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Swinomish Indian Tribal Community v. BNSF Railway Co. and its Effect on Litigation Challenging BIA's New Rights-of-Way Regulations

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*SWINOMISH INDIAN TRIBAL COMMUNITY V. BNSF
RAILWAY CO. AND ITS EFFECT ON LITIGATION
CHALLENGING BIA’S NEW RIGHTS-OF-WAY
REGULATIONS*

Kaelen H. Brodie

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*Kaelen H. Brodie**

INTRODUCTION

In April 2015, the Swinomish Tribe (Tribe) sued Burlington Northern and Santa Fe Railway Company (BNSF) for trespass and breach of contract, seeking declaratory and injunctive relief.¹ The Tribe alleged that BNSF was—and still is—violating a right-of-way easement agreement, which the Tribe and the Bureau of Indian Affairs (BIA) granted to BNSF on July 19, 1991, pursuant to 25 U.S.C. §§ 323-28 and 25 C.F.R Part 169. The easement allowed BNSF to run trains through the Swinomish Tribe Reservation to refineries at March Point, near Anacortes, Washington. The easement further required that, “unless otherwise agreed in writing, only one eastern bound train, and one western bound train (of twenty-five cars or less) shall cross the Reservation each day.”² BNSF is now running six 100-car unit trains per week through the reservation in each direction, which is four times as many railcars per day as are permitted under the explicit terms of the agreement.³

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¹ Complaint for Declaratory Judgment, Injunctive Relief, Trespass, and Breach of Contract, Swinomish Indian Tribal Cmty. v. BNSF Ry. Co., No. C15-543RSL (W.D. Wash. Apr. 7, 2015), 2017 WL 132448.

(The motion for summary judgement was heard Dec. 15, 2016 before the Honorable Robert Lasnik).

² Right-of-Way Easement—Burlington Northern, Swinomish Indian Tribe Community, at 10. http://www.swinomish-nsn.gov/media/43924/1991_sitc___bnsf_right_of_way_easement_v1_0.pdf

³ Complaint, *supra* note 1, at 5.

The agreement placed a limitation on the ability of the Tribe to control the amount of traffic on the tracks. It stipulated that “[t]he number of trains and cars shall not be increased unless required by shipper needs,” but “[t]he Tribe agrees not to arbitrarily withhold permission to increase the number of trains or cars when necessary to meet shipper needs.”⁴ BNFS has not asked the Tribe for permission to increase the number of trains running through the Reservation. This resistance is likely due, in part, to the fact that shipping crude is lucrative for BNSF, particularly with the current boom in oil production in the United States.

Since 2008, crude oil production has nearly doubled, having increased from 5 million to 9.4 million barrels per day.⁵ The uptick in production has put substantial pressure on railroads to transport the growing amount of crude oil to refineries. The increase in crude oil production has largely affected landlocked states that lack the ability to transport crude oil via pipeline or boat.⁶ Without pipelines or ships to transport oil, railroads now are the dominant method of crude oil transportation, particularly from the Bakken Shale Formation in northwestern North Dakota, eastern Montana, and southern Canada.

The Tribe’s lawsuit has environmental and monetary consequences not only for the Tribe and BNSF, but also for companies shipping crude to the refinery in Anacortes. Tesoro Refining & Marketing Company (Tesoro) ships Bakken crude to Cherry Point, and the outcome of this case will have an enormous impact on how lucrative and worthwhile such an operation will be. Consequently, Tesoro filed a petition with the Surface Transportation Board (STB)⁷ on June 3, 2016, requesting “the STB to reaffirm that federal law protects the rights of shippers to

⁴ Right-of-Way Easement, *supra* note 2.

⁵ *Petroleum and Other Liquids: U.S. Field Production of Crude Oil*, U.S. ENERGY INFO. ADMIN. (2017), <https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=MCRFPUS2&f=A> (last visited Mar. 3, 2017).

⁶ Assn. of American Railroads, *U.S. Rail Crude Oil Traffic*, 3 (Nov. 2015), available at <https://www.aar.org/BackgroundPapers/US%20Rail%20Crude%20Oil%20Traffic.pdf>.

⁷ *Overview of the STB*, SURFACE TRANSPORTATION BOARD, <https://www.stb.gov/stb/about/overview.html> (last visited Feb. 25, 2017) (“The Surface Transportation Board is an independent adjudicatory and economic-regulatory agency charged by Congress with resolving railroad rate and service disputes and reviewing proposed railroad mergers.”).

request and receive rail service... and further affirm that this right to service may not be infringed on the basis of contractual or other commitments and rights that may exist between a landowner and the railroad.”⁸ The STB denied this petition on November 14, 2016.⁹

Tesoro is not the only oil company that has considered using a refinery at Cherry Point to refine crude oil. Shell Oil Products US (Shell) does not currently ship Bakken crude, but it does have a refinery at Cherry Point that receives crude oil by ship and pipeline from Alaska’s North Slope.¹⁰ Shell intended to begin shipping crude oil by rail, but ultimately cancelled its plan to construct an additional rail spur at Cherry Point on October 6, 2016.¹¹ Although the project inspired protests, Shell said it was calling off the project because of the falling price of crude oil, something that could quickly change based on prevailing market conditions.¹² Any expansion would further increase rail traffic through the Reservation.¹³

On January 13, 2017, Judge Lasnik in the Western District of Washington granted in part and denied in part the Tribe’s motion for summary judgment.¹⁴ He held that Interstate Commerce Commission Termination Act (ICCTA) does not preempt or

⁸ Petition of Tesoro Refining & Marketing Co., LLC for Declaratory Order at 2, *Swinomish Indian Tribal Community v. BNSF*, (W.D. Wash. filed Apr. 7, 2015) (STB Finance Docket No. 36041) *available at* [https://www.stb.gov/Filings/all.nsf/WEBUNID/04D6729A21B0BD6185257FCA0048EBFB/\\$file/240861.pdf](https://www.stb.gov/Filings/all.nsf/WEBUNID/04D6729A21B0BD6185257FCA0048EBFB/$file/240861.pdf).

⁹ Surface Transportation Board Decision, *Swinomish Indian Tribal Cmty. v. BNSF*, (S.T.B. Nov. 14, 2016) (No. FD 36041) 2016 WL 6809953, *available at* [https://www.stb.gov/decisions/readingroom.nsf/UNID/049FF70E922F20788525806C00790CCF/\\$file/45330.pdf](https://www.stb.gov/decisions/readingroom.nsf/UNID/049FF70E922F20788525806C00790CCF/$file/45330.pdf) (“Given that the [Western District of Washington] has already denied a motion to refer the preemption issue to the [Surface Transportation] Board, that courts as well as the Board can decide issues involving § 10501(b) preemption in the first instance, and that the [Western District of Washington] has clearly expressed its preference to decide the preemption issue itself, the Board will decline to issue a declaratory order in this matter”).

¹⁰ *Shell Calls off Oil-by-Rail Projects in Anacortes*, THE BELLINGHAM HERALD (Oct. 6, 2016), <http://www.bellinghamherald.com/news/local/article106568582.html> (last visited Apr. 9, 2017).

¹¹ *Id.*

¹² *Id.*

¹³ Motion for Summary Judgment at 9, *Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, (W.D. Wash. Mar. 10, 2016) (No. 2:15-cv-00543RSL) 2017 WL 132448.

¹⁴ Order Regarding Cross-Motions for Summary Judgment, *Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, (W.D. Wash. Jan. 13, 2017) (No. C15-543RSL).

supersede the Indian Right-of-Way Act (IRWA), and the Tribe may move forward with a state law claim for damages, compelled disclosure, and an adjustment in rent.¹⁵ On the other hand Judge Lasnik also explained that, “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—those remedies are unavailable in this jurisdiction.”¹⁶ Thereafter, on June 8, 2017, the court reversed itself on the injunction issue and took the unusual step of granting the Tribe’s motion for reconsideration.¹⁷ The parties will now set a potential trial date.¹⁸

Part I of this article will discuss the history of litigation between the Swinomish Tribe and BNSF (and its predecessors), the dangers of transporting crude oil, and the important statutes in question. Part II of this article will argue that BNSF is bound by the easement agreement and the guidelines set forth in the Indian Right of Way Act (IRWA). Further, the court must resolve any ambiguities in the IRWA, the ICCTA, and the treaty granting the Swinomish Tribe its reservation in favor of the Tribe. Part III of this article will argue that the BIA has the authority under IRWA to promulgate the new right-of-way regulations from 2015. However, those challenging the new regulations should pay attention to the outcome in this case, for it has the potential to influence any future challenge to the new regulations.

Although this is seemingly a unique case, all tribes should heed the lessons learned by the Swinomish Tribe on how to negotiate all types of easements with private companies. If the easement negotiated under IRWA preempts the STB, the lessons for tribes are clear: in negotiating with private companies, tribes should: 1) expressly control and manage the action taking place on the tribal easement; 2) include a strict expiration date; and 3) include a provision which states that the ICCTA preemption provisions do not apply. If the STB preempts the contractual agreement between BNSF and the Tribe, tribes across the country should refrain from granting easements that impact interstate transportation—even if the tribe might otherwise be willing to do so if certain conditions are

¹⁵ *Id.* at 17.

¹⁶ *Id.* at 9.

¹⁷ Order Granting Plaintiff’s Motion for Reconsideration, at 5, *Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, (W.D. Wash. Jun. 8, 2017), (No. 2:15-cv-00543RSL) 2017 WL 132448.

¹⁸ *Id.*

included in the contract—if tribal enforcement of those conditions attempt to regulate what can be shipped, pumped, or transported in any way. In this case, those conditions may be null and void, and the tribe could be giving up control over such rights-of-way indefinitely.

I. PART I: FACTUAL HISTORY AND PROCEDURAL POSTURE

The 1855 Treaty of Point Elliott reserved the Swinomish Reservation for the Tribe's "exclusive use;" the land is held by the United States in trust for the Tribe.¹⁹ Around 1889, the Seattle and Northern Railroad Company (SNRC), a predecessor to BNSF, began constructing a rail line through the reservation.²⁰ The Secretary of the Interior at the time informed the SNRC that a treaty or congressional legislation was necessary to create a right-of-way, but SNRC built tracks through reservation land without the permission of the Tribe or the federal government anyway.²¹ The United States government took no action against SNRC.²²

The Burlington Northern Railroad Company (BN) (the successor to SNRC) applied for a right-of-way with the BIA on September 27, 1977. The Tribe objected, and the application was subsequently denied by the superintendent of the BIA's Western Washington Agency on October 17, 1978.²³ BN appealed to the BIA Area Director and to the Assistant Secretary for Indian Affairs of the Department of the Interior, who both affirmed the superintendent.²⁴ BN then brought the complaint to federal court in *Burlington Northern v. Andrus*.²⁵ The district court stayed its ruling until an opinion in *Watt*, a separate case out of the Ninth Circuit, was issued.²⁶ The *Watt* Court held that BIA's construction of the Act of March 2, 1899 to require tribal permission before a right-of-way could be granted across tribal land was reasonable.²⁷ Although the Act of March 2, 1899 did not specifically require

¹⁹ Treaty of Point Elliott, art. 2, 12 Stat. 927 (1855).

²⁰ Order Regarding Cross-Motions for Summary Judgment, *supra* note 14, at 3.

