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July 1, 2019

Via CM/ECF
The Honorable Mark J. Bennett
The Honorable William A. Fletcher
The Honorable Michael Daly Hawkins
US Court of Appeals for the Ninth Circuit
PO Box 193939
San Francisco, CA 94119-3939

Re: *Swinomish Indian Tribal Community v. BNSF Railway*
No. 18-35704, Response to BNSF June 19, 2019 Response Letter

The Tribe appreciates the opportunity to respond to counsel for BNSF's letter brief addressing the concerns raised in the Court's May 22, 2019 Order.

Introduction

There is no dispute that this case presents novel questions of law: whether ICCTA can impair Indian Treaty rights and negotiated easement agreements issued pursuant to the IRWA, and whether the District Court may exercise its equitable power to enforce railroad easement terms. Despite BNSF's aggressive position that the case law unequivocally supports its position, there is no case directly on point. No court has

determined that ICCTA prevails over Indian treaties and statutes—and in full candor, no court has determined that it does not.

The Tribe has asked this Court to find that under the applicable harmonization analysis, and in light of the canons of construction of Indian law, the Tribe is able to enforce the express terms of the Easement and enjoin BNSF from running trains that exceed those terms unless the Tribe gives its prior consent. This is admittedly a complex analysis, made more complicated by the judicial precedent underscoring both rail and Indian law that give great deference to federal regulation of railroads and the trust obligation to tribes respectively. It was therefore especially important that the parties accurately represent the authorities they provided to the Court—both legal and factual.

The Tribe endeavored to do this in its Answering Brief within the word-limits permitted by the Court. And unlike BNSF, the Tribe did not have a reply brief to further elaborate its arguments. During the briefing process, the Tribe was forced to abandon or reduce certain arguments and counterpoints in order to ensure that the most critical analysis was fully provided to the Court; this is not unusual, as word limits always require parties to present their best arguments as succinctly—but as

accurately—as possible. There are areas of the Tribe's brief that it believes could have benefitted from even a few sentences of additional analysis. Unfortunately, the Tribe had to devote many pages of its allocated space to correcting BNSF's misrepresentations about the factual history of the rail line in question[1], the Tribe's positions in this and the prior litigation, and the authorities BNSF cited to the Court. Indeed, many of the concerns raised by the Court were also raised by the Tribe in its Answering Brief, but not addressed in BNSF's Reply. In addition, the Tribe was constrained to set forth the fundamental Indian law principles applicable to this case, which BNSF's counsel inexplicably omitted from the Opening Brief.

The fact that counsel[2] have now devoted nearly 7,000 words—what amounts to an extra reply brief—in an effort to explain why their representations to the Court were candid confirms that further explanation was required to prevent them from being misleading, at best. Had a candid representation of the facts and law actually been provided by BNSF's counsel, that would have necessarily required them to cut other

[1] Although the Court did not ask counsel to explain its failure to accurately recount the historic facts that led to the current litigation, this painful history is essential to understanding this case.

[2] In this letter, the Tribe refers to BNSF as well as BNSF's counsel or counsel, but the Tribe recognizes that the Court's Order was specifically directed as BNSF's counsel.

portions of their brief to comply with the Court's word limits.[3] In addition, the Tribe is troubled that BNSF's counsel chose to respond to the Court's Order with substantive arguments supporting BNSF's positions—particularly that they did so with arguments and authorities which were not included in the actual briefing on the merits. Had BNSF raised these arguments in its Reply, the Tribe could have at least addressed them at oral argument. Because the Tribe is uncertain of the propriety of addressing the merits of a new argument raised by BNSF's counsel in this response, the Tribe will respond to BNSF's counsels' letter to the extent it answers the Court's direct questions. The Tribe will provide a brief response to the new merits arguments, but will do so in a separate section that the Court may disregard if it finds it outside the scope of the Order.

Counsel's Response to Court's Order

I. Substitution of Words in Easement

The Court asked BNSF's counsel to explain how the use of the words "at a minimum" in place of "only" to describe the 25-car limitation in the Easement candidly reflected the terms of the Easement. Order at 2. The terms of the Easement speak for

[3] BNSF used 20,993 of the 21,000 combined words permitted in its Opening Brief (13,994) and Reply Brief (6,999).

themselves and the Court can discern whether counsel candidly represented its terms when they described the 25-cars as a minimum. The Tribe would only add that while counsel did acknowledge the conditions under which the number of cars could be increased in the Opening Brief, they failed to inform the Court until oral argument that BNSF ignored those terms before unilaterally exceeding that number.

