

THE HONORABLE ROBERT S. LASNIK

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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

**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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1 Defendant BNSF Railway Company (“BNSF”) respectfully moves pursuant to Fed. R.
2 Civ. P. 12(b)(3) and 12(b)(6) for an order dismissing the Complaint without prejudice. The
3 Complaint seeks damages and other relief because of recent increases in the traffic that BNSF
4 handles over a rail line that crosses Plaintiff’s land. The Court should dismiss the Complaint
5 without prejudice under Rule 12(b)(6) because Plaintiff’s claims implicate the primary
6 jurisdiction of the federal agency that regulates BNSF’s operations – the Surface Transportation
7 Board (“STB”). To avoid subjecting BNSF to conflicting obligations, the Court should permit
8 the STB to address the threshold issues falling within the STB’s jurisdiction before allowing
9 any claims to proceed. In addition, the Court should dismiss Plaintiff’s damages claims
10 without prejudice under Rule 12(b)(3) because Plaintiff agreed to arbitrate disputes relating to
11 compensation that Plaintiff should receive as a result of increases in BNSF’s traffic flows.

12 INTRODUCTION

13 For more than a century, BNSF has been serving western Skagit County with rail
14 service over a rail line that extends across a portion of the Swinomish Tribal lands to Fidalgo
15 Island and Anacortes. The line is referred to as the Anacortes Branch. The Anacortes Branch
16 serves a Tesoro oil refinery located at March Point near Anacortes. A Shell Oil Products
17 refinery is also located at March Point.

18 In 1991, BNSF and the Swinomish Tribe entered into a Right-of-Way Easement
19 (“Easement”) for the rail line in settlement of litigation. The Easement recognizes BNSF’s
20 right to conduct rail operations over the line in exchange for an annual payment that is subject
21 to adjustment based on changes in economic conditions, property values and the number of
22 trains and cars, among other things. The Easement mandates arbitration of disputes over the
23 compensation due to the Tribe from BNSF. The Easement was entered into pursuant to a
24 Settlement Agreement reached in 1990.¹

25 _____
26 ¹ The Settlement Agreement (“Settlement”) and Easement are explicitly referenced in the
Complaint and therefore can be considered in deciding this motion. *See Knievel v. ESPN*, 393
F.3d 1068, 1076–77 (9th Cir. 2005) (“the ‘incorporation by reference’ doctrine ... permits us to

1 The Anacortes Branch is part of BNSF's common carrier rail network. Operations on
2 the line are therefore subject to the STB's exclusive jurisdiction over "transportation by rail
3 carriers." 49 U.S.C. § 10501(b). As a common carrier, BNSF has a statutory obligation to
4 provide transportation service upon reasonable request by a shipper. *Id.* at § 11101(a). Under
5 established case law, common carriers cannot decline to provide service for commodities that
6 are considered hazardous, and they must use reasonable efforts to provide transportation in the
7 volumes requested by shippers. Common-carrier obligations cannot be suspended on a rail line
8 without the STB's abandonment approval. *Id.* at §10903.

9 The Settlement and Easement did not limit BNSF's ability to satisfy common-carrier
10 obligations on the line. In apparent recognition of the primacy of BNSF's common-carrier
11 obligations, the Settlement specifically states that nothing in the Settlement or Easement "shall
12 supersede any federal law or regulation as they now exist or as they may be amended or
13 changed from time to time." Settlement, ¶12. There is no carve-out from that broad embrace
14 of BNSF's common-carrier duties. The Easement does not give the Tribe power to dictate the
15 commodities that BNSF can handle over the line, which would have conflicted with BNSF's
16 common-carrier obligations. Moreover, while the Easement identified a baseline number of
17 trains and cars that would move over the line based on existing shipper needs (in 1991), the
18 Easement, ¶7(c), also expressly provides for an increase in future number of trains and number

19
20 take into account documents whose contents are alleged in a complaint and whose authenticity
21 no party questions, but which are not physically attached to the [plaintiff's] pleading. We have
22 extended the 'incorporation by reference' doctrine to situations in which the plaintiff's claim
23 depends on the contents of a document, the defendant attaches the document to its motion to
24 dismiss, and the parties do not dispute the authenticity of the document") (internal quotations
25 omitted); *Abarquez v. Onewest Bank, FSB*, No. C11-0029RSL, 2011 WL 1459458, at *1 (W.D.
26 Wash. Apr. 15, 2011) (on a motion to dismiss, "the Court may consider documents whose
contents are alleged in a complaint and whose authenticity no party questions, but which are
not physically attached to the [complaint].") (internal quotations omitted); *In re Wet Seal, Inc.
Sec. Litig.*, 518 F. Supp. 2d 1148, 1157 (C.D. Cal. 2007) ("In a motion to dismiss, a Court may
take judicial notice of documents attached to or referenced in the complaint without converting
the motion into one [for] summary judgment where the authenticity of the documents are not in
dispute.") (emphasis omitted; citation omitted); *see also* Fed. R. Evid. 201. The Settlement and
Easement are attached to the accompanying Declaration of James Obermiller.

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1 of cars if “required by shipper needs,” consistent with BNSF’s common-carrier obligations.
2 The Easement, ¶¶3(b)(iii) and 7(c), provides that any disagreement over the amount of
3 compensation due as a result of traffic increases must be arbitrated under the procedures and
4 standards set out in the Easement.

5 The Complaint alleges that BNSF breached the Easement by increasing crude oil traffic
6 on the line without the Tribe’s permission. There are two fundamental problems with the
7 Tribe’s Complaint. First, the Tribe seeks to make an end run around the arbitration provision
8 of the Easement by asking the Court to award damages resulting from changes in BNSF’s
9 traffic flows instead of seeking an adjustment to the Tribe’s compensation through arbitration.
10 The Easement establishes standards and procedures for determining the Tribe’s compensation
11 in light of economic changes and increases in traffic flows. The Easement also specifically
12 states that disputes over compensation must be arbitrated: “[I]f the number of crossings or the
13 number of cars is increased, the annual rental will be subject to adjustment in accordance with
14 paragraph 3(b)iii [the arbitration provision].” Easement, ¶7(c). This Court is therefore an
15 improper venue to hear the Tribe’s damages claims, and those claims should be dismissed
16 without prejudice under Rule 12(b)(3).