²¹ *Id.*

²² *Id.*

²³ Amended Motion for Summary Judgment at 3, Swinomish Indian Tribal Cmty. v. BNSF Ry. Co., (W.D. Wash. July 21, 2016) (No. 2:15-cv-00543).

²⁴ *Id.*

²⁵ *Id.* at 5.

²⁶ *Id.*; *see also* Rights-of-Way over Indian Land, 25 C.F.R. § 169.3 (2016); Nev. Pub. Power Dist. v. 100.95 Acres of Land, 719 F.2d 956 (8th Cir. 1983).

²⁷ S. Pac. Transp. Co. v. Watt, 700 F.2d 550, 554 (9th Cir. 1983).

tribal permission, it directed the Secretary to “make all needful rules and regulations, not inconsistent with sections 312-318 of this title, for the proper execution and carrying into effect of all the provisions of said sections.”²⁸ The 1948 General Rights-of-Way Act did require tribal permission;²⁹ the court noted that both Acts “pertain to rights-of-way across Indian lands and share a common purpose: the preservation and protection of Indian interests.”³⁰ Subsequently, summary judgment was entered against Burlington Northern in *Andrus*.³¹

A. The Settlement Agreement

All the while, in separate litigation, the Tribe pressured the federal government to act to prevent BN from trespassing on tribal land. The Tribe brought a trespass action against BN in 1978.³² Although the litigation surrounding the trespass suit went on for over a decade, it was ultimately settled in 1990.³³ The Settlement Agreement executed on July 19, 1991 formally granted permission to BN to use the rail line.³⁴ However, that permission was qualified with certain conditions:

Burlington Northern agrees that, unless otherwise agreed in writing, only one eastern bound train, and one western bound train, (of twenty-five (25) cars or less) shall cross the reservation each day. The number of trains and cars shall not be increased unless required by shipper needs. The Tribe agrees not to arbitrarily withhold permission to increase the number of trains or cars when

²⁸ Act of March 2, 1899, ch. 374, 30 Stat. 990 (codified at 25 U.S.C. §§ 312-318 (1976)).

²⁹ 1948 General Rights-of-Way Act, Pub.L. No. 80-407, 62 Stat. 17 (codified in 25 U.S.C. §§ 323-328 (1976)). (“No grant of a right-of-way over and across any tribal lands... shall be granted without the consent of the proper tribal officials”).

³⁰ *Watt*, 700 F.2d at 554.

³¹ Amended Motion for Summary Judgment, *supra* note 23, at 5-6.

³² *Swinomish Tribal Community v. Burlington Northern, Inc.*, No. C78-429V (W.D. Wash. filed July 18, 1978).

³³ Motion for Summary Judgment, *supra* note 13, at 6.

³⁴ Right-of-Way Easement, *supra* note 2, at 14.

necessary to meet shipper needs. It is understood and agreed that if the number of crossings or the number of cars is increased, the annual rental will be subject to adjustment in accordance with paragraph 3(b)iii of this Right-of-Way Easement and paragraph 2(b)iii of the Settlement Agreement.³⁵

The Agreement also grants BN a 40-year right-of-way easement with two twenty-year options to BN.³⁶ The Interior Department approved the easement on November 27, 1990.³⁷

B. The Dangers of Transporting Crude Oil by Rail

The Tribe argues that it can reasonably deny BNSF permission to run six 100-car unit trains per week in each direction because of the inherent dangers associated with transporting crude oil and the proximity of the rail line to critical cultural practices, such as fishing, and economic infrastructure, such as the Swinomish Casino and Lodge. The United States has concluded that the transportation of Bakken crude by train is “unique[ly] hazardous.”³⁸ Derailment is more likely to occur when transporting crude oil because “[t]he trains are longer, heavier in total, more challenging to control, and can produce considerably higher buff and draft forces which affect train stability.”³⁹ Moreover, Bakken

³⁵ *Id.* at 10.

³⁶ *Id.* at 7.

³⁷ Motion for Summary Judgment *supra* note 13, at 8.

³⁸ Emergency Restriction/Prohibition Order (Order) by the United States Department of Transportation (DOT) Docket No. DOT-OST-2014-0067 (May 7, 2014),

http://www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Hazmat/Final_EO_on_Transport_of_Bakken_Crude_Oi_05_07_2014.pdf.

³⁹ PIPELINE & HAZARDOUS MATERIALS SAFETY ADMIN. AND FED. R.R. ADMIN., FRA & UNITED STATES PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION (PHMSA) REPORT, OPERATION SAFE DELIVERY UPDATE (July 23, 2014),

http://www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Hazmat/07_23_14_Operation_Safe_Delivery_Report_final_clean.pdf. (“In addition, these trains can be more challenging to slow down or stop, can be more prone to derailments when put in emergency braking, and the loaded tank cars are stiffer and do not react well to track warp which when combined with high buff/draft forces can increase the risk of derailments.”).

crude is more flammable than other types of crude oil.⁴⁰ Serious accidents involving trains carrying crude oil are common in the United States and Canada and are increasingly likely to result in “death... or substantial endangerment to health, property, or the environment.”⁴¹

The following list of other accidents from around the country illustrate the potential harm the Tribe would face if an accident were to occur on its Reservation:

- On March 7, 2015, a Canadian National Railway train carrying crude oil derailed, damaging a bridge over a waterway and dropping five cars into the waterway.⁴²
- On March 5, 2015, a BNSF train carrying Bakken crude derailed near Galena, Illinois.⁴³ Six cars derailed and two ruptured and caught fire despite being a newer model car known as the CPC-1232, which was specifically and voluntarily adopted by the industry to keep ruptures from occurring.⁴⁴
- On February 16, 2015, a train carrying Bakken crude with CPC-1232 cars derailed 33 miles southeast of Charleston, West Virginia, causing 20 cars to catch fire. Although the spill spared the nearby Kanawha River, the explosion and fire destroyed a home and caused the evacuation of two towns nearby.⁴⁵

⁴⁰ *Id.* (“[Bakken] crude has a higher gas content, higher vapor pressure, lower flashpoint and boiling point and thus a higher degree of volatility than most other crudes in the U. S., which correlates to increased ignitability and inflammability. The Congressional Research Service has reported that the properties of Bakken shale oil are highly variable, even within the same oil field.”).

⁴¹ *Id.* (“The number and type of petroleum crude oil railroad accidents described below that have occurred during the last year is startling... Releases of petroleum crude oil, subsequent fires, and environmental damage resulting from such releases represent an imminent hazard as defined by 49 U.S.C. 5102(5), presenting a substantial likelihood that death, serious illness, severe personal injury, or substantial endangerment to health, property, or the environment may occur.”).

⁴² Jeffrey Hodgson, *Canadian Nat'l Crude Train Derails in Ontario, on Fire, Leaking*, REUTERS (Mar 7, 2015), <http://www.reuters.com/article/canada-us-canada-derailment-idCAKBN0M30M520150307> (last visited Mar. 10, 2017).

⁴³ *BNSF: Oil Train Derailment Near Galena Involved Safer Tank Cars*, CHICAGO TRIBUNE (Mar. 6, 2015), <http://www.chicagotribune.com/chi-galena-train-derailment-20150305-story.html>. (last visited Mar. 10, 2017).

⁴⁴ *Id.*

⁴⁵ Edward McAllister, *Derailed CSX Train in West Virginia Hauled Newer-Model Tank Cars*, REUTERS, (Feb. 17, 2015), <http://www.reuters.com/article/us->

- On July 24, 2014, a BNSF train carrying nearly 100 cars of crude oil derailed right in the heart of Seattle despite being on new track and only going five miles per hour. Fortunately, no leakage occurred.⁴⁶
- On April 30, 2014, 15 cars on a train carrying Bakken crude derailed in Lynchburg, Virginia, resulting in a massive explosion and spilling up to 30,000 gallons of oil into the James River.⁴⁷
- On November 8, 2013, twenty-five cars derailed near a trestle in rural Alabama sending flames high into the sky that could be seen from 10 miles away. Hundreds of thousands of gallons of oil spilled into a wetland which eventually feeds into the Tombigbee River.⁴⁸
- On December 30, 2013, a train carrying crude oil collided with a derailed train carrying grain, causing a “massive fireball” prompting the Federal Aviation Administration to put flight restrictions in place over the smoky area and residents from the nearby town of Casselton to evacuate to Fargo.⁴⁹
- On July 6, 2013, a Montreal, Maine & Atlantic Railway train shipping Bakken Crude in DOT-111 cars derailed in Lac-Megantic, Quebec. The explosion and fire killed 47 people and destroyed the downtown area of Lac-Megantic. In response, Canada banned the DOT-111 cars from carrying oil, requiring instead the use of TC-177’s which are made of thicker steel.⁵⁰

usa-train-derailment-csx-idUSKBNOLK1ST20150217 (last visited Mar. 10, 2017).

⁴⁶ Lynda Mapes, *Oil Train Derails in Interbay in Seattle, No Spills*, SEATTLE TIMES: THE TODAY FILE, (July 24, 2014: 5:44 AM),

<http://blogs.seattletimes.com/today/2014/07/73125/> (last visited Mar. 10, 2017).

⁴⁷ Selam Gebrekiden, *CSX Train Carrying Oil Derails in Virginia in Fiery Blast*, REUTERS (Apr. 30, 2014), <http://www.reuters.com/article/us-railways-accident-virginia-idUSBREA3T0YW20140430> (last visited Mar. 10, 2017).

⁴⁸ Verna Gates and Edward McAllister, *Crude Oil Tank Cars Ablaze after Train Derails in Alabama*, REUTERS (Nov. 8, 2013),

<http://www.reuters.com/article/us-crude-train-explosion-idUSBRE9A70Q920131109> (last visited Mar. 10, 2017).

⁴⁹ Daniella Silva, *Mile-long train carrying crude oil derails, explodes in North Dakota*, NBC NEWS (Dec 30, 2013),

http://usnews.newsvine.com/_news/2013/12/30/22113442-mile-long-train-carrying-crude-oil-derails-explodes-in-north-dakota.

⁵⁰ Giuseppe Valiante, *DOT-111 Rail Cars That Burned In Lac-Megantic Banned For Oil Use*, HUFFINGTON POST, July 25, 2016,

http://www.huffingtonpost.ca/2016/07/25/garneau-confirms-dot-111-cars-won-t-be-able-to-transport-crude-oil-as-of-nov-1_n_11183574.html.

C. The Common-Carrier Obligation

BNSF argued it is obligated by the STB—formerly the Interstate Commerce Commission (ICC)—to transport as much cargo as it is asked to, as long as that amount is reasonable. This is the common-carrier obligation. The history of the common-carrier obligation extends back centuries to a time before railroads even existed.⁵¹ The fundamental idea was that no customer able to make payment and making a reasonable request for a service offered to the public at large could be denied.⁵² Some researchers have observed that the rules governing common carriers gradually arose from the need to mitigate the dangers of monopolization and to maximize overall economic efficiency.⁵³ In 1701, an English court found that:

If a man takes upon him a public employment, he is bound to serve the public as far as the employment extends; and for refusal an action lies, as against a farrier refusing to shoe a horse, against an innkeeper refusing a guest when he has room, against a carrier refusing to carry goods when he has convenience, his wagon not being full.⁵⁴

In return for this reduced discretion, a common carrier often received certain benefits, such as limited liability.⁵⁵

These common-law concepts are firmly established in American statutes and jurisprudence. In 1901, the United States Supreme Court held that a telegraph company is a common carrier, and as such, is “performing a public service” to which “all

⁵¹ Eli M. Noam, *Beyond Liberalization II: The Impending Doom of Common Carriage*, 18 TELECOMM. POL'Y 435, Sec. II (1994).

