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

PLAINTIFF'S MOTION FOR RECONSIDERATION

NOTE ON MOTION CALENDAR: Friday, January 27, 2017

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

Page(s)

Cases

Statutes

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

Other Authorities

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

I. INTRODUCTION

In its Order Regarding Cross-Motions for Summary Judgment ("Order"), the Court concluded (1) that Plaintiff Swinomish Indian Tribal Community (the "Tribe") asserts a "state law" claim for injunctive relief against BNSF Railway Company ("BNSF") for BNSF's overburdening of its right-of-way easement over the Tribe's property, which state law claim is preempted by the Interstate Commerce Commission Termination Act ("ICCTA"), and (2) that the Court has no authority to grant the Tribe injunctive relief under the Indian Right-of-Way Act ("IRWA"). The Tribe respectfully requests that the Court reconsider its findings and conclusions pertaining to these issues, which were not the subject of either party's briefing. First, with all due respect to the Court, there are no state law claims at issue in this lawsuit. All of the Tribe's claims are based on federal law, and the Court is fully empowered to grant the Tribe injunctive relief under federal common law, which protects the Tribe's treaty-based property interests. Second, nothing in the IRWA or its implementing regulations states that that statute preempts or supplants the Tribe's federal common law remedies or that it provides an exclusive remedy for a violation of the IRWA. On the contrary, the regulations explicitly state that unauthorized use of an existing right-of-way is a trespass, and that "Indian landowners may pursue any available remedies under applicable law" — which includes federal common law — to address such a trespass. 25 CFR § 169.413.[1]

Federal Rule of Civil Procedure 60(b)(6) provides that the Court may relieve a party from an order "for any . . . reason that justifies relief." In this case, the Tribe respectfully submits that relief is justified here, where neither party submitted briefing on legal issues that were critical to the Court's ruling. The Tribe thus requests that the Court reconsider its Order.

[1] Procedural provisions of the 2016 regulations apply to existing easements. Order, pg. 13 n.3.

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

II. ARGUMENT

A. No State Law Claims Are at Issue in This Case

The Court concluded in the Order that "a state law claim that would effectively require a common carrier to discriminate against a particular type of cargo and/or a particular region burdens interstate commerce and is therefore preempted. A significant portion of the relief requested by the Tribe is therefore unavailable in this forum . . . ." Order, pg. 10:13-15 (emphasis added).[2] The Tribe respectfully submits that the Court erred in characterizing any of the Tribe's claims — including its request for injunctive relief — as state law claims. On the contrary, all of the Tribe's claims in this matter rest entirely on federal law. The Tribe is suing to protect its interests in land that, pursuant to treaty, is held in trust for the Tribe by the United States government. The Tribe's claims are based on a contract — to which the United States is a party, entered into pursuant to federal statute and regulations in settlement of a federal court lawsuit based on federal law — as well as on federal common law.

As an initial matter, 28 USC § 1331 provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Similarly, 28 USC § 1362 provides: "The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." Under these statutes, federal question jurisdiction exists where the plaintiff's cause of action is based on the Constitution, laws, or treaties of the United States.

There is no dispute that the Court has federal question jurisdiction here. In bringing this lawsuit, the Tribe sees to protect property interests that are based on treaty as well as federal statute. As it stated in its motion for summary judgment, the Tribe is a federally-recognized

[2] *See also* Order, pg. 6:11-13 ("The cross-motions for summary judgment raise three separate issues … (2) whether the ICCTA preempts the Tribe's state law claims . . ."); pg. 10:24-25 ("The Tribe argues that, regardless of the preemptive effect that the ICCTA may have on its state law claims . . ."); and pg. 17 n. 5 ("[T]he Tribe's state law claims for injunctive relief are preempted because that relief would regulate rail transportation.") (emphasis added to each quotation).

