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

BNSF'S OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION

RE-NOTED FOR:
Friday, February 10, 2017

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I. The Tribe's Motion for Reconsideration Does Not Clear LCR 7(h)'s High Bar

Under LCR 7(h)(1), reconsideration motions are disfavored and will be granted only upon a showing of: (1) "new facts or legal authority which could not have been brought to [the court's] attention earlier with reasonable diligence" or (2) a "showing of manifest error in the prior ruling." LCR 7(h)(1); *see also Akmal v. U.S.*, 2014 WL 1744271, at *1 (W.D. Wash. Apr. 30, 2014) (reconsideration is an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources"). "Newly minted theories and claims do not justify reconsideration." *Dellelo v. Hoover*, 2010 WL 55851, at *1 (W.D. Wash. Jan. 4, 2010); *see Rispoli v. King Cty.,* 2005 WL 3454409, at *1 (W.D. Wash. Dec. 16, 2005) (denying reconsideration motion because argument could have been, but was not, raised in summary judgment briefing). And "manifest error" is error that is "plain and indisputable, and that amounts to a complete disregard of the controlling law or the credible evidence in the record." *Casteel v. Charter Commc'ns Inc.*, 2014 WL 6751219, at *1 (W.D. Wash. Dec. 1, 2014). An error is "manifest" only if it is material to the order's outcome. *See Gerlach v. City of Bainbridge Island*, 2012 WL 4903267, at *1 (W.D. Wash. Oct. 16, 2012).[1]

A. The Tribe Could Have Raised All of Its Reconsideration Arguments in the Prior Summary Judgment Briefing or at the December 15, 2016 Hearing

The Motion is based entirely on new arguments that the Tribe could have, but did not, raise in its 54 pages of summary judgment briefing or during the two-hour hearing on December 15, 2016. Instead, the Tribe simply changes tack to circumvent the Court's recognition that ICCTA and binding Supreme Court precedent bar the Tribe from enjoining the unit-train traffic. Whereas previously the Tribe argued that IRWA supplies the basis for its requested injunctive relief, its Motion now moves away from IRWA and instead argues that

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[1] Tellingly, the Tribe never addresses LCR 7(h)'s high standard and generically invokes Rule 60(b)(6). That catch-all provision—if it applies at all—is equally unforgiving. *See Akmal*, 2014 WL 1744271, at *2 ("Rule 60(b)(6) is a catch-all provision that should be used sparingly as an equitable remedy to prevent manifest injustice."); *Casteel*, 2014 WL 6751219, at *1 ("Neither the Local Civil Rules nor the Federal Rules of Civil Procedure ... is intended to provide litigants with a second bite at the apple. A motion for reconsideration should not be used to ask a court to rethink what the court had already thought through—rightly or wrongly.").

federal common law authorizes the requested injunction. This new theory is untimely raised and legally flawed.

Until its motion for reconsideration, the Tribe consistently argued that its rights in this litigation are governed by IRWA; it never once suggested that federal common law might serve as a *separate* basis for the requested injunction. *See, e.g.*, Dkt. No. 11 at 9:26–10:1 ("the Tribe's rights are governed by the IRWA"); Hearing Trans. at 3:13–17, 51:12–52:4. And, in contrast to what it argues here, the Tribe previously asserted that its rights as a federally recognized Indian tribe were codified in IRWA. *See* Dkt. No. 65 (discussing general federal rights of Indian sovereignty and stating, "[t]he provisions of the IRWA and implementing regulations—giving the Secretary of the Interior the right to place conditions on the right-of-way grant, codifying the necessity of tribal consent, and confirming the right to terminate the grant if the grantee fails to comply with those conditions—rest on this very principle"). In the wake of the Order, which correctly recognizes that IRWA does not supply a basis for injunctive relief, the Tribe pivots to claim that federal common law provides a valid basis for an injunction. The Motion never explains why the Tribe did not raise this argument previously. This kind of "newly minted theory" is exactly what LCR 7(h)(1) disfavors, and the Tribe's Motion should be denied on this basis.[2]