⁵² *Id.*

⁵³ See e.g., Harry M. Trebing, *Common Carrier Regulation--The Silent Crisis*, 34 L. & CONTEMP. PROBS. 299, 306-07 (1969); see also Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 507 (1961).

⁵⁴ Lane v. Cotton, 1Ld.Raym. 646, 654 (1701, per C.J. Holt).

⁵⁵ Eli M. Noam, *supra* note 51, at Sec. II.

individuals have equal rights both in respect to service and charges.”⁵⁶ The United States government also codified many common-law concepts. For example, the Interstate Commerce Act of 1887 (ICA) set out the duties of common carriers and many rules by which they must abide.⁵⁷ Today, “[a] rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall provide the transportation or service on reasonable request.”⁵⁸ “Commitments which deprive a carrier of its ability to respond to reasonable requests for common carrier service are not reasonable.”⁵⁹

*D. The Interstate Commerce Commission Termination Act
(ICCTA)*

Prior to the ICCTA, the Interstate Commerce Commission (ICC) regulated interstate commerce, including trucking, bus lines, and telephone companies.⁶⁰ When Congress passed the Interstate Commerce Act (ICA) and created the ICC, its purpose was to achieve by administrative control, a “proper relationship between railway corporations and the general public,” one that “consist[ed] ... just and fair standards ... to make specific orders as to rates and service and to enforce prompt obedience to these orders.”⁶¹ At the end of the 19th century, modern production depended on railway transportation.⁶² Uniform regulation was needed in order to prevent “monopolistic industrial combinations,” which led to “railway discrimination in rates and service for the benefit of one person, locality, or kind of traffic. This, in turn, prejudiced and

⁵⁶ *W. Union Tel. Co. v. Call Pub. Co.*, 181 U.S. 92, 99–100 (1901).

⁵⁷ Pub. L. 95-473 and Pub. L. 97-449 (codified as amended at 49 U.S.C. Title VI § 6018, Dec. 18, 1991).

⁵⁸ 49 U.S.C. § 11101(a) (2015).

⁵⁹ *Id.*

⁶⁰ 49 U.S.C. §§ 10301-10311 (1994) (repealed 1995); *See generally* Interstate Commerce Act, 49 U.S.C. §§ 1-2205 (1994) (current version at 49 U.S.C. §§ 101-80504 (2012)) [hereinafter ICA]; *See also* Mark F. Kightlinger, *Nihilism with a Happy Ending? The Interstate Commerce Commission and the Emergence of the Post-Enlightenment Paradigm*, 113 PENN ST. L. REV. 113, 136 (2008).

⁶¹ ISIAH LEO SHARFMAN, *REGULATION: AN ANALYSIS OF THE UNDERLYING PROBLEM IN RAILWAY ECONOMICS FROM THE STANDPOINT OF GOVERNMENT REGULATION*, 191-92 (LaSalle Extension University, 1st ed. 1915).

⁶² *Id.* at 6.

disadvantaged rival shippers, places, and industries.”⁶³ In upholding the authority of the ICC (over the States) to fix rates, the Supreme Court noted that “interstate carriers [were] instruments of interstate commerce,” and Congress had “the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic [and] to the efficiency of the interstate service...”⁶⁴

In 1999, Congress granted exclusive authority over all rail transportation in the United States to the Surface Transportation Board when it passed the ICCTA.⁶⁵ In addition to the common carrier requirement, the ICCTA described the Board’s jurisdiction as follows:

The jurisdiction of the Board over—

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,
is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.⁶⁶

With such broad language, “[i]t is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over railroad operations.”⁶⁷

⁶³ *Id.* at 23; see also Paul Stephen Dempsey, *The Rise and Fall of the Interstate Commerce Commission: The Tortuous Path from Regulation to Deregulation of America’s Infrastructure*, 95 MARQ. L. REV. 1151, 1159 (2012).

⁶⁴ *Houston, E. & W.T.R. Co. v. United States*, 234 U.S. 342, 351 (1914).

⁶⁵ ICC Termination Act of 1995, Pub. L. No. 104-88, §§ 101-106, 109 Stat. 803, 804 (1995) (codified at 49 U.S.C. §§ 101-727 1995)).

⁶⁶ 49 U.S.C. § 10501(b) (2015).

⁶⁷ *City of Auburn v. U.S. Government*, 154 F.3d 1025, 1030 (9th Cir. 1998) (quoting *CSX Transp., Inc. v. Georgia Pub. Serv. Comm’n*, 944 F. Supp. 1573, 1581 (N.D. Ga 1996)).

*E. The Indian Right of Way Act (IRWA) and the Regulations
Promulgated Thereunder*⁶⁸

Regulation and control of tribal land by Congress has an erratic and contradictory history. Inevitably, westward expansion and tribal territories came into serious conflict with the addition of Texas to the Union and the Californian Gold Rush; consequently, the federal government began to create reservations for Indians in the late 1840s.⁶⁹ In 1854, Commissioner of Indian Affairs George W. Manypenny argued it would be necessary “at no distant day, to restrict the limits of all the Indian tribes upon our frontiers, and cause them to be settled in fixed permanent localities, thereafter not to be disturbed.”⁷⁰ By 1872, the attitude that tribes would not be disturbed was replaced by the idea that Indians should eventually abandon their nomadic and communal reservations and assimilate into popular society.⁷¹ Acting on this belief, Congress passed the Dawes Act, or General Allotment Act of 1887.⁷² The Dawes Act authorized the president to allot reservation land to Indians and open any remaining land to non-Indian settlement. Around 1900, Congress passed legislation which formed a “comprehensive scheme which completely covers the subject of rights of way” and began to grant rights-of-way across reservation land.⁷³

The IRWA empowers 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 [tribal lands...]”⁷⁴ Those who are granted rights-of-way “shall comply with the provisions of sections 312 to 318 of this title and such rules and regulations as may be prescribed thereunder.”⁷⁵ The purpose of this scheme was

⁶⁸ Compare 25 U.S.C §§323-28 (2015) with 25 C.F.R. Pt. 169 (2017).

⁶⁹ FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW, 58-59, 63 (2012 ed.) (Indian tribes often ceded large swathes of land in exchange for retaining control over a small portion of the land).

⁷⁰ Comm’r Ind. Aff., Ann. Rep., S. Exec. Doc. No. 33-1, at 225 (1854).

⁷¹ COHEN, *supra* note 69, at 61.

⁷² Indian General Allotment Act, Ch. 119, 24 Stat. 388 (1887) (codified as amended in scattered sections of 25 U.S.C. (2015)).

⁷³ Paul E. Frye, *Section 1813 of the Energy Policy Act of 2005: Implications for Tribal Sovereignty and Self-Sufficiency*, 42 TULSA L. REV. 75, 75 (2006) (quoting *Plains Elec. Generating & Transmission Coop. v. Pueblo of Laguna*, 542 F.2d 1375, 1380 (10th Cir. 1976)).

⁷⁴ 25 U.S.C § 323 (2013).

⁷⁵ 25 U.S.C § 312 (2012). Congress passed Sections 311 to 321, which concerned rights-of-way for specific purposes circa 1990. Congress enacted

to protect Indian Nations “against improvident grants of rights-of-way”⁷⁶ and to “fully... protect Indian interests.”⁷⁷

F. An Overview of the Legal Arguments

At a cursory glance, it might seem like BNSF has clearly violated a valid contract, but it is far more complicated than that. At the heart of the conflict is—as it has been for the last century—the extent of tribal sovereignty. On the one hand, BNSF argued that the ICCTA preempts the part of the Agreement which—in its view—unreasonably limits commerce because federal authority to regulate railroads is exclusive. The STB, then, as the agency responsible for following the mandate of the ICCTA, is in the best position to “determine whether the relief requested by the tribe would impermissibly conflict with the statutes and regulations governing rail obligations, and if so, how the conflict should be resolved.”⁷⁸

On the other hand, the Tribe believes that the increase in crude oil passing through the Reservation presents a danger to people, recreation, and the environment. The railroad passes very close to the Swinomish Casino and Lodge, a Chevron station, an RV park, a Tribal waste treatment plant, and a Tribal air quality monitoring facility, all of which are part of the hub of commerce and culture on the Reservation.⁷⁹ Hundreds of people are present at any given time at these facilities.⁸⁰ The right-of-way also passes over Padilla Bay and the Swinomish Channel, which connect to the Puget Sound where the Tribe has its “usual and accustomed fishing grounds.”⁸¹ Since time immemorial, the Puget Sound has supported the fishing lifestyle of Northwest tribes, “and other

Sections 323 to 328 in 1948 to provide rights-of-way for all purposes. Congress did not include the requirement that Tribes consent to the right-of-way until 1948. The Supreme Court interpreted the consent provision in the 1948 General Rights-of-Way Act to apply to Sections 311 to 321. *See S. Pac. Transp. Co. v. Watt*, 700 F.2d 550, 554 (9th Cir. 1983).

⁷⁶ *Loring v. United States*, 610 F.2d 649, 651 (9th Cir. 1979).

⁷⁷ *S.P. Transp. Co. v. Watt*, 700 F.2d 550, 552 (9th Cir. 1983).

⁷⁸ Defendant BNSF Railway Company’s Motion to Dismiss or Stay, at 11-12, *Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, (No. C15-543RSL) (W.D. Wash. May 14, 2015), 2017 WL 132448.

⁷⁹ Amended Motion for Summary Judgment, *supra* note 23, at 2.

⁸⁰ *Id.*

⁸¹ *United States v. Washington*, 459 F. Supp. 1020, 1049 (W.D. Wash. 1978).

marine resources have played central and enduring roles in the Tribe's subsistence, culture, identity, and economy."⁸²

The Tribe argued that the Indian Right-of-Way Act of 1948 (IRWA), under which the Department of Interior granted the easement, is integral to any decision the court makes because it governs how the BIA grants easements and when the easements may be revoked.⁸³ Because the IRWA applies, the court must consider whether the IRWA and the ICCTA are in conflict. The Tribe argues the two statutes can be read to function harmoniously because they have obviously unrelated purposes.⁸⁴ Lastly, the Tribe argues that both statutes must be interpreted liberally in favor of tribal rights, and consistent with the Indian law canons of construction.⁸⁵

BNSF responds by arguing that the Tribe's withholding of consent to additional railcars passing through the Reservation is contrary to federal law both because the contract between the Tribe and BNSF is preempted by the ICCTA and because it is contrary to other federal laws.⁸⁶

II. PART II. THE TRIBE IS NOT ARBITRARILY WITHHOLDING ITS CONSENT TO AN INCREASE IN TRAIN TRAFFIC

BNSF argued that the tribe cannot withhold consent to an increase in train traffic because this would violate federal law, and the IRWA could not have sanctioned a contract which would violate federal law.⁸⁷ If true, this would also violate the Settlement Agreement on its face because "nothing" in the easement "shall supersede any federal law or regulation."⁸⁸ In support of the argument that the agreement violates federal law, BNSF makes two points: first, the common-carrier obligation requires BNSF to

⁸² Amended Motion for Summary Judgment, *supra* note 23, at 3.