II. Substitution of Words in Cases

a. *Thompson v. Texas-Mexican Ry. Co.*, 328 U.S. 134 (1946) ("Tex-Mex")

The Court questioned the language used by BNSF's counsel to describe the holdings of *Tex-Mex* in two places in the Opening Brief and asked them to explain how the insertion of the word "land" into a direct quotation candidly represents the holding of that case. Order at 2–3.

Counsel have completely failed to address the Court's question. Instead, they concede that despite their representations that *Tex-Mex* involved a land contract, it did not. They claim that they inserted the word "land" because they believe that *Tex-Mex* applies more broadly to all types of contracts, including land contracts, and provide argument to support this contention. But counsel do not explain why they inserted an adjective describing a narrow class of contracts if they intended to refer to an unlimited universe of contracts. Further, counsel did not make this argument—or even imply it—

in the Opening Brief. They did not address it in the Reply Brief despite the fact that the Tribe pointed out the misrepresentation. Instead, they told the Court that *Tex-Mex* involved a land contract in two separate places in their Opening Brief. And in the Reply, they repeated the same allegation: "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* . . . ." Reply Br. at 18–19 (referring to *Town of Conway v. Atl. Coast Line R.R.*, 20 F.2d 250 (E.D.S.C. 1926) (emphasis added). This was a blatant misrepresentation of the holding in *Tex-Mex* that BNSF's counsel have not explained.

Whether *Tex-Mex*'s holding can be expanded to all agreements is a legitimate—though incorrect—argument and one that BNSF could have raised in its briefing on the merits. But counsel's post-facto ability to articulate this argument now does not mean that they were candid with the Court in the first instance. Counsel's assertion that they adequately conveyed this argument is belied by the citation signals used in BNSF's Opening Brief. Briefing attorneys have numerous tools at their disposal to succinctly communicate information regarding the citations provided to the Court. Counsel failed to use one and misused another.

First, counsel cited to *Tex-Mex* without any introductory signal. In order to candidly use no signal, the cited authority must "directly state[] the proposition." THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.2(a), at 58 (Columbia Law Review Ass'n et al. eds. 20th ed. 2015). Counsel cannot reasonably contend that *Tex-Mex* directly stands for the proposition that its holding applies to all contracts. Even if BNSF's position was true—which is disputed—counsel were required to use "*see*" when discussing *Tex-Mex*. *Id*. ("'*See*' is used instead of '[no signal]' when the proposition is not directly stated by the cited authority but obviously follows from it; there is an inferential step between the authority and the proposition it supports."); *accord* THE REDBOOK: A MANUAL ON LEGAL STYLE R. 9.17(a), at 178 (Bryan A. Garner ed. 4th ed. 2018); ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES, 123 (2008) ("When you cite a case with no introductory signal, you're affirming to the court that this case explicitly *holds* what you have just said . . . . If the proposition you have propounded is not stated in the case but necessarily follows from its holding, introduce the case by *See*."). By failing to include *see*, BNSF's counsel failed to candidly represent the holding of *Tex-Mex*.

Second, BNSF's counsel improperly used brackets to make a substantive change to the holding of *Tex-Mex*. Brackets are appropriately used to make non-substantive revisions to quoted text, such as altering the capitalization of words, making the quoted language agree in number, tense or gender with the rest of the sentence, or substituting words for clarity—e.g., changing a party's name to plaintiff or defendant to provide context. *See, e.g.*, THE REDBOOK R. 1.43, at 36; BRYAN A. GARNER, LEGAL WRITING IN PLAIN ENGLISH, 162–63 (2001). Making a substantive change to facts in *Tex-Mex*—adding "land" instead of the accurate "trackage"—implied to this Court that the contract at issue in *Tex-Mex* was a land contract, which counsel concede it was not.

Counsel could have avoided this problem by accurately describing the agreement at issue or by using an appropriate signal to convey that it believed the holding applied more broadly. But using the word "land"—without the accompanying explanation now provided—was a clear misrepresentation.

The insertion of the word "land" to modify the word "contract" in the quoted sentence is all the more striking because, as now recognized by BNSF's counsel, Letter Br. at 6, the Supreme Court repeatedly used the terms "trackage contract" and "trackage agreement" throughout the pages preceding the sentence quoted. Indeed, the

quoted sentence is one of the few in that section of the opinion referring to the contract or agreement without including the word "trackage."

We submit that counsel's use of its response to the Court's order to raise merits arguments on BNSF's behalf are improper and beyond the scope of the explanation requested by the Court, and accordingly should not be considered. However, a substantive response to BNSF's merits arguments is provided at the end of this letter for the Court's consideration.[4]

b, c. *CSX Transp., Inc.*, FD 34662, 2005 WL 584026 (STB Mar. 14, 2005); *Ass'n of Am. R.R.s v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094 (9th Cir. 2010)

The Court asked counsel to explain how omission of the qualifying language "actions by states or localities" and "state laws" candidly represents the opinions in *CSX Transportation* and *Association of American Railroads*, respectively. Order at 3–4.