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

Indian tribe organized under the Indian Reorganization Act of 1934, 25 U.S.C § 476. *See* Plaintiff's Amended Motion for Summary Judgment, pg. 2. It is a successor to signatories of the Treaty of Point Elliott of 1855, 12 Stat. 927 (1855), which established the Swinomish Reservation (the "Reservation"). The lands on the Reservation that are the subject of this lawsuit are held in trust for the Tribe by the United States. *Id*. The Treaty set aside the Reservation for the Tribe's "exclusive use." *Id*. Moreover, the case involves a right-of-way easement entered into under the auspices of IRWA, a federal statute. All of the Tribe's rights — and BNSF's duties — under that agreement are predicated entirely on federal law.

It has long since been settled that Indian relations are "the exclusive province of federal law." *Oneida County v. Oneida Indian Nation of N.Y. (Oneida II)*, 470 U.S. 226, 234 (1985) (citing *Oneida Indian Nation of N.Y. v. Oneida County (Oneida I)*, 414 U.S. 661, 667 (1974)). Accordingly, where a tribe's treaty-based property rights are at stake, federal law — not state law — applies. As the United States Supreme Court has made clear: "Once the United States was organized and the Constitution adopted, these tribal rights to Indian lands became the exclusive province of the federal law." *Oneida I*, 414 U.S. at 667. "[F]ederal law now protects, and has continuously protected from the time of the formation of the United States, possessory rights to tribal lands, wholly apart from the application of state law principles which normally and separately protect a valid right of possession." *Id*.

The Supreme Court has held unequivocally that Indian tribes have a federal common law right to sue to protect their possessory interests in their lands. *Oneida II*, 470 U.S. at 235-36. "Thus, as we concluded in *Oneida I*, 'the possessory right claimed [by the Oneidas] is a *federal* right to the lands at issue in this case.'" *Id*. at 235 (quoting *Oneida I*, 414 U.S. at 671). "In keeping with these well-established principles, we hold that the Oneidas can maintain this action for violation of their possessory rights based on federal common law." *Id*. at 236. *See also Round Valley Indian Hous. Auth. v. Hunter*, 907 F. Supp. 1343 (N.D. Cal. 1995) ("An action involving an Indian *tribe's* — as opposed to an individual tribe member's — possessory

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

rights of trust land would, unquestionably create a question of federal common law.") (citing *Oneida I*, 414 U.S. at 677) (emphasis in original).

Therefore, there can be no dispute that there are no state law claims at issue in this litigation. As the Tribe's counsel stated in oral argument on the summary judgment motions, "[w]e are not dealing with state laws or tort claims." Verbatim Report of Proceedings, Motion Hearing, Dec. 15, 2016 ("Verbatim Report"), pg. 4:8-9. On the contrary, all of the Tribe's claims are predicated on federal law. Indeed, the case would have been removed to federal court if the Tribe had brought it in state court. By way of illustration, in *United States v. Pend Oreille Pub. Util. Dist. No. 1*, 28 F.3d 1544 (9th Cir. 1994), in the context of a trespass action brought by the Kalispel Indian Tribe and the United States government against a local utility district, the court held that, because the action was based on federal common law, the district court erred in calculating damages pursuant to Washington state law. 28 F.3d at 1549-50, 1549 n. 8.

For that reason, as the Tribe stated in its summary judgment motion, the case of *United States v. Baltimore & Ohio R.R. Co.*, 333 U.S. 169 (1948), is simply inapposite because it involved state law claims; it did not involve an Indian tribe seeking to protect its treaty-protected property interests under federal law.

Moreover, it is important to note that the Tribe's rights are not only based on the IRWA, but more broadly and fundamentally on treaty-based possessory interests which, as discussed below, are protected by federal common law. The Tribe's rights are of course premised in part on the IRWA, but also on the general principle that as an occupant of treaty-reserved trust lands, the Tribe has the right under federal law to place conditions on non-Tribe-members' entry onto the land, and to exclude any who do not abide by those conditions. As the Tribe noted in its summary judgment motion:

> 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."

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

> *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).

Plaintiff's Amended Motion for Summary Judgment, pg. 22, n. 6.