⁸³ *Id.* at 14-15.

⁸⁴ *Id.* at 19.

⁸⁵ *Id.* at 21-22.

⁸⁶ BNSF Railway Company's Cross-Motion for Partial Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment, at 12, *Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, No. C15-543RSL (W.D. Wash. Jan. 13, 2017), 2017 WL 132448.

⁸⁷ 25 C.F.R. § 169.9 (2015) (Rights-of-Way "(a) [a]re subject to all applicable Federal laws; and (b) [a]re subject to tribal law; except to the extent that those tribal laws are inconsistent with Federal law").

⁸⁸ Amended Motion for Summary Judgment, *supra* note 23, at 7.

provide transportation of crude oil; second, withholding consent violates the Hazardous Materials Transportation Act (hereinafter Hazmat Act).⁸⁹ Instead of addressing these arguments head on, the Tribe argues that “[e]ven the STB does not read the [ICCTA] federal preemption provision literally.”⁹⁰

A. *Withholding Consent is Not Arbitrary; Whether the Agreement Violates the Hazmat Act or the Common Carrier Obligation is Not Dispositive*

For the Tribe, the notion of “arbitrariness,” as derived from the settlement agreement, should not be based on an understanding of the practicality and the necessity of uniform regulatory practices; rather, it should be based on its objection to a significant increase of dangerous cargo passing through critical areas of the Reservation. Nothing in BNSF’s briefing attempts to rebut the Tribe’s assertion that oil traffic threatens harm to people and sacred hunting grounds, or attempts to controvert the reasonableness of the Tribe’s objection to increased crude oil traffic. Instead, BNSF argues that it is per se unreasonable for the Tribe to object to the increased traffic because states are prevented from doing so, and because the federal government sufficiently regulates the transportation of hazardous materials to keep localities safe.

Nothing in the Hazmat Act expressly prevents the Tribe from contracting with BNSF in such a way as to limit the number of oil trains running through the Reservation. The Hazmat Act is an extensive and comprehensive regulatory scheme designed to regulate the transportation of hazardous material. It states: “[e]xcept as provided in subsections (b), (c), and (e) of this section and unless authorized by another law of the United States, a requirement of a state... or a[n]... Indian tribe about [the transportation of hazardous material] ... is preempted.”⁹¹ The Eighth Circuit has interpreted the Hazmat Act to prevent the Prairie Island Mdewakanton Sioux Indian Community from implementing an ordinance requiring transporters of nuclear materials travelling across reservation land to obtain a tribal

⁸⁹ 49 U.S.C.App. §§ 5108-5128 (2013).

⁹⁰ Motion for Summary Judgment, *supra* note 13, at 16.

⁹¹ 49 U.S.C § 5125(1) (2013).

license.⁹² Like the ICCTA, however, nothing in the Hazmat Act mentions—let alone prohibits—contracting with a transporter, like BNSF, to limit the transportation of a hazardous material. Furthermore, the Hazmat Act has yet to generate litigation in which the parties claimed it conflicted with another federal statute.

Initially, in his order on cross-motions for summary judgment, Judge Lasnik did not conclude that the Tribe's withholding of consent was arbitrary as a matter of law, but he agreed with BNSF's first argument that easement agreements cannot be used to prevent the railroad from meeting its common carrier obligations.⁹³ In 1948, the United States Supreme Court heard *United States v. Baltimore & Ohio Railroad Company*, a case in which the owner of a segment of track contracted with a railroad for use of that segment.⁹⁴ Cleveland Union Stock Yards Company had attempted to impose certain fees on the rail company's use of a particular track segment it used. The railroad companies balked at how high the fees were and refused to deliver livestock to the meatpackers at the other end of the spur, effectively excluding meat from the types of product that could be transported on the spur.⁹⁵ The Supreme Court held that the ownership of the track segment in question "does not vest [the landowner] with power to compel the railroads to operate in a way which violates the Interstate Commerce Act."⁹⁶ Similarly, Judge Lasnik held that an injunction preventing the transportation of crude oil through the reservation was not an appropriate remedy because this "state law claim" would "effectively require a common carrier to discriminate against a particular type of cargo and/or a particular region" and "burden[] interstate commerce."⁹⁷ This discrimination, he said, "goes to the heart of the railroad's operations as a carrier and flies in the face of the anti-discrimination purposes for which the Interstate Commerce Act was first enacted."⁹⁸

⁹² Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty., 991 F.2d 458, 462-63 (8th Cir. 1993).

⁹³ Order Regarding Cross-Motions for Summary Judgment, *supra* note 14, at 4.

⁹⁴ *United States v. Baltimore & O. R. Co.*, 333 U.S. 169, 176-77 (1948).

⁹⁵ *Id.* at 173-74.

⁹⁶ *Id.* at 177-78.

⁹⁷ Order Regarding Cross-Motions for Summary Judgment, *supra* note 14, at 10.

⁹⁸ *Id.* Judge Lasnik also concluded that "BNSF's promises to disclose the cargo it carries across the reservation, to seek the Tribe's written agreement prior to increasing the traffic over the rail line, and to pay an adjusted rental amount do not constitute the regulation of transportation by rail carriers or involve the abandonment or discontinuance of track." *Id.* at 9.

However, *Baltimore and Ohio Railroad Company* is “simply inapposite because it involved state law claims; it did not involve an Indian tribe seeking to protect its treaty protected property interests under federal law.”⁹⁹ Judge Lasnik correctly recognized this oversight and granted the Tribe’s motion for reconsideration.¹⁰⁰ “Federal common law governs an action for trespass on Indian lands,”¹⁰¹ and federal common law provides a variety of causes of action to protect Indian lands, such as actions for ejectment, accounting for profits, and damages.¹⁰² Just recently, the Western District of Oklahoma issued a permanent injunction ejecting the operator of a network of natural gas transmission pipelines from Kiowa Tribal land, and because the judge found the federal common law trespass claim.¹⁰³ Thus, Judge Lasnik was correct to permit or exclude the Tribe’s federal common law claims; those should move forward without the limitation of *Baltimore and Ohio Railroad Company*.

III. PART III. THE ICCTA DOES NOT PREEMPT ENFORCEMENT OF THIS CONTRACTUAL AGREEMENT

As discussed above, BNSF argued that, because the IRWA does not authorize an action which would violate federal law, the court need not even consider whether the ICCTA preempts the right-of-way agreement. Whether the ICCTA preempts the enforcement of the right-of-way agreement is a separate and important question. If the ICCTA preempts the contractual agreement, the remedies provided by the IRWA are rendered moot, and the principles of economic efficiency as understood by the STB apply to conflicts over the termination or negotiation of a right-of-way agreement.

⁹⁹ Plaintiff’s Motion for Reconsideration, at 4, *Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, No. C15-543RSL (W.D. Wash. March 10, 2016), 2017 WL 132448.

¹⁰⁰ Order Granting Plaintiff’s Motion for Reconsideration, *supra* note 17, at 5.

¹⁰¹ *United States v. Milner*, 583 F.3d 1174, 1182 (9th Cir. 2009) (citing *United States v. Pend Oreille Pub. Util. Dist. No. 1*, 28 F.3d 1544, 1549 n.8 (9th Cir. 1994)).

¹⁰² *Pend Oreille*, 28 F.3d at 1549 n.8.

¹⁰³ Order, at 9-10, *Davilla v. Enable Midstream Partners*, (W.D. Okla. Mar. 28, 2017), (No. 5:15-cv-01262-M).

A. *The ICCTA Does Not on its Face Preempt the Right-of-Way Agreement Simply Because the Agreement is a Contract*

ICCTA's mandate to the STB to regulate interstate transportation is broad and sweeping, but is not absolute. First, "[s]tate and local regulation is appropriate where it does not interfere with rail operations. Localities retain their reserved police powers to protect the public health and safety so long as their actions do not unreasonably burden interstate commerce."¹⁰⁴ Second, contracts are recognized as "voluntary agreements [that] must be seen as reflecting the carrier's own determination and admission that the agreements would not unreasonably interfere with interstate commerce."¹⁰⁵ If every contractual arrangement between a rail carrier and another party was preempted, the parties' exclusive recourse would be ICCTA remedies, but the ICCTA does not include a general contract remedy.¹⁰⁶ The STB itself follows these two limiting principles and often emphasizes that courts are the proper place for resolving contract disputes.¹⁰⁷ However, in both cases, whether it is a local regulation or a contractual arrangement, the validity and enforceability is limited to the extent it unreasonably interferes with interstate commerce or the common carrier's obligations.¹⁰⁸

¹⁰⁴ *Grafton & Upton R.R. Co.*, FD 35779, 2014 WL 292443, at *5 (S.T.B. Jan. 22, 2014).

¹⁰⁵ *The Twp. of Woodbridge, NJ, et al.*, 5 S.T.B. 336, 3 (2000).

¹⁰⁶ *PCS Phosphate Co. v. Norfolk S. Corp.*, 559 F.3d 212, 218-19 (4th Cir. 2009).

¹⁰⁷ *See, e.g., Id.* at 220 (citing *The N. Y., Susquehanna, & W. Ry. Corp.--Discontinuance of Service Exemption*, No. AB-286 S.T.B. 1, 2 (2008) (rejecting stay based on claim that NYS & W did not fulfill contract obligation to "operate and maintain the [rail system] improvements" because "a court of competent jurisdiction is the proper forum to resolve contractual disputes, not the Board"); *Saginaw Bay S. Ry. Co.--Acquisition & Operation Exemption*, No. 34729 S.T.B. 1, 3, 2006 WL 1201791, at *2 (S.T.B. May 5, 2006) ("[W]hether SBS should be responsible for maintaining or indemnifying that portion of the line is a private contractual dispute subject to the terms of the agreement under which CSXT has made the assignment ... contractual disputes such as this one are properly for the courts to decide."); *see also* 49 U.S.C. § 10709(c)(2) (2013) (providing that contracts between rail carriers and shippers, which are not subject to rate requirements of the ICCTA, must be enforced in state or federal court).

¹⁰⁸ *Order Regarding Cross-Motions for Summary Judgment*, *supra* note 14, at 8.

1. The ICCTA Could Preempt the Enforcement of the Right-of-Way but for the IRWA and the Canons of Construction

In this case, Judge Lasnik concluded in his order granting the Tribe's Motion for Summary Judgement in Part and Denying it in Part that he could not grant the Tribe's requests for relief to the extent they would unreasonably interfere with interstate commerce.¹⁰⁹ In the first case relied upon by the Tribe, *Township of Woodbridge v. Consolidated Rail Corporation*, the STB denied Consolidated Railroad's motion to dismiss in a case where citizens had sued to enjoin the railroad from idling its trains in the town.¹¹⁰ The Township and Consolidated entered into a contractual relationship in which the Consolidated agreed to limit the idling of trains between 10:00 p.m. and 6:00 a.m.¹¹¹ The township then sought reassurance from the STB that Consolidated could be held to the agreement.¹¹² The STB ruled that Consolidated had not shown that enforcement of the contract between the township and Consolidated would unreasonably interfere with the railroad's operation.¹¹³ However, the court later pointed out that the railway company is not precluded from attempting to demonstrate in the future that enforcement of the contract may interfere with interstate commerce.¹¹⁴ Similarly, in *PCS Phosphate v. Norfolk Southern* the Fourth Circuit said that a deed obligating Norfolk Southern Railroad to pay for the relocation of a portion of track was not preempted because the obligation would not interfere with Norfolk Southern's ability to serve its existing customers.¹¹⁵ In these cases, although the court held that the contractual agreements were not preempted by the ICCTA, it did not disregard such a possibility. The *PCS Phosphate* court emphasized that "[t]his is not to say that a voluntary agreement could never constitute an 'unreasonable interference' with rail transportation."¹¹⁶ Rather, preemption turned on the facts of each case.¹¹⁷

¹⁰⁹ *Id.* at 10.

