination by crude oil, and odor and noise problems. Studies should examine these issues, dealing with the population in proximity at large and focusing on the vulnerable, including children and the elderly. The cumulative impacts in conjunction with other pollution sources must also be examined.

Concern 6: Cultural Resources.

As we pointed out earlier, the project site is on March Point within the boundaries of the Swinomish Reservation as established in the Treaty of Point Elliott. Prior to non-Indian settlement areas within March Point were an open prairie, a rare habitat along Puget Sound, and Swinomish ancestors fished, hunted and gathered marsh grass and other resources important to Swinomish subsistence and culture. There are at least eight registered archaeological sites within one mile of the proposed project site, including one which is less than 200 feet away. In addition, a number of other archaeological sites or known prehistoric village sites are located on or near March Point and the proposed project site. It is therefore quite likely that the proposed project will encounter archaeological resources and other tribal cultural resources. The EIS must adequately address compliance with Section 106 of the National Historical Preservation Act or other Federal or state laws requiring the protection of archaeological and cultural resources, or the development of an adequate cultural resources management plan including adequate inadvertent discovery procedures.

Concern 7: Consideration of Alternatives.

Shell proposes construction of a new rail spur and crude oil unloading facility on-site at Shell's Puget Sound Refinery because the existing rail infrastructure at the facility is not designed to receive and unload crude oil shipments by rail. There are alternatives to rail transport directly to the refinery as well as alternative locations for such a new rail spur and unloading facility. These alternatives may meet some of the concerns and reduce some of the impacts discussed above, and they should be considered. As just one example, construction of an unloading facility to the east of the Swinomish Channel, with connection to an existing

supply pipeline to the Shell refinery, would completely eliminate the need for trains carrying crude oil to Shell to cross the Channel and Reservation or to pass in close proximity to the Tribe's Casino, Lodge and RV park. Such an alternative location could reduce the risk of some environmental human health and cultural resource harm on the Reservation and in the surrounding marine environment, including Tribal treaty fishing areas. This could, in turn, impact the environmental justice concerns noted by Swinomish above. It is, therefore, essential that alternatives to the proposed action, including the No Action alternative, be analyzed in the EIS.¹

Thank you for your consideration.

Sincerely

A handwritten signature in black ink, appearing to be 'J. M.', with a long horizontal flourish extending to the right.

Environmental Policy Director
Swinomish Indian Tribal Community

¹Swinomish does not support this or any other specific alternatives to the proposed action, which is described only to emphasize the need for analysis of potential alternatives.