In other words, the Tribe has underlying federally-protected property rights that form the basis for the more specific protections afforded by the IRWA and its implementing regulations. Those federal laws augment the body of federal common law that has protected Indian interests since the formation of the United States. Indeed, as the Court itself stated in the Order: "In 1948, Congress enacted the IRWA to make clear that a right of way across tribal lands can be obtained only with the Tribe's consent." Order, pg. 13 (emphasis added). Moreover, in holding that the ICCTA does not preempt IRWA, the Court implicitly — and correctly — held that it does not supersede the Tribe's treaty-protected rights: "Nor do the surrounding legislative, judicial, or agency pronouncements support the conclusion that Congress intended to abrogate tribal rights granted by treaty and statute." *Id*. at pg. 14.

B. The Court Has Authority To Grant Relief to the Tribe Pursuant to Federal Common Law

Thus, even putting aside the Tribe's rights under IRWA, there is no question that the Court has the authority to grant the Tribe relief based on federal common law. As the Tribe pointed out in its summary judgment briefing, by exceeding the limitations contained in the Easement Agreement, BNSF has committed a trespass. *See* Omnibus Response to BNSF Railway Company's Motion for Summary Judgment and Reply in Support of Swinomish Indian Tribal Community's Motion for Summary Judgment, pg. 19 (citing *Sanders v. City of Seattle*, 160 Wn.2d 198, 215, 156 P.3d 874 (2007)).

This characterization is explicitly confirmed by the regulations promulgated under the IRWA and elsewhere. As 25 CFR § 169.413 states: "An unauthorized use within an existing right of way is . . . a trespass." And, as 25 CFR 169.2 provides: "Trespass means any unauthorized occupancy, use of, or action on tribal or individually owned Indian land or BIA

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

land." (Emphasis added). *See also* 25 CFR 166.4 ("Trespass means any unauthorized occupancy, use of, or action on Indian lands."); 25 C.F.R. 166.800 ("[T]respass is occupancy, use of, or action on Indian agricultural lands.").[3]

There is no dispute that BNSF is engaged in an unauthorized use of the Tribe's property. Plainly, BNSF's use of the right-of-way was governed by and limited by the easement agreement. The Tribe consented only to a certain level of use on the right-of-way. BNSF has indisputably exceeded the agreed-upon limitations; consequently, BNSF is indisputably using and conducting actions on the right-of-way that have never been authorized. Under the regulations cited above, this is the very definition of trespass.[4]

Just as it does with all actions relating to Indians' property rights, "[f]ederal common law governs an action for trespass on Indian lands." *United States v. Milner*, 583 F.3d 1174, 1182 (9th Cir. 2009) (citing *United States v. Pend Oreille Pub. Util. Dist. No. 1*, 28 F.3d 1544, 1549 n. 8 (9th Cir. 1994)). And, under federal common law, the Court has at its disposal numerous remedies to resolve a trespass claim: "The Supreme Court has recognized a variety of federal common law causes of action to protect Indian lands from trespass, including actions for ejectment, accounting of profits, and damages." *Pend Oreille*, 28 F.3d at 1549 n.8. As the Supreme Court has long since made clear, "[t]hat an action of ejectment could be maintained on an Indian right to occupancy and use, is not open to question." *Oneida II*, 470

[3] Other authorities also support this proposition: "[T]he holder of an easement commits a trespass by exceeding one's rights under the easement, such as by misuse or deviating from an existing easement, to the extent of the unauthorized use." 75 Am. Jur. 2d Trespass § 63 (2016) (citing *Tice v. Herring*, 717 So.2d 181 (Fla. Ct. App. 1998); *Shadewald v. Brule*, 570 N.W.2d 788 (Mich. Ct. App. 1997); *Reinbott v. Tidwell*, 191 S.W.3d 102 (Mo. Ct. App. 2006); *Olympic Pipe Line Co. v. Thoeny*, 101 P.3d 430 (Wash. Ct. App. 2004)). *See also Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 735, 745 (10th Cir. 2005) (concluding that use of right-of-way across federal lands in excess of scope of grant of right-of-way may, depending on extent, constitute trespass and remanding to district court for factual determination); *Barfield v. Sho-Me Power Elec. Co-op*, 10 F. Supp. 3d 997, 1008 (2014) ("Under Missouri law, trespass occurs either by unauthorized entry on land or by exceeding the scope of any license to enter upon the land.").

