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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INTRODUCTION

The Tribe's brief is largely devoted to establishing what nobody doubts: A tribe generally may impose conditions on entry onto its lands, and if those conditions are violated, generally may seek injunctive relief in court. But those general propositions—and the generic supporting authorities the Tribe cites—do not answer the specific questions posed here: Whether the Tribe may enforce a condition that compels the user of its land (BNSF) to violate federal obligations to third parties (shippers), and whether the Tribe may ask a court to enjoin rail operations under the exclusive control of a specialized regulator.

The remedy the Tribe specifically seeks here *has never been awarded before*, with good reason. The relief the Tribe seeks would flatly contradict bedrock common-carrier obligations. *United States v. Baltimore & Ohio R.R.*, 333 U.S. 169 (1948). And the ICC Termination Act of 1995 ("ICCTA"), Pub. L. No. 104-88, 109 Stat. 803, expressly states that the kind of remedy the Tribe seeks must be pursued before the STB, not in court. Indeed, when a similar question arose in the aftermath of the *Southern Pacific* litigation that the Tribe itself cites,

all involved understood that only the ICC (now the STB) could terminate common-carrier service, remitting a rail line to the private contractual control that the Tribe seeks here.

ICCTA is the modern backbone of the Interstate Commerce Act ("ICA"), ch. 104, 24 Stat. 379 (1887)—"the most pervasive and comprehensive of federal regulatory schemes." *Chicago & Nw. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981). It imposes the defining duty of common carriers to "provide … transportation or service on reasonable request." 49 U.S.C. § 11101(a). It establishes exclusive remedies "with respect to regulation of rail transportation" that preempt any other "remedies provided under Federal or State law." *Id.* § 10501(b)(2). And it grants the STB "exclusive" jurisdiction over "transportation by rail carriers." *Id.* § 10501(b).

Despite all this, the Tribe asks this Court to whittle ICCTA down to a statute that [1] makes false promises to shippers about common-carrier service, [2] displaces no federal remedies (despite text expressly saying the opposite), and [3] "confine[s] the … jurisdiction," Tribe Br. 58, of the railroads' "exclusive" regulator. This characterization of

ICCTA is astonishing and unrecognizable to shippers and rail carriers alike, as the extraordinary attention from amici here reveals.

The Tribe is also wrong to claim that this result "harmonizes" ICCTA with the Treaty, the Easement, or the Indian Right-of-Way Act ("IRWA"), ch. 45, 62 Stat. 17 (1948). As BNSF has explained (Br. 31-32), the Court should strive to harmonize two federal laws that appear to conflict. But the Tribe fails to identify a true conflict between ICCTA and any of its preferred sources because none of those authorities authorizes the remedy the Tribe seeks: a judicial injunction regulating a rail line with established common-carrier service. Absent another federal law granting the Tribe a judicial remedy to regulate rail transportation, no "positive repugnancy or … irreconcilable conflict" exists. *BNSF Ry. v. Cal. Dep't of Tax & Fee Admin.*, 904 F.3d 755, 762 (9th Cir. 2018) (*CDTFA*). ICCTA speaks directly to the question here. It should be given effect.

ARGUMENT

I. THE TRIBE'S "HARMONIZATION" FAILS TO GIVE EFFECT TO ICCTA'S KEY PROVISIONS

The Tribe seeks to nullify ICCTA's key provisions whenever they might intersect with tribal interests. That approach finds no support in

precedent or past practice. And accepting the Tribe's theory would have untold consequences for the interstate rail network because the very provisions the Tribe brushes aside are what assure the "efficient and uninterrupted flow of [interstate rail] traffic," *City of Chicago v. Atchison, Topeka & Santa Fe Ry.*, 357 U.S. 77, 88 (1958).

A. The Tribe's Proposed "Harmonization" Misconceives ICCTA's Key Provisions

1. The Tribe's "harmonization" would gut 49 U.S.C. § 11101(a), which obligates common carriers to "provide … transportation or service on reasonable request." Section 11101(a) is the linchpin of commerce by rail; it is why shippers can actually trust that their goods will be transported.

The Tribe does not seriously dispute that it seeks to prevent BNSF from complying with this federal law; if enjoined from moving more than 25 cars per day, BNSF will be compelled to refuse a shipper's request to carry a 26th railcar, even though the request is reasonable and the line is physically operative. Instead, the Tribe argues (Br. 25-26) that this statutory common-carrier duty disappears if the common carrier's property rights are in doubt.

But this muddling of property rights and operating obligations was squarely rejected in *Thompson v. Texas Mexican Railway*, 328 U.S. 134 (1946) (*TexMex*), and *City of Des Moines v. Chicago & North Western Railway*, 264 F.2d 454 (8th Cir. 1959). In *TexMex*, the owner sought to "enjoin [the rail carrier] from using the tracks or other facilities," 328 U.S. at 137, and in *Des Moines*, the City sought an "injunction against the [rail carrier], to prevent the [carrier] from further using [a city street] as part of its right of way," 264 F.2d at 455. In both cases, the legal obstacle to granting judicial relief was the rail carrier's existing statutory common-carrier obligation, which could be extinguished only through ICC action. *See TexMex*, 328 U.S. at 145; *Des Moines*, 264 F.2d at 457. Limits on the rail carrier's right to use the underlying facilities or land did not alter the analysis there, nor should they here.

