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 **OPPOSITION TO DEFENDANT BNSF RAILWAY COMPANY'S MOTION TO DISMISS OR STAY** **NOTE ON MOTION CALENDAR: Friday, June 5, 2015** **ORAL ARGUMENT REQUESTED**

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101-1332
TEL. (206) 682-5600 • FAX (206) 682-2992

TABLE OF CONTENTS

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101-1332
TEL. (206) 682-5600 • FAX (206) 682-2992

TABLE OF AUTHORITIES

Cases

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101-1332
TEL. (206) 682-5600 • FAX (206) 682-2992

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101-1332
TEL. (206) 682-5600 • FAX (206) 682-2992

Other Authorities

Rules

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101-1332
TEL. (206) 682-5600 • FAX (206) 682-2992

I. INTRODUCTION

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

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

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

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101-1332
TEL. (206) 682-5600 • FAX (206) 682-2992

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

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

II. FACTS

A. The Tribe

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

B. The Trespass Litigation

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

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101-1332
TEL. (206) 682-5600 • FAX (206) 682-2992

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

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

C. The Easement Agreement's Terms and Conditions

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

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

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

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101-1332
TEL. (206) 682-5600 • FAX (206) 682-2992

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

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

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

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

Easement Agreement, at ¶ 7(b).

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

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

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101-1332
TEL. (206) 682-5600 • FAX (206) 682-2992

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

D. The Parties' Rights under the Easement Agreement Are Governed by the Indian Right-of-Way Act

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

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

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101-1332
TEL. (206) 682-5600 • FAX (206) 682-2992

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

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

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

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

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101-1332
TEL. (206) 682-5600 • FAX (206) 682-2992

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

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

The Right-of-Way crosses a part of the Reservation uplands that constitutes the heart of the Tribe's economic development enterprises. *Id*. at ¶ 3.4. It is in close proximity to multiple elements of the Tribe's economic infrastructure, including the Swinomish Casino and Lodge, a Chevron station and convenience store, and an RV Park, as well as a Tribal waste treatment plant serving all of these facilities and a Tribal air quality monitoring facility. *Id*. Hundreds of guests and employees are present at these facilities at all times, 24 hours a day, 7 days a week. *Id*. This infrastructure serves as the primary source of funding for the Tribe's essential governmental functions and programs. *Id*. At the time the parties' settlement was reached in 1990, this area of future development was known and acknowledged and constituted part of the reason for the Easement Agreement's limitations on train traffic. *See* Settlement Agreement, at pg. 3.[4]

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

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101-1332
TEL. (206) 682-5600 • FAX (206) 682-2992

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

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

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

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

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

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101-1332
TEL. (206) 682-5600 • FAX (206) 682-2992

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

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

III. ARGUMENT

A. Standard for Granting Motion To Dismiss

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

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

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101-1332
TEL. (206) 682-5600 • FAX (206) 682-2992

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

B. ICCTA Preemption Applies to Efforts To Regulate Railroads

The Tribe does not dispute that the ICCTA vests the STB with general jurisdiction over *regulation* of railroads. *See, e.g.*, *City of Auburn v. U. S. Government*, 154 F.3d 1025, 1030 (9th Cir. 1998) ("It is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations.") (quoting *CSX Transp., Inc. v. Georgia Public Service Comm'n*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996)). The *City of Auburn* case dealt with governmental authority to impose 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 (emphasis added). State and local actions may also be preempted "as applied" "if they have the effect of unreasonably burdening or interfering with rail transportation." *Franks Inv. Co. v. Union Pacific R.R. Co.*, 593 F.3d 404, 414 (5th Cir. 2010).

But ICCTA preemption applies only to actions that have the effect of regulating railroads or unreasonably interfering with their operations. As one court has put it, "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 Southern Corp.*, 559 F.3d 212, 218 (4th Cir. 2009) (quoting *Florida East Coast Ry. Co. v. City of West Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001)).

C. ICCTA Preemption Does Not Apply to Contract Disputes

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

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101-1332
TEL. (206) 682-5600 • FAX (206) 682-2992

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

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

> Here, Conrail voluntarily entered into an agreement to resolve a dispute. It then submitted the agreement to the court and had it memorialized in the form of the Stipulation and Order of Settlement and a later Consent Order. Significantly, the 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.