¹¹⁰ *Woodbridge*, 5 S.T.B. at 1.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 2.

¹¹⁵ *PCS Phosphate Co. v. Norfolk S. Corp.*, 559 F.3d 212, 222 (4th Cir. 2009).

¹¹⁶ *Id.* at 221; *see also* R.R. Ventures—Aban. Exemption—Between Youngstown, Ohio, & Darlington, Pa., in Mahoning & Columbiana Ctys., Ohio, & Beaver Cty., Pa., AB 556 (Sub-No. 2X), slip op. at 3 (S.T.B. served Jan. 7,

B. Federal Courts Should Hold that the Plain Language of the ICCTA Does Not Outweigh the Trust Responsibility Between the Federal Government and Indian Tribes

Whether the ICCTA preemption provision prevails over a different federal law governing Indian tribes when that law conflicts with the ICCTA appears to be an issue of first impression. *Phosphate* and *Woodbridge* do not involve a contract authorized by a federal statute, the IRWA, and sanctioned by the BIA (in the Department of the Interior). To be clear, *state and local* regulation is preempted with few exceptions,¹¹⁸ but the Tribe is correct to point out that the “ICCTA has never been held” to preempt other federal statutes.¹¹⁹ However, this is not because courts reject the preemption provision of the ICCTA; rather, it is because “there has never been a case in which another federal remedy was being used to conflict directly with the STB’s exclusive regulation of rail transportation.”¹²⁰ And, this case is not just about any federal remedy, this case involves the trust doctrine, a sacred responsibility which courts have respected for over a century.

1. Courts Have Held that the ICCTA Does Not Supersede Other Federal Acts, But Such Circumstances are Limited and Did Not Present Serious Conflicts; No Such Holding Has Had Significant Economic Impacts

Courts have had limited opportunity to interpret how preemption applies when the ICCTA and other federal statutes cover the same topic or are in conflict. Most significantly, although

2000) (“While the Board encourages privately negotiated agreements, any contractual restrictions that unreasonably interfere with common carrier operations are deemed void as contrary to public policy.”), *aff’d sub nom.* R.R. Ventures v. STB, 299 F.3d 523, 560-63 (6th Cir. 2002).

¹¹⁷ *PCS Phosphate*, 559 F.3d at 221.

¹¹⁸ Joint Petition for Declaratory Order, Boston & Maine Corp. & Town of Ayer, MA, STB Fin. Docket No. 33971, WL 4586855, 500 S.T.B. 500, 5 (S.T.B., Apr.30, 2001). (“State and local regulation is permissible where it does not interfere with interstate rail operations, and localities retain certain police powers to protect public health and safety. For example, non-discriminatory enforcement of state and local requirements such as building and electrical codes generally are not preempted.”).

¹¹⁹ Motion for Summary Judgment, *supra* note 13, at 16.

¹²⁰ BNSF Opposition to Plaintiff’s Motion for Summary Judgment, *supra* note 86, at 27.

the plain language of “section 10501(b) [of the ICCTA] might suggest that it supersedes other federal law, the [Surface Transportation] Board and the courts have rejected such an interpretation as overbroad and unworkable.”¹²¹ In some instances, the ICCTA does not preempt other federal acts.¹²² In *Tyrell*, the court attempted to harmonize section 10501(b) of the ICCTA with the Federal Railway Safety Act (FRSA). It found that the mere existence of the FRSA indicates Congress’s intent for the STB and the Federal Railroad Administration (FRA) to have different mandates, and the history of coordination between the agencies reflects that the FRA handled safety matters, and the STB handled economic regulation and environmental impact assessments.¹²³ The importance of the case, however, was more about who had the proper mandate, rather than parsing a conflict between two statutes, such as the IRWA and the ICCTA.

Some local environmental zoning ordinances or land use restrictions have been upheld in a few contexts, but these cases are limited to when the local entity has another federal grant of power. The STB concluded that Congress did not intend the ICCTA to preempt the Clean Air Act (CAA) and the Clean Water Act (CWA), which both involve local governments, in permitting and regulation.¹²⁴ However, even when another federal agency grants certain powers to a local entity, the STB could still argue that regulation must not “interfere with interstate rail operations....”¹²⁵ Courts will seek to determine this on an individual basis and

¹²¹ C.S.X. Trans., Inc.—Pet. for Decl. Order at 1, (S.T.B. Mar. 14, 2005) (No. 34662) 2005 WL 1024490.

¹²² See, e.g., *Holland v. Delray Connecting R. Co.*, 311 F. Supp. 2d 744 (N.D. Ind. 2004) (“ICCTA did not preempt Coal Act to extent it required railroad to pay annual premiums to union health benefit plan”); see also *BNSF Ry. Co. v. Albany & E.R.R. Co.* 741 F. Supp. 2d 1184 (D. Or. 2010) (ICCTA does not preempt the Sherman Act); *Boston and Maine Corp. and Town of Ayer, MA*, 500 S.T.B at 5. (“[N]othing in section 10501(b) is intended to interfere with the role of state and local agencies in implementing Federal environmental statutes, such as the Clean Air Act, the [Clean Water Act], and the [Safe Water Drinking Act]”); and *Tyrrell v. Norfolk S. Ry.*, 248 F.3d 517, 523 (6th Cir.2001) (“[T]he ICCTA and its legislative history contain no evidence that Congress intended for the STB to supplant the FRA’s [Federal Railroad Administration] authority over rail safety. Rather, the agencies’ complementary exercise of their statutory authority accurately reflects Congress’s intent for the ICCTA and FRSA [Federal Railway Safety Act] to be construed *in pari materia*.”).

¹²³ *Tyrell*, 248 F.3d at 523.

¹²⁴ *Borough of Riverdale Petition for Declaratory Order the N.Y. Susquehanna & W. Ry. Corp.*, 4 S.T.B. 380, 5 (1999).

¹²⁵ *Id.*

whether the “statute or regulation is being applied in a discriminatory manner or being used as a pretext for frustrating or preventing a particular activity, in which case, the application of the statute or regulation would be preempted.”¹²⁶ For example, the STB noted that Environmental Protection Agency (EPA) adoption of local regulation of train emissions would be preempted.¹²⁷ The STB rarely abdicates such authority and certainly has never done so when the contract or local regulation so limited interstate commerce.

C. When Two Federal Laws Seemingly Conflict, One Does Not Normally Preempt the Other; Rather, Courts Try to Harmonize Them; There is No Evidence Congress intended to Abrogate the IRWA upon Enacting the ICCTA

The Tribe argues that, as the ICCTA preemption provision is not workable, courts must attempt to harmonize the ICCTA and the IRWA.¹²⁸ Preemption of a federal law by another federal law does not make sense in the context of the Supremacy Clause—both laws have equal power.¹²⁹ So, when federal acts conflict, courts attempt to harmonize the statutes or determine whether one act impliedly repeals another.¹³⁰ “[I]f two federal statutes are ‘capable of coexistence,’ the statutes should be harmonized and each should be regarded as effective unless there is a ‘positive repugnancy’ or an ‘irreconcilable conflict’ between the laws.”¹³¹ In *BNSF Railway Company v. California State Board of Equalization*, BNSF and Union Pacific Railroad Company challenged a California law which required the railroads to collect a fee for the State Board of Equalization from the shippers of hazardous materials.¹³² The court

¹²⁶ Joint Petition for Declaratory Order, *Boston & Maine Corp. & Town of Ayer, MA*, 5 S.T.B 5080, 6 (2001); *see also*, *Grafton & Upton R.R. Co.—Petition for Declaratory Order*, FD 35779, 2014 STB LEXIS 12, at *15 (S.T.B. Jan. 27, 2014) (“[F]ederal environmental law would be preempted if the “federal environmental laws are being used to regulate rail operations”).

¹²⁷ U.S. EPA—Pet. For Declaratory Order, F.D. No. 35803 (S.T.B. Dec. 30, 2014).

¹²⁸ Motion for Summary Judgment, *supra* note 13, at 18.

¹²⁹ U.S. Const. art. VI, cl. 2.

¹³⁰ *Randolph v. IMBS, Inc.*, 368 F.3d 726, 730 (7th Cir. 2014).

¹³¹ *Assn. of Am. Railroads v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094 (9th Cir. 2010) (citing *Town of Ayer*, 500 S.T.B at 6, n.28); *see also*, *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

¹³² *BNSF Ry. Co. v. Cal. State Bd. of Equalization*, No. 16-cv-04311-RS, 2016 U.S. Dist. LEXIS 149884, at *6 (N.D. Cal. Oct. 28, 2016)

granted the railroads' request for an injunction, reasoning that "it is not for the state effectively to instruct that entity as to what must be included in rail shipping charges."¹³³ In doing so, however, it noted that the Hazardous Materials Transportation Act (HMTA) permits states to impose fair fees,¹³⁴ and it is not the fact of a fee that triggers preemption by the ICCTA, but rather the way in which the fee was collected. The HMTA and the ICCTA could be harmonized if the fee was placed "directly on shippers, or on railroads themselves" and if it did not discriminate between railroads and other modes of transportation.¹³⁵

Similarly, the Sierra Club sued BNSF arguing that BNSF violates the CWA every time coal is discharged from a train car into waters of the United States because it has never obtained a National Pollution Discharge Elimination System (NPDES) permit.¹³⁶ The court denied the parties' motions for summary judgement because it believed issues of material fact remained outstanding; it "postpone[d] its decision on the ICCTA preemption issue until after a possible finding of liability at trial."¹³⁷ The parties settled out of court,¹³⁸ but the briefing indicated BNSF did not believe that the statutes could or should be harmonized. Rather, BNSF argued that federal law cannot be harmonized with ICCTA when it is "being used to regulate rail operations directly or being applied in a discriminatory manner against railroads."¹³⁹

¹³³ *Id.* at *11.

¹³⁴ 49 U.S.C. § 5125(f) (2013) ("A State, political subdivision of a State, or Indian tribe may impose a fee related to transporting hazardous material only if the fee is fair and used for a purpose related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response.").

¹³⁵ Cal. State Bd. of Equalization, No. 16-cv-04311-RS, at *10, *14.

¹³⁶ Order Denying Plaintiff's and Defendant's Motions for Summary Judgment at 1, *Sierra Club v. BNSF Ry. Co.*, No. C13-967-JCC, 2016 U.S. Dist. LEXIS 147786, at *4 (W.D. Wash. Oct. 25, 2016).

¹³⁷ *Id.* at 37.

¹³⁸Phuong Le, *BNSF to Study Coal Covers Under Tentative Lawsuit Agreement*, THE SEATTLE TIMES, Nov. 15, 2016, <http://www.seattletimes.com/seattle-news/environment/enviros-bnsf-railway-reach-agreement-in-coal-dust-lawsuit/> (last visited Mar. 10, 2017) ("BNSF denied any violations of federal environmental laws, but also agreed to pay \$1 million in environmental projects in the state and to clean up certain hotspots where coal has accumulated along tracks near waterways.")