The Tribe would distinguish these cases on the ground that "abandonment is not at issue here." Tribe Br. 27. The Tribe misunderstands "abandonment." Abandonment (and "discontinuance") are not ejection; neither necessarily entails an end to rail traffic across a particular line. *See* BNSF Br. 10-12, 42-44. Rather, they are formal

STB authorization releasing a rail carrier from its common-carrier obligations, freeing the carrier to provide contract-based service (or cease operations entirely). *See S. Pac. Transp. Co.*, AB-12, 1991 WL 40203, at *1 n.2 (ICC Mar. 12, 1991). Only if the Tribe obtained such an STB order could BNSF lawfully refuse service to shippers who tender goods. Those decisions are the STB's exclusive domain, subject to judicial review, 28 U.S.C §§ 2321, 2342(5).

2. The next casualty of the Tribe's "harmonization" is ICCTA's express preemption provision. The Tribe asserts that ICCTA is no bar to injunctive relief because "[n]othing in ICCTA indicates that Congress intended [for] federal remedies [to] be limited or eradicated." Br. 20. But ICCTA states exactly the *opposite*: "[T]he remedies provided under [ICCTA] … preempt the remedies provided under Federal or State law." 49 U.S.C. § 10501(b). That text "necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). The Tribe offers no sound reason to read the words "Federal or" out of Section 10501(b).

The Tribe nonetheless maintains that "courts routinely find" that ICCTA's preemption provision "does not preempt [or] repeal other

conflicting federal law." Br. 18. The Tribe overstates the limited authority it cites. Certainly, ICCTA does not displace *all* other federal laws. *See* BNSF Br. 31-32. But the Tribe distorts this principle to mean that ICCTA does not displace *any* federal laws, despite STB precedent and ICCTA's plain language to the contrary.

The Tribe first relies (Br. 28) on *Tyrrell v. Norfolk Southern Railway*, which involved ICCTA and the Federal Railroad Safety Act ("FRSA"). 248 F.3d 517, 521-22 (6th Cir. 2001). Like ICCTA, FRSA is a federal statute that addresses rail activity and contains an "explicit preemption clause[]." *Id.* at 522. Faced with two different statutes about rail operations, administered by two different expert regulators, with two different preemption clauses, the Sixth Circuit concluded that only one should apply (and found FRSA more germane to the activity at issue). Similarly, in *CDTFA* (cited at Tribe Br. 31), this Court concluded that although ICCTA addresses fees collected by railroads, it does not displace the Hazardous Materials Transportation Act, which specifically addresses fees of the type at issue. 904 F.3d at 765-66. Thus, both cases confronted two statutes apparently addressing the same question. But here, only one law—ICCTA—addresses the proper

forum and remedies for regulating existing common-carrier service. As BNSF has explained, laws about rights (*e.g.*, treaties) are not laws about remedies, and laws about property interests (*e.g.*, IRWA) are not laws about common-carrier operations.

The district court cases cited by the Tribe (Br. 32) are even further afield. *Holland v. Delray Connecting Railroad*, 311 F. Supp. 2d 744 (N.D. Ind. 2004), holds that the competing federal law was not displaced because it was not "with respect to regulation of rail transportation," as Section 10501(b) demands. And *BNSF Railway v. Albany & Eastern Railroad*, 741 F. Supp. 2d 1184 (D. Or. 2010), appears to reason that antitrust laws of general application do not interfere with ICCTA's plan of federal regulation. By contrast, the Tribe's entire objective is to regulate service on the rail line in a way that clashes with ICCTA's common-carrier duty.

Much more on point is *United States Environmental Protection Agency*, FD 35803, 2014 WL 7392860, at *7 (STB Dec. 29, 2014), which the Tribe cites but fails to reckon with. There, the STB concluded that ICCTA *does* displace "federal … laws [that] are being used to regulate rail operations directly." *Id.* That is precisely what the Tribe seeks

here. Such an application of federal law "would be preempted by § 10501(b) even under the harmonization standard" because it would "irreconcilabl[y] conflict" with ICCTA's policies of national uniformity and protection of the channels of interstate commerce. *Id.* This Court, of course, "owe[s] *Chevron* deference to the STB's guidance on the scope of ICCTA preemption." *CDTFA*, 904 F.3d at 762 (internal quotation marks omitted).