17 The second problem with the Complaint is more fundamental. The Complaint seeks
18 relief – directly through an injunction and indirectly through damages and a declaratory order –
19 that would restrict BNSF’s ability to satisfy its common-carrier obligations. The Complaint
20 asks the Court to use the Easement as a vehicle for regulating the type and volume of traffic
21 that BNSF can handle on a rail line that is subject to the STB’s regulatory authority. BNSF
22 believes that the Complaint is fatally flawed as a result. However, the STB administers the
23 statutory regime governing common carriers and the STB is therefore in the best position to
24 determine whether the relief requested by the Tribe would impermissibly conflict with the
25 statutes and regulations governing rail obligations, and if so, how the conflict should be

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1 resolved. Courts routinely defer to the STB's expertise under the doctrine of primary
2 jurisdiction to resolve disputes that involve common-carrier statutes and regulations.

3 The STB's guidance should therefore be sought under the doctrine of primary
4 jurisdiction on three threshold questions before any further proceedings are undertaken in this
5 matter:

6 1. Is the Tribe asking for relief that would conflict with the statutes and regulations
7 that govern operations on a rail line that is part of BNSF's common-carrier rail network by
8 seeking to restrict BNSF's ability to respond to the needs of shippers on the Anacortes Branch?

9 2. Should the conflict between the statutes and regulations administered by the
10 STB and the Tribe's claims result in complete or partial preemption of those claims under 49
11 U.S.C. §10501(b), which preempts all state and federal claims for relief that seek to regulate
12 rail operations?

13 3. If any claims survive preemption, what is the scope and meaning of the federal
14 law requirements referred to in the Settlement and Easement that the Court will need to
15 consider in interpreting the Easement's terms?

16 Under the doctrine of primary jurisdiction, once a court determines that referral to an
17 agency is merited, the court may dismiss a complaint without prejudice, leaving the parties to
18 present threshold issues to the relevant agency. *See Reiter v. Cooper*, 507 U.S. 258, 268-69
19 (1993) (district court "has discretion . . . if the parties would not be unfairly disadvantaged, to
20 dismiss the case without prejudice"); *Rymes Heating Oils, Inc. v. Springfield Terminal Ry. Co.*,
21 358 F.3d 82, 91 n.9 (1st Cir. 2004) (same). A motion to dismiss under the doctrine of primary
22 jurisdiction can be brought under Rule 12(b)(6). *Davel Commc'ns, Inc. v. Qwest Corp.*, 460
23 F.3d 1075, 1087-88 (9th Cir. 2006).

24 Dismissal of the Complaint without prejudice is appropriate here. The STB's responses
25 to the questions set out above could indicate that no further action will be appropriate in court,
26 or that the scope of any further proceedings should be substantially narrowed. Dismissal

1 without prejudice will also allow the Tribe to pursue its compensation claim in arbitration, as it
2 is required to do. Alternatively, even if the Court does not dismiss the Complaint outright,
3 BNSF respectfully requests that the proceedings be stayed until the STB can employ its
4 expertise to render a decision on the unique federal regulatory questions underlying the
5 Complaint and while the Tribe's AAA arbitration proceeds.

6 BACKGROUND

7 The freight railroad industry has operated for decades under a uniform and consistent
8 set of federal regulatory controls. This is necessary because freight trains cross multiple state
9 boundaries on their way to destinations. A fact of daily life for freight railroads like BNSF is
10 the oversight by federal agencies, including the STB, over various aspects of their operations.
11 A brief summary of the principal elements of the common-carrier regulatory regime
12 administered by the STB is set out below.

13 A. The ICC Termination Act

14 For over a century, the federal statutory scheme regulating railroads has been "among
15 the most pervasive and comprehensive of federal regulatory schemes." *Chicago & Nw. Transp.*
16 *Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981). The current statutory regime was
17 adopted in 1996 in the ICC Termination Act ("ICCTA"), set out in 49 U.S.C. §§ 10101-11908.

18 One of the key provisions in ICCTA (and prior iterations of the statute) is the
19 requirement that rail carriers "subject to the jurisdiction of the Board under this part shall
20 provide the transportation or service on reasonable request." 49 U.S.C. § 11101(a). The STB
21 and its predecessor agency have found that this statutory requirement limits a railroad's ability
22 to refuse to handle hazardous materials or restrict the volume of its hazardous materials traffic,
23 so long as safety standards are in place. *See, e.g., Radioactive Materials, Missouri-Kansas-*
24 *Texas R.R. Co.*, 357 I.C.C. 458, 465 (1977) (radioactive materials); *Union Pac. R.R. Co.—*
25 *Petition for Declaratory Order*, FD 35219, 2009 STB LEXIS 242 (Served June 11, 2009)
26 (chlorine) ("UP").

1 Another key ICCTA provision gives the STB exclusive control over railroads' ability to
2 eliminate their common-carrier obligations through abandonment of rail lines. Once a rail
3 carrier has been authorized to provide service over a rail line, "the common carrier obligation
4 continues . . . unless and until the Board grants the appropriate discontinuance or abandonment
5 authority" under 49 U.S.C. § 10903. *Juniata Valley R.R.—Operation Exemption—SEDA-COG*
6 *Joint Rail Auth.*, FD 35469, 2011 STB LEXIS 104 at n.1 (Served Mar. 11, 2011). A railroad
7 may not relinquish its common-carrier obligations through contract, "as doing so would amount
8 to an unauthorized abandonment or discontinuance under federal law." *Allied Erecting and*
9 *Dismantling, Inc. and Allied Indus. Dev. Corp. Petition for Declaratory Order Rail Easements*
10 *in Mahoning County, Ohio*, FD 35316, 2013 STB LEXIS 407 at *39 (Served Dec. 20, 2013).
11 Even when an easement or agreement has terminated, common-carrier obligations remain in
12 effect until a line abandonment has been approved by the STB. *See Thompson v. Tex. Mexican*
13 *Ry.*, 328 U.S. 134, 144-45 (1946).