¹³⁹ BNSF Railway Company's Motion for Summary Judgment, *Sierra Club v. BNSF*, 2016 WL 4721022 (W.D.Wash. Aug. 19, 2016) (Nos. 2:13-cv-00967-JCC, 2:14-cv-00660) (citing *In re EPA Petition*, (S.T.B. Dec. 29, 2014) (No. 35803) 2014 WL 7392860.

In this case, Judge Lasnik stated the issue is not whether the ICCTA preempts IRWA, but rather “whether Congress intended to repeal the Treaty of Point Elliott when it enacted the ICCTA.”¹⁴⁰ Unlike *California State Board of Equalization* or *Sierra Club v. BNSF*, this case involves the treaty right to exclude non-members.¹⁴¹ Only an act of Congress or the Executive can extinguish treaty rights, including the Treaty of Point Elliott, if there is “clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.”¹⁴² “The intention to abrogate a treaty or modify a treaty is not to be lightly imputed by the Congress,”¹⁴³ and Judge Lasnik found no evidence of such intent.¹⁴⁴ He concluded that the ICCTA does not preempt or repeal the Treaty.¹⁴⁵

D. The ICCTA and the IRWA Should Be Construed in Favor of Indian Rights; Considering This, the ICCTA Cannot Preempt the IRWA

Judge Lasnik found that the ICCTA did not preempt the IRWA, and he did so in large part on the basis that there was no evidence Congress intended to abrogate the treaty rights. The canons of construction are critical in this analysis as they apply to treaty rights and they may apply to the interpretation of statutes. Like the CWA, the IRWA is a federal statute granting federal agencies the right to issue administrative rules governing the granting of rights-of-way on tribal land. Given the extent of federal control, trust responsibilities apply to the granting of rights-of-way,¹⁴⁶ as do the classic canons of construction, instructing courts

¹⁴⁰ Order Granting Plaintiff’s Motion for Reconsideration, *supra* note 17, at 3.

¹⁴¹ *United States v. Dion*, 476 U.S. 734, 739 (1986). The right to exclude non-members from the reservation is “too fundamental to be easily cast aside.”

¹⁴² *Id.* at 739-40.

¹⁴³ *Cook v. U.S.*, 288 U.S. 102, 120 (1933).

¹⁴⁴ Order Regarding Cross-Motions for Summary Judgment, *supra* note 14, at 14; *see also* Order Granting Plaintiff’s Motion for Reconsideration, *supra* note 17, at 4.

¹⁴⁵ Order Regarding Cross-Motions for Summary Judgment, *supra* note 14, at 16.

¹⁴⁶ *United States v. Mitchell*, 463 U.S. 206, 223-24, 225 n.29, 226 n.31 (1983) (hereinafter *Mitchell II*).

to construe treaties and regulations liberally in favor of Indians.¹⁴⁷ Given the trust doctrine and the canons of construction, BNSF should be held to the express language of the contract. The court could grant an injunction until the parties determine what amount of traffic across the reservation is reasonable considering the dangers of crude oil transportation.

The concepts of the trust responsibility and protection are inherent in the very first treaties negotiated between Indians and the United States Government.¹⁴⁸ John Marshall, the first Chief Justice of the Supreme Court of the United States, described the Cherokee Nation as a “domestic dependent nation[.]”¹⁴⁹ and summarized the relationship between tribes and the United States as “marked by peculiar and cardinal distinctions which exist nowhere else.”¹⁵⁰ Congress codified this trust relationship in several statutes. For example, the Northwest Ordinance, passed by Congress in 1787 stated:

The utmost good faith shall always be observed towards the Indians, their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they shall never be invaded or disturbed . . . but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.¹⁵¹

Over the last century, the trust relationship has survived a variety of permutations. The U.S. Supreme Court has both expanded and then limited its influence. During the “Allotment Era,” in which

¹⁴⁷ *Star Lake R.R. v. Lujan*, 737 F. Supp. 103, 109 (D.D.C. 1990), *aff'd*, 925 F.2d 490 (D.C. Cir. 1991) (per curiam).

¹⁴⁸ See ROBERT A. WILLIAMS, JR., *LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600-1800*, 124-37 (Oxford U. Press 1997).

¹⁴⁹ *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

¹⁵⁰ *Id.* at 16.

¹⁵¹ See “An Ordinance for the government of the territory of the United States Northwest of the river Ohio,” July 13, 1787 art. 3, in 32 *Journals of the Continental Congress, 1774-1789*, 334, 341 (Worthington C. Ford *et al.*, eds. 1904-37).

Congress opened many reservations to non-Indian settlement, the U.S. Supreme Court upheld Congress's decision to both unilaterally abrogate a treaty and apply federal criminal laws to Indians.¹⁵² The U.S. Supreme Court held that the guardian-ward relationship was both the source and the justification for this "plenary" power,¹⁵³ which Congress readily used to limit tribal sovereignty.¹⁵⁴

The canons of construction are as old as the trust relationship. "The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians."¹⁵⁵ In *Worcester v. Georgia*, Chief Justice John Marshall interpreted the treaty between the Cherokee Tribe and the federal government—the Treaty of Hopewell of 1785—as the "unlettered people" would have understood it.¹⁵⁶ The Treaty indicated that the tribal lands were "allotted" to the Tribe, which, of course, had a particular legal connotation. However, Marshall explained it was highly unlikely the Cherokee Nation had understood that "instead of granting, they were receiving lands."¹⁵⁷ "Therefore, he read the term from the tribe's perspective, as merely establishing a 'dividing line between the two nations.'"¹⁵⁸

The federal trust responsibility limits the power of the executive branch of the federal government in three ways. First,

¹⁵² *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564 (1903) (holding Congress did not have to abide by the treaty requiring consent of three-fourths of adult male members for any allotment of land to non-Indians because it would materially limit and qualify the controlling authority of Congress in respect to the care and protection of the Indians, and to deprive Congress, in a possible emergency, to partition Indian land without consent); *see also* *United States v. Kagama*, 118 U.S. 375, 384 (1886) (upholding the constitutionality of the Major Crimes Act, which *inter alia* gave federal courts jurisdiction of some crimes committed on reservation land even between Indians).

¹⁵³ *Kagama*, 118 U.S. at 384.

¹⁵⁴ *See, e.g.*, *United States v. Sandoval*, 231 U.S. 28, 46 (1913) (quoting *Kagama* to uphold statute making it a crime to introduce liquor into Indian country); *and* *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 308 (1902) (invoking political question doctrine to upholding Congress's ability to lease reservation land without tribal consent); *and* *Stephens v. Cherokee Nation*, 174 U.S. 445, 485 (1899) (quoting *Kagama* and invoking political question doctrine in upholding Congress's ability to determine membership in tribe).

¹⁵⁵ *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985) (quoting *Oneida Cty. v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985)).

¹⁵⁶ *Worcester v. Georgia*, 31 U.S. 515, 582 (1832) (McLean J., concurring).

¹⁵⁷ *Id.* at 553 (Majority Opinion).

¹⁵⁸ Jacob Schuman, *Indian Canon Originalism*, 126 HARV. L. REV. 1100, 1102 (2013) (quoting *Worcester*, 31 U.S. at 552).

the “[general trust] represents the historical obligation of the federal government to protect tribal lands and tribal self-government.”¹⁵⁹ This general trust also serves to restrain alienation of Indian land and requires the Secretary of the Interior to approve all leases on Indian land.¹⁶⁰

Second, a general statute may give rise to obligations enforceable by suit, but such “limited trust” does not permit actions for damages.¹⁶¹ In *Mitchell I*, the Quinault Nation sued the federal government under the General Allotment Act (GAA) claiming mismanagement of its timber resources and the proceeds from timber sales.¹⁶² Although the language of section five of GAA required the United States to hold land in trust for the Tribe, the court held that section five created only a limited trust relationship between the United States and the Tribe, and it did not impose upon the federal government any duty to manage timber resources.¹⁶³

Third, when a statutory scheme contemplates “elaborate control” over Indian land and resources, the United States may be liable for damages under a theory of fiduciary responsibility.¹⁶⁴ In *Mitchell II*, the Quinault Nation brought the same claim again, this time, arguing that the timber management statutes and other federal statutes established fiduciary obligations between the Tribe and the federal government.¹⁶⁵ The court agreed, finding that a fiduciary obligation existed that mandated the federal government to compensate the Tribe for mismanagement or forest resources.¹⁶⁶ The Tribe successfully used the trust doctrine to assert that the federal government had a positive duty to Indians, and where that duty was breached, the federal government could be sued for damages.

Although the canons of construction and the trust relationship are incredibly important to Indian law, the extent to which they impact Indian law today is debatable. Modern jurisprudence does

¹⁵⁹ Judith V. Royster, *Equivocal Obligations: The Federal-Tribal Trust Relationship and Conflicts of Interest in the Development of Mineral Resources*, 71 N.D. L. REV. 327 (1995).

¹⁶⁰ *Id.* at 327-28.

¹⁶¹ *United States v. Mitchell*, 445 U.S. 535, 542 (1980) (hereinafter *Mitchell I*).

¹⁶² *Id.*

¹⁶³ *Id.* at 542-53.

¹⁶⁴ *Mitchell II*, 463 U.S. 206, 224-25 (1983).

¹⁶⁵ *Id.* at 226.

¹⁶⁶ *Id.*

not explicitly apply the canons to federal statutes, particularly ones of general applicability. The U.S. Supreme Court originally only applied the canons to treaties, but in the early 1900's, treaty making ceased as Indian policy creation shifted from the Executive Branch to Congress.¹⁶⁷ The Supreme Court expanded the canons to apply to statutes affecting Indians without noting the significance of the application.¹⁶⁸ The Nebraska District Court explicitly noted that these statutes were in effect treaties and, thus, should be interpreted and construed as though they were treaties.¹⁶⁹ More modern jurisprudence is, in large part, consistent with this principles. “[F]aced with . . . two possible [statutory] constructions, our choice between them must be dictated by a principle deeply rooted in [the Supreme] Court's Indian jurisprudence: ‘[s]tatutes are to be construed liberally in favor of Indians, with ambiguous provisions interpreted to their benefit.’”¹⁷⁰ On the other hand, this method of statutory interpretation seems only to apply to statutes “enacted specifically for the benefit of Indians or for the regulation of Indian affairs,” rather than statutes of general application.¹⁷¹

Moreover, courts sometimes “disregard[]”¹⁷² the canons, especially when there are significant countervailing considerations or incongruous canons.¹⁷³ Canons are not “mandatory rules”¹⁷⁴ and “need not be conclusive.”¹⁷⁵ Detractors also criticize the canons for being “normative in a fuzzy, liberal”¹⁷⁶ way and for the difficulty of determining the tribe's original understanding of a

¹⁶⁷ Schuman, *supra* note 157, at 1103.

¹⁶⁸ *Id.* See also Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 152 (2010).

¹⁶⁹ *Conway v. United States*, 149 F.261, 265-66 (C.C.D. Neb. 1907).

¹⁷⁰ *Cty. of Yakima v. Confederated Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985); see *City of Roseville v. Norton*, 348 F.3d 1020, 1032 (D.C. Cir. 2003) (“ambiguities in federal statutes are to be read liberally in favor of the Indians”).