3. Finally, the Tribe's "harmonization" fails to recognize that "[t]he jurisdiction of the [STB] over transportation by rail carriers … *is exclusive*." 49 U.S.C. § 10501(b) (emphasis added). The Tribe believes the STB's authority over rail lines on a reservation is limited by a tribe's right to condition access to its reservation (Tribe Br. 33), by the federal courts' equitable powers (Tribe Br. 54), and by the Secretary of the Interior's ("Secretary") authority under IRWA (Tribe Br. 46-47).[1] As

[1] This brief refers to "reservation" land for convenience, although that is an imprecise and potentially over-inclusive term in this context. For example, IRWA applies to lands "held in trust by the United States," 25 U.S.C. § 323, but—contrary to the Tribe's oversimplification—not all "Reservation lands are held in trust for the Tribe by the United States," Tribe Br. 5. *See generally Cty. of Yakima v. Confederated Tribes*, 502 U.S. 251 (1992) (discussing status of lands within reservation boundaries).

BNSF has explained, those bodies all have well-defined roles. BNSF Br. 40-45, 52, 68-69. But *exclusively* the STB can permit a rail carrier to cease providing common-carrier service. STB and ICC decisions on that subject are legion and unequivocal.

By contrast, *the Tribe has never cited a single case* in which a court, a tribe, or the Secretary has ever ordered a restriction on common-carrier rail transportation that survived appellate review. Ironically, the Tribe cites several matters involving the STB or ICC addressing disputes between tribes and common carriers, confirming that the STB is the appropriate tribunal in this context. *See, e.g.*, Tribe Br. 41. In *New Mexico Navajo Ranchers Ass'n v. ICC*, for example, the court remanded *to the ICC* to further consider whether "the building of a new [rail] line … is consistent with … the status of the Navajo tribe as a quasi-sovereign nation." 702 F.2d 227, 233 (D.C. Cir. 1983) (quotation marks omitted).

B. The Tribe's Proposed "Harmonization" Would Contradict the Established Practice of Applying the Interstate Commerce Act on Reservation Lands

The Tribe implies it has no remedy if it cannot pursue an injunction in court. That is incorrect. *See* BNSF Br. 40. Indeed, the

Southern Pacific line of decisions—which the Tribe itself cites—illustrates the process for restricting existing common-carrier service and the indispensable role the ICC (now STB) plays in that process.

1. The underlying facts of *Southern Pacific* parallel the Tribe's allegations here in many respects: In 1882, the Southern Pacific railroad ("SPT") began operating across the reservation of Nevada's Walker River Paiute Tribe (the "Paiute"). *United States v. S. Pac. Transp. Co.*, 543 F.2d 676, 680 (9th Cir. 1976). Nearly a century later, after common-carrier service had long existed on the line, the Paiute sued, alleging that SPT had never obtained a valid right-of-way through the reservation and thus was a trespasser that could be ejected. *Id.* This Court upheld the Paiute's trespass claims. *Id.* at 699. SPT attempted to cure the problem by securing a right-of-way from the Secretary, but this effort failed. *See S. Pac. Transp. Co. v. Watt*, 700 F.2d 550 (9th Cir. 1983).

Critically, neither this Court's 1976 decision nor its 1983 decision ended the parties' dispute. The Paiute wanted SPT to stop operating, but SPT served a nearby Army facility and, as a common carrier, was

obligated under federal law to continue doing so. *S. Pac. Transp. Co.*, AB-12, 1991 WL 108066, at *1 (ICC Jan. 16, 1991).

The parties negotiated a settlement under which, *inter alia*, SPT would pay damages, SPT would apply to the ICC for permission to discontinue common-carrier service across the reservation, the Paiute would grant the Army a right-of-way across the reservation, SPT would sell its tracks to the Army, and the Paiute would permit the Army to contract with SPT to operate private (*i.e.*, non-common-carrier) service to the Army facility. 1991 WL 108066, at *1. As these terms reflect, SPT could not simply agree to stop operating as a common carrier; it was required to "obtain either abandonment authority or an exemption from the [ICC] to discontinue its common carrier obligation over … the line." *Id.* at *1 n.4. Thus, after the settlement was reached, SPT petitioned the ICC for permission to cease common-carrier operations across the reservation, which the ICC granted after considering the relevant factors. *Id.* at *5; 1991 WL 40203, at *2.

2. This sequence of events is exactly what BNSF contends the law requires, but it would all have been an unnecessary detour if the Tribe's manner of "harmonization" were correct. Under the Tribe's

view, this Court's trespass holding in 1976 should have ended the matter long before the ICC got involved in 1991: As a trespasser, SPT could immediately have been ordered to cease its common-carrier service. But that is not what happened: SPT had to petition the ICC to end common-carrier service—even though its rail line was on a reservation, even though this Court had already determined that SPT never had the right to build the railroad, and even though SPT had agreed to sell its tracks.

This page of history provides a blueprint for harmonizing ICCTA with the Tribe's rights. As this Court's 1983 decision shows, a tribe generally has the prerogative to decide whether to grant a right-of-way to a common carrier, and nothing in ICCTA calls that right into question. But when common-carrier operations exist on a rail line, they are controlled by a regulatory process that other actors—the rail carrier, the Tribe, courts, etc.—cannot ignore. If the Tribe here wanted only limited service on the rail line, as the Paiute did in *Southern Pacific*, then it should have agreed to settle only on terms similar to the Paiute's. And if the Tribe wants to pursue that result today, it must petition the STB for an abandonment or discontinuance order removing

the rail line from the interstate rail network and extinguishing BNSF's common-carrier obligations.