14 **B. ICCTA's Preclusion of State and Federal Law Remedies**

15 Section 10501(b) of ICCTA provides that "the jurisdiction of the [STB] over . . . the
16 transportation by rail carriers . . . is exclusive." 49 U.S.C. § 10501(b). Rail "transportation" is
17 broadly defined to include equipment and services related to the movement of property. 49
18 U.S.C. § 10102(9). The statute further states that "the remedies provided under this part [49
19 U.S.C. §§10101-11908] with respect to regulation of rail transportation are exclusive and
20 preempt the remedies provided under Federal or State law." 49 U.S.C. §10501(b).

21 ICCTA preempts remedies under state and federal law that seek directly to regulate rail
22 operations. *See, e.g., Ass'n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094,
23 1098 (9th Cir. 2010) (local government rules regulating locomotive idling preempted). Section
24 10501(b) also preempts state and federal laws of general application, like environmental laws,
25 that have the effect of regulating rail transportation. *See, e.g., Green Mountain R.R. v.*
26 *Vermont*, 404 F.3d 638, 643 (2d Cir. 2005) (enforcement of Vermont's environmental land use

1 statute preempted in connection with a railroad’s construction of a transloading facility);
2 *Grafton & Upton R.R. Co.—Petition for Declaratory Order*, FD 35779, 2014 STB LEXIS 12 at
3 *15 (Served Jan. 27, 2014) (federal environmental law would be preempted if the “federal
4 environmental laws are being used to regulate rail operations”).

5 “Every court that has examined the statutory language has concluded that the
6 preemptive effect of section 10501(b) is broad and sweeping.” *City of Creede, Co.—Petition*
7 *for Declaratory Order*, FD 34376, 2014 STB LEXIS 486 at *10 (Served May 3, 2005).
8 Accordingly, ICCTA preemption applies not just to direct regulation of rail operations, but also
9 to tort claims where such claims would have the effect of managing or governing rail
10 transportation. *See, e.g., Thomas Tubbs—Petition for Declaratory Order*, FD 35792, 2014
11 STB LEXIS 265 at *10 (Served Oct. 31, 2014) (“damages awarded under state tort laws can
12 manage or regulate a railroad as effectively as the application of any other type of state statute
13 or regulation”) (“*Tubbs*”). Trespass claims have specifically been found to be preempted when
14 they relate to routine rail construction or operations. *Id.* A trespass suit is preempted under
15 ICCTA whether plaintiffs seek immediate possession of the railroad property or redress for an
16 alleged harm arising from the railroad’s operations. *See Mark Lange – Petition for Declaratory*
17 *Order*, FD 35037, 2008 STB LEXIS 45, at *3 (Served Jan. 28, 2008).

18 Requests for injunctive relief are similarly preempted where the relief sought would
19 interfere with interstate commerce or railroad operations. *See, e.g., Blanchard Sec. Co. v.*
20 *Rahway Valley R.R. Co.*, No. 04-3040, 2004 U.S. Dist. LEXIS 25647, *18-20 (D.N.J. Dec. 22,
21 2004) *aff’d* 191 F. App’x 98, 100 (3d Cir. June 30, 2006) (dismissing injunctive relief claim
22 that would restrict the railroad’s use of the rail line to three round trips per week because such
23 relief was within the exclusive capacity of the STB); *Guild v. Kan. City S. Ry. Co.*, 541 F.
24 App’x. 362, 2013 U.S. App. LEXIS 18730 (5th Cir. 2013) (attempt to compel railroad to add a
25 switch seeks to regulate rail conduct and is preempted).

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1 ICCTA preemption also extends to breach of contract claims where such claims would
2 unreasonably interfere with rail transportation or interstate commerce. As the STB recently
3 noted, “a railroad’s agreements with state or local entities may be preempted by § 10501(b) if
4 the agreement unreasonably interferes with interstate commerce or railroad operations.” *In re*
5 *California High-Speed Rail Authority*, FD 35861, 2014 STB LEXIS 311, at *28 (Served Dec.
6 12, 2014). *See also Township of Woodbridge v. Consolidated Rail Corp.*, FD 42053, 2000 STB
7 LEXIS 709 (Served Dec. 1, 2000), *clarified*, 2001 STB LEXIS 299, at *5 (Served Mar. 23,
8 2001) (noting the possibility that a breach of contract claim would be preempted if it is based
9 on an interpretation of the contract that resulted in an “unreasonable interference with interstate
10 commerce”).

11 **C. The Swinomish-BNSF Easement.**

12 The BNSF track across the Swinomish property (“Right-of-Way”) is part of BNSF’s
13 Anacortes Branch line that terminates at the Tesoro refinery at March Point. BNSF and its
14 predecessors have been operating a rail line on the Right-of-Way since the 1890s. Complaint,
15 ¶3.8. The parties’ recognition of BNSF’s right to use the Right-of-Way was documented
16 through an easement over the Right-of-Way described in a 1990 settlement of litigation with
17 the Tribe over use of the Right-of-Way to provide rail services. *Swinomish Tribal Community*
18 *v. Burlington Northern Railroad*, United States District Court for the Western District of
19 Washington, Case No. C76-550V. The Settlement Agreement set forth the basic terms to be
20 included in the Easement, which are discussed below. The Settlement Agreement also
21 provides:

22 Nothing in this Settlement Agreement or the associated Right-of-
23 Way Easement shall supersede any federal law or regulation as
24 they now exist or as they may be amended or changed from time
25 to time.

