

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 RAILWAY COMPANY’S
MOTION FOR CLARIFICATION
AND, IF NECESSARY,
RECONSIDERATION**

**NOTED FOR CONSIDERATION:
Thursday, June 22, 2017**

I. INTRODUCTION

BNSF Railway Company (“BNSF”) respectfully submits this motion to seek clarification and, if necessary, reconsideration regarding the Court’s June 8, 2017 Order Granting Plaintiff’s Motion for Reconsideration (the “Order”) (Dkt. No. 85). In the at-issue summary judgment motion, the Tribe moved solely on the issue of whether BNSF could raise the affirmative defense of preemption. The Court ruled on that issue, holding that the ICC Termination Act (“ICCTA”) does not affect Treaty-backed federal common law claims. However, the Court’s Order could be read as also ruling on issues the Tribe has the burden of establishing to prove its claims in this lawsuit—*viz.*, the Tribe’s possessory right to the at-issue property and, relatedly, the rights granted within the Treaty’s scope. Alternatively, the Court may only have been articulating a controlling legal principle that could eventually be applied to facts if the Tribe is able to prove them following discovery. BNSF brings this motion to clarify that the Court did not rule on the ownership and Treaty issues. In the event the Court did intend to resolve those issues, BNSF respectfully asks the Court to reconsider and withdraw its ruling on those issues because such a ruling would implicate disputed issues of material fact that have not been briefed by the parties. Finally, were the Court to confirm that it ruled on those issues but decline to withdraw its ruling, BNSF requests that the Court clarify the bases on which it found in the Tribe’s favor on those issues.

II. STATEMENT OF FACTS

A. The Court’s Order Could Be Read to Rule on Issues the Tribe Has Not Yet Established

In its Order, the Court states that the present case involves a situation in which “a treaty is pitted against a federal statute” and finds that “[t]he correct analysis when considering the Tribe’s treaty-based federal common law claims is not whether the requested relief would interfere with rail transportation, but whether Congress intended to repeal the Treaty of Point Elliot when it enacted the ICCTA.” Dkt. No. 85 at 3:9–15. Although these statements were

made in the context of resolving whether BNSF may raise ICCTA as an affirmative defense to the Tribe's claims, they could be read to rule on an issue that the Tribe must establish as part of its affirmative claims—*viz.*, that it has a possessory right to the at-issue property through the Treaty or otherwise. In the event the Court was making a finding on these issues, BNSF submits such a ruling should be reconsidered and withdrawn because the questions of the Tribe's possessory right to the property and the Treaty's scope were not answered with finality in the prior litigation, the Settlement Agreement, or the Easement, nor were they squarely addressed in the parties' summary judgment briefing in this litigation.

B. The Prior Litigation Did Not Determine the Tribe's Possessory Right to the Property or the Treaty's Scope

There is no dispute that the parties' prior litigation centered on who had a right to the property over which the tracks run. In the lawsuit the Tribe filed in 1978, which ultimately led to the Settlement Agreement and Easement at issue in the present matter,¹ the issues of the reservation boundaries and the Treaty's scope and meaning were litigated for nearly ten years without final resolution.²

The parties' inability to resolve these issues was for good reason. The tracks are located at the extreme northern edge of the reservation, which is defined by both the Treaty of Point Elliot and President Grant's 1873 Executive Order. The prior litigation's filings suggest that

¹ In a separate administrative proceeding and resulting federal court case that concluded in 1983, the parties also litigated Burlington Northern's application to obtain a right-of-way.

² In 1979, the Tribe filed a motion for summary judgment on the Treaty's meaning and the reservation's geographic scope, which the Court denied, finding there were factual issues left to resolve. *See* Declaration of Andrew R. Escobar in Support of BNSF Railway Company's Motion for Clarification and, If Necessary, Reconsideration ("Escobar Decl."), Exs. A, B, C. The Court found that there were "genuine issues of material fact ... [regarding] the interpretation of the executive order of September 9, 1873; the location of the tidelands at the time of the treaty and at the present time; the effect of allotment on the ownership of the tidelands; and the existence of rights of access and wharfage over the tidelands." Escobar Decl. Ex. C at SITC000002421. A bench trial was subsequently held on the boundary issue in 1981, which also did not resolve the issue because the Court apparently held that additional parties may have had an interest in the disputed property and therefore needed to be joined before the litigation could proceed. *See* Escobar Decl. ¶ 5, Ex. D at SITC000010627–28, Ex. F at SITC000016019. Finally, as the parties were preparing to again take the boundary issue to trial in the late 1980s, they reached a settlement, eliminating the need for final resolution of the reservation boundary and treaty scope issues. Escobar Decl. Exs. H, I.

