No. 18-35704

In the United States Court of Appeals for the Ninth Circuit

SWINOMISH INDIAN TRIBAL COMMUNITY,
a federally recognized Indian Tribe,

***Plaintiff-Appellee*,**

v.

BNSF RAILWAY COMPANY,
a Delaware corporation,

***Defendant-Appellant*.**

On Appeal by Permission Under 28 U.S.C. § 1292(b) of Orders of the United States District Court for the Western District of Washington, Case No. 2:15-cv-543-RSL The Honorable Robert S. Lasnik, United States District Judge

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CORPORATE DISCLOSURE STATEMENT

BNSF Railway Company is an indirect wholly owned subsidiary of Berkshire Hathaway Inc., a publicly traded corporation. No publicly traded corporation owns more than 10% of the shares of Berkshire Hathaway Inc.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS (continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES (continued)

Page(s)

TABLE OF AUTHORITIES (continued)

Page(s)

TABLE OF AUTHORITIES (continued)

Page(s)

REGULATORY DECISIONS

TABLE OF AUTHORITIES (continued)

Page(s)

STATUTES, REGULATIONS, AND RULES

TABLE OF AUTHORITIES (continued)

Page(s)

TABLE OF AUTHORITIES (continued)

Page(s)

OTHER AUTHORITIES

INTRODUCTION

The rule—across the Nation and for a century—is that courts do not regulate common-carrier railroad operations by injunctions entered at the behest of local interests. Such matters belong, instead, before a single federal agency—historically the Interstate Commerce Commission ("ICC"), now the Surface Transportation Board ("STB"). Those agencies have administered what the Supreme Court has repeatedly described as "among the most pervasive and comprehensive of federal regulatory schemes." *Chicago & Nw. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981).

The federal policy of centralized expert regulation makes profound sense. The national rail network is the paradigmatic channel of interstate commerce. But that network would soon fail if local interests could clog individual rail segments with orders regulating the volume and kinds of cargo carried. Restrictions telling railroads what they can and cannot carry clash with the keystone of the Nation's rail policy: Common carriers on the interstate network have a statutory duty to transport regulated commodities of any quantity upon reasonable request, and shippers have a right to that service. Indeed,

shippers and the public depend on movement of their goods across the continent unhindered by local chokepoints. Congress's recognition a century ago of the imperative for uniform federal administration of this principle helped transform an expanding Nation into a thriving one, bound together by a reliable all-purpose rail network.

This case challenges that uniform federal plan. Plaintiff-Appellee Swinomish Indian Tribal Community (the "Tribe") seeks an injunction restricting the type and volume of commodities that Defendant-Appellant BNSF Railway Company ("BNSF") may carry on a rail line near the northern edge of the Tribe's reservation in Washington State (the "Reservation"). BNSF is a common carrier by rail, and if its operations are enjoined, it cannot fulfill its absolute duty to provide service to shippers on reasonable request. The disputed line serves refineries that produce a substantial share of the fuel used in Washington State.

The rail line is on a right-of-way granted by the Tribe in a written Easement, which envisioned that BNSF would run "one eastern bound train, and one western bound train, (of twenty-five (25) cars or less)" across the rail line each day, not to be "increased unless required by

shipper needs." ER0869. Over time, as shipper needs increased, so did the rail traffic on the line. The Tribe now seeks an injunction from the district court under federal common law restricting rail traffic to 25 cars per day—to the detriment of shippers (and members of the public) that are not even parties here.

Such injunctive relief is expressly forbidden by the ICC Termination Act of 1995 ("ICCTA"), Pub. L. No. 104-88, 109 Stat. 803 (1995), which carries forward the key components of the Interstate Commerce Act ("ICA"), ch. 104, 24 Stat. 379 (1887), as amended. ICCTA establishes a set of administrative remedies before the STB for controlling or limiting common-carrier service. *See* 49 U.S.C. § 10903. ICCTA further provides that "[t]he jurisdiction of the [STB] over … transportation by rail carriers … is exclusive," and "the 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). That provision doubly extinguishes the Tribe's federal common law action for an injunction: The Tribe is pursuing a remedy not provided by ICCTA, and it is not pursuing it before the STB.

Although ICCTA's plain terms should resolve the matter, the Tribe has advanced contrary theories that rely variously (1) on the lands settlement Treaty between the United States and the Tribe's predecessors; (2) on the Easement itself; and (3) on the Indian Right-of-Way Act, ch. 45, 62 Stat. 17 (1948), 25 U.S.C. §§ 323–328 ("IRWA"), which supplied the procedure for approving the Easement. None of these affects ICCTA's dispositive application here.

The Treaty grants the Tribe a right to exclude those who are not already on the Reservation. But that right is not relevant to this dispute, given that rail activity on the Reservation dates back more than a century, and the Tribe and BNSF have entered into an Easement that governs the terms of BNSF's use of the right-of-way. Even if the Tribe's Treaty controlled over the Easement, tribal *rights* are distinct from tribal *remedies*. *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005) (*Oneida III*). This appeal presents a question about *remedies* against a common carrier—a subject on which ICCTA speaks directly and the Treaty is silent.

The Easement likewise does not promise injunctive relief, nor could it. Rather, the parties expressly agreed that it would be

interpreted in conformity with federal law such as ICCTA. And regardless, the Supreme Court long ago held that a contract between a landowner and a rail carrier that would impair shippers' rights to common-carrier service is void. *United States v. Baltimore & Ohio R.R.*, 333 U.S. 169, 177–78 (1948) (*Baltimore*). The enforcement the Tribe seeks is barred.

Finally, IRWA does not govern this dispute. It is a procedural statute for simplifying the process for granting rights-of-way across tribal land. IRWA is about property rights; it does not authorize Indian tribes (or anyone else) to regulate existing common-carrier rail service. As the Supreme Court recognized before IRWA was enacted, property rights and common-carrier obligations are distinct matters; even where a rail carrier's contract for the use of land and tracks has expired, the carrier's statutory operations cannot be enjoined unless the ICC (or now the STB) approves. *Thompson v. Tex. Mexican Ry.*, 328 U.S. 134, 144–45 (1946) (*Tex-Mex*). The Tribe cannot use property rights to violate federal law (or force BNSF to violate such law) by limiting rail operations that are the exclusive province of ICCTA and the STB.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1362. This Court has jurisdiction under 28 U.S.C. § 1292(b). The district court certified its orders for appeal under Section 1292(b) on May 15, 2018. ER0001–ER0002. BNSF's petition for permission to appeal was timely filed in this Court on May 25, 2018. 28 U.S.C. § 1292(b). This Court's order granting the petition serves as the notice of appeal, Fed. R. App. P. 5(d)(2), and was filed on August 21, 2018. ER0035. This Court has jurisdiction over the entirety of the orders under review. *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 205 (1996).

ISSUE PRESENTED

Whether ICCTA precludes injunctive relief that would regulate the operation of a common carrier by rail.

STATEMENT OF THE CASE

A. Common-Carrier Service and the Federal Rail Regulatory Scheme

1. As a common carrier by rail, BNSF has "a duty to carry all goods offered for transportation." *Am. Trucking Ass'ns v. Atchison, Topeka & Santa Fe Ry.*, 387 U.S. 397, 406 (1967). Today, that

obligation is codified in ICCTA's command that common carriers by rail "shall provide … transportation or service on reasonable request." 49 U.S.C. § 11101(a). BNSF has no choice: "If a line of rail track has not been abandoned or embargoed [*i.e.*, rendered physically inoperative], 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.' " *Riffin v. STB*, 733 F.3d 340, 347 (D.C. Cir. 2013) (quoting *Pejepscot Indus. Park, Inc.*, FD 33989, 2003 WL 21108198, *7 (STB May 9, 2003)) (alterations in original).

This "comprehensive" obligation has existed "[f]rom the earliest days." *Am. Trucking Ass'ns*, 387 U.S. at 406–07. At common law, with few exceptions, common carriers were "bound to receive and carry all the goods offered for transportation … and [were] liable to an action in case of refusal." *N.J. Steam Navigation Co. v. Merchants' Bank of Boston*, 47 U.S. (6 How.) 344, 382 (1848); *ICC v. Baltimore & Ohio R.R.*, 145 U.S. 263, 275 (1892) (explaining that, prior to the ICA, rail carriers were bound by the common law duties of common carriers); *cf.* 2 James Kent, *Commentaries on American Law* 465 (1827) ("[Common carriers] are bound to do what is required of them in the course of their

employment, if they have the requisite convenience to carry, and are offered a reasonable or customary price; and if they refuse without some just ground, they are liable to an action.").

These legal obligations helped build and now sustain the Nation. As borders widened and the economy expanded in the late 19th and early 20th Century, producers and consumers alike came to rely on the interstate rail network to transport goods to and from the coasts and throughout the interior. *Encyclopedia of North American Railroads*, 1–9 (William D. Middleton et al. eds., 2007). Common carriers' duty to provide service was the cornerstone of that network. Today, shippers—especially those that need to move hazardous materials—can trust that the interstate rail network will transport their goods. *See Riffin*, 733 F.3d at 347 (recognizing that "given the complexity and interdependence of the national rail system, … ensuring the freight rail network remains open to transportation of hazardous materials without any gaps implements a public interest in consistency"). And the public, in turn, has dependable access to the hazardous commodities that are "essential to the economy of the United States and the well being of its people"—materials like fuel for cars, fertilizer for farming, and chlorine

for treating drinking water. *Hazardous Materials: Transportation of Explosives by Rail*, 68 Fed. Reg. 34,470, 34,472 (June 9, 2003).