26 Settlement, ¶12.

1 Under the 1991 Easement, BNSF is entitled to use the Right-of-Way for an initial 40-
 2 year term, with two 20-year option periods. Easement Recitals at D. BNSF pays an annual fee
 3 for its use of the Right-of-Way. The amount of that payment is subject to annual consumer
 4 price index adjustments, as well as periodic adjustments based on the value of the property
 5 burdened by the Right-of-Way and remainder/severance damage to adjacent Tribal lands.
 6 Easement, ¶3(b)(ii). The Easement Agreement also provides that the Tribe may seek additional
 7 payments based on increases in BNSF’s traffic volumes. *Id.*, ¶3(b)(iii) (providing for
 8 procedure and specifically referring to “adjustment under paragraph 7.c” – which addresses
 9 payment adjustments for increases in “the number of crossings or the number of cars”). The
 10 Easement provides that disputes over the amount due to the Tribe for use of the Right-of-Way
 11 must be resolved in binding arbitration. *Id.*, ¶3(b)(iii).

12 The Easement also provides that, unless otherwise agreed in writing, only one east-
 13 bound train and one west-bound train (of 25 cars or less) are to cross the Reservation each day.
 14 Easement, ¶7(c). For over 20 years, that traffic limitation presented no impediment to BNSF
 15 satisfying shipper needs. The Easement contemplates that the number of cars and trains will
 16 increase in the future if required to meet shipper needs:

17 The number of trains and cars shall not be increased unless
 18 required by shipper needs. The Tribe agrees not to arbitrarily
 19 withhold permission to increase the number of trains or cars when
 20 necessary to meet shipper needs.

21 *Id.* The Easement provides that “if the number of crossings or the number of cars is increased,
 22 the annual rent will be subject to adjustment” under the payment adjustment and arbitration
 23 provisions of the Easement. *Id.*

24 **D. The Complaint**

25 The Tribe’s Complaint alleges that:

- 26 • BNSF’s transportation of crude oil across the Right-of-Way in six 100-car trains per week violates the easement (Complaint, ¶3.16);

- 1 • “The substantial increase in train traffic across the Right-of-Way is the result of BNSF’s
- 2 decision to transport large quantities of crude oil to the Tesoro refinery at March Point
- 3 (and, in the future, to the Shell refinery described in paragraph 3.17)” (*Id.* ¶3.18);
- 4 • “The Tribe has never granted BNSF permission to exceed the express limitations
- 5 contained in Paragraph 7(c) of the Easement Agreement” (*Id.* at ¶3.14); and
- 6 • “Crude oil is a notoriously dangerous cargo to ship by rail” (*Id.* ¶3.20).

7 The Complaint asks the Court to declare that BNSF is in breach of the Easement, to

8 enjoin BNSF from transporting Bakken crude oil across the Right-of-Way, to enjoin BNSF

9 from moving more than the number of cars and trains specified in 1991 as the limit on traffic

10 volumes, and to award the Tribe damages for the alleged breach of the Easement and for an

11 alleged trespass that occurred when BNSF exceeded the train and car limits in the Easement.

12 Complaint, ¶¶5-13.

13 ARGUMENT

14 The Complaint directly challenges BNSF’s obligations arising under statutes

15 administered by the STB. The Tribe seeks to regulate BNSF’s transportation of crude oil,

16 which is subject to the STB’s exclusive regulatory jurisdiction. Absent referral to the STB,

17 BNSF could be subjected to conflicting and contradictory directions from this Court and the

18 federal agency over the same operations and shipments. At a minimum, the STB’s views will

19 materially aid the outcome of this litigation and promote uniformity in rail transportation

20 policies. This is precisely the kind of case in which certain threshold issues relating to the

21 scope of a regulatory regime should be decided initially by the agency that administers that

22 regime.

23 The Complaint also circumvents the dispute resolution provisions of the Easement by

24 asking the Court to award damages as compensation for increases in traffic that BNSF handles

25 over the Right-of-Way. The Tribe’s damages claims belong in arbitration.

26 Dismissal without prejudice of the Complaint under the doctrine of primary jurisdiction

will therefore allow the parties to seek the STB’s guidance on the validity of the Tribe’s claims

in light of the STB’s jurisdiction over rail transportation, and it will also allow the Tribe to

1 pursue its claims for compensation in the forum that the parties agreed to use – arbitration – to
 2 resolve disputes over payments.

3 **I. The Doctrine of Primary Jurisdiction – the Four-Factor Test**

4 The doctrine of primary jurisdiction has been fashioned precisely to avoid the problem
 5 of conflicting directions from a court and an agency:

6 Whether the agency happens to be expert or not, a court should not act
 7 upon subject matter that is peculiarly within the agency’s specialized
 8 field without taking into account what the agency has to offer, for
 otherwise parties who are subject to the agency’s continuous
 regulation may become the victims of uncoordinated and conflicting
 requirements.

9 4 Davis, *Administrative Law* at ¶22.1, p. 81 (1983). *Accord Oasis Petroleum Corp. v. Dep’t of*
 10 *Energy*, 718 F.2d 1558, 1563, 1567 (Temp. Emer. Ct. App. 1983).

11 The doctrine of primary jurisdiction also recognizes that the expertise of the regulatory
 12 agencies should be made available to the court, “thereby aid[ing] the court by laying a
 13 foundation for a more intelligent disposition of the question” *Weidberg v. American*
 14 *Airlines, Inc.*, 336 F. Supp. 407, 409 (N.D. Ill. 1972). *Accord Ricci v. Chicago Mercantile*
 15 *Exchange*, 409 U.S. 289, 305-06 (1973). Such a determination is particularly appropriate
 16 where issues “have been placed within the special competence of an administrative body.”
 17 *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 64 (1956) (“*W. Pac. R.R.*”). Indeed, Congress
 18 has given statutory authority to the district courts to refer cases to the STB in order to avail
 19 themselves of the STB’s primary jurisdiction. 28 U.S.C. § 1336(b).