B. There Is No Manifest Error—or Any Error at All—in the Court's Ruling that the Tribe's Request for Injunctive Relief Is Preempted

The Tribe contends that this Court erred in holding that injunctive relief is "unavailable

[2] The Tribe also raises a new argument—in a footnote—that BNSF's motion should have been denied because a factual dispute exists regarding the level of interference an injunction would have on shippers' needs. Mot. at 11 n.6. This argument also runs squarely into LCR 7(h)'s directive that reconsideration be confined to arguments that could not have been raised previously. *See Rispoli*, 2005 WL 3454409, at *1 (refusing to entertain factual dispute argument raised for first time on reconsideration). BNSF repeatedly stated in its summary judgment briefing that limiting rail traffic across the Easement would interfere with shippers' needs, and the Tribe never disputed this claim or BNSF's evidence to support it. *See, e.g.*, Dkt. No. 63 at 20. Having failed to dispute the issue, the interference with rail transportation is, by definition, undisputed. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). The Tribe conceded at oral argument that "<u>The Tribe submits there are no material issues of fact</u>." Hearing Trans. at 16:21.

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in this jurisdiction," Order at 17:11, because the Court incorrectly characterized the Tribe's federal common-law claims as state-law claims. The Tribe's position on the law governing its claims draws a distinction without practical difference for purposes of the Order. Nowhere does the Tribe explain why Congress would regard a federal common-law cause of action as different from a state-common-law cause of action in this context when, either way, the remedy sought "flies in the face of the anti-discrimination purposes for which the Interstate Commerce Act was first enacted." Order at 10:8–9. Today, ICCTA broadly and expressly preempts, among other things, common-law "remedies provided under ***Federal* or State law**." 49 U.S.C. § 10501(b) (emphasis added); *see infra* Part II. Because an injunction "limiting the type of cargo or the number of trains or cars crossing the reservation," Order at 17:9–10, would necessarily burden interstate rail transportation, Order at 9–10, the Court correctly concluded that no such injunction is available, no matter how the Tribe frames its common-law claims. And because it makes no difference to the summary judgment outcome whether federal or state common law is applied, the Motion is no occasion for the Court to decide the choice-of-law issue the Tribe poses. *See, e.g.*, *Int'l Admins., Inc. v. Life Ins. Co. of N. Am.*, 753 F.2d 1373, 1376 n.4 (7th Cir. 1985) ("Conflicts rules are appealed to only when a difference in law will make a difference to the outcome."). Thus, the Motion does not raise a "manifest" error that permits reconsideration.

II. Federal Common-Law Claims Must Yield to ICCTA's Preemption Provision

The Tribe's Motion for Reconsideration explains at length that Indian tribes usually "have a federal common law right to sue to protect their possessory interests in their lands." Motion at 3:19–20. Under *Oneida Cty. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226 (1985) ("*Oneida II*"), a trespass action brought by an Indian tribe usually is governed by federal common law. But Congress can displace or modify federal common law by enacting a statute to eliminate causes of action or remedies that might otherwise be available, just as Congress can preempt state-law causes of action or remedies. That is what Congress has done here:

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ICCTA, like its statutory predecessors, displaces common-law remedies—state *or* federal—that would effectively regulate interstate commerce. For that reason, even though an Indian tribe would ordinarily be able to pursue injunctive relief under a federal common-law possessory claim (much as any landowner would ordinarily be able to pursue injunctive relief under a state common-law possessory claim), the Tribe may not do so here.