To secure this public interest, Congress "codified the common-law obligations of railroads as common carriers" in the ICA in 1887, 24 Stat. 379. *Akron, Canton & Youngstown R.R. v. ICC*, 611 F.2d 1162, 1166 (6th Cir. 1979); *see Cellco P'ship v. FCC*, 700 F.3d 534, 545 (D.C. Cir. 2012). In the years since, Congress has refined the federal regime that regulates the interstate rail network, but it has always reaffirmed the statutory common-carrier obligation. *See, e.g.*, *id.*; *Nat'l Grain & Feed Ass'n v. United States*, 5 F.3d 306, 309–10 (8th Cir. 1993). Since 1995, ICCTA has housed this obligation. 49 U.S.C. § 11101(a).

2. ICCTA also creates the Surface Transportation Board and vests in it unified and exclusive authority over the complex interstate rail network. 49 U.S.C. § 1301. This plan of centralized federal rail regulation dates back a century. Congress amended the ICA in the Transportation Act of 1920, ch. 91, 41 Stat. 456, 484, because it recognized that empowering a single regulator would facilitate effective rail service, ensure rail carriers met their common-carrier obligations, and prevent local action from upsetting the wider public's reliance

interests. "Prior to … 1920, regulations … by federal and state authorities were frequently conflicting, and often the enforcement of state measures interfered with, burdened, and destroyed interstate commerce. Multiple control … of matters affecting [interstate rail] transportation has been found detrimental to the public interest as well as to the carriers. Dominant federal action was imperatively called for." *Transit Comm'n v. United States*, 289 U.S. 121, 127 (1933).

Initially, the responsible administrative body was the ICC; in 1995, ICCTA abolished the ICC and transferred responsibility to the STB. As with the ICC, the STB's "jurisdiction … over … transportation by rail carriers … is exclusive." 49 U.S.C. § 10501(b); *see also Transit Comm'n*, 289 U.S. at 129 (describing the "paramount" and "exclusive" jurisdiction of the ICC).

One of the STB's exclusive prerogatives is determining whether common-carrier rail service will commence or terminate on a particular rail line. 49 U.S.C. §§ 10901, 10903; *Kalo Brick & Tile*, 450 U.S. at 322. "The exclusive and plenary nature of the Commission's authority to rule on carriers' decisions to abandon lines is critical to the congressional

scheme, which contemplates comprehensive administrative regulation of interstate commerce." *Id.* at 321.

Thus, before a rail carrier can construct or operate a railroad line that will be part of the interstate rail network, it must obtain authorization from the STB. *See* 49 U.S.C. § 10901 ("A person may (1) construct an extension to any of its railroad lines; (2) construct an additional rail line; [or] (3) provide transportation over, or by means of, an extended or additional railroad line … only if the [STB] issues a certificate authorizing such activity ….") . Critically, in this scheme, a "railroad" is "the road used by a *rail carrier*," which is, in turn, "a person providing *common carrier* railroad transportation for compensation." 49 U.S.C. § 10102(6)(B) & (5) (emphases added). By contrast, a person that has rail equipment and facilities (*e.g.*, locomotives, rail cars, and tracks), but that has not obtained authorization from the STB, is not a "rail carrier" under 49 U.S.C. § 10102(5)—and can therefore offer private rail service outside of the interstate rail network, outside the STB's jurisdiction, and not subject to common-carrier duties. *See, e.g.*, *Hanson Nat. Res. Co.—Non-*

Common Carrier Status, FD 32248, 1994 WL 673712 (ICC Nov. 15, 1994).

ICCTA also provides that "[a] rail carrier providing transportation subject to the jurisdiction of the [STB] … who intends to … abandon any part of its railroad lines; or … discontinue the operation of all rail transportation over any part of its railroad lines, must file an application relating thereto with the [STB]." 49 U.S.C. § 10903(a)(1). Ending common-carrier service and removing a rail line from the STB's jurisdiction are known, respectively, as "discontinuance" and "abandonment," but in the absence of such STB authorization, "there is 'an absolute duty to provide rates and service over the [l]ine upon reasonable request.' " *Riffin*, 733 F.3d at 347; *see Cerro Gordo Cnty., Iowa—Adverse Abandonment—Backtrack, Inc.*, AB 1063, 2010 WL 3285655, at *1 (STB Aug. 19, 2010) ("The [STB] has exclusive and plenary jurisdiction over rail line abandonments and discontinuances of service to protect the public from unnecessary discontinuance, cessation, interruption, or obstruction of available rail service.").

Significantly, the obligation to provide continuing common-carrier service exists independently of the rail carrier's property rights in the

tracks themselves or the land beneath, and therefore continues *regardless* of whether those property rights have terminated. *Tex-Mex*, 328 U.S. at 144–45 ("Though the [land] contract were terminated pursuant to its terms, a certificate [of abandonment or discontinuance] would still be required."); *see City of Des Moines v. Chicago & Nw. Ry.*, 264 F.2d 454, 457 (8th Cir. 1959) ("Regardless, however, of whether a valid forfeiture [of the rail carrier's right-of-way] would have existed under the ordinance, a court could still not decree an ouster of the Railway from the street … until the [ICC] gave its permission to such abandonment or discontinuance being made").

3. Because ICCTA provides a remedial path for a party that wishes to eliminate common-carrier obligations on a rail line (*e.g.*, an abandonment or discontinuance order), and because "[t]he jurisdiction of the [STB] over … transportation by rail carriers … is exclusive," 49 U.S.C. § 10501(b), ICCTA expressly displaces other remedies with respect to rail transportation: "[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." *Id.* As discussed in greater detail below, even this expansive preemption

provision leaves room for remedies and rules that may incidentally affect rail carriers. But where guaranteeing the STB's exclusive authority over "regulation of rail transportation" itself is concerned, "[i]t is difficult to imagine a broader statement of Congress's intent." *City of Auburn v. U.S. Gov't*, 154 F.3d 1025, 1030 (9th Cir. 1998).

B. Underlying Facts

Since 1890, BNSF and its predecessors have operated rail service along a rail line near the northern edge of the Swinomish Reservation. ER0694. Thus, BNSF's predecessor was operating rail service on the line when the Transportation Act of 1920 brought the entirety of the interstate rail network under exclusive federal regulatory control, requiring ICC approval for construction, operation, or abandonment of railroad lines. *See* § 1(18), 41 Stat. 477.

In the 1970s and 1980s, the Tribe and BNSF (then operating as its predecessor, Burlington Northern) litigated the railroad's ability to operate on the rail line. The parties' dispute centered on the nature and existence of the Tribe's possessory rights to the land under BNSF's tracks. *See* ER0344, ER0384. The court did not resolve the question of ownership of the land, and the parties ultimately sidestepped the

matter by entering into a settlement (the "Settlement Agreement") in 1991, which was executed by the Tribe, the United States (which holds the Reservation lands in trust for the Tribe), and BNSF. ER0846–ER0858.

As part of the settlement, and notwithstanding the parties' disagreement about who owned the land, the Tribe granted BNSF a right-of-way easement (the "Easement") covering BNSF's rail operations "across all lands … in which the Tribe or the BIA have or claim to have an ownership or beneficial interest." ER0851; *see* ER0861 (describing conveyance of easement "despite any questions 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"). The Easement provides that BNSF may run, at a minimum, "one eastern bound train, and one western bound train, (of twenty-five (25) cars or less)" across the rail line each day. ER0869. In exchange, BNSF agreed to pay the Tribe rent, subject to adjustments based on changes in economic conditions, inflation, and increased traffic. ER0862–ER0865.

In negotiating the Easement, BNSF insisted that it would need "flexibility with regard to the number of cars" permitted on the line, due to its common-carrier obligations under law. ER0921. Accordingly, the parties agreed that the "number of trains and cars" would not increase "unless required by shipper needs"; and the Tribe "agree[d] not to arbitrarily withhold permission" to an increase. ER0869. BNSF would also keep the Tribe apprised of the kinds of commodities moving on the rail line. ER0869.

The parties agreed that "[n]othing in th[e] Settlement Agreement or the associated Right-of-Way Easement [would] supersede any federal law or regulation." ER0856. And BNSF pledged to "comply with all applicable federal laws and regulations pertaining to [its] activities within the Swinomish Reservation." ER0857.

As part of the settlement, BNSF agreed to apply to the Bureau of Indian Affairs ("BIA") in the United States Department of the Interior for approval of the right-of-way under IRWA, which empowers "[t]he Secretary of the Interior … to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual

Indians or Indian tribes." 25 U.S.C. § 323. BNSF had not previously obtained such a right-of-way because its predecessor railroad did not believe that the line was located on the Reservation. ER0160 ¶¶46–48. The BIA approved BNSF's application.

BNSF's present operations on the disputed line serve oil refineries at March Point operated by Shell and Tesoro (now owned by Marathon Petroleum). The refineries depend on reliable inbound rail service to provide crude oil and other feedstock, as well as on outbound service to their customers. ER0503–ER0504 ¶¶11–12; ER0511–ER0512 ¶¶12, 16–18. The refineries supply fuels to consumers in Washington and beyond. ER0502 ¶6; ER0512 ¶20. BNSF is the only rail carrier that serves these refineries, and limiting or stopping BNSF's service would severely impact their ability to produce fuel to meet consumer needs. ER0506 ¶¶19–20; ER0514–ER0515 ¶¶28–33.

C. Procedural History

1. On April 7, 2015, the Tribe sued BNSF, alleging that BNSF had breached the Easement by running more than one train of twenty-five cars per day in each direction over the line, and by failing to inform the Tribe of the shipment of crude oil on the line. ER1083 ¶7.1. The

Tribe's Complaint requests a permanent injunction regulating the number of cars and kinds of cargo that BNSF can carry on the rail line, along with monetary damages for trespass and breach of the Easement. *Id.* ¶7.2. The Tribe also seeks increased rent, which BNSF agrees it owes; the parties agreed to bifurcate this issue of monetary relief, which is subject to arbitration under the Easement. ER0034.