C. The Tribe's Proposed "Harmonization" Would Warp the Federal Regime Regulating Railroads

The Tribe offers a deceptively simple proposal: Allow the Secretary and Tribe plenary authority to constrain ICCTA's application to rail lines on reservations. *E.g.*, Tribe Br. 38. As explained, this proposal clashes with ICCTA's basic commands on its own terms. But equally important, because the national rail network is an interconnected whole, the Tribe's position would create far-reaching incoherence in the federal regime regulating railroads. The Tribe nowhere grapples with these larger implications because, although it rejects the label "local" (Tribe Br. 1), its interest in creating a novel exception is undeniably localized to the rail line here. But ICCTA establishes nationally uniform rules. This Court cannot ignore that national perspective, for "this Court's duty [is] to interpret Congress's statutes as a harmonious whole," *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018). For example, if the Tribe's position prevails:

- Will shippers that are deprived of common-carrier service because of a tribe's land restriction have a remedy? Against the Tribe, the railroad (Tesoro Amicus Br. 16-17), or both? In what forum? Under what substantive law? How else might shippers seek to protect themselves from the uncertainty a decision in the Tribe's favor would engender? (No existing law supplies a ready answer for how shippers can seek redress because *Baltimore* has always ruled out the possibility that such restrictions would be enforced to shippers' detriment.)

- How would traffic limitations be apportioned among shippers—for example, what if two shippers each wished to send 25 cars on the rail line here? What agency or forum would handle disputes? How are such decisions to be made if the limitation governs a segment at the center of the railroad's network serving innumerable shippers? (Again, no framework for answering such questions exists because the common-carrier duty is not subject to such limitations.)

- Can tribes limit the types of commodities carried over a line? What if the shippers' fears of tribes and railroads "pick[ing] and choos[ing] which products may be shipped" should materialize? ACC Amicus Br. 19. What agency has responsibility to monitor and enforce such restrictions? (Because such conditions are foreign to the common-carrier regime, once again no system exists for addressing these issues.)

- How will the Secretary make decisions about appropriate restrictions, and whether to override other federal laws? (The Secretary has no expertise in rail regulation, nor any policy instruction from Congress.)

In short, the Tribe's position would seriously destabilize the federal common-carrier regime as it has existed for a century. AAR Amicus Br. 15; ACC Amicus Br. 20-21. This Court should "not [be] willing to stand on the dock and wave goodbye as [those involved] embark[] on this multiyear voyage of discovery," bereft of any congressional instruction. *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 328 (2014).

D. The Tribe Errs as a Matter of Law and Fact in Implying that ICCTA Does Not Govern the Rail Line

The Tribe suggests (Br. 22) that ICCTA does not even apply to the rail line because, it contends, the line was unlawfully constructed in the 19th Century. That argument is unsound in three independent ways.

1. First, the Tribe is flat wrong about ICCTA. ICCTA (and the ICA before it) applies wherever common-carrier service exists, regardless of how that service came to be. For example, in *Allied Erecting & Dismantling Co. v. STB*, 835 F.3d 548 (6th Cir. 2016), a landowner "want[ed] to evict a railroad company from … tracks on land that [the landowner] claim[ed] to own," "contend[ing] that the tracks were private when they were built, [and] that the [STB] never authorized [the railroad] to provide common-carrier service on the tracks." *Id.* at 550, 552. The Sixth Circuit held that the tracks were subject to ICCTA because the landowner "concede[d] that [the railroad] now provides common-carrier service using the … tracks. [That] use of the tracks fits the statutory definition of 'transportation by rail carrier … by railroad' and is thus within the [STB's] jurisdiction." *Id.* at 552 (second ellipses in original; citing 49 U.S.C. §§ 10501; 10102(5), (6), (9)).

The same is true here: Common-carrier service exists on the line; ICCTA therefore applies. Indeed, the rail line was under federal regulatory control by 1920, when the Transportation Act of 1920 first required ICC approval for cessation of existing common-carrier service. *See* § 402, 41 Stat. 477-78 (amending ICA § 1(18)). By its terms, the Act was not limited to rail lines established under clear title. *See id.* § 400, 41 Stat. 474 (amending ICA § 1(1)(a)) ("[T]he provisions of this Act shall apply to common carriers engaged in … [t]he transportation of passengers or property wholly by railroad"). Rather, the Act encompassed *all* common-carrier lines, consistent with Congress's purpose to uniformly regulate lines based on their importance to the national economy, regardless of when or how established. *See, e.g.*, *Burlington N. & Santa Fe Ry.*, FD 33740, 2003 WL 21062875, at *4-6 (STB May 13, 2003).