[4] It is important to emphasize that the Tribe is not simply "seeking an injunction precluding certain types of cargo over the reservation," as stated in the Order; the Tribe is seeking an injunction requiring BNSF to abide by the traffic limitations contained in the Easement Agreement. As the Tribe's counsel stated at the summary judgment hearing, "our objection to this request is not merely because it's Bakken. Our objection to this request is because it's a five-fold increase to Tesoro. And if you add Shell, it's another four. And we built our economic center based on the understanding that there would be a limitation in this easement." Verbatim Report, pg. 18:7-12.

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

U.S. at 235 (quoting *Marsh v. Brooks*, 8 How. 223, 232, 12 L.Ed. 1056 (1850)). *See also United States v. Torlaw Realty*, 483 F. Supp. 2d 967, 973 (C.D. Cal. 2007) ("Remedies for trespass under federal common law include: ejectment and damages . . . .").

Thus, for example, in *United States v. Pend Oreille Pub. Utility Dist. No. 1*, *supra*, the United States government and the Kalispel Tribe brought a trespass action, seeking damages and an injunction in connection with a public utility district's flooding of land on the Kalispel Indian Reservation. *Pend Oreille*, 28 F.3d at 1547. The court held that it was inappropriate for the district court to have denied the tribe's request for injunctive relief. *Id*. at 1551.

Likewise, in *United States v. Torlaw Realty*, *supra*, the court held that it was proper to enjoin the unauthorized operation of a waste disposal facility by non-allottees on allotted land located on the Torres Martinez Desert Cahuilla Indian Reservation. *Torlaw Realty*, 483 F. Supp. 2d at 973. As the court stated, "[t]he United States can recover damages and obtain a permanent injunction to remove 'the encroachment' in an action for trespass." *Id*. at 973 (citing *United States v. Imperial Irrigation Dist.*, 799 F. Supp. 1052, 1068-70 (C.D. Cal. 1992)). *See also Eastern Band of Cherokee Indians v. Griffin*, 502 F. Supp. 924, 931 (W.D. N.C. 1980) (permanently enjoining individual tribe members from remaining in possession of property granted to the North Carolina Department of Transportation for a right of way); *United States v. West*, 232 F.2d 694, 699 (9th Cir. 1956) (in trespass action brought by the United States government as trustee to preclude the defendants from grazing livestock on Fort Apache Indian Reservation, holding government was entitled to an injunction restraining any further trespass). *Cf. United States v. Milner*, 583 F.3d 1174, 1181-82, 1191, 1193-94 (9th Cir. 2009) (in action by federal government and the Lummi Nation seeking, in part, removal of certain "shore defense structures" from tribal tidelands held in trust for the Lummi Nation, holding that the construction of structures constituted trespass, and affirming the district court's injunction requiring removal of the structures).

Here, again, BNSF's trespass is the use of and activities of the right-of-way in excess of the consent supplied by the Tribe — it is "an unauthorized use within an existing right-of-

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

way." Abatement of the trespass would simply involve an order requiring BNSF to cease and desist the unauthorized use. Based on the foregoing authorities, the Court is fully empowered to do so.

C. IRWA Does Not Provide the Exclusive Remedy for BNSF's Overburdening of the Right-of-Way Easement

Finally, the Tribe respectfully disagrees with the Court's conclusion that the Tribe's only injunctive remedy is to request that the Bureau of Indian Affairs of the Interior Department ("BIA") terminate the right-of-way easement.