2. On May 14, 2015, BNSF moved to dismiss the suit based on the doctrine of primary jurisdiction. BNSF explained that the Tribe was "ask[ing] for [injunctive] relief which, if granted, would conflict with common-carrier obligations on the rail line" and intrude on the STB's exclusive jurisdiction. Dkt. 8, at 12; *see id.* at 10–14. BNSF urged the court to dismiss or stay the case to allow the parties to ask the STB to decide whether the Tribe's requested relief would conflict with the statutes and regulations that govern operations on a common-carrier rail line. *Id.* at 21.

The district court denied BNSF's motion. It acknowledged that "the STB would be able to shed light on the nature of the common carrier's obligations," but it held that the particular "preemption issue can be decided by this Court" because it is "a legal question that can be

resolved without the delay of initiating a separate agency action." ER0032–ER0033. BNSF then answered the Complaint, urging that the Tribe's claims are "barred in whole or in part" by ICCTA. ER1011.

3. The parties next filed cross-motions for partial summary judgment. BNSF argued that ICCTA displaces judicial remedies that would regulate rail transportation, such as the injunction the Tribe seeks limiting the volume of traffic and types of commodities that may be carried on the rail line. Dkt. 63. In response, the Tribe argued that IRWA gives it the "statutory right to place conditions on grants of easements over its land" and to terminate the right-of-way if the railroad does not abide by the conditions. Dkt. 65, at 27. The Tribe disputed ICCTA's relevance because, the Tribe argued, ICCTA does not specifically mention IRWA. *Id.*

On January 13, 2017, the district court granted the cross-motions in part and denied them in part. ER0012–ER0028. The court explained that ICCTA preempts any "state law claim that would effectively require a common carrier to discriminate against a particular type of cargo and/or a particular region." ER0021. The court thus agreed with BNSF that the Tribe could not pursue an "injunction limiting the type

of cargo or the number of trains or cars crossing the reservation—whether under a breach of contract, trespass, or estoppel theory." ER0028. But the court permitted the Tribe's "state law claims for damages, compelled disclosures [regarding the cargo BNSF carries on the line], and an adjustment in rent" to go forward. *Id.* In addition, the court noted that the administrative "rights and remedies afforded by the IRWA and its implementing regulations remain available to the Tribe." ER0027. The court indicated, however, that it lacked "the power to enforce" IRWA and identified the BIA as the proper "avenue" for any relief under IRWA. ER0028 n.5.

4. The Tribe moved for reconsideration, arguing that the district court had erroneously analyzed its claims as arising under state law. ER0234–ER0237. The Tribe insisted that "all of [its] claims … rest entirely on federal law." ER0234. Specifically, the Tribe said that its "rights are not only based on the IRWA, but more broadly and fundamentally on treaty-based possessory interests … protected by federal common law." ER0236. To support this argument, the Tribe pointed to the Treaty of Point Elliott, Jan. 22, 1855, 12 Stat. 927. ER0235.

In opposition, BNSF explained that the Tribe drew a distinction without a difference: Where "regulation of rail transportation" is concerned, ICCTA expressly "preempt[s] the remedies provided under *Federal or State law*," and so injunctive relief regulating BNSF's rail traffic should be equally unavailable under state law and federal common law. 49 U.S.C. § 10501(b) (emphasis added).

On June 8, 2017, the district court granted the Tribe's motion for reconsideration, concluding that the Tribe's claims are "based on the right of exclusive use granted by the Treaty" and therefore arise under federal common law. ER0011. The district court believed that this conclusion radically altered the judicial relief available to the Tribe, and it held that the Tribe could pursue the full range of its requested injunctive and monetary relief—even though "[a]n injunction … under federal law will affect BNSF's rail operations to the same extent and in exactly the same way as would a similar injunction issued under state law." ER0008–ER0009, ER0011.

5. BNSF moved the district court to clarify that, although the court had made a legal determination that ICCTA does not affect the Tribe's federal common-law claims, the court had not determined

whether the Tribe owns the land underlying the rail line. In BNSF's view, that matter was neither resolved by the prior litigation nor briefed by the parties in this case (and thus is not currently fit for this Court's review). On March 15, 2018, the district court denied BNSF's motion, stating that it had already found "that the Tribe has a treaty right to the land under BNSF's tracks." ER0006.

6. BNSF asked the district court to certify for interlocutory appeal its January 13, 2017 summary judgment order; its June 8, 2017 order granting the Tribe's reconsideration motion; and its March 15, 2018 order clarifying the previous orders.

Shortly after BNSF's filing, the STB submitted a letter to the district court urging "[p]rompt resolution at the appellate level" of the issues presented in the cross-motions for summary judgment, because clear precedent "would be desirable for the parties; for rail shippers, other railroads, and local communities facing arguably analogous situations; and for the [STB] itself." ER0037.

On May 15, 2018, the district court certified the three orders for interlocutory appeal and stayed the case pending review in this Court. ER0001–ER0002.

7. BNSF timely petitioned this Court to permit its appeal under 28 U.S.C. § 1292(b). The Tribe stated that it did not oppose. On August 21, 2018, this Court granted permission to appeal.

SUMMARY OF ARGUMENT

1. ICCTA's broad preemption provision effectuates Congress's policy of comprehensive federal control by displacing remedies under other federal or state law that manage or govern rail transportation. The judicial injunction the Tribe seeks under federal common law is expressly foreclosed by ICCTA.

Although ICCTA preemption has its limits, they are not implicated here. ICCTA does not preempt a remedy or regulation that has only an incidental effect on rail transportation. But here the Tribe seeks to control the number of cars and types of commodities that BNSF may transport—an unambiguous demand for regulation-by-injunction. And although ICCTA must be harmonized with remedial authority created by another federal statute, the Tribe's desired remedy arises under federal common law. By expressing Congress's intent for exclusive administrative jurisdiction over rail remedies, ICCTA leaves no room for judge-made remedies regulating common carriers.

The Tribe is certainly entitled to the remedy of increased rent for the increased use of the rail line, as the Easement contemplates. If, however, it wishes to restrict service on the rail line, it must first pursue an abandonment or discontinuance proceeding before the STB. That is the proper remedy under ICCTA to remove the line from the interstate network and extinguish common-carrier duties, allowing an action like the present one to go forward.

2. The Treaty does not support the Tribe's claim. The Treaty speaks of the Tribe's right to exclusive use of its Reservation, but the Tribe has already authorized BNSF to use the land beneath its tracks through the Easement. In any event, the Treaty is silent as to remedies for infringing that right of exclusive use, while ICCTA clearly bars other remedies with respect to rail transportation.

Even if a treaty violation could sometimes support injunctive relief, this is not such a circumstance. Rather, this Court should harmonize ICCTA and the Treaty by recognizing both (a) the Treaty right to exclude others from the Reservation in the first instance, and (b) the exclusive-remedies provision of ICCTA that applies to common-carrier service already established on the Reservation. Here, the latter

controls because common-carrier service has existed on the rail line for well over a century.

3. The Easement does not support the Tribe's claim. The plain terms of the Easement contemplate that rail traffic may increase in response to shipper needs, and the Easement identifies adjustment of rent (not specific performance) as a remedy for increased traffic. Even if the Easement could be read to support the Tribe's pursuit of an injunction, that term would be unenforceable under longstanding federal law. *Baltimore*, 333 U.S. at 177–78.

4. IRWA does not authorize the injunction the Tribe seeks. IRWA is an administrative statute that addresses only the process for obtaining a right-of-way over Indian land, such as the Easement. Under IRWA, a tribe can choose whether to consent to a third-party's proposal to establish a common-carrier rail line on its land. But under ICCTA, the tribe thereafter lacks the authority to seek an injunction regulating that rail service. Moreover, as the district court recognized, any remedies available to the Tribe under IRWA must be pursued before the Secretary of the Interior—not in court. In all events, even if IRWA vests some substantive authority in the Secretary, no reason

exists to believe that authority includes regulating rail transportation in violation of other federal law, especially where (as here) the Easement itself recognizes the primacy of federal law. ICCTA controls, and it unambiguously reserves such responsibilities to the STB as the exclusive federal regulator.

STANDARD OF REVIEW

This Court reviews a ruling on summary judgment motions de novo. *Roach v. Mail Handlers Benefit Plan*, 298 F.3d 847, 849 (9th Cir. 2002).

ARGUMENT

I. THE ICC TERMINATION ACT PREEMPTS THE TRIBE'S CLAIM FOR INJUNCTIVE RELIEF

ICCTA establishes that the STB has exclusive jurisdiction over rail transportation; that the remedies under ICCTA with respect to rail transportation are exclusive; and that other such remedies are unavailable. The Tribe's request for a judicial injunction contradicts these clear statutory commands.

A. The ICC Termination Act Expressly Displaces Judicial Remedies that Regulate the Operation of a Common Carrier by Rail

"National rather than local control of interstate railroad transportation has long been the policy of Congress." *City of Chicago v. Atchison, Topeka & Santa Fe Ry.*, 357 U.S. 77, 87 (1958). And understandably so. "Serious impediments to the efficient and uninterrupted flow of [interstate rail] traffic might well result" if local interests—be they States, Indian Tribes, municipalities, or private parties—could atomize and regulate the national rail system through lawsuits like the Tribe's. *Id.* at 88.

1. ICCTA's preference for unified federal administrative control—and against piecemeal regulation—is unmistakable in the exclusive jurisdiction and preemption clauses of the statute. *First*, ICCTA entrusts federal rail policy to the STB, to the exclusion of any other body: "The jurisdiction of the [STB] over … transportation by rail carriers, and the remedies provided in [ICCTA] with respect to … practices, routes, services, and facilities of such carriers … is exclusive." 49 U.S.C. § 10501(b)(1). *Second*, ICCTA expressly displaces any federal or state remedies that would otherwise regulate the transportation

provided by a common carrier by rail: "[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." *Id.* § 10501(b). The "plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent," *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993), draws no distinctions among remedies that arise under federal common law, state statutes, state common law, or local ordinances; remedies outside the statute are incompatible with uniform federal rail policy.