In response, the Tribe cites (Br. 22) *Southern Pacific* (which, as explained above, actually *disproves* the Tribe's theory) and a lone district court decision, *Town of Conway v. Atl. Coast Line R.R.*, 20 F.2d 250, 260 (E.D.S.C. 1926). Inasmuch as *Conway* reasons that a landowner may eject a common carrier simply by revoking its

permission to be on the land—a view the Supreme Court has since squarely rejected in *TexMex*, 328 U.S. at 144-45—this Court can comfortably decline to follow *Conway* in favor of appellate decisions like *TexMex* and *Allied Erecting*.

2. Even on the Tribe's reasoning, the rail line came under federal regulation when the Easement issued, putting the Tribe on par with any other landowner that lacks the power to extinguish common-carrier service. The record shows that the Tribe was fully aware of the circumstances.

For example, the Tribe does not contest that it was told the railroad could not "agree" to "a limitation on the number of cars," and could agree only that increased traffic would trigger "a rent adjustment based upon the greater burden." ER0921. Indeed, the pre-existence of common-carrier service is confirmed repeatedly in filings from the prior litigation. *See* ER0381 ¶ 35 (Pretrial Order signed by Tribe's counsel) ("The railway right of way herein disputed is an integral part of the railroad's continental line and substantial shippers, receivers and communities rely on the rail service provided."); ER0367 ¶ 18 (Tribe's admission to the same effect). The Tribe was even on notice that *the*

ICC itself regarded the line as under its jurisdiction, with termination of service permissible only pursuant to an administratively approved abandonment. *See* ER0321-ER0322 (1980 ICC Motion for Leave to Intervene) ("Granting of the Tribe's Prayer for Injunctive Relief Would Cause an Illegal Abandonment"). The Easement and Settlement Agreement that followed are governed by "all applicable federal laws and regulations," without any exception for the federal railroad laws that the Tribe now seeks to nullify. ER0856, ER0857.

The Tribe cites *nothing* supporting its charge that BNSF's predecessor "misrepresented" its common-carrier obligations. Tribe Br. 24. The Tribe's real concern may be that, decades after the Easement, refinery expansion increased the quantity of commodities that BNSF was required to transport. *See* Tribe Br. 11, 24-25. But BNSF's predecessor was clear, even in the 1980s, that the required level of service would "depend[] upon business at the refineries." ER0921. In all events, BNSF's obligation to respond to increased shipper needs is the essence of its common-carrier obligation, and furthers the national policy of "ensur[ing] the development and continuation of a sound rail

transportation system … to meet the needs of the public." 49 U.S.C. § 10101(4).

3. At the very least, this Court cannot in the current posture disregard ICCTA by accepting the Tribe's bare assertion that BNSF's predecessor was unlawfully present on the Reservation prior to the Easement. That was not the basis for the district court's decision below, the record is undeveloped on that subject, and the issue has long been a point of disagreement.

The rail line has operated since 1890. BNSF Br. 14. BNSF has contended that those rail operations have long been legitimate—arguing, for example, [1] its predecessor established a valid right-of-way under the Act of Mar. 2, 1899 ("1899 Act"), ch. 374, 30 Stat. 990, ER0345 ¶ 16; [2] the Tribe acquiesced in the continued operation of the rail line by failing to object after the Tribe's formal reorganization in 1935, ER0344 ¶ 6, ER0345 ¶ 17; and [3] BNSF's predecessor specifically re-sited the railroad to *avoid* the Reservation, ER0384 ¶¶ 43-49.

The district court below apparently rejected the last of these contentions, *see* BNSF Br. 21-22, but no tribunal has ever concluded that BNSF's operations on the line were unlawful prior to the

Easement. Nor does the record reflect the ownership or status of the parcels across which the rail line runs. The Settlement Agreement was prompted by the *absence* of judicial resolution of the rail line's status. That agreement "releases and forever discharges the Tribe" from "any and all liability … related to or aris[ing] out of the location [of the rail line]" (ER0852), and reciprocally releases BNSF (ER0852-ER0853). The releases show that the parties set their dispute aside—not that either party acceded to the other's view of the relevant facts or law.

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

The Tribe insists it is entitled to an injunction here because the Treaty or its inherent sovereignty gives it the right to impose conditions on entry onto the Reservation. That is incorrect.

1. The Tribe asserts the "power" "to exclude nonmembers entirely," and "to condition their presence on the reservation." Tribe Br. 33 (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983)). The present existence of a *treaty* power to impose right-of-way conditions is doubtful, inasmuch as Congress has overtaken the field by later *statute*. *See, e.g.*, 1899 Act, 25 U.S.C. §§ 312-317; IRWA, 25 U.S.C. §§ 323-328. Even so, such a power would not answer the question here:

Can the Tribe establish conditions on presence that would compel BNSF to violate its obligations under federal law? The Tribe does not dispute that *other* property owners lack the power to disregard federal law. *See* BNSF Br. 52-54. And none of the authorities the Tribe cites for its treaty- or sovereignty-based rights suggests that Indian tribes have a right to compel others to violate federal law. *See, e.g.*, Tribe Br. 33 (citing *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir. 2011)).