the geography of this area has changed substantially since the tracks were first constructed in 1889. When the tracks were built—which was before the Swinomish Slough was dredged—the tracks crossed submerged land, or at least land that was submerged during periods of high tide. *See, e.g.*, Escobar Decl. Exs. E at SITC000000143, G at SITC000005063, J. Moreover, it appears that Burlington Northern was prepared to present evidence during the late-1980s trial that after beginning construction on the railroad in 1889, the Seattle and Montana Railroad moved the railroad north to keep it off of the reservation after learning the original location may have been on the Tribe’s property. *See* Escobar Decl., Ex. H at SITC000005336. (This history would help explain the railroad’s otherwise confounding decision to place the tracks over submerged land.) Given this complicated history, the parties had to grapple with complex issues, including the meaning of the Treaty and the Executive Order, the evolving topography of the area, and the extent to which the reservation might include formerly submerged lands—issues that were never resolved, even after ten years of litigation.³

C. Neither the Settlement Agreement Nor the Easement Resolved the Issues of Whether the Tracks Are on the Reservation or the Treaty’s Scope

Because the parties had not resolved the questions about the Tribe’s possessory right to the property or the Treaty’s scope when they settled the prior litigation, they made no affirmative statement about ownership of the disputed property in the Easement and acknowledged there could be lingering questions about the reservation boundaries. *See* Dkt. No. 33-5 at 3 (“This right-of-way easement is intended to grant and convey to BN, *despite any question of survey, or any uncertainty as to the location of (a) the boundaries of the Swinomish Indian Reservation, and (b) any lands within the Reservation (whether tidelands, submerged lands, or uplands) held in trust by the United States for the benefit of the Tribe*, a forty (40) year easement with two twenty (20) [year] options over *any* and all lands comprising

³ BNSF offers the above-referenced documents only as background information and does not attempt to augment the factual record through this motion. The present motion turns solely on the facts submitted during the at-issue summary judgment briefing, which did not include any evidence on the Tribe’s possessory right to the property.

1 part of the Swinomish Indian Reservation and held in trust by the United States for the benefit
 2 of the Tribe over which the existing railway of BN passes.”) (emphasis added). Similarly, the
 3 parties were careful to note in the Settlement Agreement that a right-of-way was being granted
 4 across property that may not be held by the Tribe. *See* Dkt. No. 33-5 at 24 (“It is the intention
 5 of the Tribe and BN that BN be granted a forty (40) year easement covering ... BN’s existing
 6 railroad and all facilities ancillary thereto across all lands within the Swinomish Indian
 7 Reservation (‘the Reservation’) and in which the Tribe or the BIA have *or claims to have* an
 8 ownership or beneficial interest.”) (emphasis added).⁴ There is accordingly no valid argument
 9 that either the Settlement Agreement or Easement resolved who has a right to the property.

10 **D. Because the Parties’ Summary Judgment Briefing Focused on BNSF’s**
 11 **Defense Under ICCTA, the Parties Never Briefed Questions Regarding the**
Tribe’s Possessory Right to the Property or the Treaty’s Scope

12 In the most recent motions, the Tribe moved only to preclude one of BNSF’s
 13 affirmative defenses. And the Tribe—by its own admission—originally appeared to be
 14 pursuing common law claims based on the Easement, and not the Treaty.⁵ Consequently, the
 15 only instance in which the Tribe’s right to the property (through the Treaty or otherwise) arose
 16 in the summary judgment briefing was in the parties’ summation of the prior litigation. In its
 17 cross-motion for summary judgment, BNSF, in an attempt to rebut the Tribe’s contention that
 18 “BNSF ran trains across the [the Tribe’s] reservation for over a century without justification,”
 19 stated that the prior “litigation focused on the boundaries of the Tribe’s Reservation and
 20 BNSF’s good faith claim that its tracks did not cross land within the Reservation” and that the
 21 prior “litigation did not produce a definitive answer to whether the tracks in fact cross the
 22 Reservation.” Dkt. No. 63 at 4:13–22. In response, the Tribe pointed to the Easement and

23 ⁴ Consistent with the Settlement Agreement and the Easement, Burlington Northern did not make any
 24 representation in its application to the Department of the Interior for approval of the Easement that the Tribe in
 25 fact owned the at-issue property. *See* Dkt. No. 33-8 at 3–4 (application seeking “a right-of-way easement for
 railroad purposes crossing certain lands in Skagit County, Washington *claimed by* the Swinomish Tribal
 Community”) (emphasis added).