A. Federal Statutes Provide the Rule of Decision Over Federal Common Law

Although "[t]here is no federal general common law," *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), federal courts continue to fashion federal common law in certain areas of national concern. This judge-made law operates to "fill in 'statutory interstices,'" and sometimes provides a federal cause of action when none is provided by statute. *Amer. Elec. Power Co. v. Conn.*, 564 U.S. 410, 420–21 (2011). But "[f]ederal common law is used as a 'necessary expedient' when Congress has not 'spoken to a particular issue.'" *Oneida II*, 470 U.S. at 237 (quoting *Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981)). A court "cannot read federal common law into a statute if [the court] determine[s] it is contrary to congressional intent." *AmeriPride Servs. Inc. v. Texas E. Overseas Inc.*, 782 F.3d 474, 485 (9th Cir. 2015).

In determining whether federal common law provides a cause of action—and concomitant remedy—courts have relied on three general principles. First, as with federal preemption of state law, if a federal statute expressly displaces federal common law, that direction from Congress is dispositive. *See, e.g.*, *Barany v. Buller*, 670 F.2d 726, 735 (7th Cir. 1982) ("[W]here federal statutory or regulatory provisions expressly preclude a remedy which federal common law provides, the common-law remedy does not continue to be available."); *see also Milwaukee*, 451 U.S. at 313–14 ("[F]ederal common law is subject to the paramount authority of Congress [and] is resorted to in absence of an applicable Act of Congress.") (internal quotation marks and brackets omitted).

Second, when a statute lacks a provision expressly displacing federal common law, courts look to congressional intent expressed in federal statutes. *See, e.g.*, *Exxon Shipping Co.*

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v. Baker, 554 U.S. 471, 489 (2008) (examining congressional intent to determine whether the Clean Water Act displaced the availability of certain kinds of damages under federal maritime common law); *United States v. Northrop Corp.*, 59 F.3d 953, 958 (9th Cir. 1995) ("Even if federal common law otherwise would operate, it is displaced when Congress has decided the matter."). Thus, for example, where Congress has signaled an intent to "occup[y] the field through the establishment of a comprehensive regulatory program," federal common law must yield to the relevant federal statutes. *Milwaukee*, 451 U.S. at 316–18.

Third, even where "there is an established and continuing tradition of federal common lawmaking"—such as in admiralty—"that law is to be developed, insofar as possible, to harmonize with the enactments of Congress in the field." *Am. Dredging Co. v. Miller*, 510 U.S. 443, 455 (1994); *see also Miles v. Apex Marine Corp.*, 498 U.S. 19, 27, 36 (1990) (explaining that because "[m]aritime tort law is now dominated by federal statute," "an admiralty court should look primarily to these legislative enactments for policy guidance" and "must be vigilant not to overstep the well-considered boundaries imposed by federal legislation").

B. ICCTA Speaks Directly to the Question Here and Precludes the Tribe From Obtaining Injunctive Relief

All three of the above principles confirm that there is no federal common-law injunctive remedy available in this litigation. First, ICCTA speaks expressly to the displacement of common-law remedies, whether they arise under state *or* federal law: "[T]he remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." 49 U.S.C. §10501(b). Second, the fact that railroad legislation is "among the most pervasive of federal regulatory schemes" signals Congress's intent to displace the common law in this context. *Chicago & N.W. Transp. v. Kalo Brick & Tile*, 450 U.S. 311, 320 (1981). Congress and the courts have consistently mandated that rail transportation is to be regulated exclusively and comprehensively under the statutory provisions of the Interstate Commerce Act enacted originally in 1887 ("ICA"), and

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1 now ICCTA, including the statutory provisions governing common-carrier obligations, non-
2 discrimination, and the abandonment of common-carrier rail lines. Third, given this
3 congressional occupation of the field, any federal common law that touches on rail
4 transportation must respect the statutory rules Congress has imposed. A federal common-law
5 injunctive remedy would clash with Congress's decision in ICCTA to centralize interstate rail
6 regulation with the STB and its imposition of non-discrimination requirements. For all these
7 reasons, as the Court correctly concluded in its Order, a federal common-law injunctive remedy
8 is unavailable to the Tribe.

