THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
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

REPLY IN SUPPORT OF DEFENDANT BNSF RAILWAY COMPANY'S MOTION TO DISMISS OR STAY

NOTE ON MOTION CALENDAR: Friday, June 5, 2015

ORAL ARGUMENT REQUESTED

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PRELIMINARY STATEMENT

BNSF's Motion to Dismiss seeks dismissal of the Tribe's complaint without prejudice for two reasons: First, to allow the Surface Transportation Board ("STB") to address certain threshold regulatory issues relating to BNSF's common-carrier obligations and, second, to require the Tribe to pursue its claim for monetary relief in arbitration, pursuant to the parties' arbitration agreement.

On the latter issue, the Tribe disputes that it has an obligation to arbitrate its demand for monetary relief arising from increased traffic, but the Tribe's opposition brief says little. The arbitration issue is straightforward: the Tribe does not contest the abundant case law in this Circuit requiring that arbitrability disputes be decided by the arbitrator where, as here, the AAA rules are incorporated in a contract. A stay or dismissal of the Complaint is therefore required under established federal law so that an arbitration panel may, at a minimum, resolve the dispute over arbitrability.

The Tribe's opposition brief directs most of its attention to BNSF's request that the Complaint also be dismissed on primary jurisdiction grounds. Plaintiff's argument fails for three main reasons. First, Plaintiff asks the Court to address the merits of the preemption issue. But BNSF is not asking the Court to rule on the preemption question or to rule on the meaning of the Easement or Settlement Agreement. A primary jurisdiction referral is necessary here to obtain the STB's views on the probable conflict between the Tribe's claims and the STB's regulation of common carriers and how that conflict should be resolved. The Court does not have to – and should not – guess at how the STB will rule on the disputes over the Tribe's factual assertions to rule on BNSF's request for a primary jurisdiction referral.[1]

[1] BNSF vigorously disputes the Tribe's accusations underlying its fairness argument. The Tribe repeatedly claims that it would be unfair for BNSF to use ICCTA preemption to avoid an obligation voluntarily agreed to by its predecessor. "[E]quitable arguments – such as judicial economy, fairness, prejudice and delay – . . . are not relevant to the ultimate question of whether an issue is within the agency's primary jurisdiction." *Gentry v. Cellco P'ship*, No. CV 05-7888 GAF (VBKx), 2006 WL 6927883, at *6 n.3 (C.D. Cal. Mar. 26, 2006). It is therefore not clear why the Tribe returns to this theme so often in its Opposition except to try to portray BNSF in a bad light at a point in this proceeding when BNSF is unable to defend itself on the facts. Further, what the Tribe obtained in the

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Second, the Tribe is patently wrong when it argues that this case is only "a straightforward contract dispute" that has no regulatory implications. Opp. 8:25. The Tribe asserts trespass damages and asks the Court to enforce the Easement in a way that BNSF could be prevented from complying with its statutory common-carrier obligations. BNSF could therefore be placed in a conflict between a court-imposed requirement limiting common-carrier service and regulatory obligations requiring such service. The Ninth Circuit and other courts have concluded that the precise purpose of the primary jurisdiction doctrine is to identify or clarify existing regulatory obligations *before* a court order creates a conflict with regulatory requirements. The Tribe's claims here present a paradigmatic case for primary jurisdiction referral.

Third, the Tribe's reliance on IRWA is misplaced. The Tribe points to nothing in IRWA that conflicts with, or has anything to do with, common-carrier obligations created under ICCTA. And even if the Tribe had identified a true conflict between IRWA and ICCTA, the starting point for addressing any possible "harmonization" of the two statutes would be an assessment by the STB of the federal interests advanced by ICCTA, including the common-carrier obligations that are at the heart of the regulatory scheme for the Nation's railroads. If it were necessary to assess ICCTA's preemption of another federal law, like IRWA, the STB would be in a much better position to address the preemption analysis, given the need for uniformity in this emerging area of the law and the procedural flexibility that the STB has to address the range of potentially relevant federal policies. Contrary to what the Tribe suggests,

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Easement was not "illusory." Opp. 16:3. The Tribe obtained the right to rentals, including rental adjustments in the event of traffic increases, as well as a limited right to control BNSF's use of the rail line for purposes that were not necessary to comply with federal statutory requirements. Additionally, BNSF's predecessor did not, because it could not, give the Tribe control over BNSF's ability to comply with federal statutory common-carrier obligations. Finally, the Tribe knew well it was not obtaining rights that would supersede federal law obligations. As BNSF explained, the Settlement Agreement – which the Tribe and the Department of Interior signed – explicitly recognized that the Easement would not supersede federal law obligations. *See* BNSF Motion 8; *infra* Section II.C.