26 ⁵ In the original summary judgment briefing, the Tribe even implied that the Treaty was not relevant because
 “[t]his litigation can and should be decided on the basis of the Easement Agreement.” Dkt. No. 58 at 22 n.6.

incorrectly asserted that the boundary issue had been resolved by the Easement. *See* Dkt. No. 65 at 2:8–20. Because this exchange focused only on the ancillary historical background that led to the present litigation, neither party submitted evidence on the reservation boundaries or the Treaty’s scope, nor did either party seek summary judgment on these issues. After the Tribe filed its reconsideration motion and changed course to assert that its claims are instead federal common law claims based on the Treaty, BNSF expressly reserved its right to present evidence rebutting that point, given that it was being raised for the first time in a reconsideration motion after the factual record had already been set in the parties’ summary judgment motions. *See* Dkt. No. 79 at 11 n.9.⁶

III. ARGUMENT

BNSF reads the Court’s Order as setting forth a legal determination on the preemption issue that will, if appropriate, be applied to facts that must still be adjudicated regarding the Tribe’s possessory right to the land and the Treaty’s scope. But if, contrary to BNSF’s understanding, the Court views its Order as making a determination about the Tribe’s possessory rights to the at-issue land and the Treaty’s scope, then BNSF respectfully requests the Court to reconsider its ruling and withdraw that portion of the Order because such a ruling implicates disputed issues of material fact that have not been briefed by the parties.

Specifically, because these issues were not resolved through the prior litigation or the Settlement Agreement or Easement, the Tribe must establish that the Treaty grants it a possessory right to exclude the challenged use of the land over which it is claiming a trespass occurred.⁷ The Tribe may be able to demonstrate that the Treaty includes the land over which

⁶ BNSF notes that its Answer could be read as suggesting the tracks cross what is today the Tribe’s reservation. *See* Dkt. No. 21 at ¶¶ 3.4, 3.7. That Answer was filed before discovery had begun and before BNSF had access to records from the prior litigation revealing the complex history of the reservation. Moreover, the location of the tracks relative to what is today the Tribe’s reservation does not necessarily answer the question of the Tribe’s right vis-à-vis a use that commenced in the late 19th Century. Regardless, even if the tracks are on what is today the Tribe’s reservation, there remain the questions of whether the Tribe’s possessory right arises out of the Treaty or how the Treaty otherwise affects the Tribe’s right to the land. To ensure its position is clear on these points, BNSF intends to file a motion to amend its Answer.

⁷ In the event the tracks are determined to be off of the reservation, BNSF does not contend that the Tribe would

1 the tracks run. Alternatively, after the Treaty initially defined the reservation, the boundaries
 2 were clarified by an Executive Order and the land's topography changed. Accordingly, it is
 3 possible the Tribe may have a possessory right to the at-issue property that is not derived from
 4 the Treaty, it may not have any possessory right to the land, or it may have limited rights with
 5 respect to use of the rail line.

6 Finally, if the Court believes these issues have been decided through its Order—a
 7 prospect BNSF believes would be improper—yet declines to reconsider, then BNSF asks that
 8 the Court clarify the basis for its findings because the source of any ownership rights the Tribe
 9 has will also determine the applicability of the Court's Order to BNSF's ICCTA defense. If the
 10 Tribe has a right to the property, but it comes from a source other than the Treaty, BNSF
 11 respectfully asserts that the Court's legal ruling regarding the application of ICCTA should be
 12 reevaluated given that the Tribe's claims would not be supported by rights given to it through
 13 the Treaty.

14 IV. CONCLUSION

15 For all of the foregoing reasons, BNSF respectfully requests that the Court clarify that
 16 its Order (1) sets forth only a legal determination as to the applicability of BNSF's ICCTA
 17 defense to any Treaty-based federal common law claims, and (2) does not make a
 18 determination as to either the Tribe's possessory right to the at-issue property or the Treaty's
 19 scope and meaning, neither of which has been established or even briefed by the parties. To
 20 the extent the Court did intend to make such a determination, BNSF respectfully requests that
 21 the Court reconsider and withdraw that aspect of its Order or, in the alternative, set forth the
 22 basis for such a ruling.

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 26 necessarily be without a contract-based claim, only that such a common law claim could not be supported by the
 Treaty of Point Elliot.

1 Respectfully submitted this 22nd day of June, 2017.

2
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4 s/ Andrew R. Escobar

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17
18 Attorneys for defendant BNSF Railway
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CERTIFICATE OF SERVICE

I hereby certify that on June 22, 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 22nd day of June, 2017.

s/ Stellman Keehnel

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