9 **1. State and Federal Common-Law Remedies that Effectively Regulate**
10 **Rail Transportation Over the Easement Are Preempted**

11 The Tribe does not dispute, nor can it, that BNSF is subject to ICCTA's requirements
12 for movements that cross the Easement.[3] Nor does the Tribe challenge the Court's conclusion
13 that ICCTA preempts state law remedies that burden transportation over the Easement. Rather,
14 the Tribe argues that "the Court [nonetheless] has the authority to grant the Tribe relief based
15 on federal common law." Mot. at 5:16–17.

16 But the distinction between state and federal *common-law* remedies is immaterial

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[3] There can be no dispute that the railroad line along the northern edge of the Swinomish Reservation is part of the national rail network that is subject to the STB's jurisdiction under ICCTA. Under ICCTA, the STB has jurisdiction over rail transportation "in the United States between a place in [] a State and a place in the same or another State. . . ." 49 U.S.C. §10501(2)(A). Reservation land held in trust by the United States for Indian tribes is within the United States and, for purposes of federal law, is located within individual States. "Ordinarily, it is now clear, an Indian reservation is considered part of the territory of the State." *Nevada v. Hicks*, 533 U.S. 353, 361–62 (2001) (internal quotation marks omitted). In turn, a railroad's common-carrier obligations apply to transportation over rail lines that are subject to the STB's jurisdiction. *See, e.g., Riffin v. Surface Transp. Bd.*, 733 F.3d 340, 347 (D.C. Cir. 2013) ("[I]f a line of rail track has not been abandoned or embargoed, there is 'an absolute duty to provide rates and service over the [l]ine upon reasonable request,' and a 'failure to perform that duty [is] a violation of section 11101.'"). Similarly, railroads seeking to discontinue common-carrier rail service over lines subject to the STB's jurisdiction, including those that cross Indian land, must first obtain authorization from the STB under 49 U.S.C. §10903. *See Southern Pac. Transp. Co.—Abandonment Exemption—in Mineral Cty., NV* (ICC Docket No. AB-12), 1991 WL 108066 at n.3 (Jan. 16, 1991) (railroad "must obtain either abandonment authority or an exemption from the Commission to discontinue its common carrier obligation over" portion of line crossing Indian reservation). Federal policy could not coherently be otherwise. Railroads in the United States cross numerous land segments that are owned by Indians or Tribes. A railroad's statutory obligation to meet shipper needs, which is a central feature of ICCTA and is critical to the proper functioning of the rail network, cannot be suspended on an ad hoc basis for movements that occur over Indian land.

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according to ICCTA's plain language: "[T]he remedies provided under [ICCTA] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." 49 U.S.C. §10501(b). The statutory reference to remedies under "Federal" law would be meaningless if it did not reach at least remedies under federal common law. *See United States v. Menasche*, 348 U.S. 528, 538–39 (1955) ("It is [a court's] duty to give effect, if possible, to every clause and word of a statute.") (internal quotation marks omitted).

The Court's Order states that ICCTA has not been interpreted "as preempting other federal statutes." Order at 11:6. As the Court itself acknowledged, the cited decisions address ICCTA's displacement of federal *statutes*, not displacement of federal *common law*. The Court concluded that it is appropriate to "harmonize" overlapping statutes to give full effect to Congress's intent. But no federal common law exists to "harmonize" when it has been expressly displaced. And any federal common law that does exist necessarily takes a backseat to ICCTA and must be "developed . . . to harmonize with the enactments of Congress." *Am. Dredging*, 510 U.S. at 955. On that score, it is impossible to "harmonize" an injunction restricting traffic over the Easement with ICCTA's common-carrier and non-discrimination obligations.