The Court can determine whether the selective quotations inappropriately sought to expand the scope of the preemption holdings beyond the articulated state and local entities and their laws. Counsel do not explain why they mischaracterized the holdings

[4] Just as the Tribe was constrained to devote time and pages to correcting BNSF's misrepresentations, so too was the Tribe required to devote legal resources to responding to the new arguments raised in counsel's letter.

of these cases and simply claim that in the context of the entire brief, the other references to these cases rendered the totality of the discussion accurate. The Tribe agrees that BNSF did discuss these cases in their proper context elsewhere, but would add to that context the fact that counsel repeatedly cited state preemption cases for sweeping propositions that falsely implied that the preemption analysis was equally applicable here. Indeed, many of the cases cited in the Opening Brief are state preemption cases with no relevance to the question before this Court. This gave the false impression that the weight of authority supports BNSF's position. It does not.

BNSF's counsel claim that these citations are relevant because the preemption analysis applies to federal common law claims, citing *Alliance Shippers* in support. Letter Br. at 16 (citing *Alliance Shippers, Inc. v. S. Pac. Transp. Co.*, 858 F.2d 567 (9th Cir. 1988)). But again, *Alliance Shippers* is not as broad as counsel now represents. *Compare* Opening Br. at 38 (recognizing holding limited to common law claims regarding rates). In *Alliance Shippers*, the plaintiff brought, *inter alia*, federal common law price discrimination claims. *Id.* at 568. This Court held that the federal common law claims (to the extent they even existed, which it doubted) were preempted, not because *all* federal common law is preempted but because this particular claim fell

squarely within the ICC's exclusive jurisdiction to regulate, or in this case deregulate, rail rates. *Id.* at 569; *accord G. & T. Terminal Packaging Co. v. Consol. Rail Corp.*, 830 F.2d 1230, 133–36 (3rd Cir. 1987) ("this statutory provision, as illuminated by the legislative history, makes clear that the only remedies regarding rail rates are those provided by federal statutes") (noting legislative history of Staggers Act expressly referenced federal common law, which the Tribe notes was not included in ICCTA or its statutory history). In other words, because the ICC directly regulated—and had the authority to deregulate—rates, to the extent that any federal common law claim existed, it was preempted because the statute directly governed the issue.

These holdings are consistent with the authority cited by the Tribe in its Answering Brief that federal common law arises when "Congress has not spoken 'in an area comprising issues substantially related to an established program of government operation," and the converse inference that federal statutes only displace common law when they speak directly to the question answered by common law. Answering Br. at 54 (citing *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727 (1979)); *see also Oneida Cty v. Oneida Indian Nation*, 470 U.S. 226, 236–37 (1985) ("in determining whether a federal statute pre-empts common-law causes of action, the relevant inquiry

is whether the statute '[speaks] *directly* to [the] question' otherwise answered by common law."). Here, ICCTA does not provide rules on trespass over tribal lands—a federal claim—nor is the STB authorized to require trespass by a railroad, let alone a trespass over tribal trust land. *Alliance Shippers* is therefore also distinguishable on that basis. *See* Answering Br. at 42–45 (discussing application of federal laws to Tribes).

But perhaps most telling is that counsel made these representations after calling Indian Tribes "local interests" with the same legal position as "municipalities, or private parties." Opening Br. at 1, 27. This was not only incorrect, but offensive to the Tribe. Indian tribes are sovereign nations. Answering Br. at 28–29. This distinction cannot be disregarded when analyzing the intersection of ICCTA, the IRWA and the Treaty. Yet, this is precisely what BNSF and its counsel invited this Court to do. BNSF ignored Tribal sovereignty when it constructed the rail line on the Tribe's land over its objections and continues to disregard it now.

d. *S. Pac. Transp. Co.—Abandonment Exemption—In Mineral & Lyon Counties, Nev.*, AB 12, 1991 WL 40203 (ICC Mar. 12, 1991)

The Court asked BNSF's counsel to explain how the omission of language requiring the party to "obtain a right-of-way across the Reservation" candidly

represents the full context of the *Southern Pacific* abandonment proceedings. Order at 5.

Counsel explained that they cited to *Southern Pacific* for the limited purpose of showing that "[a]n abandonment order from the STB 'would allow [BNSF] 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." Letter Br. at 21. The problems with this explanation are two-fold.