20 Primary jurisdiction also promotes uniformity in the application of federal policies. The
 21 Supreme Court has stated that “issues of transportation policy . . . ought to be considered by the
 22 Commission in the interests of a uniform and expert administration of the regulatory scheme
 23 laid down by that Act.” *W. Pac. R.R.*, 352 U.S. at 65. *See also DeBruce Grain Inc. v. Union*
 24 *Pac. R.R.*, 149 F.3d 787, 789-90 (8th Cir. 1998).

25 In assessing a primary jurisdiction argument, the Ninth Circuit examines four factors:
 26 “(1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of

1 an administrative body having regulatory authority (3) pursuant to a statute that subjects an
2 industry or activity to a comprehensive regulatory authority that (4) requires expertise or
3 uniformity in administration.” *Syntek Semiconductor Co., Ltd. v. Microchip Tech., Inc.*, 307
4 F.3d 775, 781 (9th Cir. 2002) (citation omitted). Each of the four prongs is easily satisfied
5 here, thus establishing “the desirability of applying the doctrine of primary jurisdiction.” *Id.* at
6 781.

7 **II. All Four Factors of the Primary Jurisdiction Test Are Squarely Met Here**

8 **A. The Complaint Raises Issues Within the Special Competence of the STB**

9 The first factor in the Ninth Circuit’s four-part test is the need to resolve an issue within
10 the special competence of an agency. In this case, there are three issues that must be addressed
11 to determine whether the Tribe is entitled to pursue relief that would have the effect of
12 regulating rail transportation.

13 The first issue is whether the Tribe is asking for relief which, if granted, would conflict
14 with common-carrier obligations on the rail line. The Tribe claims that limits on BNSF’s
15 operations are appropriate because the Tribe is “justifiably . . . concerned” about the
16 transportation of crude oil across the Right-of-Way in increased volumes. Complaint, ¶3.31.
17 But the STB has dismissed this concern in other circumstances as the basis for suspending
18 common-carrier obligations. *See, e.g., CSX Transp., Inc.—Petition for Declaratory Order*, FD
19 34662, 2005 STB LEXIS 675 (Served May 3, 2005) (rejecting limits on transportation of
20 chlorine in close proximity to the U.S. Capitol building) (“CSX”).

21 Second, the Complaint directly implicates the scope of the statute conferring exclusive
22 jurisdiction to the STB over rail transportation because it asks the Court to regulate BNSF’s
23 operations. Any order from the Court limiting BNSF’s ability to respond to reasonable
24 requests for service on the line would be preempted under 49 U.S.C. §10501(b). The STB has
25 found consistently that regulation of rail conduct through relief provided under other state and
26 federal laws is preempted under the plain language of Section 10501(b). If the Tribe’s claims

1 are not precluded in their entirety by ICCTA, it will be necessary to determine whether some
2 claims (such as the request for injunctive relief) must be dismissed because they directly
3 regulate rail conduct.

4 Finally, if any claims are found to survive, and in light of the parties' agreeing that
5 "[n]othing in . . . [the] Right-of-Way Easement shall supersede any federal law or regulation as
6 they now exist or as they may be amended or changed from time to time" (Settlement, ¶12), it
7 will be necessary to consider how to interpret and apply BNSF's common-carrier duties and the
8 purported limitations in the Easement so as to avoid a conflict with the regulatory regime that is
9 administered by the STB. The STB can provide guidance on the scope and meaning of the
10 federal laws and regulations governing common carriers if the Court needs to determine
11 whether it would be "arbitrary," as that term is used in the Easement, for the Tribe to withhold
12 consent for traffic increases that are necessary to meet statutory requirements.

13 **B. The STB Has Regulatory Authority Over the Issues**

14 These vital threshold issues were clearly "placed by Congress within the jurisdiction of
15 an administrative body having regulatory authority," *Syntek*, 307 F.3d at 781 – *i.e.*, the STB.
16 Congress created common-carrier obligations under 49 U.S.C. § 11101 and gave the STB
17 "exclusive" jurisdiction over transportation by rail carriers, including the rules, practices and
18 routes provided by common carriers. 49 U.S.C. § 10501(b). This jurisdiction is sufficient to
19 support a referral. *See Pejepsco Ind. Park, Inc. v. Maine Cent. R.R. Co.*, 215 F.3d 195, 205-06
20 (1st Cir. 2000) (holding that the district court should defer to the STB's primary jurisdiction on
21 the question of whether the railroad violated its common-carrier obligations under § 11101(b));
22 *see also United States v. Gen. Dynamics Corp.*, 828 F.2d 1356, 1365 (9th Cir. 1987)
23 (explaining that the STB's predecessor agency is well-suited for referrals under the doctrine of
24 primary jurisdiction because ICC has "quasi-legislative powers and [is] actively involved in the
25 administration of regulatory statutes."). Thus, the second prong of the four-factor test is
26 satisfied.

1 **C. ICCTA Subjects BNSF to a Comprehensive Regulatory Regime**

2 Congress expressly gave the STB broad regulatory jurisdiction over

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

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

11 49 U.S.C. §10501(b). Transportation by rail carriers, over which the STB was given regulatory
12 power under Section 10501(b), is broadly defined in 49 U.S.C. §10102(9) to include equipment
13 related to the movement of freight and services related to that movement. The STB frequently
14 exercises its regulatory authority in areas relating to the scope of railroads' common-carrier
15 obligations, a threshold issue raised by the Complaint.

16 **D. The STB's Expertise and Uniformity Are Essential to Resolution of the
17 Issues**

18 The fourth factor of the primary jurisdiction test is often the most important
19 consideration, and in this case it is easily satisfied as to each of the three issues raised by the
20 Complaint relating to regulation of BNSF's operations.