Consistent with the statutory text, "[e]very court that has examined [Section 10501(b)] has concluded that [its] preemptive effect … is broad and sweeping," forbidding "impinge[ment] on the [STB]'s jurisdiction or a railroad's ability to conduct its rail operations." *CSX Transp., Inc.*, FD 34662, 2005 WL 584026, at *6 (STB Mar. 14, 2005); *see, e.g.*, *Delaware v. STB*, 859 F.3d 16, 18–19 (D.C. Cir. 2017); *cf. Kalo Brick & Tile*, 450 U.S. at 318 (addressing ICC authority).

This Court, too, has held that ICCTA squarely preempts remedies that "may reasonably be said to have the effect of managing or governing rail transportation." *Ass'n of Am. Railroads v. S. Coast Air*

Quality Mgmt. Dist., 622 F.3d 1094, 1097 (9th Cir. 2010); *see also BNSF Ry. v. Cal. Dep't of Tax & Fee Admin.*, 904 F.3d 755, 760 (9th Cir. 2018) (same); *Or. Coast Scenic R.R. v. Or. Dep't of State Lands*, 841 F.3d 1069, 1077 (9th Cir. 2016) (same); *City of Auburn*, 154 F.3d at 1030–31 ("All the cases cited by the parties find a broad reading of Congress' preemption intent, not a narrow one.").

The STB itself has taken a similarly expansive approach to Section 10501(b). The STB has explained that the provision "broadly divest[s] states and localities of a regulatory role over rail transportation" in an effort to "prevent a patchwork of local regulation from unreasonably interfering with interstate commerce." *CSX Transp.*, 2005 WL 584026, at *7, *9. Accordingly, like the federal courts, the STB understands Section 10501(b) to preempt "state and local actions … that, by [their] nature, could be used to deny [a] railroad the ability to conduct its operations or to proceed with activities that the [STB] has authorized." *DesertXpress Enters., LLC*, FD 34914, 2007 WL 1833521, at *3 n.4 (STB June 27, 2007); *see also, e.g.*, *Norfolk S. Ry.*, FD 35701, 2013 WL 5891582, at *3 (STB Nov. 4, 2013) (ICCTA displaces remedies that would "regulate matters … such as … the

construction, operation, and abandonment of rail lines" or that would "unreasonably burden interstate commerce or unreasonably interfere with railroad operations").

2. ICCTA preemption has its limits. *First*, courts and the STB alike recognize that ICCTA does not preempt a suit or regulation that has only an "incidental effect" on rail transportation. *Ass'n of Am. Railroads*, 622 F.3d at 1097 (noting that although ICCTA broadly preempts state laws that regulate rail transportation, it "permit[s] the continued application of laws having a more remote or incidental effect on rail transportation" (quoting *N.Y. Susquehanna & W. Ry. v. Jackson*, 500 F.3d 238, 252 (3d Cir. 2007)); *see also Norfolk S. Ry.*, 2013 WL 5891582, at *3. For example, the STB has observed that "railroads can be required to comply with some health and safety rules, such as fire and electric codes if they are applied without discrimination." *CSX Transp., Inc.*, FD 34662, 2005 WL 1024490, at *4 (STB May 3, 2005).

That limitation reflects ICCTA's textual instruction that preemption extends only to matters "with respect to regulation of rail transportation," 49 U.S.C. § 10501(b); railroads "are not necessarily exempt from other generally applicable laws," *Boston & Maine Corp. &*

Town of Ayer, 5 S.T.B. 500 (2001). This result also aligns with ICCTA's policy objectives: ICCTA's preemption provision reflects Congress's intention to safeguard common carriers' ability to fulfill their duty to the public, free from localized interference. Regulations that apply generally and have only an incidental effect on interstate commerce are unlikely to impair common-carrier service or undermine the STB's status as a single regulator, and thus are unlikely to threaten the public interest.

Second, where another Act of Congress supplies remedial or regulatory authority that seemingly conflicts with ICCTA, "then the courts must strive to harmonize the two laws, giving effect to both laws if possible." *Ass'n of Am. Railroads*, 622 F.3d at 1097; *BNSF*, 904 F.3d at 762 (same); *see Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) ("When confronted with two Acts of Congress, allegedly touching on the same topic, this Court is not at 'liberty to pick and choose among congressional enactments' and must instead strive 'to give effect to both.' ") (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).

Thus, for example, the STB has explained "that federal environmental statutes such as the [Clean Air Act], the Clean Water

Act, and the Safe Drinking Water Act are generally outside the scope of § 10501(b) preemption, unless the federal environmental laws are being used to regulate rail operations directly or being applied in a discriminatory manner against railroads." *United States EPA*, FD 35803, 2014 WL 7392860, at *7 (STB Dec. 30, 2014). The STB has opined that, although those environmental laws may generally *not* conflict with ICCTA when applied to railroads, certain local rules adopted under the Clean Air Act that would "allow[] states and localities to … govern[] how an instrument of interstate commerce is operated, equipped, or kept track of … *would* directly conflict with the goal of uniform national regulation of rail transportation … [and] likely would be preempted." *Id.* at *9 (emphasis added).

B. The ICC Termination Act Precludes the Injunction Sought by the Tribe Because It Would Regulate the Operation of a Common Carrier by Rail

The Tribe's complaint seeks injunctive relief that would prohibit BNSF "(i) from running more than one train of twenty-five cars or less in each direction over the Right-of-Way per day, and (ii) from shipping Bakken Crude [oil] over the Reservation." ER1084 ¶C. The Tribe points to no cause of action from a federal statute, but instead has

asserted that "the Court is fully empowered to grant the Tribe injunctive relief under federal common law." ER0233. ICCTA squarely preempts the Tribe's requested remedy.

1. Without question, an injunction dictating the number of cars and types of commodities that a rail carrier may transport would "have the effect of managing or governing rail transportation," *Ass'n of Am. Railroads*, 622 F.3d at 1097. Such a remedy would violate 49 U.S.C. § 10501(b) twice over. *First*, the injunction would impermissibly regulate "transportation by [a] rail carrier[]" and the "routes, services, and facilities of such [a] carrier[]"—matters over which "the jurisdiction of the [STB] … is exclusive." *Id.* *Second*, ICCTA's "remedies … with respect to regulation of rail transportation are exclusive"—and those remedies do not include an injunctive remedy in court. *Id.*

Other courts have uniformly reached the same conclusion in suits seeking similar operating restrictions on when and where a rail carrier may operate its trains. *See, e.g.*, *Pace v. CSX Transp., Inc.*, 613 F.3d 1066, 1068 (11th Cir. 2010) (holding that ICCTA preempts action challenging "the operation of [a] side track [that] caused an increase in noise and smoke due to the traffic on the track"); *Friberg v. Kansas City*

S. Ry., 267 F.3d 439, 443 (5th Cir. 2001) (holding ICCTA preempts action against rail carrier for blocking road crossing because "[r]egulating the time a train can occupy a rail crossing impacts, in such areas as train speed, length and scheduling, the way a railroad operates its trains"); *Maynard v. CSX Transp., Inc.*, 360 F. Supp. 2d 836, 842 (E.D. Ky. 2004) (holding that ICCTA preempts the claim of a landowner that the defendant rail carrier's operation of trains on a railroad siding unreasonably blocked access to landowner's property).*

* Cases like *Pace* and *Friberg*—which held damages actions were preempted, *see Pace*, 613 F.3d at 1069; *Friberg*, 267 F.3d at 441—illustrate why ICCTA also precludes the Tribe's claims for monetary relief to some extent. Although the parties have not yet briefed or developed a record on the issue, ICCTA necessarily preempts any damages remedies that amount to an indirect form of regulation. *See San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) ("The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."); *Kalo Brick & Tile*, 450 U.S. at 325-26 ("It would vitiate the overarching congressional intent of creating 'an efficient and nationally integrated railroad system' to permit [a third party] to use the threat of damages to require a carrier to do exactly what the Commission is empowered to excuse.") (citation omitted). ICCTA does not, however, prevent the Tribe from securing higher rent payments as contemplated by the Easement, because such enforcement of the railroad's contract would not "unreasonably interfere with railroad operations." *Norfolk S. Ry.*, 2013 WL 5891582, at *3.

2. Neither of the recognized limits on ICCTA preemption applies here. The order the Tribe seeks has more than a "remote or incidental effect on rail transportation," *Ass'n of Am. Railroads*, 622 F.3d at 1097. Indeed, judicial control over the volume and types of cargo on a rail line is perhaps the most direct and substantial regulation of rail transportation imaginable. The district court in fact recognized the obvious effect of the Tribe's claim when it initially held that claim preempted by ICCTA, ER0021; it reconsidered that decision based only on the *source* of the Tribe's claim, while conceding that the claim would have identical *effects* on rail transportation. ER0008–ER0009, ER0011.

Nor does recognizing ICCTA's preemptive effect here require harmonizing various Acts of Congress. Certainly, during this litigation, the Tribe has invoked various federal enactments—principally, the Treaty and IRWA. As discussed below, neither changes the result here. *See infra* pp. 45–56, 64–72. But more fundamentally, ICCTA preempts "remedies," and the *remedy* the Tribe invokes is purely a matter of judge-made federal common law. *See, e.g.*, ER0233 (referring to "the Tribe's federal common law remedies"); ER0238 (urging that " '[t]he

Supreme Court has recognized a variety of federal common law causes of action to protect Indian lands from trespass …' " (quoting *United States v. Pend Oreille Pub. Util. Dist. No. 1*, 28 F.3d 1544, 1549 n.8 (9th Cir. 1994)); ER0241 (Tribe's argument that it must "seek to vindicate its rights under federal common law").