First, it disregards the fact that BNSF *did* agree by contract to an absolute restriction on the number of cars, with an increase *only* available with the Tribe's prior, written consent. Counsel's explanation presupposes the invalidity of that promise. BNSF never presented the Tribe with abandonment as either an option or a requirement during the Trespass Litigation settlement negotiations.

Second, counsel's explanation obscures the actual context of the Southern Pacific settlement, which is analogous to the settlement of the Trespass Litigation, not the resolution of the claims now before the Court: the *Southern Pacific* ICC proceedings occurred contemporaneously with the Trespass Litigation settlement and Easement. Southern Pacific chose to go through the ICC; BNSF chose instead to obtain an

easement limiting its rights to run cars over the Reservation. Had BNSF ever told the Tribe that an abandonment was necessary before it could actually comply with its promises, the Tribe would have been able to consider the validity of that argument, and the parties could have jointly sought an abandonment certificate (which the Tribe contends was not and is not necessary). Only now, when BNSF wants to void the undesirable terms of its contract, does it claim that abandonment—which BNSF would clearly contest—is the only means of actually achieving its compliance with the Easement.

III. Characterization of Plaintiff-Appellee's Arguments

a. Treaty

The Court asked BNSF's counsel to explain how their characterization of the Tribe's Treaty argument below candidly represented the content of that argument. Order at 5–6.

Context for the Tribe's arguments before the District Court would be helpful here. After the District Court issued its Order Regarding Cross-Motions for Summary Judgment (ER0012) and then its Order Granting Plaintiff's Motion for Reconsideration (ER0007), BNSF filed a Motion for Clarification and, If Necessary, Reconsideration.

This Motion was not included in the record, but in that Motion, BNSF asked the District Court to clarify that it had not ruled on whether the Tribe actually owned the land in question, and to the extent that it had, to reconsider that ruling. Dkt. 88.

The District Court denied this motion, noting that BNSF had never contested that the right-of-way crossed the Reservation. Not only had the Tribe presented evidence establishing this contention in its summary judgment briefing—to which BNSF had offered no contrary "evidence that would suggest a genuine dispute"—but BNSF had also *admitted* these facts for purposes of this litigation in its Answer. ER0004. It was not until oral argument on the summary judgment motions that BNSF's counsel announced (again without any actual evidence) that BNSF was questioning the Tribe's ownership rights in the land underlying the railway. ER0005.

It was in response to the Motion for Clarification that the Tribe made the comments discussed in BNSF's Opening Brief. In that context, it is clear that the Tribe was not disclaiming the relevance of the Treaty in the preemption/repeal analysis, but the relevance of the Tribe's *possessory* rights under the Treaty that were settled in the Trespass Litigation. In that litigation, the Tribe released its trespass claims and BN released its counterclaim that the Tribe did not own the land. In light of this

background, counsel have not accurately explained why their characterization candidly represented the Tribe's arguments.

To the contrary, BNSF's counsel mislead the Court *again* by suggesting that the Tribe's statements—made in the context of the entirely separate issue of land ownership—should be juxtaposed with the District Court's approach that "'the correct analysis when considering the Tribe's treaty-based federal common law claim' was 'whether Congress intended to repeal the Treaty of Point Elliott when it enacted the ICCTA.'" Letter Br. at 24 (citing ER0009). But the Tribe made those statements *after* the District Court had already ruled on preemption, and made them about an entirely separate issue.

The Treaty is an express agreement with the United States that reserves rights to the Tribe, most of which are not implicated in this litigation. Only one of the Treaty's expressly enumerated rights is relevant to the legal question before this Court: the right to exclude non-Natives from the land reserved for the Tribe's exclusive use. BNSF tried to avoid the consequences of the District Court's ruling on its preemption defense by raising questions and confusing issues about the applicability of the Treaty to the land under the right-of-way; the Tribe appropriately objected that the Tribe's

possessory rights were not relevant to the narrower breach of easement claim. That those possessory rights are not relevant in *this* dispute does not mean that the Treaty as whole should be eliminated from the Court's analysis of ICCTA, the Easement and the availability of equitable relief. BNSF completely mischaracterized the Tribe's position when it represented to this Court that the Tribe did not believe the Treaty to be relevant to the question raised in this appeal and its counsel repeat that mischaracterization here.

The Tribe agrees with the District Court that whether ICCTA preempts or repeals the Tribe's requested remedy of injunction absolutely *must* consider the Treaty and the body of law regarding Treaty and inherent rights of Indian tribes to exclude non-Indians from their lands. The Treaty confirms the federal nature of the Tribe's claims. The Treaty, in conjunction with the IRWA, forms the basis of the Tribe's authority to require BNSF to obtain a right-of-way before it may enter Tribal trust land. And as the District Court found, the Treaty prevents ICCTA from superseding the Tribe's lack of consent. There is no tension between the District Court's Treaty-based analysis and the Tribe's claim for breach of the easement.

b. Monetary Claims

The Court asked BNSF's counsel to explain how their characterization of the Tribe's requested relief as "increased rent" and position on the arbitrability of monetary relief candidly represents the content of the Tribe's argument. Order at 6–7.