The Tribe nonetheless argues that the Treaty must prevail over ICCTA, relying on a select line of cases stating that "Congress' intention to abrogate Indian treaty rights" must "be clear and plain." Tribe Br. 34 (citing *United States v. Dion*, 476 U.S. 734, 736 (1986)). But that rule operates only where a *specific* treaty provision *directly* conflicts with the application of a federal statute. *Compare Dion*, 476 U.S. at 736, 746 (analyzing relationship between statute criminalizing hunting bald eagles and tribal treaty right to hunt bald eagles), *with Solis v. Matheson*, 563 F.3d 425, 435 (9th Cir. 2009) (rejecting application of

Dion to analysis of Fair Labor Standards Act because "nothing" in the treaty "discuss[ed] employment or wages and hours").

Absent such a specific provision and direct conflict, the baseline is the opposite: "[A] general statute in terms applying to all persons includes Indians and their property interests." *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960). This rule makes good sense because the alternative would "almost invariably compel the conclusion that every federal statute that failed expressly to mention Indians would not apply to them." *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 178 (2d Cir. 1996). Indeed, here the Tribe asks for something even more striking: not just the power to ignore federal law *itself*, but the power to force *another person* (BNSF) to do so too, and to deprive *third parties* with no relationship to the Tribe or its Reservation (shippers) of their federal rights. Nothing in the Treaty contemplates such far-reaching powers.

The Tribe nonetheless claims all this is proper, urging that a "sufficient[ly] direct" conflict exists because "BNSF's unrestricted use of the Reservation would eviscerate the Tribe's right to exclude." Tribe Br. 44. But BNSF has never claimed such an expansive right. In truth, the

Tribe's interests are largely untouched by ICCTA: A tribe can refuse to allow common-carrier service in the first instance. *Cf. Star Lake R.R.*, FD 28272, 1987 WL 98276 (ICC Apr. 10, 1987). A tribe can impose conditions consistent with federal law within the right-of-way. And a railroad user generally has no right to be present outside the right-of-way. The residual "entry" effected by ICCTA—*viz.*, continuing existing common-carrier service unless discontinuance is approved by an expert regulator—does not clash with anything specific in the Treaty because nothing in the Treaty "detail[s] with any level of specificity the types of activities the Tribe may control or in which it may engage." *Soaring Eagle Casino & Resort v. NLRB*, 791 F.3d 648, 661 (6th Cir. 2015).[2]

2. Even if the Tribe somehow had the *right* to condition BNSF's entry on violations of ICCTA, the Treaty establishes no particular *remedy* against BNSF. Rather, the remedies available to the Tribe are the product of federal common law. *See* Tribe Br. 16 (acknowledging the Tribe is "pursuing … federal common law claims"). The Tribe does

[2] The Tribe curiously asserts "BNSF waived this argument"—despite concededly citing the controlling caselaw below. Tribe Br. 43. Regardless, "it is claims that are deemed waived or forfeited, not arguments." *United States v. Pallares-Galan*, 359 F.3d 1088, 1095 (9th Cir. 2004).

not dispute that federal common law can be superseded by a statute such as ICCTA. *See* BNSF Br. 37.

The Tribe's answer (which it never offered below) is that the Treaty is "self-enforcing." Tribe Br. 36. That is true but irrelevant. A "self-enforcing" treaty is one that provides it "shall be obligatory on the *contracting parties*" once ratified and therefore needs no "implementing legislation" "to form the basis of a lawsuit" *as between the treaty parties*. *Skokomish Indian Tribe v. United States*, 410 F.3d 506, 513 (9th Cir. 2005) (en banc) (emphasis in *Skokomish*). But nothing in the Treaty creates a cause of action against *non-contracting* parties. *Cf. id.* (holding that self-enforcing treaty did not create a damage remedy against a non-contracting party). Indeed, when the Supreme Court concluded that non-contracting parties could sometimes be bound by an injunction issued against a contracting party under a self-enforcing treaty, it offered several rationales drawn from general principles of equity, but conspicuously *omitted* the theory that such a treaty itself authorized an injunction against non-contracting parties. *See Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 692 n.32 (1979).

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

The Tribe and its amici States argue that the Easement requires injunctive relief because BNSF voluntarily submitted to a limit on rail traffic. That is incorrect. Such a limit—even if "voluntary" on the railroad's part—would be unenforceable under ICCTA as an unreasonable interference with service to shippers.

1. Restrictions that unreasonably interfere with rail operations are "void as contrary to public policy." *Hanson Natural Res.*, FD 32248, 1994 WL 673712, at *2 (ICC Nov. 15, 1994); *R.R. Ventures, Inc. v. STB*, 299 F.3d 523, 560 (6th Cir. 2002) (upholding STB decision that settlement contract was unenforceable insofar as it would "unreasonably interfere with" the railroad's "future fulfillment of common carrier obligations"); *PCS Phosphate Co. v Norfolk S. Corp.*, 559 F.3d 212, 220-21 (4th Cir. 2009) (acknowledging ICCTA would preempt an "enforcement action" that "unreasonably interfer[es] with rail transportation").