21 **1. Common Carrier Issues Are Routinely Referred to the STB.**

22 The Tribe is asking for relief which, if granted, would conflict with common-carrier
23 obligations on the rail line. Issues relating to common-carrier obligations under 49 U.S.C. §
24 11101(a) are routinely referred to the STB. As a federal court in the District of Minnesota
25 recently explained, "courts almost invariably defer to the STB's expertise regarding such
26 [section 11101-related] disputes." *Chlorine Institute, Inc. v. Soo Line R.R.*, Case No. 14-CV-
1029 (PJS/SER), 2014 WL 2195180, at *2 (D. Minn. May 27, 2014) (collecting cases). The
Minnesota court explained that such routine referral is "not surprising" given the STB's
expertise and procedural flexibility and the need for uniformity in rail service standards. *Id.*

1 Indeed, the STB has frequently been called on to address the scope of a railroad's
2 obligation for the transportation of materials considered to be hazardous, an issue directly
3 raised by the Complaint here. *See CSX*, FD 34662 (chlorine movements through the District of
4 Columbia); *UP*, FD 35219 (long-distance chlorine movements).

5 The STB has also addressed the scope of a railroad's common-carrier obligations in the
6 context of property disputes. For example, in *Yreka Western R.R. Co. v. Tavares*, No. CIV.
7 2:11-1868 WBS CMK, 2012 WL 2116500 (E.D. Cal. June 4, 2012), the Eastern District of
8 California was presented with the question whether foreclosure under a deed of trust would
9 "interfere with plaintiffs' common carrier obligations." *Id.* at *5. The federal court referred the
10 question to the STB, concluding that "[g]iven the STB's vast and unique experience in dealing
11 with such matters, it is far better suited than any court to uniformly apply national rail policy
12 and determine whether the proposed foreclosure will result in interference with, or
13 abandonment of, plaintiff's railroad operations." *Id.* (citing *Pejepscot Ind. Park*, 215 F.3d at
14 205-06 and *Buffalo Crushed Stone, Inc. v. R.J. Corman R.R. Corp.*, No. 97-CV-0875E(SR),
15 2001 WL 392075, at *4 (W.D.N.Y. Apr.10, 2001)).

16 The STB also has extensive experience applying the statutory regime of rail regulation
17 in the context of Native American land rights and interests. *See, e.g., Alaska Railroad*
18 *Corporation--Construction and Operation Exemption--Rail Line Between North Pole and*
19 *Delta Junction, AK*, FD 34658, 2010 WL 24954 at *36 (STB served Jan. 6, 2010) (adopting a
20 Plan for Tribal Consultation regarding rail construction project); *Six Counties Association of*
21 *Governments Construction and Operation Exemption Rail Line Between Levan and Salina,*
22 *Utah*, FD 34075, 2007 WL 2020032, at *24-25, 154 (Served June 29, 2007) (describing
23 extensive coordination with Tribes in carrying out environmental impact analysis); *Dakota,*
24 *Minnesota & Eastern Railroad Corp.—Construction into the Powder River Basin*, FD 33407,
25 2002 STB LEXIS 74 (Served Jan. 30, 2002) (establishing consultation procedures and
26

1 environmental mitigation conditions relating to Native American lands affected by proposed
2 rail construction).

3 **2. ICCTA Preemption Issues Are Also Regularly Referred to the STB.**

4 The STB is also best positioned to decide in the first instance whether the Tribe's
5 claims fall within the STB's exclusive jurisdiction under 49 U.S.C. § 10501(b) in whole or in
6 part. Courts have long held that the STB (like its predecessor, the ICC) has primary authority
7 to determine the scope of its regulatory authority. *See, e.g., RLTD Ry. Corp. v. Surface Transp.*
8 *Bd.*, 166 F.3d 808, 812 (6th Cir. 1999) ("This court must give considerable weight and due
9 deference to the STB's interpretation of the statutes it administers unless its statutory
10 construction is plainly unreasonable") (citations, quotations, and brackets omitted). *See also B*
11 *& S Holdings, LLC v. BNSF Ry. Co.*, 889 F. Supp. 2d 1252, 1257 (E.D. Wash. 2012) ("As the
12 agency authorized by Congress to administer the ICCTA, the [Surface] Transportation Board is
13 'uniquely qualified to determine whether state law . . . should be preempted') (brackets,
14 quotations, and citations omitted); *Green Mountain*, 404 F.3d at 642-43 (same).

15 Accordingly, courts regularly refer to the STB questions related to the scope and
16 application of section 10501(b) preemption. *See, e.g., Coastal Distribution, LLC v. City of*
17 *Babylon*, 216 F. App'x 97, 103 (2d Cir. 2007) ("we modify the preliminary injunction to allow
18 the parties to petition the STB for a declaratory judgment on the scope of its jurisdiction");
19 *Boston and Me. Corp. v. Town of Ayer*, 191 F. Supp. 2d 257, 261 (D. Mass. 2002) (explaining
20 that the case was referred to the STB under the doctrine of primary jurisdiction to decide
21 ICCTA preemption questions in the first instance); *Grafton and Upton R. Co. v. Town of*
22 *Milford*, 337 F. Supp. 2d 233, 240 (D. Mass. 2004) (staying case pending the STB's ruling on
23 the preemption questions and, "[b]y so doing, the Court upholds the intent of Congress to
24 delegate authority to that agency to adjudicate disputes regarding railroad transportation.");
25 *Tubbs*, FD 35792 (referral from Missouri state court on ICCTA preemption questions); *14500*
26 *Limited LLC – Petition for Declaratory Order*, FD 35788, 2014 STB LEXIS 136 (Served June

1 5, 2014) (referral from U.S. District Court for the Northern District of Ohio); *Eastern Alabama*
2 *Ry. LLC Petition for Declaratory Order*, FD 35583, 2012 STB LEXIS 95 (Served Mar. 8,
3 2012) (referral from U.S. District Court for the Northern District of Alabama); *Norfolk S. Ry.*
4 *Co. & the Alabama Great S. R.R. Co. Petition for Declaratory Order*, FD 35196, 2010 STB
5 LEXIS 635 (Served Feb. 26, 2010) (same); *City of Creede, Co. Petition for Declaratory Order*,
6 FD 34376, 2005 STB LEXIS 486 (Served May 3, 2005) (referral from U.S. District Court for
7 the District of Colorado).