The Tribe agrees that the parties' respective positions on arbitrability and calculation of damages are not relevant to the ultimate legal question before this Court. Yet, BNSF and its counsel thought them important enough to raise in their Opening Brief to support the narrative that the Tribe has an adequate remedy at law.[5] The Tribe disagrees that anything short of any injunction will adequately protect its interests.

With respect to arbitrability, BNSF implied that the parties are in agreement that the arbitration provision in the Easement governs damages in this litigation. As the

[5] BNSF's preference to characterize the Tribe's damages as "increased rent" likely arises from the fact that during the last contractually required rent-adjustment, BNSF's appraiser opined that there is no difference between the fair market rent for permitted use and the fair market rent for BNSF's actual use. *See* ER0863 (Easement ¶ 3(b)(ii) requiring rental adjustments every five years). BNSF's concession that it owes the Tribe "increased rent" is easy to make when it believes the amount of that increase is essentially zero. Despite its counsel's seemingly magnanimous "concession" on this limited point, BNSF believes that it should suffer no meaningful consequences for its willful violation of the Easement and that it should continue (indefinitely) to reap substantial profits from that misconduct.

Court noted, and as BNSF's counsel now concede, that is inaccurate. The Tribe's position is that the arbitration provision only applies to disputes over land value or *agreed*, future increases in traffic, not prior increases in traffic that violated the terms of the Easement. This question has not been resolved by the District Court.

The characterization of the Tribe's damages for breach of the Easement and trespass is more troubling. As a consequence of the bifurcation, the Tribe has not disclosed its damages theories to BNSF. It was therefore inappropriate for BNSF's counsel to presume what the Tribe seeks and to speak on the Tribe's behalf to the Court. The Tribe does *not* seek increased rent for past—and ongoing—overburdening of the Easement, it seeks trespass damages. While BNSF or its counsel might not see damages and increased rent as "mutually exclusive", the Tribe does and it was the Tribe's position that counsel purported to relay to the Court.

IV. Characterization of Prior Negotiations

Finally, the Court asked BNSF's counsel to explain how its characterization of prior settlement negotiations of the Trespass Litigation candidly represents BNSF's statements and what the Tribe agreed to because the letter from BNSF's counsel in the

Trespass Litigation did not mention common-carrier obligations in connection with the negotiation for the number of cars. Order at 6–7.

Counsel provide two explanations for their characterization: (1) common-carrier obligations with respect to cargo were explicitly mentioned later in the Silvernale letter, and (2) the letter implicitly referred to common-carrier obligations by using the phrase "'shipper needs,' which the STB associates with the common-carrier obligation." Letter Br. at 33. Although BNSF and its counsel can present this theory, the Letter Brief assumed the validity of this position without sufficient explanation.

Ultimately, what the parties believed they were agreeing to and what they actually intended during the negotiations of the Easement are fact questions that have not been finally determined, though the District Court has ruled that BNSF breached the Easement. It was inappropriate for BNSF to speak for the Tribe and claim that the Tribe acknowledged BNSF's purported common-carrier obligations simply because the Tribe agreed to easement language that provided a mechanism for the railroad to seek the Tribe's consent to increase the number of cars to meet "shipper needs".

Neither BNSF nor its counsel can credibly claim to know what BN believed the Easement meant when it was issued. BNSF has not produced any documents relating to

the Trespass Litigation or its settlement. As the Tribe stated at oral argument, all of these records were maintained and produced by the Tribe. To the Tribe's knowledge, all of the BN employees and attorneys that participated in this negotiation have retired and most of them—including BNSF's attorney who authored the letter in question, Lawrence Silvernale—have passed away. As a result, BNSF cannot definitively say what BN understood *its* agreement to be at the time; it can only rely on the documents preserved by the Tribe to represent the position that best suits it now. Similarly, a number of those involved in the negotiations on behalf of the Tribe have passed away. There are, however, some individuals, including the Tribe's then-attorney Allan Olson, who participated in and recall the Trespass Litigation settlement negotiations.

That counsel can point to STB opinions—issued over a decade after the Easement was negotiated and executed—indicating that shipper needs and common-carrier obligations can be construed as synonymous, does not mean that they accurately represented the negotiations as they were understood by the parties in 1989. Even if the ICC understood "shipper needs" to represent common-carrier obligations in 1989, that does not mean that the Tribe, as a party not regulated by the ICC, was bound by or shared the ICC's understanding.