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the STB has ample experience balancing rail interests with those of Indian tribes, as evidenced by the STB decisions BNSF cited in its opening brief.

The proper course of action in this case is to dismiss the Tribe's Complaint without prejudice so that BNSF can seek the STB's views on the three questions set out in BNSF's motion, before proceeding further with litigation over the Tribe's breach of contract and trespass claims.

ARGUMENT

I. Referral Is Proper Because the STB Should Make the Threshold Determination of Whether the Tribe's Claims Create a Conflict With Statutory Common Carrier Obligations.

Plaintiff argues that this case is a "straightforward contract dispute" with no regulatory issues for the STB to address. But the argument begs the question. The Tribe seeks direct and indirect limits on the transportation that BNSF can provide over the line at issue. The threshold question for the STB to address is whether these claims would create a conflict with BNSF's regulatory obligations as a common carrier. As BNSF explained in its Motion, courts "almost invariably defer to the STB's expertise regarding such [common carrier] disputes." *Chlorine Institute, Inc. v. Soo Line R.R.*, No. 14-1029, 2014 WL 2195180, at *2 (D. Minn. May 27, 2014). Such disputes are "extremely complicated, fact-intensive inquiries that require both extensive practical knowledge of the nation's rail system and a careful weighing of a broad array of costs and benefits." *Id.*[2]

When contract claims could result in a conflict with regulatory requirements, the courts have found it particularly important to refer the contract claims to the relevant agency under the doctrine of primary jurisdiction to avoid putting the regulated entity into a position of having to comply with irreconcilable orders of a court and an agency. *See Davel Comm'ns, Inc. v. Qwest*

[2] *See also Pejepscot Industrial Park, Inc. v. Maine Central Railroad Co*., 215 F.3d 195, 205 (1st Cir. 2000) (rejecting the plaintiff's argument that "no technical issue exists for the STB's consideration" because the "STB's expertise is clearly involved in the question of whether [the railroad's] actions constitute an unlawful refusal to 'provide . . . service on reasonable request[.]'").

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Corp., 460 F.3d 1075, 1090 (9th Cir. 2006) ("It is precisely the purpose of the primary jurisdiction doctrine to avoid the possibility of conflicting rulings by courts and agencies concerning issues within the agency's special competence."). For example, in *Oasis Petroleum Corp. v. Dep't of Energy*, 718 F.2d 1558, 1567 (Temp. Emer. Ct. App. 1983), the Court of Appeals found that the district court had abused its discretion by failing to refer a contract dispute to the Department of Energy to avoid a conflict between enforcement of the parties' intent, as set forth in private agreements, and valid regulations. The court explained that the parties' intent with respect to the contract "may not be controlling where it conflicts with lawfully issued regulations." *Id*. at 1565. Therefore, the agency "should be given the opportunity to explain and apply its policy and regulations before the district court considers the merits of [the parties'] conflicting claims." *Id*.

The exact same logic applies here. The Tribe's "straightforward contract dispute" seeks to put BNSF into an irreconcilable conflict between a court order limiting BNSF's ability to comply with statutory obligations, and BNSF's requirements under ICCTA to provide service requested by shippers. The purpose of a primary jurisdiction referral is to allow the agency responsible for administering a federal regulatory scheme to determine the circumstances under which such a conflict would be created and how to preserve the integrity of the regulatory scheme in the face of such a conflict. *Davel Comm'ns, Inc.*, 460 F.3d at 1090 (reversing and remanding to refer the matter to the FCC). The doctrine of primary jurisdiction was developed by the courts precisely to deal with the types of potential conflicts that are raised in this case. *See Syntek Semiconductor Co. v. Microchip Tech. Inc*., 307 F.3d 775, 780 (9th Cir. 2002) (citing Richard J. Pierce, Jr. *Administrative Law Treatise* § 14.1 p. 917 (4th ed. 2002)).