8 Similarly, federal agencies have petitioned the STB for guidance on questions relating
9 to the ICCTA's preclusion of other federal laws. *See U.S. Environmental Protection Agency –*
10 *Petition for Declaratory Order*, FD 35803, 2014 STB LEXIS 48 (Served Feb. 26, 2014) (in
11 response to a petition filed by the EPA, the STB initiates proceedings to provide guidance on
12 whether two local rules concerning locomotive idling would be preempted if they were
13 incorporated into the state's implementation plan pursuant to the federal Clean Air Act); *see*
14 *also U.S. Environmental Protection Agency –Petition for Declaratory Order*, FD 35803, 2014
15 STB LEXIS 335 (Served Dec. 30, 2014) (providing guidance to the EPA on the preemption
16 issue and finding that the proposed local rules are likely preempted under ICCTA).

17 These referrals to the STB have the beneficial effect of promoting uniformity in
18 administering the statutory scheme. *See Tubbs*, FD 35792, at *12 (“The purpose of the
19 § 10501(b) preemption is to prevent a patchwork of state and local regulation from
20 unreasonably interfering with interstate commerce”). Primary jurisdiction referral of
21 preemption questions also permits the development of a consistent national rail policy based on
22 the agency's expert judgment. *See Norfolk S. Ry. Co. Petition for Declaratory Order*, FD
23 35701, 2013 STB LEXIS 338, at *7 (Served Nov. 4, 2013) (“in determining whether an action
24 under a state law, as applied, would unreasonably burden interstate commerce or unreasonably
25 interfere with railroad operations we inherently exercise our policy-based judgment”). The
26 STB can consider the many competing interests at stake and the implications that an

1 interpretation of Section 10501(b) may have on both the national rail network and the public at
2 large.

3 The STB's guidance on questions of ICCTA preemption has helped courts resolve cases
4 in their entirety or in part. *Compare 14500 Limited LLC*, FD 35788 (recommending that the
5 district court dismiss plaintiff's complaint) and *Boston and Me. Corp.*, 191 F. Supp. 2d at 261
6 (granting summary judgment based on the STB's preemption rulings), with *Tubbs*, FD 35792
7 (finding that ICCTA preempts plaintiffs' state law claims except to the extent that plaintiffs
8 allege that the railroad violated the federal regulations). Similarly, an STB ruling could have a
9 range of implications here: preempting the Tribe's claims in their entirety, preempting none of
10 the Tribe's claims, or preempting only certain claims. The STB has the expertise to properly
11 frame the Tribe's request in the first instance. The Court should, therefore, refer the
12 preemption issue to the STB.

13 **3. Courts Have Also Referred Questions Relating to Easement**
14 **Interpretation to the STB**

15 Even if the STB finds that the Tribe's claims are not precluded in their entirety, the STB
16 can provide guidance on the intersection between the laws and regulations administered by the
17 STB and the specific terms of the Settlement and Easement. Many of the key terms in the
18 Settlement Agreement and Easement implicate BNSF's common-carrier obligations. For
19 example, the Easement gives BNSF the right to "operate . . . the existing line of railroad . . . for
20 the transportation of general commodities" Easement, ¶6. Critically, the Settlement
21 Agreement specifies that the Easement will not "supersede any federal law or regulation as they
22 now exist or as they may be amended or changed from time to time." Settlement, ¶12. That
23 important and broad provision requires that the Easement be squared with BNSF's common-
24 carrier obligation that it "shall provide the transportation or service on reasonable request." 49
25 U.S.C. §11101(a). The Easement further provides that the Tribe will not "arbitrarily withhold
26 permission to increase the number of trains or cars when necessary to meet shipper needs."

1 Easement, ¶7(c). If any claims survive preemption, the STB is uniquely suited to explain the
2 statutory and regulatory framework and national policy considerations that will need to be
3 considered by the Court in interpreting the Settlement and Easement.

4 While the STB does not generally resolve pure contract law disputes, the STB has
5 previously provided guidance on the laws and regulations governing common carriers to assist
6 courts in interpreting contractual terms when issues relating to a railroad's common carrier
7 obligations are implicated by a contract. Indeed, the STB has provided such guidance in the
8 context of easements. *See Allied Erecting*, FD 35316, 2013 STB LEXIS 407 at *33-39
9 (explaining the federal law framework for applying easements that allegedly prevented the
10 railroad from stopping, storing or staging railcars).

11 **III. The Tribe's Claims for Monetary Relief Must Be Pursued in Arbitration**

12 The Tribe's request for monetary "damages" resulting from increases in BNSF's train
13 traffic over the Right-of-Way is an end run around the standards and procedures established in
14 the Easement for resolving disputes over the Tribe's compensation. Under the Easement, the
15 Tribe is entitled to pursue an adjustment to compensation in the event of traffic increases over
16 the Right-of-Way. Easement, ¶7(c). However, the Tribe is required to resolve any disputes
17 over such claims for an adjustment to compensation through binding arbitration. *Id.* ¶3(b)(iii).