The Tribe's position is equally plausible. BN was indisputably a common-carrier railroad offering common-carrier services throughout the country. BN represented that due to its common-carrier obligations it could not require its shippers on its common-carrier network, initially serviced outside of the Reservation, to provide prior disclosure of the contents of their shipments. But just because BN was a common-carrier, did not mean that *all* of BN's services and lines were subject to common-carrier duties. There is no evidence that the Tribe understood that BN had provided legitimate common-carrier service over the Reservation prior to the Easement or that it would be providing common-carrier service with respect to future, permitted operations over the Reservation. *See* Answering Br. at 21–23 (explaining that BNSF did not have authority to operate on Reservation land prior to the Easement).[6] The use of the phrase "shipper needs" does not require a contrary reading. The refineries, as shippers, would have "needs" regardless of whether BN was offering common-carrier or contract service over the right-of-way. And as BNSF argued, the easement restrictions are facial

[6] To the extent that any legitimate common-carrier obligations arose before the easement that would continue after its execution—which *Town of Conway* calls into doubt—the Tribe has offered the appropriate harmonization of its Treaty-supported rights under the IRWA and ICCTA: the STB's authority is confined to the terms of the Tribe's consent under the Easement.

limitations on its purported common-carrier duties. *See e.g.*, Opening Br. at 17, 33; *cf.* Answering Br. at 23 (explaining that railroads are presumed to believe that the voluntary contracts they execute are compatible with common-carrier duties).

BNSF's counsel in effect explain that their statements were reasonable because BN had used the term "common-carrier" once in a settlement letter to the Tribe, and because the Easement contains the term "shipper needs." But neither this Court in reading BNSF's Brief, nor the Tribe in reading BN's settlement proposals, should be required to parse scattered words to discern content, as if searching for meaning in an obscure poem. If BN believed in 1989 that it could not comply with the express terms in the Easement because of its common-carrier obligations, it should not have proposed those terms to the Tribe or the Department of the Interior, but, having done so, counsel should not have claimed that BN did otherwise in its briefing to this Court.

***

In summary, and to be clear, counsel intentionally made direct misrepresentations or carefully crafted their words to alter the scope of the legal holdings, the history of this case, and the claims brought by the Tribe. They did so to advance their incomplete narrative in their Opening Briefing. And when these failings

were pointed out in the Tribe's Answering Brief, they did not endeavor to correct the record. Now they offer what the Tribe reads as a hollow apology and a convoluted justification which inappropriately includes new arguments and case citations.

This case, and the rights it concerns, are deeply important to the Tribe, and resolution of the issues it raises is not a matter of gamesmanship. The rail line in question runs adjacent to both the Tribe's economic center and ecologically vulnerable Padilla Bay, and the Court's decision will impact the Tribe's ability to enforce not only the terms of the negotiated Easement, but may also touch its sovereign and Treaty-based rights to protect its lands and resources. For this reason, the Tribe has understood that it is essential that this Court have an accurate understanding of the law and facts on which to resolve the complex issues.

Response to New Substantive Argument Regarding *Tex-Mex*

As set forth above, BNSF's counsel represented in its Opening Brief that *Tex-Mex* was a land contract. It did not argue, as it now does, counsel's "underst[anding]" that *Tex-Mex* states "a general legal principle applicable to all types of contract, including . . . land contracts." Letter Br. at 5. Under the guise of explaining that understanding, counsel make additional substantive arguments and provide detailed

analysis of *Tex-Mex*, *Smith*, and new authorities. Regardless of whether counsel's explanation is sufficient to answer the Court's concerns, the Tribe provides the following response on the merits to avoid any prejudicial application of BNSF's new arguments.

The stated holding of *Tex-Mex* is undisputed; the Tribe only rejects its application to this Easement. In *Tex-Mex*, the Supreme Court held that under Section 1(18) of the Interstate Commerce Act, a certificate of abandonment was required for a trackage agreement that had terminated pursuant to its terms. 328 U.S. at 145; Letter Br. at 7.

a. ICCTA, and therefore *Tex-Mex*, do not apply to the Tribe.

Principally, the Tribe continues to disagree that Section 1(18) of the former Interstate Commerce Act, its current iteration at 49 U.S.C. § 10903, or the related preemption clause under 49 U.S.C. § 10501 apply to the Tribe at all.