Woodbridge, 2000 WL 1771044, at *3 (emphasis added). Accordingly, the STB stated: "We conclude that Conrail's own commitments (as reflected in the contracts that it entered into voluntarily) are not preempted." *Id*. Instead, the Board reasoned, disputes relating to such voluntary commitments are the province of the courts: "It would be inappropriate for us to rule on the merits of the contract disputes in this case. Such matters are best addressed by the courts. The courts can fashion appropriate remedies, such as damage awards, when required." *Id*. (emphasis added). While the STB later clarified its order to point out that the railway company was not precluded from arguing in the future that enforcement of the contract may interfere with interstate commerce, it also made it clear that any such argument would be made in court, and not before the STB:

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

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101-1332
TEL. (206) 682-5600 • FAX (206) 682-2992

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

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

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

> Voluntary agreements between private parties, however, are not presumptively regulatory acts, and we are doubtful that most private contracts constitute the sort of 'regulation' expressly preempted by the statute. If contracts were by definition 'regulation,' then enforcement of every contract with 'rail transportation' as its subject would be preempted as a state law remedy 'with respect to regulation of rail 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.

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

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

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

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101-1332
TEL. (206) 682-5600 • FAX (206) 682-2992

> sophisticated business parties. The agreements envision this 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.

Id. at 221.

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

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

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

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

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

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101-1332
TEL. (206) 682-5600 • FAX (206) 682-2992

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

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

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

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101-1332
TEL. (206) 682-5600 • FAX (206) 682-2992

the present case does not involve regulation, nor does it involve an "implied" agreement. It involves BNSF's express contractual commitments, which it is now seeking to avoid.

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

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

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101-1332
TEL. (206) 682-5600 • FAX (206) 682-2992

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

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

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

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

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

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

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101-1332
TEL. (206) 682-5600 • FAX (206) 682-2992

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

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

Therefore, despite its broad preemption provision, the ICCTA does not preempt the rights of the Tribe relating to an easement over 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.[7] *See Pacific Transp. Co. v. Watt,* 700 F.2d 550, 554 (9th Cir. 1983), *cert. den.* 464 U.S. 960 (1983). The Tribe was willing to create a contractual exception to its Federal right to withhold consent to an easement, and its Treaty right to exclusive use of the Reservation, by consenting to BNSF's use and occupancy of the Right-of-Way for a limited

[7] 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).

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101-1332
TEL. (206) 682-5600 • FAX (206) 682-2992

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 trust property otherwise remain fully intact and enforceable.

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

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

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

But this is not the end of the inquiry. This general approach to statutory construction 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

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101-1332
TEL. (206) 682-5600 • FAX (206) 682-2992

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

BNSF has pointed to no language whatsoever in the ICCTA suggesting that Congress intended the ICCTA to in any way abrogate or diminish existing tribal rights in trust lands or under easements across trust lands, or even that Congress considered that the ICCTA might possibly 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 simply no basis for determining that the remedies that would otherwise available to the Tribe for violation of the Easement Agreement have been in any way diluted or abrogated, or are in any fashion pre-empted by the ICCTA.

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

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

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101-1332
TEL. (206) 682-5600 • FAX (206) 682-2992

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

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

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

As the United States Supreme Court has made clear:

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

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

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101-1332
TEL. (206) 682-5600 • FAX (206) 682-2992

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

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

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

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

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

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101-1332
TEL. (206) 682-5600 • FAX (206) 682-2992

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

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

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

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

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101-1332
TEL. (206) 682-5600 • FAX (206) 682-2992

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

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

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

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

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101-1332
TEL. (206) 682-5600 • FAX (206) 682-2992

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

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

IV. CONCLUSION

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

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

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101-1332
TEL. (206) 682-5600 • FAX (206) 682-2992

DATED this 1st day of June, 2015.

TOUSLEY BRAIN STEPHENS PLLC

By: */s/ Christopher I. Brain*
Christopher I. Brain, WSBA #5054
cbrain@tousley.com

By: */s/ Paul W. Moomaw*
Paul W. Moomaw, WSBA #32728
pmoomaw@tousley.com
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101-1332
T: 206.682.5600
F: 206.682.2992

OFFICE OF THE TRIBAL ATTORNEY, SWINOMISH INDIAN TRIBAL COMMUNITY

By: */s/ Stephen T. LeCuyer*
Stephen T. LeCuyer, WSBA #36408
slecuyer@swinomish.nsn.us
11404 Moorage Way
LaConner, WA 98257
T: 360.466.1058
F: 360.466.5309
Attorneys for Plaintiff

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101-1332
TEL. (206) 682-5600 • FAX (206) 682-2992

CERTIFICATE OF SERVICE

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

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

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