¹⁷¹ *San Manuel Indian Bingo & Casino v. N.L.R.B.*, 475 F.3d 1306, 1312 (D.C. Cir. 2007).

¹⁷² *Montana v. United States*, 450 U.S. 544, 569 (1981) (Blackmun, J. dissenting); see also David M. Blurton, *Canons of Construction, Stare Decisis and Dependent Indian Communities: A Test of Judicial Integrity*, 16 ALASKA L. REV. 37 (1999) (noting that Justice Thomas did not mention the canons at all in the *Alaska v. Native Village of Venetie* opinion).

¹⁷³ *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001).

¹⁷⁴ *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001).

¹⁷⁵ *Circuit City Stores, Inc.*, 532 U.S. at 115.

¹⁷⁶ Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 424 (1993).

document.¹⁷⁷ However, these criticisms of the trust doctrine are not persuasive in this case.

If the trust relationship and the canons of construction are to mean anything, when the BIA sanctions, permits, and approves contractual provisions under IRWA—a statute enacted for the benefit of Indians—those provisions should be interpreted considering the Tribe’s interests and its original understanding of the document. In *Minnesota v. Mille Lacs Band of Chippewa Indians*, the U.S. Supreme Court analyzed several treaties and orders within the context of the canons of construction to assure the Chippewa Indians of their fundamental hunting and fishing rights.¹⁷⁸ In so doing, the court emphasized that if Congress intends to nullify treaty rights, it must do so explicitly.¹⁷⁹ An 1837 treaty between the Chippewa Bands of Indians ceded land to the United States, which, in turn, guaranteed to them certain hunting, fishing, and gathering rights.¹⁸⁰ President Taylor revoked the usufruct rights in an Executive Order of 1850, but in the subsequent Treaty of 1855, the Bands relinquished to the United States “any and all right” to land within the Territory of Minnesota or elsewhere. The 1855 Treaty did not mention whether it modified any of the terms from the original 1837 Treaty or hunting and fishing rights.¹⁸¹ In this context, the court concluded that the Treaty was ambiguous and resolved the tension “in favor of the Indians.”¹⁸² The Swinomish Tribe protected itself from potentially unlimited violations of its tribal sovereignty, by including certain “conditions” in the easement agreement as allowed for in IRWA.¹⁸³ There is no limit on what conditions can be imposed. Any ambiguity on what conditions may be imposed under IRWA should be resolved in favor of the Tribe.

It would be manifestly unjust for the federal government and the federal courts to invalidate a contract, and provisions therein, which retained some of the Tribe’s inherent sovereignty. The

¹⁷⁷ Schuman, *supra* note 157, at 1104.

¹⁷⁸ *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 188-93 (1999); *see also* *United States v. Dion*, 476 U.S. 734 (1986) (When Congress amended the Bald Eagle Protection Act to extent the ban on golden eagle hunting except by Indians with a permit it explicitly abrogated the treaty rights of the Tribe).

¹⁷⁹ *Mille Lacs*, 526 U.S. at 196.

¹⁸⁰ *Id.* at 176.

¹⁸¹ *Id.* at 184.

¹⁸² *Id.* at 218 (Rehnquist, C.J., dissenting).

¹⁸³ Easement Agreement, *supra* note 2.

Swinomish Tribe lamented that without “the conditions contained in the Easement Agreement,” or if it had known that “BN . . . considered the terms of the [grant] to be subordinate to ICC or common carrier obligations, [] the Tribe would never have granted its consent.”¹⁸⁴ Even without a treaty protecting a right, “a hallmark of Indian sovereignty is the power to exclude non-Indians from Indian lands.”¹⁸⁵ Tribes have authority “[t]o determine who may enter the reservation; to define the conditions upon which they may enter; to prescribe rules of conduct; [and] to expel those who enter the reservation without proper authority.”¹⁸⁶ With the treaty, the Tribe has the “exclusive” use of the land. In summary, the federal government would violate its trust responsibility by approving a contract that did grant some sovereignty, and then going back on its word to hold the portion of the contract in which the Tribe retained sovereignty invalid. To hold that the ICCTA preempts the agreement would amount to an unqualified injustice to tribes.

Judge Lasnik properly considered the canons of construction in his ruling.¹⁸⁷ The purpose of IRWA is to protect Indians “against improvident grants of rights-of-way”¹⁸⁸ and to “fully . . . protect Indian interests.”¹⁸⁹ For the federal government to so thoroughly reject a tenet of Indian sovereignty would completely undermine the stated purpose of the IRWA. With the canons, the court can prevent BNSF from using its common carrier obligations to dodge its contractual obligations and continue to perpetuate a history of Indian subjugation.

Despite this, Judge Lasnik initially found the injunction remedy unavailable to the Tribe because it would “fly[] in the face of the anti-discrimination purposes for which the Interstate Commerce Act was first enacted.” If the ICCTA is preempted, it should not then be used to justify the denial of an injunctive remedy for the Tribe. Similarly, why should the Tribe seek a declaration from the STB of its contractual rights if the ICCTA is

¹⁸⁴ Motion for Summary Judgment, *supra* note 13, at 7-8.

¹⁸⁵ *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982).

¹⁸⁶ *Quechan Tribe of Indians v. Rowe*, 531 F.2d 408, 411 (9th Cir. 1976).

¹⁸⁷ Order Regarding Cross-Motions for Summary Judgment, *supra* note 14, at 12.

¹⁸⁸ *Loring v. United States*, 610 F.2d 649, 651 (9th Cir. 1979).

¹⁸⁹ *S. Pac. Transp. Co. v. Watt*, 700 F.2d 552 (9th Cir. 1983).

not preempted?¹⁹⁰ Ultimately, in granting the Tribe's motion for reconsideration, Judge Lasnik correctly limits *Baltimore and Ohio Railroad Company* to state law claims.¹⁹¹

Despite rejecting the applicability of the ICCTA, Judge Lasnik did determine in the order on cross motions for summary judgment that any conflict between the IRWA and the ICCTA is not irreconcilable, but he fails to explain why this is so under the facts of *Swinomish v. BNSF*.¹⁹² There is no doubt, BNSF will argue on appeal that the conflict is irreconcilable. As the Tribe admits, “[b]oth enactments have provisions applicable to railroads, even if the policies behind those provisions are very different.”¹⁹³ Patchwork easements negotiated separately with different tribes that may have different priorities and conditions will likely frustrate the policy of the ICCTA—to prevent railroads from being subject to “new and conflicting regulatory obligations that will vary as a train travels across different jurisdictions.”¹⁹⁴ Judge Lasnik notes that “between 1980 and 1995 the courts and the ICC recognized the ‘primary responsibility and presumably greater expertise of the Department of the Interior over tribal affairs.’”¹⁹⁵ After the ICCTA was enacted, the STB continued to recognize the BIA's expertise and right to handle disputes between Tribes and those entities that hold a right-of-way.¹⁹⁶ Judge Lasnik's conclusion that “BNSF has not shown that compliance with these provisions would impose an unreasonable burden on interstate

¹⁹⁰ Order Regarding Cross-Motions for Summary Judgment, *supra* note 14, at 18.

¹⁹¹ Order Granting Plaintiff's Motion for Reconsideration, *supra* note 17, at 2. BNSF again points out that the ICCTA's preemption provision applies to federal and state law, but seemingly forgets the court has already rejected the applicability of the ICCTA and the blanket preemption on remedies under federal law. BNSF's Opposition to Plaintiff's Motion for Reconsideration at 3-4, *Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, No. C15-543RSL (W.D. Wash. Jan. 13, 2017), 2017 WL 132448.

¹⁹² Order Regarding Cross-Motions for Summary Judgment, *supra* note 14, at 14.

¹⁹³ Motion for Summary Judgment, *supra* note 13, at 19.

¹⁹⁴ Defendant BNSF Co.'s Motion for Summary Judgment, *Sierra Club v. BNSF Railway Co.*, 2016 WL 4721022 (W.D. Wash. Aug. 19, 2016)

¹⁹⁵ Order Regarding Cross-Motions for Summary Judgment, *supra* note 14, at 15 (citing *N.M. Navajo Ranchers Ass'n v. Interstate Commerce Comm'n*, 702 F.2d 227, 232-33 (D.C. Cir. 1983)).

¹⁹⁶ See Draft Environmental Impact Statement, Alaska, Alaska R.R. Construction and Operation of a Rail Line Extension to Port MacKensie, No. 35095, 2010 WL 1266781, at *562 (S.T.B. Mar. 16, 2010).

commerce”¹⁹⁷ is untenable—there is an inevitable economic conflict. Until now, it appears there has not been a significant conflict, but to grant the Tribe’s injunction would have a significant impact on BNSF’s common carrier obligations and crude oil transportation to Cherry Point.

While this case is unique, if the ICCTA preempts the IRWA, the new BIA right-of-way rules would be swallowed by the ICCTA insofar as no tribe would be allowed to terminate a grant of right-of-way. BNSF or another railroad would simply claim that the agreement impeded its common carrier obligations. For such a drastic unsettling of BIA administrative procedure, the Court should require explicit intent from Congress, as it does when Congress abrogates a treaty right.

IV. PART IV: THE IRWA AND THE CANONS OF CONSTRUCTION
MUST PREEMPT THE ICCTA OR MUCH OF THE NEW RULES ON
RIGHTS-OF-WAY PROMULGATED BY THE BIA IN 2015 IS RENDERED
INEFFECTUAL

The validity of the BIA’s new regulations as they pertain to railroads and other areas regulated by the STB is threatened if the ICCTA preempts the IRWA in *Swinomish v. BNSF* or if the Tribe is unable to hold BNSF accountable using federal remedies for its continued violations of the right-of-way agreement. BIA’s argument that it does have authority to promulgate the new rules is relevant to the extent that it shows a clear grant of federal administrative power that conflicts with the ICCTA. If the BIA has authority to grant tribes the power to unilaterally terminate a right-of-way or to limit the range of use permitted under a right-of-way, then holding that the ICCTA preempts the IRWA in *Swinomish v. BNSF* does not merely threaten the BIA’s new rules—indeed, some of the regulations may be void. On the other hand, if the BIA has no authority to promulgate the new rules, the authority of the STB and the BIA may not conflict. While the new regulations are probably in keeping with federal law, they will likely be tested in federal court because it is not sufficiently clear what provisions in a right-of-way agreement would violate federal law and what would not. A court trying to determine if a provision in a right-of-way agreement violated federal law would have to consider

¹⁹⁷ Order Regarding Cross-Motions for Summary Judgment, *supra* note 14, at 9.

whether the provision granted a tribe civil or criminal jurisdiction in violation of existing federal law.