Contrary to BNSF's assertion, the rail line was not brought under the ICC's jurisdiction in 1920 because the rail line and its use was a trespass on the Tribe's land when the Transportation Act of 1920 was enacted; accordingly, it could not be "grandfathered" in. Answering Br. at 22; Oral Argument at 23:37–24:07. The Tribe

relied on *Town of Conway,* which involved an 1882 ordinance that granted a railroad a right-of-way along Conway's main road. 20 F.2d at 255. In 1912, however, the town passed an ordinance revoking the right-of-way and declaring the railroad a nuisance. *Id.* at 252. The railroad refused to comply with the ordinance ousting it from the street and later brought suit under the Transportation Act of 1920, arguing that it could not abandon its track without ICC approval. *Id.* at 253, 254–55, 259–60. The court rejected this argument:

> I do not construe the act to apply to a case like the one at bar. The defendant does not seek to abandon a portion of its track. Nor does the town seek to compel it to abandon a portion where it has a legal right to remain. The act of Congress was . . . not intended to apply to those cases where the railroad is a trespasser, or where the railroad's occupancy is only by permission, and such permission has been revoked.

Id. at 260. In its Reply, BNSF argued that the Court should disregard *Town of Conway* because it was presumptively overruled by *Tex-Mex* (based on the false assertion that it expressly applied to land owners) and *City of Des Moines v. Chicago & North Western Railway*, 264 F.2d 454 (8th Cir. 1959). But unlike *Town of Conway,* neither *Tex-Mex* nor *City of Des Moines* involved a railroad that was trespassing when the 1920 statute was enacted; nothing in these cases implies that *Town of Conway*'s holding was

overruled with respect to rail activities that were unlawful at the time the abandonment requirements went into effect. Moreover, BNSF's supposition that *Town of Conway* was overruled by *Tex-Mex* is belied by post-*Tex-Mex* authority in the Second and Fifth Circuits citing *Town of Conway* approvingly. *Zirn v. Hanover Bank*, 215 F.2d 63, 69 (2d Cir. 1954); *City of Alexandria, La. v. Chicago, R. I. & P. R. Co.*, 321 F.2d 822, 824–25 (5th Cir. 1963).

But even if *Town of Conway*'s reasoning does not apply here, ICCTA (and its predecessors) do not apply to the Tribe because they directly conflict with the Tribe's Treaty right to exclude. Answering Br. at 42–45.

Finally, the Tribe—contrary to BNSF's assertions—does not seek an abandonment; it seeks to hold BNSF to the terms of its agreement that were the same in 1991 when the agreement was signed as they are today. If compliance with the Easement terms constitutes an abandonment, that abandonment occurred in 1991 and BNSF was statutorily obligated to seek a certificate from the ICC. 49 U.S.C. § 10904 (1991). It cannot equitably use the ICC or STB as a shield today to justify its own failure to comply with its statutory obligations. *See Waldo v. Bessemer & Lake Erie R. Co.*, 307 Pa.Super. 56 (1982) (holding private landowner did not need to institute

adverse abandonment proceedings; interpreting *Tex-Mex* to apply to regulated parties, where railroad had not used property in over a decade and sought to avoid claim for reversionary title by citing lack of abandonment certificate that it failed, though was required, to obtain).

b. *Tex-Mex* applies to landowner claims only through preemption.

A review of cases citing *Tex-Mex* confirms its limited holding, and reveals two patterns.[7]

First, most of cases citing *Tex-Mex* (many of which involved bankruptcy reorganizations), did so in the context of trackage agreements or similar ICC/STB controlled contracts, like track lease agreements. The Tribe contends that this is the scope of *Tex-Mex*: contracts expressly overseen by the STB. *See Tex-Mex*, 328 U.S. at 146 (citing § 5(2)(a)(ii) of the Transportation Act of 1940, which required Commission approval for trackage rights); *see also* 49 U.S.C. § 11323(a). *Smith v. Hoboken Railroad, Warehouse & S.S. Connecting Co.*, 328 U.S. 123 (1946), the companion case to *Tex-Mex*, supports this reading. Although *Smith* involved a lease agreement, which

[7] Counsel reviewed as many cases citing *Tex-Mex* as time permitted following receipt of BNSF's Letter Brief.

included both land and tracks, that agreement was between two railroads and therefore itself fell directly within the control of the ICC. *See* 49 U.S.C. § 11323(a) (listing transactions that require STB approval); 49 U.S.C. § 11343 (1990) (listing transactions that required ICC approval).

Indeed, in an unrelated case not involving railroads, Justice Stevens read *Smith* and *Tex-Mex* to apply to regulated companies:

> The question was *which* of the two companies subject to the jurisdiction of the Commission should operate—not *whether* the operation should continue. Neither the lessor nor the lessee wanted to have the regulated operation cease; both recognized that the common carrier's obligation to provide service to the public existed independently of the lease and survived its termination. In short, in neither case was there any question but that the lessor was a "common carrier" under the Interstate Commerce Act and subject to the obligations imposed by the Act.