As discussed above, while the IRWA defines many of the specific rights and obligations of the parties in connection with the easement agreement, it is not the sole basis for the Tribe's federal property rights. *See* Order, pg. 12:20 ("The rights the Tribe seeks to assert arise out of both a treaty and a federal statute."). Again, the IRWA confirms and supplements the already-existing rights of the Tribe to place conditions on non-Indians' entry onto Tribal lands, and to exclude all who fail to comply with those conditions. In no way does the IRWA provide the Tribe's exclusive remedies, nor does it preempt the Tribe's ability to protect its property rights under the federal common law principles discussed above.

On the contrary, the IRWA regulations explicitly state that the Tribe's remedies for BNSF's overburdening of the right-of-way are not limited to action by the BIA but, rather, that the Tribe "may pursue any available remedies under applicable law." As 25 CFR § 169.413 states:

> If an individual or entity takes possession of, or uses, Indian land or BIA land without a right-of-way and a right-of-way is required, the unauthorized possession or use is a trespass. An unauthorized use within an existing right-of-way is also a trespass. We may take action to recover possession, including eviction, on behalf of the Indian landowners and pursue any additional remedies available under applicable law. The Indian landowners may pursue any available remedies under applicable law, including applicable tribal law.

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

(Emphasis added.) Plainly, under the authorities discussed above, "applicable law" includes federal common law. Thus, it is clear that the Tribe's remedies for BNSF's unauthorized activities on the right-of-way include injunctive relief in this forum.

Even in the absence of this explicit recognition, the IRWA in no way supplants or supersedes the Tribe's rights under federal common law. In *Oneida II*, Oneida County argued that the Oneida Indian Nation's federal common law remedies to protect its property interests were preempted by the Nonintercourse Act. The Supreme Court disagreed: "In determining whether a federal statute pre-empts common-law causes of action, the relevant inquiry is whether the statute '[speaks] *directly* to [the] question' otherwise answered by federal common law." *Oneida II*, 470 U.S. at 236-37 (quoting *Milwaukee v. Illinois*, 451 U.S. 304, 315 (1981)) (emphasis in original).

There is nothing whatsoever in the IRWA itself that directly addresses the remedies available to a tribe if the grantee of a right-of-way fails to adhere to the conditions of the grant. While the IRWA's implementing regulations discuss certain actions *the BIA* "may" take if a grantee fails to comply with the right-of-way grant, nothing in those regulations provides *the Tribe* with a direct right of action to remedy BNSF's overburdening of the easement, other than to seek to vindicate its rights under federal common law. And just as the Court found that Congress did not intend through the ICCTA to abrogate the Tribe's treaty right of exclusive use or repeal the IRWA, Order, pg. 14:17-19, so too nothing in the IRWA regulations suggest they were in any way intended to supplant or abrogate the Tribe's common law remedies, or that a request for BIA termination is the Tribe's exclusive remedy.[5] And indeed, again, the regulations are explicitly to the contrary.

[5] The same is even more true of the ICCTA. In *Oneida II*, the Supreme Court concluded that "the Nonintercourse Act of 1793 did not establish a comprehensive remedial plan for dealing with violations of Indian property rights," and therefore that "the Nonintercourse Act does not address directly the problem of restoring unlawfully conveyed land to the Indians." 470 U.S. at 237-39. The ICCTA likewise contains no remedial provision for violation of Indian property rights or restoring land to Indians. Therefore, like the Nonintercourse Act, the ICCTA does not preempt the Tribe's common law rights of action that protect Indian property rights. *Id.* at 240.

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

Moreover, the IRWA and its implementing regulations provide little in the way of remedy for BNSF's overburdening of the right-of-way. The regulations provide that the BIA "may" terminate the right-of-way for failure to comply with the conditions of the grant, but other than threatening outright termination, the agency has no authority to compel specific compliance. There is no dispute resolution or enforcement mechanism other than termination. Unlike the Court, the BIA cannot order BNSF to comply. (In fact, the BIA or the Tribe would need to petition this Court to compel BNSF to cease operations on the right-of-way if the BIA did, in fact, terminate the easement.) Further, in the absence of Court action, the parties are left with an either/or proposition: Either BNSF may keep doing what it is doing, with no regard for the Tribe's rights, or the BIA may terminate the right-of-way entirely. There is no means to require BNSF to simply comply with the limitations to which it voluntarily agreed. In this Court, there is such a means: an injunction under federal common law ordering BNSF to cease and desist its unauthorized use of the Tribe's property.