18 The Easement has specific provisions that govern the compensation that the Tribe is
19 entitled to receive for use of the Right-of-Way. Easement, ¶¶3, 7(c). The standards and
20 procedures for determining compensation and adjustments to compensation are set out in
21 paragraphs 3(b)(iii) and 7(c) of the Easement. In paragraph 7(c), the Easement specifically
22 recognizes that compensation adjustments might be appropriate if the traffic handled by BNSF
23 over the Right-of-Way increases over time. *Id.* ¶7(c). The Easement provides: "It is
24 understood and agreed that if the number of crossings or the number of cars is increased, the
25 annual rental will be subject to adjustment in accordance with paragraph 3(b)(iii) of this Right-
26 of-Way Easement. . . ." *Id.* ¶7(c). The standards and procedures for determining the adjusted

1 compensation are set out in paragraph 3(b)(iii) of the Easement, which expressly gives the
 2 Tribe the right to “initiate an appraisal adjustment under paragraph 7.c of this Right-of-Way
 3 Easement.” *Id.* ¶3(b)(iii). That paragraph of the Easement also provides that disputes over
 4 adjustments to the Tribe’s compensation are to be resolved “in accordance with the
 5 Commercial Arbitration Rules of the American Arbitration Association and the provisions set
 6 forth herein by binding arbitration.”²

7 The Tribe cannot avoid the arbitration provision of the Easement by styling its request
 8 for a compensation adjustment as “damages” for a breach of the Easement. In plain terms, the
 9 Tribe is seeking to be compensated for the fact that traffic volumes have increased over the
 10 Right-of-Way. The Easement provides both the means to obtain such compensation and the
 11 applicable standards, and the Tribe should be required to pursue its compensation claims as
 12 provided in the Easement, including through arbitration.³

13
 14 _____
 15 ² The Settlement contains the same provisions to arbitrate increases in train traffic. *See*
 Settlement, ¶2(b)(iii).

16 ³ BNSF sees no basis for the Tribe to dispute its obligation to arbitrate its demand for money.
 17 Were the Tribe to challenge arbitrability, this Court would still have to dismiss or stay the
 18 damages claim, because the parties’ arbitrability disputes are allocated to the arbitrator. When
 19 there is purported ambiguity in the scope of an arbitration clause, the question of arbitrability is
 20 to be addressed by the arbitrators in cases such as this where the arbitration provision
 21 incorporates the rules of the American Arbitration Association (“AAA”). This is because “the
 22 favored approach among circuit courts is to interpret incorporation of AAA rules as ‘clear and
 23 unmistakable’ delegation of the question of arbitrability of to the arbitrator.” *Brennan v. Opus*
 24 *Bank*, No. 2:13-cv-00094-RSM, 2013 WL 2445430, *6 (W.D. Wash. June 5, 2013). *See, e.g.,*
 25 *Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1074 (9th Cir. 2013) (“Virtually every
 26 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”); *Fadal Machining Centers, LLC v.*
Compumachine, Inc., 461 F. App’x 630, 631-32 (9th Cir. 2011) (affirming district court’s
 conclusion that questions of arbitrability were for the arbitrator due to incorporation of AAA
 Rules); *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009) (“we conclude that the
 arbitration provision’s incorporation of the AAA Rules, like the incorporation of the NASD
 Code in FSC, constitutes a clear and unmistakable expression of the parties’ intent to leave the
 question of arbitrability to an arbitrator.”); *Crook v. Wyndham Vacation Ownership, Inc.*, No.
 13-CV-03669-WHO, 2013 WL 6039399, at *6 (N.D. Cal. Nov. 8, 2013) (parties’ use of AAA
 makes the arbitrator the decision-maker on arbitrability issues). Here, as noted above, the
 Easement incorporates the AAA rules. Easement, ¶3(b)(iii).

1 Motions to dismiss pursuant to an arbitration clause in a contract are to be treated as a
2 motion to dismiss for improper venue under Fed. R. Civ. P. 12(b)(3). *See Argueta v. Banco*
3 *Mexicano, S.A.*, 87 F.3d 320, 324 (9th Cir. 1996); *Brennan*, 2013 WL 2445430, at *8
4 (dismissing pursuant to Rule 12(b)(3) in favor of arbitration). “An agreement to arbitrate
5 before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits
6 not only the situs of suit but also the procedure to be used in resolving the dispute.” *Scherk v.*
7 *Alberto-Culver*, 417 U.S. 506, 519 (1974). Since the Easement provides for arbitration of
8 disputes regarding the amount of compensation to which the Tribe is entitled for increases in
9 traffic over the Right-of-Way, the Tribe’s request for damages resulting from such changes in
10 traffic flows should be dismissed under Rule 12(b)(3).

11 CONCLUSION

12 BNSF respectfully requests that the Court dismiss the Complaint without prejudice
13 under the doctrine of primary jurisdiction so that the parties can present the following three
14 questions to the STB:

15 1. Is the Tribe asking for relief that would conflict with the statutes and regulations
16 that govern operations on a rail line that is part of BNSF’s common carrier rail network by
17 seeking to restrict BNSF’s ability to respond to the needs of shippers on the Anacortes Branch?

18 2. Should the conflict between the statutes and regulations administered by the
19 STB and the Tribe’s claims result in complete or partial preemption of those claims under 49
20 U.S.C. §10501(b), which preempts all state and federal claims for relief that seek to regulate
21 rail operations?

22 3. If any claims survive preemption, what is the scope and meaning of the federal
23 law requirements referred to in the Settlement and Easement that the Court will need to
24 consider in interpreting the Easement’s terms?

1 Dismissal of the Complaint without prejudice is also appropriate because it will allow
2 the Tribe to pursue its claims for alleged “damages” from BNSF’s traffic changes in arbitration
3 under the arbitration provision in the Easement.

4 Alternatively, the Court should stay further proceedings to give the STB an opportunity
5 to address unique federal regulatory questions underlying the Complaint and while the Tribe’s
6 AAA arbitration proceeds.

7 Respectfully submitted this 14th day of May, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on May 14, 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 14th day of May, 2015.

s/ *Stellman Keehnel*
Stellman Keehnel, WSBA No. 9309

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