With no competing remedial *statute* in the picture, any call for harmonization vanishes. ICCTA simply applies by its terms: "[T]he remedies provided under [ICCTA] … preempt the remedies provided under Federal … law." 49 U.S.C. § 10501(b). The "rules aiming for harmony over conflict" are rules of "*statutory* interpretation" that courts apply "[w]hen confronted with two *Acts of Congress* allegedly touching on the same topic." *Epic Sys.*, 138 S. Ct. at 1624 (emphasis added). Those "rules exist" because "[r]espect for Congress as drafter counsels against too easily finding irreconcilable conflicts in its work." *Id.*; *see Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) (explaining that "[t]he reason and philosophy of the rule" is to respect "the mind of the legislator [that] has been turned to the details of a subject") (internal quotation marks and citation omitted).

No such special status attaches to the judge-made federal common law remedy that the Tribe invokes. Rather, federal common law operates to "fill the interstices of federal legislation" only when "Congress has *not* spoken." *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727 (1979). When a federal statute expresses Congress's *actual* intent on a particular issue, that instruction displaces what power the judiciary might otherwise have had to create its own remedies. *See, e.g.*, *City of Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981) ("[W]hen Congress addresses a question previously governed by a decision rested on federal common law[,] the need for such an unusual exercise of lawmaking by federal courts disappears"); *Nw. Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 95 (1981) ("[W]e consistently have emphasized that the federal lawmaking power is vested in the legislative, not the judicial, branch of government; therefore, federal common law is subject to the paramount authority of Congress") (internal quotation marks and citation omitted).

Here, Congress has spoken directly to what remedies are available to end common-carrier service on a rail line once it has begun. ICCTA provides for an administrative determination removing the rail line

from the interstate network. That remedy "[is] exclusive and preempt[s] the remedies [otherwise] provided under Federal or State law." 49 U.S.C. § 10501(b).

Indeed, even before ICCTA established the STB, courts—including this Court—recognized that the ICC's exclusive authority preempted federal common law actions. For example, by "ma[king] clear that the only remedies regarding rail rates are those provided by federal statute[]," those same statutes leave no room for judge-made remedies against common carriers, "whether … arising under state or federal common law." *G. & T. Terminal Packaging Co. v. Consol. Rail, Corp.*, 830 F.2d 1230, 1234, 1235 (3d Cir. 1987); *accord Alliance Shippers, Inc. v. S. Pac. Transp. Co.*, 858 F.2d 567, 568–69 (9th Cir. 1998) (per curiam) ("adopt[ing]" *G. & T. Terminal* and affirming district court's holding that "causes of action … under federal common law and state statutory law were preempted"). Because common carrier rates and common carrier service are two sides of the same coin—and subject to the same exclusive federal jurisdiction—there is no reason for a different result here. As the authoritative legislative history of ICCTA's immediate statutory predecessor (the Staggers Rail Act of 1980) explains, "[n]o

state law or federal or state common law remedies are available," because "[t]he remedies available against rail carriers with respect to rail rates, classifications, rules and practices are exclusively those provided" by federal statute. H.R. Rep. No. 96-1430, at 106 (1980) (Conf. Rep.).

3. This case well illustrates how ICCTA's preemption provision reinforces ICCTA's broader policy. The injunction the Tribe seeks would directly compromise the very common-carrier obligations that Congress sought to vindicate in ICCTA. If the Tribe were to prevail here, then BNSF would be compelled to obey a judicial decree obtained by a single plaintiff—instead of performing its "absolute duty to provide rates and service over the [l]ine upon reasonable request" to all shippers, *Riffin*, 733 F.3d at 347.

Moreover, Congress reaffirmed in ICCTA that uniformity and centralization were the surest routes to a dependable interstate rail network. *See* H.R. Rep. No. 104-311, at 96 (1995) (explaining the need to impose "uniform[] … Federal standards" and avoid "balkanization and subversion of the Federal scheme"). If the Tribe can regulate BNSF by an injunction here, then other plaintiffs in other courts can do the

same, shredding Congress's national plan with localized carve-outs. And the cost would fall on the very people to whom Congress has guaranteed continued rail service—shippers like the refineries on the rail line here, and the consumers who rely on the commodities they produce. That result would contradict the "policy of the United States" announced in ICCTA that rail regulation should "ensure the development and continuation of a sound rail transportation system … to meet the needs of the public." 49 U.S.C. § 10101(4).

C. The Tribe Can Pursue Other Remedies

Although ICCTA forecloses the injunctive relief the Tribe seeks, the Tribe has other remedies.

1. As an initial matter, ICCTA does not preclude the Tribe from bringing a claim for an increase in rent that reflects the reasonable value of the increased use of the right-of-way. BNSF accepts that increased rent for increased use is appropriate. ICCTA does not ordinarily preempt a railroad's compliance with a voluntary commitment to pay for use of property because such an agreement ordinarily would not unreasonably interfere with railroad operations. *See, e.g.*, *Township of Woodbridge v. Consol. Rail Corp.*, No. 42053, 2001

WL 283507 (STB Mar. 23, 2001). Because the Easement provides that disputes about the appropriate rent must be resolved through binding arbitration, ER0864–ER0865 ¶3(b)(iii), the parties in the district court agreed to bifurcate issues regarding monetary relief for later resolution, ER0034.

2. If the Tribe wishes to stop or restrict service on the rail line, it may have administrative remedies. If the Tribe wishes only to limit rail traffic, it would first need to ask the STB to enter an appropriate abandonment or discontinuance order. *See, e.g.*, *Consol. Rail Corp. v. ICC*, 29 F.3d 706, 708–09 (D.C. Cir. 1994) (describing the "unusual practice known as adverse abandonment," in which "the carrier wants to continue service; it is a third party who seeks the issuance of an abandonment certificate"); *Lake Cnty., Oregon—Adverse Discontinuance of Rail Serv.—Modoc Ry. & Land Co. & Modoc N. R.R.*, AB 1035, 2009 WL 3827540, at *2 (STB Nov. 17, 2009) ("The circumstances here warrant granting the [adverse] discontinuance application, thereby removing the [STB's] primary jurisdiction over the discontinuance of rail service and allowing the [landowner] to pursue whatever relief it may need under state law to permanently remove [the rail carriers]

from the line."). *But see City of S. Bend v. STB*, 566 F.3d 1166, 1171–72 (D.C. Cir. 2009) (Kavanaugh, J., concurring) (questioning whether ICCTA contemplates third-party petitions seeking abandonment or discontinuance).

Under ICCTA, an abandonment or discontinuance order is the *only* way to eliminate or reduce a rail carrier's common-carrier obligations on a rail line. *See* 49 U.S.C. § 10903; *Tex-Mex*, 328 U.S. at 144–45 (holding that even when a private agreement permitting a railroad to use property expires, the railroad cannot cease providing common-carrier service without ICC authorization); *City of Des Moines*, 264 F.2d at 457; *cf. Smith v. Hoboken R.R. Warehouse & S.S. Connecting Co.*, 328 U.S. 123, 130 (1946) (bankruptcy trustee cannot abandon rail operations without ICC approval). The fact that the rail line operates across a reservation makes no difference; the process is exactly the same because the salient fact is that common-carrier service is offered on the line. *See S. Pac. Transp. Co.—Abandonment Exemption—In Mineral & Lyon Counties, Nev.*, AB 12, 1991 WL 40203, at *1 (ICC Mar. 12, 1991) (ICC evaluating request to abandon rail line across tribal reservation, as contemplated by court-approved settlement

agreement between railroad and tribe). The administrative process exists precisely so that the STB can assess the public interest by considering the views of all affected stakeholders, including railroads, shippers, and landowners. The bilateral adversary litigation initiated by the Tribe here is ill-suited to that complex task.

"Abandonment" and "discontinuance" are somewhat inapt monikers because they do not (necessarily) entail cessation of *all* rail service. Under ICCTA, they are shorthands for removal of a rail line from the STB's jurisdiction and cessation of *common-carrier* service. *See generally S. Pac.*, 1991 WL 40203, at *1 n.2 ("Service over an abandoned line under contractual agreement does not carry with it a common carrier obligation."); *Consol. Rail Corp.*, FD 30527, 1984 WL 49391, at *1, *2 (ICC Oct. 1, 1984) ("[P]ost-abandonment handling of local traffic under contract is not subject to [the ICC's—or, today, the STB's—] jurisdiction …. Upon abandonment, the line, as a legal matter, no longer functions in interstate or foreign commerce."). In this case, such an order would excuse BNSF from the requirement that it "provide … transportation or service on reasonable request," 49 U.S.C. § 11101(a), and thus would allow it to agree by contract to absolute

restrictions on the number of cars or the types of goods that it will transport across the rail line. *Cf. S. Pac.*, 1991 WL 40203, at *1 (approving abandonment so that "once the line is abandoned the [the affected shipper] will purchase the line … and contract for continued rail service over the line").

3. If the Tribe wishes to stop rail service entirely, it would also need to take the *additional* step of asking the BIA to cancel BNSF's right-of-way set forth in the Easement. *See, e.g.*, 25 C.F.R. §§ 169.408, 169.409. Just as a landlord cannot eject a tenant without terminating a lease, the Tribe must pursue cancellation of the right-of-way if it wishes to extinguish BNSF's property right.

4. Although BNSF (and, presumably, the affected shippers) would resist these remedies under current circumstances, the first or both of these two steps—an adverse abandonment or discontinuance order from the STB, and a cancellation decision from the BIA—can move the Tribe toward the remedial outcome it appears to seek. But the Tribe's current effort in court to limit BNSF's rail service is incompatible with the rail line's current status as part of the interstate network. The Transportation Act of 1920 made the preexisting

common-carrier service on the line subject to the ICC's (and now the STB's) exclusive jurisdiction. To reverse that process, the Tribe must comply with the statutory requirements for removing the line from the STB's jurisdiction. Rather than pursue these avenues, the Tribe has sought recourse through a remedy that ICCTA has expressly disallowed (an injunction limiting interstate rail traffic) and in a forum that Congress has not sanctioned (the courts). This Court should redirect the Tribe toward the channels Congress intended.