Certainly, ICCTA leaves many rail-related contracts untouched. Like "laws having [only a] remote or incidental effect on rail transportation," *CDTFA*, 904 F.3d at 761-62 (quotation marks omitted),

contracts that do not "unreasonably burden rail carriage" can be enforced, *PCS Phosphate*, 559 F.3d at 221 (quotation marks omitted). Courts have even observed that "most private contracts" will not "constitute the sort of 'regulation' expressly preempted by the statute." *PCS Phosphate*, 559 F.3d at 218; *accord Union Pac. R.R. v. Chi. Transit Auth.*, 647 F.3d 675, 682 (7th Cir. 2011) (positing contracts that would not be preempted).

But courts and the STB draw the line at enforcing contracts that would "abrogate" the railroad's "rights and responsibilities under the statutory provisions" of ICCTA. *R.R. Ventures*, 299 F.3d at 540. No other approach would protect the integrity of federal law. A judicial injunction can surely be a "remed[y] … with respect to regulation of rail transportation." 49 U.S.C. § 10501(b); *see Nottke v. Norfolk S. Ry.*, 318 F. Supp. 3d 1036, 1039 (N.D. Oh. 2018) (describing "the injunction at issue" as "a form of regulation"); *cf. Pejepscot Indus. Park, Inc. v. Maine Cent. R.R.*, 297 F. Supp. 2d 326, 333 (D. Me. 2003) (explaining that "[t]he power to punish with huge monetary penalties" is a form of regulation). If ICCTA indulged such regulation-by-contract, rail carriers and landowners could "voluntarily" contract out of carriers'

federal obligations to shippers. ACC Amicus Br. 11-12. That result is illogical because common-carrier duties exist not at the sufferance of railroads and landowners, but for the common good of shippers and commerce at large. *See, e.g.*, *Riffin v. STB*, 733 F.3d 340, 347 (D.C. Cir. 2013).

2. These principles squarely forbid the remedy the Tribe seeks. An injunction managing the level of service on the rail line would be a direct "regulation of rail transportation." 49 U.S.C. § 10501. The Tribe cannot seriously contend otherwise. ICCTA requires BNSF to "provide … transportation or service on reasonable request," 49 U.S.C. § 11101(a), but the Tribe's action would forbid it from doing so. And denying shippers the service they demand is the very definition of interference with commerce.

This case is therefore on all fours with *Baltimore*, which squarely held that the ICA forbade the enforcement of a contract that would require the railroad to refuse service in violation of federal law. 333 U.S. at 174. The Tribe's efforts to distinguish *Baltimore* (Br. 40-41) are futile. There, and here, the voluntariness of the contract is no justification. There, and here, the landowner's motive for imposing the

limit makes no difference; the question is *whether* contract enforcement would regulate rail operations, not *why*. *Cf. Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 107 (1992) ("Whatever the purpose or purposes of the state law, pre-emption analysis cannot ignore the effect of the challenged state action on the pre-empted field."). And the timing of when the offensive term was added to the contract is irrelevant; once common-carrier service exists, it cannot be limited to a landowner's preferred level. Indeed, the very notion of limited common-carrier service is an oxymoron; a common carrier's duty is to provide service upon any reasonable request.

3. Alternatively, this Court could avoid any conflict between the Easement and ICCTA by recognizing that the Easement [1] does not afford the Tribe any particular remedy, and [2] allows BNSF to increase its operations in compliance with federal law, *see* BNSF Br. 57.

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

The Tribe's reliance on IRWA is also misplaced.

1. The central question on appeal is whether the Tribe can obtain a particular remedy—a judicial injunction regulating BNSF's rail activity. The Tribe concedes that IRWA is not the source of that

remedy: It consistently references the "injunctive relief available *under federal common law*." Tribe Br. 3, 20 (emphasis added). And it acknowledges that IRWA "does not itself provide for a cause of action"; instead, a tribe may "'pursue any available remedies under applicable law.'" Tribe Br. 48, 55 (quoting 25 C.F.R. § 169.413). The Tribe thus ratifies the district court's conclusion that IRWA does not empower courts to enforce or cancel rights-of-way. ER0027-ER0028 & n.5.

2. Because IRWA does not itself authorize an injunction, the Tribe instead argues that IRWA endows right-of-way conditions with a special status that supersedes any federal law that might prevent their specific enforcement. The Tribe grounds this argument in IRWA's authorization for the Secretary "to grant rights-of-way for all purposes, subject to such conditions as he may prescribe." 25 U.S.C. § 323. This provision, the Tribe says, allows the Secretary to impose literally "any restrictions [he] deems fit," including "restrictions that would interfere with certain common-carrier obligations." Tribe Br. 49. That argument fails at every step.

a. The Tribe's reasoning repeats its persistent error of conflating rights and remedies. As BNSF previously explained (Br. 48),

"the creation of a right is distinct from the provision of remedies for violations of that right." *eBay v. MercExchange, LLC*, 547 U.S. 388, 392 (2006). The Tribe *does not even respond* to this elementary principle. No analysis of the Secretary's authority to define the respective rights of tribes and right-of-way users can answer where and how violations of those rights should be remedied.