The STB also needs to consider the policy implications of the Tribe's argument that common-carrier obligations can be limited through private contracts. BNSF expects that the STB would be particularly troubled by the Tribe's argument that railroads could avoid obligations to serve some shippers by entering into private agreements with landowners that

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restrict the railroad's ability to provide service. In recent cases, the STB has been adamant about railroads' need to comply with their common-carrier service obligations even in circumstances where the railroad would like to avoid having to provide the requested service. *See, e.g.*, *Eric Strohmeyer and James Riffin—Acquisition and Operation Application*, *Valster Industrial Track in Middlesex and Union Counties, N.J.*, FD 35527, 2011 WL5006471 (Served Oct. 20, 2011) (denying request by rail carrier to limit transportation of hazardous materials).

II. The Tribe's Complaint Raises Significant Preemption Issues That Should Be Addressed By the STB.

A. Preemption is warranted when contractual obligations conflict with federal law.

The Tribe argues that referral of the case to the STB would be "futile" because contract enforcement actions are not subject to ICCTA preemption. Opp. 10:24-11:2. The Tribe is simply wrong that ICCTA preemption is inconceivable here. Significant case law, including the cases on which the Tribe relies, establishes that preemption is warranted when contractual obligations directly conflict with common-carrier obligations.

For example, the Tribe points to the Fourth Circuit's finding that contractual promises are "'presumptively'" valid under ICCTA. Opp. 12:10 (quoting *PCS Phosphate Co. v. Norfolk S. Corp.*, 559 F.3d 212, 218-19 (4th Cir. 2009)). But the Fourth Circuit went on to state that "[t]his is not to say that a voluntary agreement could never constitute an 'unreasonable interference' with rail transportation" *PCS Phosphate*, 559 F.3d at 221. In fact, the court emphasized that its ICCTA preemption analysis turned on "the facts of this case . . . ." *Id.* According to the court, "the facts of this case indicate that any interference is not unreasonable" in large part because the parties' agreement explicitly stated that the track "'relocation will not affect the ability of [the railroad] to comply with its legal obligation to serve any existing customer then on the line.'" *Id.* at 222 (quoting contract). That is not the case here, where the Tribe is attempting to thwart BNSF's legal obligation to serve existing rail customers.

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The Tribe also relies on *Township of Woodbridge v. Consolidated Rail Corp*., 5 S.T.B. 336, 2000 WL 1771044 (Served Dec.1, 2000), but that case similarly contradicts the Tribe's claim that ICCTA preemption does not apply to contracts. There, the railroad agreed in a court settlement to abate noise associated with rail operations and then later expressly renewed the agreement after an acquisition. *See* 5 S.T.B. at 337, 340. The STB found no ICCTA preemption "in the circumstances of this case," explaining that "Conrail has not shown that enforcement of its commitments would unreasonably interfere with the railroad's operations." *Id*. at 340. Just as the Tribe admits in its Opposition, the STB "later clarified its order to point out that the railway company is not precluded from arguing in the future that enforcement of the contract may interfere with interstate commerce . . . ." Opp. 11:20-22 (citing *Township of Woodbridge v. Consolidated Rail Corp*., 5 S.T.B. 488, 491, 2001 WL 283507 (STB served Mar. 23, 2001)). Thus, the STB specifically contemplated that contractual rights could be preempted when there is a direct conflict with federal law.

The other cases cited by the Tribe follow the same approach. In *Pejepscot Industrial Park, Inc. v. Maine Central Railroad Co.*, the district court made clear that "Defendants will have the opportunity to assert that any such contract, as interpreted by [plaintiff], is unreasonably burdensome to interstate commerce." 297 F. Supp. 2d 326, 333 n.6 (D. Me. 2003) (cited at Opp. 13:19-20). As Plaintiff admits, an Iowa federal court found that state law lease claims were preempted "to the extent that they sought to bar defendant railroad from using tracks . . . ." Opp. 13:13-16 (citing *Cedarapids, Inc. v. Chi., Cent. & Pac. R.R. Co*., 265 F. Supp. 2d 1005, 1014-15 (N.D. Iowa 2003)). Thus, every case cited by the Tribe on this issue undermines its position that an STB referral would be futile because ICCTA preemption supposedly does not apply to contracts.