II. THE TREATY OF POINT ELLIOTT DOES NOT SUPPORT THE TRIBE'S CLAIM FOR INJUNCTIVE RELIEF

As discussed above, no doubt exists that the Tribe seeks an injunction that would "have the effect of managing or governing rail transportation." *Ass'n of Am. Railroads*, 622 F.3d at 1097. The district court nonetheless held that ICCTA had no effect on the Tribe's claim because it believed the Tribe's claim was "based on the right of exclusive use granted by the Treaty." ER0011. The district court overread the Treaty. The Treaty says nothing about particular remedies, while ICCTA is unambiguous in limiting remedies with respect to rail transportation. And even if a Treaty violation could give rise to equitable relief under some circumstances, courts are obliged to

"give effect to both" ICCTA and the Treaty "if possible." *Mancari*, 417 U.S. at 551. Both can be respected by recognizing the Tribe's possessory rights under the Treaty while obeying ICCTA's provision of exclusive remedies for restricting existing common-carrier service.

A. The Treaty Does Not Support a Claim for Injunctive Relief Because It Is Silent About Remedies

The Treaty of Point Elliott, signed by the Tribe's predecessors and the United States, "reserved for the present use … of the said tribes and bands" certain parcels of lands. 12 Stat. 927, art. II. It declared that those "tracts shall be set apart, and so far as necessary surveyed and marked out for [the tribes'] exclusive use." *Id.* The Treaty thereby created a number of Indian reservations, including what is today the Swinomish Reservation. Invoking this "exclusive use" language, the district court described the Tribe's "treaty-based federal common law claim" as transforming the preemption analysis: The question was no longer "whether the requested relief would interfere with rail transportation, but whether Congress intended to repeal the Treaty of Point Elliott when it enacted the ICCTA." ER0009. Because "[t]he Treaty of Point Elliott is not mentioned in the ICCTA," the Court held

"that right remains enforceable in federal court," including through claims for injunctive relief. ER0010–ER0011.

1. As an initial matter, the district court erred in relying on the Treaty for the simple reason that the Tribe itself has pointed to the specific agreement between the parties—the Easement—and has disclaimed the Treaty as determinative of its claims. *See, e.g.*, ER0044 ("[T]he Tribe's burden of proof in this litigation is … not [to show] that BNSF violated the Treaty. As such, possessory rights under the Treaty to the land under BNSF's tracks need not be proven or adjudicated as an element of the Tribe's claims in this litigation[.]"); *id.* ("Resolution of the Tribe's actual claims does not require any adjudication of the Tribe's treaty rights"). It cannot be both that the Tribe's treaty rights are so compelling that they displace a century of exclusive federal rail regulation and statutory protections for shippers, and that those same treaty rights are so irrelevant that they "do[] not need any adjudication" here.

2. In any event, the Treaty does not support the district court's reasoning because the Treaty guarantees no specific remedies for violations of the rights it establishes. Those remedies come from federal

common law, and whatever background remedies federal common law might provide the Tribe, they are always subject to modification by a statute like ICCTA. *See supra* pp. 35–39.

The existence of a right does not mean that every imaginable legal or equitable remedy is available for a violation of that right. Rather, "the creation of a right is distinct from the provision of remedies for violations of that right." *eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388, 392 (2006); *see* D. Dobbs, *Handbook on the Law of Remedies* § 1.2, at 3 (1973) ("The substantive question[] whether the plaintiff has any right … [is] very different … from the remedial questions whether this remedy or that is preferred, and what the measure of the remedy is.").

This distinction between rights and remedies is exactly what led the Supreme Court in *Oneida III* to conclude that a tribe could pursue legal remedies with respect to aboriginal lands it had reacquired in fee, but could not assert equitable remedies to reestablish sovereignty over those lands. "There is a sharp distinction between the *existence* of a federal common law right to Indian homelands and how to *vindicate* that right." 544 U.S. at 213 (quoting *Oneida Indian Nation v. County of Oneida*, 199 F.R.D. 61, 90 (N.D.N.Y. 2000)). "The distinction between a

claim or substantive right and a remedy is fundamental." *Id.* (quoting *Navajo Tribe of Indians v. New Mexico*, 809 F.2d 1455, 1467 (10th Cir. 1987)). Under the circumstances of that case, Justice Ginsburg explained for the Court, "standards of federal Indian law and federal equity practice" precluded the relief sought by the tribe in *Oneida III*. *Id.* at 214.

The same mode of reasoning applies here. That is, it can be assumed for purposes of this appeal that the Tribe's treaty right of exclusive use would be implicated by building a *new* railroad like the one at issue here. *See* Dkt. 1 (Pet. for Permission to Appeal) at 21 (No. 18–80062). But that does not answer the question whether injunctive relief is available to the Tribe now that regulated common-carrier service has been underway for a century on an *existing* railroad. Rather, because the Treaty is entirely silent on the issue of remedies, this Court must look elsewhere to ascertain what remedies are available. Just as "standards of federal Indian law and federal equity practice" informed the answer to that question in *Oneida III*, 544 U.S. at 214, here the answer is supplied by the federal law governing

existing rail transportation—and ICCTA unmistakably rejects the remedy the Tribe seeks.

B. The Treaty and the ICC Termination Act Are Readily Harmonized

As just explained, no conflict exists between ICCTA and the Treaty on the remedial question presented here. But even if the Treaty were in tension with ICCTA, it would be this Court's duty to "harmonize[]" the two authorities, so long as they are "capable of coexistence"—that is, they must both be given effect "unless there is a positive repugnancy or an irreconcilable conflict" between them. *BNSF*, 904 F.3d at 762 (internal quotation marks omitted). Courts "approach conflicts between treaties and statutes the way they would a conflict between two treaties or two statutes: … courts prefer to avoid [direct] conflicts altogether." *Owner-Operator Indep. Drivers Ass'n v. U.S. Dep't of Transp.*, 724 F.3d 230, 233–34 (D.C. Cir. 2013); *see Whitney v. Robertson*, 124 U.S. 190, 194 (1888) ("When [a treaty and a statute] relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either").

Any potential conflict between the Treaty and ICCTA can easily be reconciled because both the Treaty and ICCTA have meaning and operation in their own spheres: The Treaty grants the Tribe an exclusive right to use the Reservation—it need not allow a railroad on its land to begin with. But the Treaty is silent as to whether and how the exclusive-use right can be enforced against existing activity like BNSF's operations on the rail line. Conversely, ICCTA does not authorize a railroad to intrude on a tribe's reservation lands in the first instance. But it is fundamental to the comprehensive scheme of federal rail regulation that the STB alone can approve the restriction of existing common-carrier service.

Thus, this Court can and must "give effect to both" the Treaty and ICCTA. *Epic Sys.*, 138 S. Ct. at 1624. Once the Reservation is used for common-carrier operations, the Tribe can seek to restrict that service—but only through the exclusive administrative remedies set forth in ICCTA. *See supra* pp. 41–44.

C. The Tribe's Inability to Obtain an Injunction Based on the Treaty Is Consistent with Basic Principles of Property Law and Federal Indian Law

The way in which ICCTA limits the Tribe's ability to unilaterally control established activity on the Reservation is entirely unremarkable, both as a matter of ordinary property law and under precedent applying federal law to ordinary tribal activity. Just as a landowner's property right is not a license to impose land-use conditions that violate the law, so too an ordinary treaty right of exclusive use is not a license for a tribe to opt out of federal law by attaching conditions to the use of its reservation. No land owner, tribal or otherwise, can use property rights to violate federal law.

1. As a baseline, the owner of private property has an absolute right to exclude others from his land. *See, e.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) ("The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights"). But if a landowner opens his land to public use, his right to exclude is limited by applicable common law and statutory rules.

Thus, the Supreme Court has recognized that a landowner who admits a common carrier onto his property is restricted by federal law in his ability to control that service. "Property can be used even by its owner only in accordance with law, and conditions its owner places on its use by another are subject to like limitations. Of course it does not deprive an owner of his property without due process of law to deny him the right to enforce conditions upon its use which conflict with the power of Congress to regulate railroads …." *Baltimore*, 333 U.S. at 177.

The underlying principle—that property rights are subject to reconciliation with laws for the common good—could not be more familiar or more foundational. *See, e.g.*, *Munn v. Illinois*, 94 U.S. 113, 126 (1876) ("When … one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created."); *The Civil Rights Cases*, 109 U.S. 3, 41 (1883) (Harlan, J., dissenting) ("[A] keeper of an inn is in the exercise of a quasi public employment" which "forbids him from discriminating against any person asking admission as a guest on account of the race or color of that person.").

Likewise, here, because the Tribe has allowed common-carrier rail service on the rail line, it is no longer the exclusive user of its Reservation. Consequently, ICCTA today limits the mechanisms by which and conditions under which the Tribe can exclude shippers' cargo from the rail line. The Tribe surely has rights under the Treaty. But those rights cannot be parlayed into an unlimited and inexorable power to dictate what may be carried on the rail line.

2. The restraints that come from allowing common-carrier service on the rail line make particular sense in light of the established rule that federal statutes of general application routinely apply on tribal lands. It is "well settled by many decisions of [the Supreme] Court" and of this Court "that a general statute in terms applying to all persons includes Indians and their property interests." *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1115 (9th Cir. 1985) (quoting *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960)).