Indeed, the rights/remedies distinction requires special caution where, as here, a plaintiff claims that an *executive* official can refashion the remedies available in court. Nothing in IRWA vests the Secretary with the quintessentially *legislative and judicial* role of deciding what causes of action and remedies exist. *Cf. Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990) (holding that a statute authorizing a "Secretary to promulgate *standards* implementing [a statute] … does not empower the Secretary to regulate the scope of the judicial power [to enforce those standards]"). That is why the Secretary, with appropriate agnosticism, simply provided that tribes may "pursue any *available* remedies under *applicable* law." 25 C.F.R. § 169.413 (emphasis added).

b. What the Tribe proposes is *not* harmonization. As the Supreme Court has explained, when one statute would "normally

require[]" a result, but a party claims that another statute "overrides that guidance," that party must show "that [the] two statutes cannot be harmonized, and that one displaces the other." *Epic Sys.*, 138 S. Ct. at 1623-24. Here, IRWA "normally requires" no particular remedies. By contrast, ICCTA "normally requires" resort to the STB for relief against common-carrier service. Indeed, "prohibit[ing] common carrier rail transportation directly conflicts with the most fundamental … obligations provided by federal law." *Boston & Maine Corp. & Springfield Terminal R.R.*, FD 35749, 2013 WL 3788140, at *3 (STB July 19, 2013). The Tribe thus "faces a stout uphill climb." *Epic Sys.*, 138 S. Ct. at 1624.

But the Tribe's argument for why IRWA would override ICCTA rests entirely on the absence of textual limitations on the "conditions [that the Secretary] may prescribe," 25 U.S.C. § 323, under IRWA. The Tribe reads far too much into far too little. Section 323 is merely a vanilla grant of administrative discretion, and "Congress does not alter the fundamental details of a regulatory scheme in vague terms." *Epic Sys.*, 138 S. Ct. at 1626-27 (quotation marks omitted). Moreover, if the Tribe were correct, the Secretary of the Interior would be a regulatory

despot the likes of which the *United States Code* has never seen: If the Secretary can force a rail carrier to forsake its statutory common-carrier duty under ICCTA, then what other railroad laws can he displace? Is the Secretary not only a super-regulator for railroads, but also for "highways … [o]il and gas pipelines … [e]lectric transmission and distribution systems … [and] [t]elecommunications … lines," 25 C.F.R. § 169.5, empowered to override laws administered by the Secretary of Transportation, the Federal Energy Regulatory Commission, and the Federal Communications Commission?

This cannot be correct, and the Tribe cites no authority in IRWA's seven-decade history endorsing such an extravagant interpretation of the Secretary's authority. The Secretary himself certainly does not claim to possess such authority. Rather, IRWA's implementing regulations state that "rights-of-way approved under [IRWA] … [a]re subject to all applicable Federal laws." 25 C.F.R. § 169.9(a). Nor is there evidence that the Secretary actually exercises the vast authority the Tribe posits. The Tribe concededly cannot identify any "other easement containing similar conditions." Br. 53. And here in particular, the relevant documents reflect 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.

c. Rather than needlessly overreading the Secretary's authority under IRWA to collide with ICCTA, this Court should give effect to both statutes by recognizing that the Secretary's authority ends where the STB's authority begins. The Tribe objects that affording the Secretary anything less than absolute power would render IRWA "hollow" and the Secretary's conditions "toothless." Br. 49. That concern is grossly exaggerated.

Certainly, the Secretary can generally prescribe and enforce right-of-way conditions. Under the Easement here, the Secretary has properly required BNSF to pay rent, ER0971; to comply with an "annual rental … adjustment," ER0978; to "provide a fifty (50) foot wide boat access," ER0974; and to submit a summary of commodities to be transported on the rail line, ER0978. But the Secretary's power must be exercised in harmony with other federal law, which means it does not extend to imposing or enforcing conditions that conflict with federal law, including ICCTA.

V. NO CANON OF INTERPRETATION SALVAGES THE TRIBE'S CASE

The Tribe also contends that the canon that statutes and treaties should be construed in favor of Indian tribes enlarges its treaty rights; gives the Secretary limitless authority under IRWA; and overcomes the text, precedent, and history of federal railroad law. But that interpretive canon is only a tool of last resort when courts are faced with "doubtful expressions" that they cannot otherwise resolve. *Bonnichsen v. United States*, 367 F.3d 864, 878 n.18 (9th Cir. 2004). It "does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress." *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 & n.16 (1986) (citing cases). As explained above, ICCTA's instructions are not ambiguous, a century of federal railroad precedent is clearly in BNSF's favor, and nothing in the Treaty or IRWA is to the contrary.

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: January 31, 2019 By: */s/ Benjamin J. Horwich*
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