ICCTA built on a long history of congressional action and court decisions finding that it is incompatible with the comprehensive regulation of railroads under the ICA (now ICCTA) to permit remedies under common law—whether state or federal—to overlap and conflict with statutory requirements and regulations that govern railroads. *See generally Kalo Brick & Tile*, 450 U.S. 309. As early as 1907, the Supreme Court in *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), concluded that the ICA's regulatory scheme would be undermined if remedies relating to rail transportation could be pursued under common law.[4] In

[4] The action at issue in *Abilene Cotton* was a common-law action in state court for damages from the payment of an allegedly unreasonable rate. But the decision did not turn on whether the action arose under state or federal common law, since the decisional point was that the action under common law conflicted with the uniform

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1980, Congress codified this rule in the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, adding a provision to the ICA that "jurisdiction of the Commission . . . over transportation by rail carriers, and the remedies provided in this title with respect to the rates, classifications, rules, and practices of such carriers, is exclusive." 49 U.S.C. §10501(d) (1982). Congress explained the provision's purpose:

> The remedies available against rail carriers with respect to rail rates, classifications, rules and practices are exclusively those provided by the Interstate Commerce Act, as amended, and any other federal statutes which are not inconsistent with the Interstate Commerce Act. No state law *or federal or state common law remedies* are available.

H.R. Conf. Rep. No. 96-1430, 96th Cong., 2d Sess. 106 (emphasis added). Following the Staggers Act, courts repeatedly held that "common law claims, whether considered as arising under state *or federal common law*, are preempted." *G&T Terminal Packaging v. Consol. Rail*, 830 F.2d 1230, 1235 (3d Cir. 1987) (emphasis added); *see also Alliance Shippers v. Southern Pac. Transp. Co.*, 858 F.2d 567, 568 (9th Cir. 1988) ("causes of action for price discrimination under *federal common law* and state statutory law were preempted by the Staggers Act") (emphasis added). Congress codified this rule in ICCTA's express preemption provision.

2. The Remedy the Tribe Seeks Irreconcilably Conflicts With ICCTA Regardless of How It Is Characterized

The Tribe's Motion focuses on characterizing its remedy but does not address the Court's central concern that the remedy sought (however characterized) conflicts directly with the statutes governing rail transportation. The purpose of the statutory ICCTA preemption provision is to displace remedies that burden interstate rail transportation and that interfere with the STB's exclusive regulation of rail transportation. Not all common-law remedies conflict with the regulatory scheme established by ICCTA by burdening interstate rail movements. For example, enforcement of the Easement's rental provision does not conflict with ICCTA rights

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regulation of railroads under the ICA. Such a conflict can arise from application of state or federal common law.

1 or obligations and therefore is not subject to ICCTA preemption.[5] Similarly, remedies under
2 other federal statutes may not conflict with the scheme of regulation established by ICCTA. As
3 the Court concluded in the Order, "[t]he ICCTA and the IRWA generally operate in separate
4 spheres…" Order at 13:20–21. Indeed, the Tribe acknowledges that remedies under IRWA do
5 not include the power to force BNSF to limit traffic (and thereby violate its common-carrier
6 obligations) or to "eject[] BNSF from the right-of-way" (and thereby violate the STB's
7 exclusive authority over rail line abandonments). Mot. at 10:4–5, 10:22–23. Accordingly,
8 giving effect to IRWA remedies would not appear to produce an irreconcilable conflict with
9 ICCTA that would implicate ICCTA's preemption provision.[6]

10 But what the Tribe seeks here under federal common law—an order requiring BNSF to
11 violate its obligations under ICCTA—cannot possibly be reconciled with ICCTA. Congress's
12 clear intent to occupy the field of rail regulation with a statutory scheme based on common-
13 carrier obligations that serve the public interest leaves no room for common-law remedies that
14 are inconsistent with the statutory scheme.[7]

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16 [5] While the issue has not yet been raised or briefed, damages remedies, including those related to contracts, are preempted when they amount to an indirect form of regulation. *See, e.g.*, *Pejepscot Indus. Park, Inc. v. Maine*
17 *Cent. R. Co*., 297 F. Supp. 2d 326, 333 (D. Me. 2003) ("The power to punish with huge monetary penalties is the most stringent 'regulation' possible.") (internal quotation marks omitted). For this reason, the Court's statement
18 that state law claims for damages are not preempted, Order at 17:8, is overly broad.