And indeed, the easement agreement itself contemplates court action under certain circumstances. Specifically, if BNSF holds over after termination of the right-of-way grant and fails to make monetary payments during the holdover period, the Tribe is authorized to seek redress with any court of competent jurisdiction (i.e., this Court). *See* Declaration of Christopher Brain (Docket #33), at Ex. 29, pg. 7.

Finally, requiring the Tribe to go to the Department of Interior to request termination of the right-of-way is not an efficient use of any of the parties' resources. Plainly, BNSF would contest any efforts by the BIA to terminate the right-of-way, presumably reprising the same arguments it has already made to this Court. Because the BIA has no power to enforce a termination by physically ejecting BNSF from the right-of-way other than bringing a court action (*see, e.g.*, 25 CFR § 169.410), this matter would very likely be back before this Court — for the fourth time — this time in the context of a request for affirmation of the BIA's determination and for an injunction to enforce it. Meanwhile, BNSF would continue to flout the Tribe's property rights, just as its predecessors did for the first 100 years.

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

III. CONCLUSION

For the foregoing reasons, the Tribe respectfully requests that the Court reconsider its findings and conclusions that the Tribe is asserting state law claims and that the Court is not empowered to grant the Tribe injunctive relief. All of the Tribe's claims are inherently federal, and the Court is fully authorized under federal common law to provide the relief the Tribe seeks.[6]

[6] Further, one of the bases for the Court's ruling that the Tribe's claims for injunctive relief are preempted was that injunctive relief would unreasonably burden interstate commerce. While the parties may have implicitly assumed that this is the case for purposes of the preemption arguments in the summary judgment briefing, this is a factual issue that the Tribe has not conceded. And, as the Court observed in the Order, it is the railroad's burden to show that enforcement of a voluntary contract unreasonably burdens interstate commerce, since the existence of such a voluntary agreement gives rise to an assumption that the railroad can perform without adversely impacting its common carrier obligations. Order, at pg. 8 and 9:3-6 (citing *Pejepscot Indus. Park, Inc. v. Me. Central R.R. Co.*, 297 F. Supp. 2d 326, 333 (D. Me. 2003)). Here, BNSF submitted the Verified Statement of Keith M. Casey ("Casey Statement"), which had been filed in support of Tesoro Refining and Marketing Company's petition to the Surface Transportation Board, as Exhibit P to the Declaration of Andrew Escobar (Docket #64-16). Mr. Casey stated there only that shipment of Bakken crude by rail is more "economically attractive" (i.e., profitable) than other sources. *See* Casey Statement at ¶¶ 5, 20. The Court did not determine that this evidence met BNSF's burden, and it does not follow that relying on less profitable sources, via maritime shipment, pipeline, or otherwise, unreasonably burdens interstate commerce. This is a factual matter for resolution by the Court when making a final determination on the issue of preemption of injunctive relief, assuming the Court determines that the Tribe is indeed asserting claims that are subject to preemption. While there might be some financial cost involved in relying on such non-rail sources of crude, that is no different than the situation in *PCS Phosphate Co., Inc. v. Norfolk S. Corp.*, 559 F.3d 212 (4th Cir. 2009), discussed in the Order at pp. 8-9, in which a promise to relocate a rail line to an alternative location was found enforceable and not pre-empted. As in *PCS Phosphate*, the additional cost is a risk that BNSF accepted reflecting a market calculation when it agreed to the express limitations on train traffic in the easement agreement in order to secure the lawful right to transport any cars at all across the Reservation. Order, pg. 8-9.

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

DATED this 27th day of January, 2017.

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

CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2017, 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 27th day of January, 2017.

/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