Further, the courts and federal agencies repeatedly have held that private contracts cannot be used to override regulatory obligations. *See United States v. Baltimore & O. R. R.*, 333 U.S. 169, 177-78 (1948) (finding that non-carrier owner of a railroad track segment may

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not contract to restrict the common carrier's statutory obligations in its operations on that track segment); *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 STB has an obvious interest in claims that seek to enforce alleged contract obligations that are inconsistent with statutory requirements administered by the STB.[3]

The Tribe then undermines its argument that preemption does not apply to contracts by arguing that only a court – not the STB – is competent to decide whether a contract is preempted by ICCTA. *See* Opp. 11:21-12:1-3. However, in the lead cases cited by the Tribe, the STB acted on ICCTA preemption issues first and provided guidance for the federal courts on the scope of its jurisdiction under Section 10501(b). *See PCS Phosphate*, 559 F.3d at 221; *Township of Woodbridge*, 5 S.T.B. at 491. More importantly, the Tribe ignores the critical factor bearing on BNSF's referral request: the preemption issue in this case arises from a possible conflict with common-carrier obligations. The duty to provide transportation services upon reasonable request—as required by § 11101—is assessed and enforced by the STB. And courts "almost invariably defer to the STB's expertise" when the dispute concerns the railroad's common-carrier obligations. *Chlorine Institute, Inc. v. Soo Line R.R.*, No. 14-1029,

[3] BNSF's motion relied on *Allied Erecting and Dismantling, Inc. and Allied Indus. Dev. Corp. Petition for Declaratory Order Rail Easements in Mahoning County, Ohio*, FD 35316, 2013 STB LEXIS 407 (Served Dec. 20, 2013) and *Thompson v. Texas Mexican Ry.*, 328 U.S. 134 (1946). *See* Motion at 6:6-13. The Tribe's attempt to distinguish those cases misses the point. *See* Opp. 15. Those cases, as well as many others, find that only the STB can relieve a railroad of obligations to provide common-carrier service over rail lines that are part of the railroad's common-carrier network. Railroads cannot, through contract commitments with other parties, unilaterally avoid statutory requirements.

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2014 WL 2195180, at *2 (D. Minn. May 27, 2014). Referral to the STB is warranted so the STB, drawing on its expertise regarding common-carrier obligations, can decide the preemption issue. *See, e.g.*, *B & S Holdings, LLC v. BNSF Ry. Co.*, 889 F. Supp. 2d 1252, 1257 (E.D. Wash. 2012) ("As the agency authorized by Congress to administer the ICCTA, the [Surface] Transportation Board is uniquely qualified to determine whether state law . . . should be preempted") (brackets, quotations, and citations omitted).

B. The Tribe ignores the preemption issues its trespass claim implicates.

The Tribe's position is belied by its own trespass claim and the trespass accusations it levels at BNSF throughout its Opposition. *See, e.g.,* Opp. 8:21-22 ("Consequently, the Tribe had no choice but to bring this lawsuit, to seek the Court's assistance in enjoining BNSF's new trespass."). The trespass claims are significant here because, as explained by BNSF in its Opening Brief, a trespass suit is preempted under ICCTA when a plaintiff seeks redress for an alleged harm arising from the railroad's operations, especially where the trespass claim would have the effect of managing or governing rail transportation. *See* Opening Br. 7:8-7:17. The Opposition makes no attempt to address this authority.

C. The parties agreed that federal law supersedes the Easement's terms.

The Tribe argues that contractual undertakings generally are not preempted because such voluntary commitments are supposedly an admission that the contract's enforcement would not interfere with federal law. Opp. 10:25-11:2. That argument is wrong as a matter of law. As discussed above, the courts and the STB have recognized that contract commitments can be preempted if they interfere with regulatory obligations, regardless of what "admissions" can be inferred from the parties' private agreement. Here, the Tribe's argument is also contradicted by the plain language of the parties' Settlement Agreement.[4]

That document, which the Tribe only briefly addresses at the end of its brief, states clearly that "[n]othing in this Settlement Agreement or the associated Right-of-Way Easement

[4] The Court does not need to address this contract interpretation issue to resolve this Motion.

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shall supersede any federal law or regulation as they now exist or as they may be amended or changed from time to time." Settlement, ¶ 12. This language, which encompasses Section 11101(a)'s requirement that BNSF comply with shippers' reasonable requests, shows that the Tribe and BNSF expressly contemplated that federal law will supersede the agreement's terms if a conflict with federal law arose. Accordingly, the parties agreed that there would be no conflict with federal law because the parties would not allow such a conflict to arise.

