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 **REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR RECONSIDERATION** **NOTE ON MOTION CALENDAR: Friday, February 10, 2017**

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A. The Tribe's motion meets the standard under Rule 7(h)(1)

The Court made two rulings that are the subject of this motion: (1) the Tribe's "state law" claims for injunctive relief are preempted by the ICCTA, and (2) the Tribe's sole remedy to enforce the terms of the Easement Agreement is to ask the Bureau of Indian Affairs to cancel the right-of-way. BNSF's assertion that the Tribe should have raised these issues in its summary judgment briefing and at the hearing is incorrect. The characterization of the Tribe's claims as state law claims was never at issue in the parties' summary judgment arguments, and did not arise until entry of the Order. And, the Court's authority to provide relief for BNSF's violation of the Tribe's rights under the Easement Agreement and IRWA came up for the first time when the Court raised the question at the hearing, and neither party submitted briefing on the issue.[1]

The Tribe is therefore not asserting "newly minted theories and claims." The Tribe is requesting that the Court reconsider certain assumptions that formed the basis for its ruling but were never briefed. With all due respect to the Court, the Tribe asserts that these assumptions were in error, because (a) the Tribe has not pled any state law claims, but the Court's preemption ruling treated the claims as a form of state regulation, Order, pg. 6:24-10:22, and (b) the IRWA and federal common law both empower the Court to enforce the Tribe's federal rights under the Easement Agreement, the IRWA, and the Treaty of Point Elliott (the "Treaty").

Nor is the Tribe "moving away from IRWA" as the basis for its right to enforce the Easement Agreement, and instead relying on federal common law. The Tribe continues to assert that by overburdening the right-of-way, BNSF has breached the Easement Agreement, which is governed by the IRWA, and that doing so is a trespass that violates the Tribe's possessory

[1] Indeed, the Tribe never sought a ruling on summary judgment that BNSF was in breach and that the Tribe was therefore entitled to injunctive relief. The Tribe merely sought a ruling that the ICCTA did not preempt the Tribe's claims. *See* Amended Motion for Summary Judgment at 24-25 ("the Tribe respectfully requests that the Court grant summary judgment in its favor, finding and concluding that this action to enforce the terms of the Easement Agreement is not preempted by the ICCTA.") The Court correctly held that the ICCTA does not preempt the Tribe's rights under the IRWA, nor its treaty-based rights, but went further and held that the Tribe's sole remedy was to ask the BIA to cancel the right-of-way. While BNSF briefly argued that injunctive relief was inappropriate, its arguments were intertwined with the argument that all of the Tribe's claims were preempted. As noted below, it never suggested that such preemption resulted from the fact that the Tribe was asserting state-law claims. Thus, neither party had any occasion to submit briefing or argument on the subject of the instant motion.

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interests. The Tribe has always asserted that it has federally protected contractual and property rights, based on the Easement Agreement, the Treaty and federal statute, which the Court is fully empowered to protect under federal law. This was fully briefed in the Tribe's summary judgment briefing, and BNSF had ample opportunity to respond. And, the Court unambiguously concluded that the Tribe's rights under the IRWA and the Treaty are not preempted or abrogated by the ICCTA. The question for purposes of this motion is whether the Court is empowered to protect those rights under federal law.

B. BNSF does not dispute that the Tribe is not asserting state law claims

Significantly, BNSF does not dispute that the Tribe is not asserting state law claims. BNSF has never argued — either in its affirmative defenses or in its summary judgment briefing — that the Tribe's claims are barred because they are state-law claims. BNSF also did not contradict the Tribe's counsel's statement at oral argument that no state-law claims are at issue. And, BNSF does not dispute the issue in its response to the Tribe's motion for reconsideration. Thus, the character of the Tribe's claims as federal claims is uncontested. It follows that BNSF cannot and does not dispute that it was "manifest error" for the Court to conclude otherwise.

Nevertheless, BNSF continues to contend that *U.S. v. Baltimore & Ohio R.R. Co.*, 333 U.S. 169 (1948), is "on all fours" with the case at bar. It is not. Unlike here, that case did involve a state law contract claim. It did not involve federal treaty-based property rights that were codified in part by a federal statutory and regulatory scheme meant to protect those interests. And it did not involve a situation where a tribe placed initial conditions on entry into the reservation — which it had a right to do pursuant to its treaty-based right to exclude — which were later violated. Accordingly, the case is not applicable to the current analysis.