California v. Southland Royalty Co., 436 U.S. 519, 543 (1978) (Stevens, J., dissenting); *see also United Transp. Union-General Committee of Adjustment v. STB*, 363 F.3d 465, 466 (D.C. Cir. 2004) ("The termination of a trackage rights agreement is among the transactions requiring Board approval.") (citing *Tex-Mex*). The fact that BNSF thought it unnecessary to have the Easement approved by the ICC or the STB suggests that

BNSF understood the agreement to not require such regulatory approval and accordingly, it would not be controlled by *Tex-Mex*.

Second, in the few cases citing *Tex-Mex* that involved unregulated, non-carrier landowners, the ICC's or STB's abandonment authority and jurisdiction turned not on *Tex-Mex*, but preemption. *See, e.g.*, *Louisiana & Arkansas Ry. Co. v. Bickham*, 602 F.Supp. 383, 384–85 (M.D. La. 1985) (holding that servitude could not be extinguished under state law as a direct conflict with 49 U.S.C. § 10903 and citing *Tex-Mex* for general proposition that third-parties can seek adverse abandonment); *Bitner v. Watco Companies, Inc.*, 43 Kan.App.2d 495, 497–99 (2010) (engaging in preemption analysis to determine whether abandonment required certificate from governing authority and citing *Tex-Mex* only for adverse abandonment authority); *Pinelawn Cemetary v. Coastal Distribution, LLC*, 74 A.D.3d 938, 940–41 (2010) (holding that ICCTA preempts state law and that only after abandonment certificate from STB is obtained can landowner seek eviction under state law; citing *Tex-Mex* for propositions of adverse abandonment and staying proceedings pending STB abandonment determination); *Louisiana v. Ill. Central R.R. Co.*, 928 So.2d 60 (La. App. 1 Cir. 2005) (recognizing STB's stance that property interests and scope of contracts must be resolved in courts,

but that where state's ownership claims required a finding of abandonment, the STB first had to address that question).

To the extent that the STB has at times relied on *Tex-Mex* in adjudicating preempted disputes, this does not alter the conclusion that *Tex-Mex* has a limited holding. State law cannot ordinarily be used to evict a railroad from its lease until an abandonment certificate is issued; this is typical preemption, and the statutory abandonment terms, which *Tex-Mex* supports, would apply. *See* 49 U.S.C. § 10903. Indeed, although the STB in *Pinelawn Cemetery*—a decision now cited by BNSF for the first time in this appeal—indicated that *Tex-Mex* would apply to "excepted track and related facilities, which are not subject to the Board's entry and exit licensing," the Board's discussion of its authority clearly anticipated *state* law preemption. FD 35468, 2015 WL 1813674, at *7–*8 (STB Apr. 20, 2015). Similarly, counsel's reliance on the ICC's motion to intervene in the Trespass Litigation fails to establish that *Tex-Mex* applies here. Not only was the motion denied by the court in the Trespass Litigation, but the motion was drafted before the *Southern Pacific* cases made clear that a railroad operating over tribal lands without tribal consent was a trespasser, and it also failed to address the necessary federal harmonization analysis. Moreover, as explained, BNSF's

decision to not seek abandonment authority from the ICC after the settlement was reached, indicates that the parties ultimately disagreed with the ICC's opinion after the case was more fully developed.

We were unable to locate any case law or ICC/STB opinions that applied *Tex-Mex* as a means of evading the harmonization analysis and superseding federal claims pertaining to a federal agreement or statutory right—such as tribal consent mandated in the IRWA. To the contrary, the only federal claims discussed in the reviewed cases were those arising under 43 U.S.C. § 912, which governs disposition of rights-of-way granted by the United States to public lands and expressly requires an abandonment as recognized by the appropriate regulatory or judicial authority. *See Phillips Co. v. Denver & Rio Grande W. R. Co.*, 97 F.3d 1375, 1376 (10th Cir. 1996) (holding § 10903 abandonment to be a prerequisite to bringing a claim under 43 U.S.C. § 912).

Tex-Mex does not apply to non-regulated contracts absent preemption, which BNSF agrees is not the appropriate analysis in this case.

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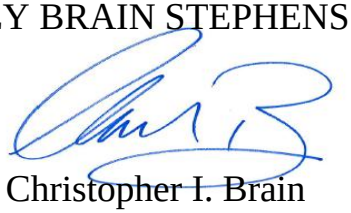
The Tribe thanks the Court for the opportunity to respond to counsel's letter.

Very truly yours,

TOUSLEY BRAIN STEPHENS PLLC



Christopher I. Brain

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FOR THE NINTH CIRCUIT

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