Because of the potency of the parties' agreement that federal law, such as Section 11101(a), trumps the contract, the Tribe tries to juke around the Settlement Agreement's terms. The Tribe asks the Court to focus on the second sentence of the relevant provision but not to give any weight to first or third sentences of the provision.[5] If only the second sentence were given meaning, the first sentence would be superfluous. The law is clear that all contractual terms are to be given weight when interpreting an agreement. *See, e.g.*, *Bogomolov v. Lake Villas Condo. Ass'n of Apartment Owners*, 131 Wn. App. 353, 361, 127 P.3d 762 (2006) ("When interpreting a document, the preferred interpretation gives meaning to all provisions and does not render some superfluous or meaningless."). Accordingly, the first sentence regarding the parties' intent not to supersede federal law must be given full weight.[6]

[5] The sentence quoted above from paragraph 12 is in the section titled "Integration, Governing Laws, Miscellaneous," not a section about the rental amount. And, the third sentence—the sentence following the sentence to which the Tribe points—reads: "BNSF shall comply with all applicable federal laws and regulations pertaining to BN's activities within the Swinomish Reservation." The broad language used in the first and third sentences in this paragraph give no indication that the parties intended to limit their scope to the narrow issue of rental amounts.

[6] In a throwaway comment, the Tribe obliquely asks the Court to ignore the Settlement Agreement because its terms supposedly "merged" into the Easement. This argument has many flaws. For example, the fact that the Easement does not wipe out the Settlement Agreement is confirmed by the Easement's plain language, which references the Settlement Agreement throughout and requires arbitrators to enforce provisions of the Settlement Agreement. Easement ¶ 3(b)(iii)[at p. 6]; *see also Black v. Evergreen Land Developers, Inc.*, 75 Wn. 2d 241, 249-50, 450 P.2d 470 (1969) (reiterating rule that merger doctrine does not apply to provisions in a contract for the sale of land that do not relate to conveyance without evidence that they were intentionally surrendered through the deed). Additionally, under *Brown v. Johnson*, 109 Wn. App. 56, 34 P.3d 1233, (2001), the case on which the Tribe relies, the merger doctrine does not apply "where terms of a purchase and sale agreement are not contained in or performed by the execution and delivery of the deed, are not inconsistent with the deed, and are independent of the obligation to convey." *Id.* at 60. To the extent the merger doctrine even applies to the Easement and Settlement Agreement, the relevant terms fall within this exception. The Settlement Agreement's terms at issue here are not contained in the Easement and are not performed by delivery of the Easement; they are not inconsistent with the Easement; and they are separate from an obligation to convey the Easement.

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III. The Tribe's Argument About IRWA Misses the Mark.

The Tribe argues that referral of its claims to the STB is inappropriate because "the STB is certainly not competent to adjudicate the respective rights of the parties under the IRWA." Opp. 2:3-4. The Tribe devotes much of its brief to IRWA, but fails to explain how IRWA is implicated by this lawsuit or by any of BNSF's arguments. As the Tribe's brief discusses, IRWA covers the Easement's creation and the process by which the Tribe could revoke the Easement if certain prerequisites are satisfied—two issues not before the Court. Opp. 5:3-22. BNSF has never disputed that the Easement was properly created pursuant to IRWA. The Tribe's claim is that BNSF breached the Easement, not that BNSF violated IRWA. Referral to the STB of the Tribe's breach of contract (and trespass) claims is necessary to determine whether those claims create a conflict with statutory obligations under ICCTA. The STB is not being asked to adjudicate any "rights . . . under IRWA."

The Tribe also asserts, without reference to any provisions of IRWA, that there is a potential conflict between IRWA and ICCTA that only the Court is capable of resolving. Opp. 18:4-9. There is no conflict between these two federal statutes. IRWA does not address the rights or obligations of common carriers operating on tribal lands that might conflict with ICCTA. The only potential conflict that the Tribe identifies arises from the Tribe's threat to seek termination of the Easement if BNSF is allowed to move the disputed shipments across the tribal land. Opp. 18:17-24. But the Tribe in the current action is not trying revoke the Easement pursuant to IRWA; rather, it is seeking to keep the Easement in place and secure an injunction and monetary relief. If the Tribe were to exclude BNSF from any operations, the importance of referring the Tribe's claims to the STB is obvious given the conflict with BNSF's common-carrier obligations.[7]