C. BNSF does not dispute that the IRWA expressly allows the Tribe to pursue any available remedies under applicable law

BNSF also does not dispute that its conduct in this matter — engaging in "an unauthorized use within an existing right-of-way" — is defined as a trespass under 25 CFR § 169.413. Nor does BNSF dispute that, under the IRWA, the Tribe "may pursue any available remedies under

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applicable law" to address such a trespass. This should be the end of the analysis. The Court has held that the ICCTA does not preempt or abrogate the IRWA. As the Court stated in the Order, "[t]he rights and remedies afforded by the IRWA and its implementing regulations remain available to the Tribe. . . ." Order, pg. 16:19-20. One of the remedies for trespass afforded by the IRWA's regulations is to allow the Tribe to look to "applicable law" for relief. Applicable law includes asking the Court to abate the trespass by entering an order requiring BNSF to comply with the terms of the right-of-way grant. It follows that the Court's authority to grant the relief the Tribe seeks in this matter is in no way diminished by the ICCTA.

Moreover, the Court also correctly ruled that the Tribe's treaty-based right to exclude was not abrogated by the ICCTA. And contrary to BNSF's contention, this was not merely a "passing suggestion." The Court found and concluded in relevant part as follows: "The rights the Tribe seeks to assert arise out of both a treaty and a federal statute." Order, pg. 12:20. "[T]he Tribe has a right to exclude non-members from the reservation that is 'too fundamental to be easily cast aside.'" *Id.*, pg. 12:24-25 (quoting *U.S. v. Dion*, 476 U.S. 734, 739 (1986)). "Treaty rights will not be abrogated absent explicit statutory language indicating Congress' intent to invalidate or modify the right in question." *Id.*, pp. 12:25-13:2 (citing *Dion*, 476 U.S. at 738-39). In enacting the ICCTA, Congress "most certainly did not make clear an intention to resolve potential conflicts by abrogating the treaty right of 'exclusive use' or repealing the IRWA." *Id.*, pg. 14:18-19. "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.*, pg. 24-25. "In short, there is no evidence that Congress actually considered the obvious potential for conflict between its establishment of the STB with exclusive jurisdiction over rail transportation and the Tribe's treaty right of 'exclusive use' or the BIA's right to terminate a railroad right of way, much less that it affirmatively chose to resolve that conflict by abrogating the treaty or repealing the IRWA." *Id.*, pg. 16:9-13.

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The significance of the Tribe's treaty-based rights — separate and apart from the recognition of those rights in the enactment of the IRWA — was unquestionably the subject of the parties' summary judgment briefing. As the Court recognized: "BNSF argues that the treaty right to exclude and the law and regulations recognizing that right have been abrogated by the ICCTA." Order, pg. 13:11-12. Thus, the issue of the ICCTA's impact on the Tribe's right to exclude was duly briefed by the parties, and the Court resolved it in favor of the Tribe. BNSF attempts to re-litigate the issue, by arguing that the Tribe's right to exclude "is insufficient to bar application of federal regulatory statutes of general applicability" such as the ICCTA. *See* BNSF Brief, at pp. 11-12. But, again, the Court has already ruled to the contrary, and held that the ICCTA did not abrogate the Tribe's treaty right of exclusive use. BNSF has not asked the Court to reconsider that ruling, which is clearly correct.

As set forth at length in the Tribe's opening brief, the Court is fully empowered to provide a remedy for BNSF's violation of the Easement Agreement and the Tribe's possessory interests — whether based on the IRWA or the Tribe's treaty rights, neither of which are preempted or abrogated by the ICCTA — by entering an injunction requiring BNSF to comply with the traffic limitations contained in the right-of-way grant. This is so whether referred to as "federal common law" or something else. As the Ninth Circuit Court of Appeals observed in *Skokomish Indian Tribe v. U.S.*, 410 F.3d 506 (9th Cir. 2005), treaties are the "supreme law of the land," and a tribal treaty may form the basis for a claim for equitable relief against a third party. 410 F.3d at 512. *See also* Plaintiff's Motion for Reconsideration, at pp. 6-8 (discussing cases in which courts granted injunctive relief to abate a trespass). In short, it is well established in the case law and explicitly confirmed by the IRWA itself that the Court may grant the Tribe injunctive relief to remedy BNSF's overburdening of the easement, and the Tribe is not limited to the remedy of asking the BIA to cancel the right-of-way grant.