[6] BNSF does not agree with the Court's statement in the Order that "[t]he correct analytical framework is whether
19 Congress explicitly or implicitly repealed the IRWA when it enacted the ICCTA." Order at 12:3–4. ICCTA continues the federal common-carrier principles that originated at common law, and which Congress amplified and
20 codified in the ICA in 1887—*i.e.*, well before IRWA was enacted in 1948. The question of the correct analytical framework may be immaterial, however, because, as explained in BNSF's summary judgment briefing and *infra* at
21 note 8, the two statutes can be harmonized in a way that gives effect to ICCTA's requirements and supplies the Tribe with an avenue to potentially obtain the relief it seeks.

22 [7] The Tribe's belated argument (*see supra*, note 2) that the existence of a conflict with ICCTA might turn on how costly it would be for BNSF's shippers to find alternative service is a nonstarter. The STB has made clear that _any_
23 attempt to dictate when and where particular products may be carried by rail is a direct regulation of railroad activities. *See CSX Transp., Inc.—Petition for Declaratory Order*, FD No. 34662, 2005 WL 584026, at *8 (STB
24 served Mar. 14, 2005) (treating the preemption issue as a matter of law). As the Court noted, a requirement "to discriminate against a particular type of cargo and/or a particular region burdens interstate commerce and is
25 therefore preempted." Order at 10:14–15. Because there is no dispute that the requested injunction would force BNSF to discriminate against a particular type of cargo and the amount of it that can be shipped, that remedy is
26 preempted because it would prevent BNSF from complying with its statutory obligations under ICCTA.

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The Supreme Court recognized this principle long before Congress expressly displaced state and federal common-law remedies with the Staggers Act and then ICCTA. In *U.S. v. Baltimore & Ohio R.R. Co.*, 333 U.S. 169 (1948), a case on all fours here, the Supreme Court refused to enforce a contract provision requiring a railroad to violate its common-carrier obligations. The Supreme Court's conclusion did not rest on whether the enforcement action sounded in contract or trespass, whether it arose under state or federal law, or whether the railroad owned the land. The critical factor, as this Court recognized in the Order, was that the remedy sought would go "to the heart of the railroad's operations as a carrier and fl[y] in the face of the anti-discrimination purposes for which the Interstate Commerce Act was first enacted." Order at 10:8–9. Accordingly, the Court's conclusion that the injunctive relief sought by the Tribe strikes at the heart of BNSF's obligations as a common carrier cannot change, because this form of relief is displaced, and thus preempted, by ICCTA.[8]

III. The Tribe's Asserted Treaty Right to "Exclusive Use" Does Not Change This Result

The Tribe now tethers its federal common-law claim to the Treaty of Point Elliott, 12 Stat. 927 (1859). *See, e.g.*, Mot. at 1:12–15 (requesting "injunctive relief under federal common law, which protects the Tribe's treaty-based property interests"). To argue that this lends a distinctly stronger character to its claim, the Tribe relies (Mot. at 9:17–18) on this

[8] To be clear, the control the Tribe seeks over rail operations is not unavailable within the framework Congress has established. ICCTA provides avenues that the Tribe could use to attempt to convert the rail line at issue here into a private line that would not be subject to ICCTA's common-carrier requirements. *See, e.g., Southern Pac. Transp. Co.—Petition for Exemption—Abandonment Between Thorne and Wabuska, Mineral and Lyon Counties, NV* (ICC Docket No. AB-12), 1991 WL 40203 (March 12, 1991) (converting common-carrier line crossing Indian land to private line with restrictions on type of cargo that can be moved). To accomplish that goal, though, the Tribe **must** obtain authorization from the STB to abandon the line. In *Thompson v. Tex. Mex. Ry. Co.*, 328 U.S. 134, 145 (1946), the Supreme Court made clear that a railroad providing service on a line that is part of the common carrier network **cannot** cease providing that service without ICC (and now STB) authorization. The existence of a valid right to the land was irrelevant (indeed, the carrier in question did not appear to have a right to operate over the track); the Court concluded that the ICC's (now STB's) authority over abandonment of common-carrier lines is independent of possessory rights to the land. The STB's statutory authority **cannot** be circumvented by asking for an injunction under federal common law. And even if the Tribe were to successfully petition the BIA under IRWA to terminate the Easement, BNSF's common-carrier obligations would still compel it to move the unit trains unless the Tribe successfully petitions the STB for abandonment.