[7] If the Tribe were to follow through with its threat, the STB's authority would clearly be implicated. In *City of Des Moines, Iowa v. Chicago & N. W. Ry. Co.*, 264 F.2d 454 (8th Cir. 1959), the City sought to evict the railroad on the ground that it had violated the conditions of the original grant for use of the street for right of way purposes. *See id.* at 455. The Eighth Circuit agreed with the railroad that the case "must be referred to the Commission for

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The Tribe's threat to take some action based on the outcome of its litigation does not create a conflict between IRWA and ICCTA. It emphasizes the central importance of the regulatory scheme administered by the STB in addressing the Tribe's claims, which is the reason for referring the Tribe's claims to the STB under the doctrine of primary jurisdiction. Even if IRWA created a substantive conflict with ICCTA, the STB would need to have a role in resolving that conflict. In creating the STB's organic statute, Congress made clear that ICCTA's provisions "preempt the remedies provided *under Federal* or State law." 49 U.S.C. § 10501(b) (emphasis added). This preemption statute is part of the comprehensive regulatory scheme given to the STB to administer. The STB would need to have a role in assessing the scope of this broad preemption statute if there were a conflict with another federal law.

The Tribe nevertheless argues that "it is 'the courts' . . . who are charged with harmonizing the two laws – not the STB." Opp. 18:23-24. In fact, there have been very few cases involving the interplay between ICCTA and other federal laws, but the STB, not the courts, has been the only tribunal that has addressed an actual conflict between ICCTA and another federal law. *See U.S. Environmental Protection Agency–Petition for Declaratory Order*, FD 35803, 2014 STB LEXIS 335 (STB Served Dec. 30, 2014). The STB is particularly well suited to address any conflict that might arise with another federal law, given the need to develop a uniform body of law in a new and emerging area of law and given the procedural flexibility that an agency has to address policy issues that must be considered in any federal law preemption case.

The Tribe's arguments in this regard are further undermined by the Federal Railroad Administration ("FRA") and the Pipeline and Hazardous Materials Safety Administration ("PHMSA") recent rulemaking concerning rail shipments of hazardous materials. *See* 80 Fed. Reg. 26643 (May 8, 2015). There, the tribal governments raised concerns about "the

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answer, before any ouster could at all be decreed . . . ." *Id.* at 459. "'Until abandonment is authorized [by the agency], operations must continue.'" *Id.* at 457 (quoting *Tex. Mex.*, 328 U.S. at 147).

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environmental, economic and safety impacts of crude oil derailments in tribal lands" and asked for stricter measures for shipping hazardous materials by rail than were being proposed in the rulemaking. *Id.* at 26725. After rejecting these stricter measures, the FRA and PHMSA found that their rulemaking preempted the tribal governments from regulating in the areas of routing, packaging and classifying hazardous shipments by rail because the "federal government has a superseding preemption with regard to hazardous materials regulation and railroad safety." *Id.*

IV. The Tribe's Monetary Damages Claims Must Be Referred to an Arbitration Panel

As noted in the introduction to this Brief, the Tribe has only a short, and ultimately unpersuasive, argument relating to BNSF's assertion that the Tribe's monetary damages claims must be addressed in arbitration. The Tribe argues that the parties intended to resolve any breach of contract claims in court, not arbitration, pointing to two narrow issues completely unrelated to compensation due to the Tribe that the parties agreed to address in court if disputes arose over those issues. Opp. 23:23-26. The fact that the Easement specifically identified two issues unrelated to Tribal compensation to be addressed in court says nothing about the parties' intent with respect to the resolution of claims relating to Tribal compensation, which the parties specifically identified as being subject to arbitration.

Much more importantly, the Tribe does not address the dispositive case law BNSF cited in its opening brief for the well-established principle that incorporation of American Arbitration Association rules in a contract is clear evidence that the parties intended to arbitrate arbitrability. *See, e.g., Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1074 (9th Cir. 2013) ("Virtually every circuit to have considered the issue has determined that incorporation of the American Arbitration Association's (AAA) arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability"). The Tribe does not even contest this point. *See* LR 7(b)(2). Accordingly, the Court should dismiss without prejudice or stay the Tribe's damages claims to allow the parties to address the arbitrability of those claims in the arbitration forum where that dispute must be resolved.

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Respectfully submitted this 5th day of June, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on June 5, 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 the attorneys of record for the parties.

Dated this 5th day of June, 2015.

s/ Stellman Keehnel
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