D. The ICCTA did not abrogate the Tribe's federal common law remedies to enforce its rights under the Treaty or the IRWA

Despite (a) the Court's ruling that the ICCTA did not repeal the IRWA or abrogate the

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Tribe's treaty-based rights, (b) the case law holding that the Tribe may look to federal common law to protect its treaty-based property rights, and (c) the explicit language in the IRWA regulations confirming that the Tribe has at its disposal "any applicable law" to remedy a trespass, BNSF argues that the Tribe's federal remedies to protect its property interests are preempted.[2]

BNSF's argument has no merit. To begin with, it would be nonsensical to hold that the Tribe's federal rights under the IRWA and the Treaty are not preempted by the ICCTA, but that the Tribe's federal remedies to protect those rights are preempted. Nothing in the ICCTA suggests that Congress intended to repeal Indian tribes' treaty-based rights to protect their possessory interests. Order, pp. 16:9-13.

Furthermore, BNSF's argument that the ICCTA preempted the aspects of federal common law that protect the Tribe's property interests misses the mark. As discussed in the Tribe's opening brief, the Supreme Court made it clear in *Oneida County v. Oneida Indian Nation of New York*, 470 U.S. 226 (1985), that, "[i]n 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." 470 U.S. at 236-37 (emphasis in original). Nothing in the ICCTA even remotely hints at tribal remedies to protect their possessory interests in treaty-protected trust lands, much less speaks directly to the question. Just like the Tribe's federal rights under the IRWA and the Treaty, the federal common law remedies to protect those rights remain fully intact.

BNSF makes a number of arguments to the contrary, all of which are unavailing. First, BNSF suggests that those remedies have been expressly displaced. But BNSF's support for this proposition is exactly what it relied on in initially arguing that the ICCTA preempts the Tribe's rights under the IRWA — that the language of the ICCTA expressly states that it preempts other

[2] BNSF now even argues that the Tribe's damages claims are preempted because a damages award may also burden interstate commerce. *See* BNSF Brief, pg.9 n.5. In essence, BNSF's position is that the Tribe has no remedy at all, despite the Court's ruling that the ICCTA does not abrogate the Tribe's federally protected rights.

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federal laws. But the Court has already rejected this logic, on the basis that federal laws do not preempt other federal laws, and there is nothing in the ICCTA suggesting that Congress intended to abrogate Indian tribes' treaty-based rights. BNSF next argues that it was plainly Congress' intent to displace the tribes' federal common law rights, based on the pervasiveness of the ICCTA. Again, however, in the absence of a clear expression, "[t]reaty rights will not be abrogated absent explicit statutory language." Finally, BNSF contends that any federal common law related to the Tribe's rights must be harmonized with the ICCTA. But this is just another way of claiming — as BNSF has claimed time and time again — that railroads' rights under the ICCTA take precedence over tribal rights. As the Tribe has had to respond again and again, that is not the case and, if anything, the contrary is true.

The cases BNSF cites in support of its argument that federal common law has been displaced where ICCTA is concerned — *G&T Terminal Packaging v. Consol. Rail*, 830 F.2d 1230 (3rd Cir. 1987), and *Alliance Shippers v. Southern Pac. Transp. Co.*, 858 F.2d 567 (9th Cir. 1988) — do not help it. Both of those cases had to do with rates and pricing — subjects that were "directly" addressed by the ICCTA.

Finally, it is worth observing that, despite this Court's Order, BNSF claims the BIA's IRWA enforcement authority is ineffective, stating that "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." BNSF Brief, at pg. 10 n.8. In other words, just as the Tribe predicted, termination of the right-of-way by the BIA would only result in BNSF reprising its argument that the Tribe's rights are preempted, requiring yet further litigation in this Court.

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DATED this 10th day of February, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on February 10, 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 10th day of February, 2017.

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