Under that principle, a tribe's treaty right of exclusive use does not eclipse all of federal law. As this Court explained in *United States Dep't of Labor v. Occupational Safety & Health Review Comm'n*, 935 F.2d 182, 186–87 (9th Cir. 1991), giving such vast effect to a typical

right of exclusive use would mean that "the enforcement of nearly all generally applicable federal laws would be nullified" as to "any Tribe which has signed a Treaty containing a general exclusion provision."

Accordingly, when a tribe engages in statutorily regulated activity—like operating an industrial workplace or establishing an employee benefit plan—the tribe is generally subject to the relevant terms of applicable federal laws, notwithstanding the rights it might have under a treaty or otherwise. *See, e.g.*, *id.* at 186 (OSHA applied to tribal sawmill, and permitted OSHA inspectors to enter the tribe's reservation for "investigations necessary to effectuate the Act"); *cf. Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus.*, 939 F.2d 683, 685–86 (9th Cir. 1991) (tribal sawmill was subject to ERISA liability for unpaid contributions to employee pension fund).

The situation here is similar. ICCTA, by its terms, applies broadly. It gives no hint that tribal members or lands should be exempt. And treating reservation land differently from all other land in the Nation would be inconsistent with the entire purpose of deploying unified federal regulation to avoid balkanization of a fundamentally interstate activity. For all those reasons, the Tribe, like other

landowners, is bound by ICCTA's exclusive remedies once common-carrier service is established across its land. Nothing in the Treaty requires this Court to endorse a contrary conclusion.

III. THE EASEMENT DOES NOT SUPPORT THE TRIBE'S CLAIM FOR INJUNCTIVE RELIEF

The Tribe has based its claim for an injunction on the Easement, arguing that BNSF has trespassed by exceeding the amounts of rail traffic described in the Easement. *E.g.*, ER0238. It seeks, for example, "an injunction requiring BNSF to abide by the traffic limitations contained in the Easement." *Id.* at n.4. The Tribe's request is unsound. The bargain between the Tribe and BNSF in the Easement, by its own terms, conforms to federal law that forbids rail regulation-by-injunction, and expressly acknowledges and accommodates the possibility of increased rail traffic based on BNSF's duties under federal law. And even if the Easement purported to authorize such an injunction, that term would be unenforceable because, under settled Supreme Court precedent, "contractual restrictions that unreasonably interfere with common carrier operations are deemed void as contrary to public policy." *Railroad Ventures, Inc.—Abandonment Exemption*, AB 556, 2000 WL 1125904, at *2 (STB Jan. 7, 2000) (citing *Baltimore*, 333 U.S.

at 177–78), *aff'd*, *Railroad Ventures, Inc. v. STB*, 299 F.3d 523 (6th Cir. 2002). No claim for an injunction is proper under the Easement.

A. The Easement by Its Own Terms Does Not Restrict BNSF's Performance of Federally Required Common-Carrier Duties

The Easement does not authorize the Tribe to seek an injunction that would require BNSF to violate its common-carrier duties under ICCTA. Rather, the Easement contemplates that BNSF (like any common carrier) may adjust its operations in response to shipper needs, and authorizes an adjustment of rent (not specific performance) as a remedy. The Easement should be "interpreted in light of existing law." 11 Williston on Contracts § 30:19 (4th ed. 1990); *see* Restatement (Third) of Property (Servitudes) § 4.1 cmt. j (2000). Accordingly, this Court should read the Easement to allow BNSF to comply with federal law—including its common-carrier obligations under ICCTA—rather than read the Easement to abridge BNSF's duties to non-parties (the shippers who rely on the rail service) and to clash with the Supreme Court's holding in *Baltimore* (*see infra* pp. 60–64).

In particular, the text of the Easement does not prohibit BNSF from adjusting its operations on the rail line to fulfill its common-

carrier obligations. To the contrary, the Easement specifically provides that the contemplated number of trains and cars can be increased as "required by shipper needs." ER0869 ¶7(c).

This flexibility in the traffic limit in the Easement was the result of BNSF's insistence in negotiations that its common-carrier obligations might affect operations on the line. As BNSF's predecessor explained to the Tribe during these negotiations: "We cannot agree to a single train limitation, or to a limitation on the number of cars. At times, depending upon business at the refineries, we must have flexibility with regard to the number of cars …." ER0921. The Tribe itself acknowledged shippers' rights to common-carrier service in "agree[ing] not to arbitrarily withhold permission to increase the number of trains or cars when necessary to meet shipper needs." ER0869 ¶7(c).

Consistent with the expectation that operations on the line might increase, the only remedy envisioned in the text of the Easement is an adjusted amount of rent—no provision is made for an injunction. The parties "understood and agreed that if the number of crossings or the number of cars is increased, the annual rental will be subject to adjustment." ER0869 ¶7(c); *see* ER0864–ER0865 ¶3(b)iii (describing

rent adjustment procedure); ER0849–ER0850 ¶2(b)iii (same). As discussed above, unlike an injunction, a rent remedy is consistent with ICCTA, *see supra* pp. 40–41, note *, and BNSF acknowledges that it must pay the Tribe increased rent for the increased use of the rail line.

Finally, the Settlement Agreement independently confirms all this by affirming that federal law remains fully in force. *See* ER0856 ¶12 ("Nothing in this Settlement Agreement or the associated Right-of-Way Easement shall supersede any federal law or regulation as they now exist or as they may be amended or changed from time to time.") Thus, by their own terms, the Easement and the Settlement Agreement provide no basis for enjoining BNSF to violate its federal common-carrier obligations under ICCTA.

B. To the Extent the Easement Purports to Limit Shippers' Rights to Service on the Rail Line, It Is Unenforceable

Even if the Easement could be read in isolation to support the Tribe's pursuit of an injunction, any provision that would force BNSF to breach its common-carrier obligations to shippers would be void.

1. ICCTA imposes an absolute statutory duty on BNSF to provide "transportation or service on reasonable request." 49 U.S.C.

§ 11101(a). And it is hornbook law that no contract, concerning land use or otherwise, can be specifically enforced in violation of federal or state law. *See* 5 Williston on Contracts § 12:1 ("Bargains that comply with formal contractual requirements may nevertheless be unenforceable … by operation of express statutory prohibition."); Restatement (Third) of Property (Servitudes) § 3.1 cmt. *l* (2000) (a servitude that includes conditions prohibited by federal statute is void); Restatement (Second) of Contracts § 365 (1981) (equitable relief is not appropriate where it would be "contrary to public policy").

The Supreme Court has consistently applied this principle to bar enforcement of private contracts when enforcement would violate statutory rail law. *See, e.g.*, *Louisville & Nashville R.R. v. Mottley*, 219 U.S. 467, 486 (1911) (holding that settlement agreement with railroad company was unenforceable because railroad's compliance would violate 1906 amendment to the ICA).

2. Of most direct relevance, the Supreme Court applied this principle in *Baltimore*, 333 U.S. 169, to hold that a contract between a rail carrier and the owner of the land and tracks used by the carrier could not limit or override the carrier's statutory obligations.

Baltimore concerned a rail line used by five rail carriers but owned by another party, the Cleveland Union Stock Yards Company ("Stock Yards"). Initially, Stock Yards and the rail carriers had a workable agreement that permitted the use of the track for common-carrier service to Stock Yards and other meatpackers. But Stock Yards later argued that the contract required the rail carriers to "either stop carrying livestock" to other meatpackers, or pay Stock Yards an "exorbitant" amount to continue. *Id.* at 173. The ICC ordered Stock Yards to permit delivery of commodities, including livestock, over the line. *Id.* at 174.

The Supreme Court upheld the ICC's order by answering fundamentally the same question that is presented here: "Can the noncarrier owner of a segment of railroad track who contracts for an interstate railroad's use of the segment as part of its line reserve a right to regulate the type of commodities that the railroad may transport over the segment, or would such a reservation be invalid under the Interstate Commerce Act?" *Id.* at 175.

The Supreme Court held that Stock Yards' property right in the tracks "d[id] not vest it with power to compel the railroads to operate in

a way which violates the Interstate Commerce Act." *Id.* at 177–78. It reasoned that the ICA "is one of the most comprehensive regulatory plans that Congress has ever undertaken," and "[i]t would be strange had this legislation left a way open whereby carriers could [evade their obligations] merely by entering into contracts for the use of trackage." *Id.* at 175. Accordingly, Stock Yards had no "right to enforce conditions upon [the] use [of its property] which conflict with the power of Congress to regulate railroads so as to secure equality of treatment of those whom the railroads serve." *Id.* at 177. The bottom line, the Court explained, is that "the command of Congress [with respect to common-carrier service] cannot be subordinated to the command of a track owner." *Id.*

Since *Baltimore*, courts have recognized and repeated its clear holding: A contract cannot be enforced in a manner that would force a railroad to derogate from its statutory common-carrier duties. *See, e.g.*, *Boynton v. Virginia*, 364 U.S. 454, 460 (1960) ("We have held [in *Baltimore*] that a railroad cannot escape its statutory duty to treat its shippers alike … by contractual arrangement with the owner of [rail] facilities."); *Railroad Ventures*, 299 F.3d at 560 (upholding STB's

invalidation of settlement agreement between railroad and township, where enforcement of the agreement "would unreasonably interfere with … [railroad's] future fulfillment of common carrier obligations"); *cf. Akron, Canton & Youngstown R.R.*, 611 F.2d at 1167 ("[E]ven at common law, a carrier could not put off its common-carrier status by mere contractual provision").

The STB and ICC have consistently recognized and repeated the same principle. *See, e.g.*, *Railroad Ventures*, 2000 WL 1125904, at *2 (citing *Baltimore*, 333 U.S. at 177–78); *Hanson Nat. Res.*, 1994 WL 673712, at *2 ("[O]nce common carrier operations commence over all or part of [a] line, any contractual restrictions that unreasonably interfere with those common carrier operations will be deemed void as contrary to public policy.").