Court's passing suggestion—made by the Court in discussing IRWA, not the Treaty—that Congress "did not make clear an intention to resolve potential conflicts [between STB and BIA authority] by abrogating the treaty right of 'exclusive use.'" Order at 14:18–19. The Tribe's argument is unsound.[9]

In the absence of any other applicable federal law, a trespass claim based on a treaty right can potentially support an injunction. But the cases the Tribe cites (Mot. at 7) in which an Indian tribe pursued a trespass claim are inapposite because none involved a competing federal statutory framework. When such a framework exists, the analysis is different. Courts once suggested broadly that "[a] federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if ... the application of the law to the tribe would abrogate rights guaranteed by Indian treaties." *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985).[10] But more recent cases have refined that principle to recognize that "a general right of exclusion, with no additional specificity, is insufficient to bar application of federal regulatory statutes of general applicability." *Soaring Eagle Casino & Resort v. NLRB*, 791 F.3d 648, 661 (6th Cir. 2015) (holding that the National Labor Relations Act applies to tribal casino on reservation land, notwithstanding general treaty right of "exclusive use, ownership, and occupancy"); *see also United States Dep't of Labor v. Occupational Safety & Health Review Commission*, 935 F.2d 182, 186–87 (9th Cir. 1991) (concluding that a "conflict between the Tribe's right of general exclusion and the limited entry

[9] Previously, the Tribe told this Court that Article II of the Treaty—including the "exclusive use" clause—is irrelevant because "[t]his litigation can and should be decided on the basis of the Easement Agreement." Dkt. No. 58 at 22 n.6. For that reason, the parties have not briefed (and this Court is not in a position to resolve) the scope of the Tribe's Treaty right. BNSF thus asserts that determining the scope of the "exclusive use" provision is not necessary to resolve the instant motion, and BNSF reserves all rights to make future arguments regarding the Treaty.

[10] In addition to the situation in which federal law may not apply because it was not intended to abrogate a specific treaty right, courts have recognized that federal law may not apply because it "touches exclusive rights of [tribal] self-governance in purely intramural matters" or "there is [other] proof ... that Congress intended [the law] not to apply to Indians." *U.S. Dep't of Labor v. Occupational Safety & Health Review Comm'n*, 935 F.2d 182, 184 (9th Cir. 1991). The Tribe does not, and cannot, contend that ICCTA implicates tribal self-governance or that Congress specifically intended that ICCTA "not apply to Indians."

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necessary to enforce [the Occupational Safety and Health Act] must be resolved in favor of applying that statute on tribal land."); *Solis v. Matheson*, 563 F.3d 425, 436–37 (9th Cir. 2009) (overtime provisions of the Fair Labor Standards Act supported the Secretary of Labor's authority to enter tribal land to inspect records, notwithstanding general tribal treaty rights of exclusion). Thus, the general right of "exclusive use" invoked by the Tribe here is not a basis for preventing trains from crossing the reservation in fulfillment of federally imposed common-carrier obligations.

IV. Conclusion

For the reasons set forth herein, as well as those provided in BNSF's summary judgment briefing, BNSF respectfully requests that the Court deny the Tribe's Motion.

Respectfully submitted this 7th day of February, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on February 7, 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 the attorneys of record for the parties.

Dated this 7th day of February, 2017.

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