3. *Baltimore*—and the precedents since—defeat the Tribe's claim for an injunction based on the Easement. The Tribe occupies the same status as Stock Yards did in *Baltimore*: a localized interest seeking to leverage property rights and a contract to force a rail carrier to forsake its common-carrier duties under federal law, all to the detriment of shippers (and the public) who have no say in the matter.

The Easement need not be read to authorize, and cannot be enforced by way of, an injunction that the Supreme Court, the ICC, and the STB have all said is forbidden by settled law.

IV. THE INDIAN RIGHT-OF-WAY ACT DOES NOT SUPPORT THE TRIBE'S CLAIM FOR INJUNCTIVE RELIEF

The Tribe has also suggested that IRWA, 25 U.S.C. §§ 323–328, provides authority for the injunction it seeks. In a ruling the Tribe did not ask this Court to review, the district court rejected that argument, finding "[n]o legal … authority" for the judicial application of IRWA to terminate the right-of-way agreement, *see* ER0028 n.5; that alone is a sufficient basis for this Court to conclude IRWA is not relevant here. But IRWA is unhelpful to the Tribe for the additional and more fundamental reasons discussed below.

A. The Indian Right-of-Way Act Is a Narrow Administrative Statute that Does Not Authorize a Tribal Action for Injunctive Relief

IRWA was enacted to address administrative inefficiencies in the process for obtaining rights-of-way across Indian land. It was never intended to endorse tribal regulation of common-carrier operations through judicial injunctions.

Prior to IRWA's enactment in 1948, "the authority of the Secretary of the Interior to grant rights-of-way [across tribal land was] contained in many acts of Congress, dating as far back as 1875." S. Rep. No. 80-823, at 1036 (1948). Consequently, each right-of-way application had to be "painstakingly scrutinized in order to make certain that the right-of-way sought [was] within a category specified in some existing statute." *Id.* Compounding the problem, when no existing statute authorized the Secretary to grant the particular kind of right-of-way, the right-of-way would need to "be obtained by means of easement deeds executed by the Indian owners and approved by the Secretary." *Id.* This piecemeal process frequently imposed enormous burdens on both the Secretary and the affected tribe, because the land in question might be owned by any number of individuals, many of whom could be difficult to identify and locate. *Id.*

Accordingly, Congress enacted IRWA to "simplify" the process and address the "dissatisfaction on the part of both applicants and Indians." *Id.* at 1035. IRWA consists of just six brief sections, which together establish a straightforward and uniform scheme for the process of granting rights-of-way of all kinds on tribal land. 25 U.S.C. §§ 323–328.

The first section "empower[s]" the Secretary of the Interior "to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations." *Id.* § 323. The second section requires the Secretary to obtain prior consent to the right-of-way from tribal officials. *Id.* § 324. The third section bars grants without just compensation. *Id.* § 325. And the remaining three sections preserve existing federal statutes empowering the Secretary to grant rights-of-way, *id.* § 326; allow federal agencies to obtain rights-of-way, *id.* § 327; and authorize the Secretary to promulgate "regulations for the purpose of administering" the statute, *id.* § 328.

Nothing about this framework remotely suggests Congress intended to grant tribes—or, for that matter, the Secretary—the authority to engage in common-carrier regulation-by-injunction. Nothing in IRWA's text mentions judicial injunctions (or any other legal or equitable remedies) controlling activity on existing rights-of-way. Rather, the statute by its terms addresses only the *administrative* process for *obtaining* a right-of-way over Indian land. That

understanding of IRWA is in perfect harmony with ICCTA's concern for exclusive federal regulation of common-carrier rail service; both statutes have a distinct purpose and offer distinct remedies in distinct circumstances.

B. Even a Broad Interpretation of the Indian Right-of-Way Act Would Not Support the Injunction the Tribe Seeks

Even if IRWA empowers the Secretary of the Interior to make some substantive decisions about the use of rights-of-way across tribal lands, it still would not authorize the injunction the Tribe seeks.

1. As an initial matter, the district court correctly recognized that whatever authority IRWA vests in the Secretary, it vests *in the Secretary* by way of administrative action, not in the Tribe by way of a suit for an injunction. *See* ER0028 n.5 (rejecting the Tribe's contention "that if the Department of the Interior has the power to terminate the right of way agreement for breach of its terms and limitations, this Court must have the power to enforce those same terms and limitations"). Regardless of the scope of the Secretary's authority, or how it relates to ICCTA, the Tribe lacks a right under IRWA that is enforceable through an injunction in district court.

2. Moreover, even if the Secretary somehow had carte blanche to supersede other federal laws when granting a right-of-way under IRWA—which he does not—no such authority was exercised here. Rather, the Secretary granted the right-of-way on the parties' own understanding that "[n]othing in … the … Right-of-Way Easement shall supersede any federal law or regulation as they now exist or as they may be amended or changed from time to time." ER0856 ¶12; *see* ER0968 ¶*l* (right-of-way application referencing Settlement Agreement).

3. The district court nonetheless discussed at length "whether Congress explicitly or implicitly repealed the IRWA when it enacted the ICCTA." ER0023. That approach was inconsistent with the instruction of the Supreme Court and this Court that seemingly conflicting federal statutes should be reconciled if possible: If ICCTA and IRWA "act[] upon the same subject," this Court is obliged to "give effect" to both. *Mancari*, 417 U.S. at 551.

IRWA and ICCTA are not in "irreconcilable conflict." *BNSF*, 904 F.3d at 762. Broadly speaking, IRWA addresses property rights, while ICCTA addresses the continuing obligations of common carriers by rail.

The two are distinct matters. A right-of-way can be granted or cancelled under IRWA's procedures. But regardless of the status of the property itself—for example, even if a lease has expired by its terms—a common carrier's operating authority can be granted or terminated only under ICCTA's procedures. *See supra* pp. 12–13, 42–43.

4. Additional sources confirm this understanding that, whatever power Congress gave the Secretary in IRWA to impose substantive conditions on property grants of rights-of-way, it intended that power to be exercised in conformity with—not in contradiction to—other federal laws such as the ICA and ICCTA.

First, IRWA's implementing regulations reflect the Secretary's understanding that Congress intended IRWA to coexist with other federal statutes, including ICCTA. "[R]ights-of-way approved under [IRWA] … [a]re subject to all applicable Federal laws." 25 C.F.R. § 169.9(a); *see* Bureau of Indian Affairs, Rights-of-Way (25 C.F.R. § 169), Guidance, *What are Procedural Provisions of the Rights-of-Way on Indian Land Final Rule?*, at 2, https://www.bia.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/idc1-033661.pdf (emphasizing that "[f]ederal law applies to ROWs on Indian land regardless of when the ROW was

granted"). Nor do the IRWA regulations create a separate system of remedies that could be thought to supplant existing law. Rather, "Indian landowners" who wish to respond to a trespass "may pursue any available remedies *under applicable law*." 25 C.F.R. § 169.413 (emphasis added). Here, ICCTA is the "applicable law" in a dispute about a common carrier's operations.

Second, IRWA's regulations addressing cancellation (*e.g.*, 25 C.F.R. §§ 169.405, .408, .409) nowhere suggest that the consequences of the Secretary's termination of a right-of-way differ (in any respect relevant here) from any other landowner's termination of a property right enjoyed by a railroad. In particular, nothing in IRWA or the accompanying regulations suggests that the Secretary claims the power to abrogate common-carrier obligations safeguarded by other federal statutes administered by other agencies. Instead, the Secretary's authority to cancel a right-of-way is simply the inverse of his authority to grant rights-of-way on tribal land: He may (with tribal consent) grant and extinguish right-of-way easements across tribal land. But he no more has the ability to order common-carrier service to cease than he

does to authorize it in the first place. Those directives come from the STB.

Third, when IRWA was enacted in 1948, Congress would necessarily have recognized how a law governing property rights (IRWA) would harmonize with a law governing common-carrier operations (then the ICA, now ICCTA). Just two years earlier, in *Tex-Mex*, 328 U.S. 134 (1946), the Supreme Court had held that, absent an abandonment order from the ICC, a railroad must continue providing common-carrier service—*even if* a landowner terminates the property right that allowed the railroad to occupy the land in the first place. Congress is presumed to be aware of the Supreme Court's holdings, and it enacts legislation against the backdrop of those holdings. *E.g.*, *Cary v. Curtis*, 44 U.S. (3 How.) 236, 240 (1845) ("Such was the law as announced from this Court, and Congress must be presumed to have been cognisant of its existence ….").

Thus, Congress understood that IRWA would operate in tandem with—not in contradiction to—the established principles governing common-carrier service. Here, that means that a tribe (like the landowner in *Tex-Mex*) can choose whether to consent to a third party's

operation of a common-carrier rail line over its land. But because of ICCTA, once such common-carrier service exists, the tribe (like the landowner in *Tex-Mex*) lacks the authority to regulate that rail service; such matters are reserved exclusively to the STB.

CONCLUSION

The orders of the district court should be reversed and the case remanded with instructions to grant BNSF's motion for partial summary judgment on the Tribe's claim for injunctive relief.

Respectfully submitted.

DATED: November 14, 2018 By: */s/ Benjamin J. Horwich*
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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Defendant-Appellant BNSF Railway Company states that, other than the proceeding in which this appeal was permitted, No. 18-80062, it does not know of any related case pending in this Court.

DATED: November 14, 2018 By: */s/ Benjamin J. Horwich*
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Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 18-35704

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Signature of Attorney or Unrepresented Litigant [/s/ Benjamin J. Horwich] Date [Nov 14, 2018]

("s/" plus typed name is acceptable for electronically-filed documents)

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I hereby certify that on November 14, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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DATED: November 14, 2018 By: */s/ Benjamin J. Horwich*
Benjamin J. Horwich