On March 11, 2016, the Western Energy Alliance (Alliance)¹⁹⁸ sued the Department of the Interior (DOI) and the BIA in the United States District Court for the District of North Dakota seeking injunctive relief and to block new rules regarding rights-of-way on tribal land.¹⁹⁹ The Alliance mounted a facial challenge to the new rule arguing that it exceeded the authority of the Secretary of the DOI because, *inter alia*, tribes cannot unilaterally terminate a right-of-way or regulate the conduct of non-Indians on federally granted rights-of-way.²⁰⁰ The complaint did not mention common carrier obligations or the ICCTA. The district court held that the Alliance failed to show that, on balance, the court should grant an injunction.²⁰¹ This ruling doesn't end litigation on the new rules; it only means that Alliance must now show "concrete and particularized harm" because of the new rules as required by the United States Supreme Court standing jurisprudence.²⁰²

The BIA last made material modifications to the right-of-way regulations in 1968 and has now updated many of the outdated aspects of the old rules.²⁰³ One of the significant changes to the new regulations promulgated by the BIA allows for the tribe to unilaterally terminate those rights-of-way granted after implementation of these rules.²⁰⁴ The new regulations require the Secretary's grant of any right-of-way to clarify that it does not diminish to any extent:

¹⁹⁸ *The Alliance: Who We Are*, WESTERN ENERGY ALLIANCE, <https://www.westernenergyalliance.org/> (last visited Mar. 10, 2017). The Alliance is an "alliance of stakeholders" who "represent the voice of the Western oil and natural gas industry in a variety of ways."

¹⁹⁹ Complaint, *Western Energy Alliance v. United States Dep't of the Interior*, (March 11, 2016) (16-cv-00050-DLH-CSM).

²⁰⁰ *Id.* at 4.

²⁰¹ Order Denying Plaintiff's Motion for Preliminary Injunction at 15, *Western Energy Alliance v. United States Dep't of the Interior*, 16-cv-00050-DLH-CSM (April 19, 2016); *See Dataphase Systems, Inc., v. C L Systems Inc.*, 640 F.2d 109, 114 (8th Cir. 1981).

²⁰² U.S. Const. art. III, § 2, cl. 1. *See Lujan v. Def. Of Wildlife*, 504 U.S. 555, 560 (1992).

²⁰³ Defendant's Opposition to Motion for Preliminary Injunction, 4, *Western Energy Alliance v. United States Department of the Interior*, No. 16-cv-00050-DLH-CSM, (March 30, 2016). The new rules are promulgated at: *Rights-of-Way on Indian Land*, 80 Fed. Reg. 72492-72549 (Nov. 19, 2015).

²⁰⁴ *Rights of Way on Indian land*, 25 C.F.R. § 169.403(a) (2015) (A grantee and a tribe can negotiate remedies that may "provide one or both parties with the power to terminate the grant...").

- (a) The Indian tribe's jurisdiction over the land subject to, and any person or activity within, the right-of-way;
- (b) The power of the Indian tribe to tax the land, any improvements on the land, or any person or activity within, the right-of-way;
- (c) The Indian tribe's authority to enforce tribal law of general or particular application on the land subject to and within the right-of-way, as if there were no grant of right-of-way;
- (d) The Indian tribe's inherent sovereign power to exercise civil jurisdiction over non-members on Indian land; or
- (e) The character of the land subject to the right-of-way as Indian country under 18 U.S.C. 1151.²⁰⁵

The new rules also emphasize that right-of-way grants “[a]re subject to all applicable federal laws” and tribal law “except to the extent that those tribal laws are inconsistent with applicable federal law.”²⁰⁶

In fact, the STB claims complete control of the termination of railroad rights-of-way. The ICCTA, which grants the STB exclusive jurisdiction over the “construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities,”²⁰⁷ is in direct opposition to the current rules promulgated under IRWA. The 2015 rules state:

Any abandonment, non-use, or violation of the right-of-way grant or right-of-way document, including but not limited to encroachments beyond the defined boundaries, accidental, willful, and/or incidental trespass, unauthorized new construction, changes in use not permitted in the grant, and late or insufficient payment may result in enforcement actions including, but not limited to, cancellation of the grant [by BIA in consultation with the tribe].²⁰⁸

²⁰⁵ Rights of Way on Indian Land, 25 C.F.R. §169.010 (2015). (A grantee and a tribe can negotiate remedies that may “provide one or both parties with the power to terminate the grant...”).

²⁰⁶ *Id.* §169.009.

²⁰⁷ 49 U.S.C. § 10501(b)(2) (2013).

²⁰⁸ 25 C.F.R. §169.401 (2015).

In addition, §169.403 allows for the tribe and the grantee to negotiate a termination provision that would execute in the case of a violation of the agreement without the permission of the BIA or any other federal agency.²⁰⁹

These provisions are not precisely at issue in *Swinomish v. BNSF* because the Tribe is not seeking termination of the right-of-way, but, if it were, BNSF noted in its cross-motion for Summary Judgement that such action as it pertained to railroads would again be preempted by the ICCTA.²¹⁰ The Tribe is also concerned that the expiration of the Easement Agreement no later than 2071 would be seen by BNSF as an “impermissible interference with its common carrier obligations and would be preempted by the ICCTA.”²¹¹ Indeed, counsel for BNSF did not object to the court’s observation at the motion to dismiss hearing that “you’re not going to abide by the termination agreement in the lease either.”²¹²

A. *The BIA Has Authority to Grant Rights-of-Way with Conditions*

In its suit against the BIA, Western Energy Alliance argued that the new rules expand tribal jurisdiction in violation of federal law. While the BIA can certainly attach provisions to any grant,²¹³

²⁰⁹ 25 C.F.R. §169.403 (2015). The previous iteration of the right-of-way rules, which also is arguably in conflict with the ICCTA states: “[a]ll rights-of-way granted under the regulations in this part may be terminated in whole or in part upon 30 days written notice from the Secretary mailed to the grantee at its latest address furnished in accordance with §169.5(j) for any of the following causes: (a) Failure to comply with any term or condition of the grant or the applicable regulations; (b) A nonuse of the right-of-way for a consecutive 2-year period for the purpose for which it was granted; (c) An abandonment of the right-of-way. If within the 30-day notice period the grantee fails to correct the basis for termination, the Secretary shall issue an appropriate instrument terminating the right-of-way.” 25 C.F.R. § 169.20(a) (2012).

²¹⁰ Cross-Motion and Opposition to Plaintiff’s Motion for Summary Judgement, *supra* note 86, at 24, n28.

²¹¹ Motion for Summary Judgment, *supra* note 13, at 13; *Chicago & N.W. Tr. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981) (ICC abandonment authority is plenary and exclusive); *Transit Comm’n v. United States*, 289 U.S. 121 (1933) (ICC authority is exclusive for constructions of railroads).

²¹² Motion for Summary Judgment, *supra* note 13, at 13.

²¹³ BUREAU OF INDIAN AFFAIRS, PROCEDURAL HANDBOOK: GRANTS OF EASEMENT FOR RIGHT OF WAY ON INDIAN LANDS, § 1.2 (2006) (“The [right-of-way] creates a non-possessory interest in the land which is a right to use or the right to restrict use of the property for a particular purpose. A ‘grant of easement’

the Alliance argues the rules go too far and “bestow jurisdiction over non-Indians.”²¹⁴ For example, the Alliance argues that the new rules restrict grantees’ property rights by requiring Tribal permission to assign the property both prospectively and retrospectively if the contract is silent as to assignment.²¹⁵ On the contrary, “[r]ights-of-way are typically easements that do not convey fee title and may be limited to a specific use or purpose.”²¹⁶ Assignment is not an absolute right that is concomitant with rights-of-way; rather, it is subject to contractual negotiation just as it would in a commercial lease.

The Alliance further objects that 169.405(d), which covers remedies available for existing grants, would lead to unilateral termination of right-of-way grants in tribal court. It states: “[BIA] may invoke any other remedies available to us under the grant, including collecting on any available bond, and the Indian landowners may *pursue any available remedies under tribal law*.”²¹⁷ Despite the Alliance’s concerns, it is not likely to be an available remedy because unilateral termination only applies *prospectively*.

Any provision in a right-of-way agreement which either allows for unilateral termination or otherwise limits the activity of the grantee must not be precluded by federal law. The criminal, civil, and regulatory jurisdiction of a tribe is a convoluted analysis and depends on whether an incident occurs on fee land—whether it be owned by a tribal member or a non-tribal member—or land held in trust. A right-of-way agreement might be considered a “regulation.” The Supreme Court has limited the civil regulatory jurisdiction of tribes over non-Indians on non-Indian-owned fee land.²¹⁸ Absent a specific federal statute or treaty, tribes

for [a right-of-way] defines the type, extent, use, purpose, width, length, and duration of the [right-of-way].”).

²¹⁴ Complaint, *supra* note 198, at 6.

²¹⁵ *Id.* at 5. See also Right-of-Way on Indian Land, 80 Fed. Reg. 72,492, 72,545 (Nov. 19, 2014).

²¹⁶ *United States v. Jackson*, 697 F.3d 670, 676 (8th Cir. 2012).

²¹⁷ Reply in Support of Motion for Preliminary Injunction at 7, *Western Energy Alliance v. United States Dep’t of the Interior*, 16-cv-00050-DLH-CSM, (April 4, 2016) (emphasis added).

²¹⁸ Opposition to Plaintiff’s Motion for Preliminary Injunction at 7, *Western Energy Alliance v. D.O.I.*, 16-cv-00050-DLH-CSM (W.D. N.D. Apr. 4, 2016) (Fee land is that land owned in fee simple by Indians or non-Indians. Trust land is that land which is held in trust by the federal government. Except in *Nevada v. Hicks*, 533 U.S. 353 (2001), the “United States Supreme Court has not applied

presumptively do not retain civil regulatory jurisdiction over non-Indians on non-Indian owned fee land within the reservation power except in two instances:

Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.²¹⁹

While phrased quite broadly, the Supreme Court tends to narrowly construe these exceptions, known as the Montana exceptions, particularly the second one.²²⁰ Threatening conduct only applies where the tribe may be in actual jeopardy, such as in an armed takeover of a tribe's casino and government center by security guards,²²¹ or igniting forest fires.²²² In *Montana*, the Supreme Court highlighted several cases which it considered to be represent

Montana to evaluate a tribe's jurisdiction over nonmember conduct on trust or restricted lands.”).

²¹⁹ *Montana v. United States*, 450 U.S. 544, 565–66 (1981) (internal citations omitted).

²²⁰ *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 319 (2008) (quoting *Nevada v. Hicks*, 533 U.S. 353, 360 (2001)) (Except in *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 408 (1989), “this Court has never ‘upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land”).

²²¹ *Attorney's Process and Investigation Services v. Sac & Fox Tribe*, 609 F.3d 927, 936 (8th Cir. 2010).

²²² *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 849-50 (9th Cir. 2009).

consensual relationships in retail sales, permitting, and taxes.²²³ Since *Montana*, however, courts often analyze whether to apply the exceptions even in cases where the controversy arises from trust land.

In *Strate v. A1 Contractors*, the court potentially expanded *Montana*'s applicability by applying it to the grant of a right-of-way on trust land for a highway in North Dakota. In that case, neither *Montana* exception applied when an Indian is involved in a car accident on a right-of-way granted to the state with a car owned by a non-Indian contracting with the Tribe for landscaping.²²⁴ However, *Strate* did not say that all rights-of-way are fee land subject to the *Montana* exceptions. Rather, land ownership "is only one factor to consider" when evaluating whether *Montana* applies regarding a tribe's jurisdiction over nonmembers, although it "may sometimes be a dispositive factor."²²⁵ The Court limited *Strate* to the "particular matter:" the lands were the equivalent of fee land for tribal jurisdiction because the right-of-way was a state highway and "subject to the State's control, the "[t]ribes [] consented to, and received payment for" the grant, and the Tribe "retained no gatekeeping right" to allow it to "assert a landowner's right to occupy and exclude" nonmembers.²²⁶

When the case and controversy arises on land held in trust or fee land owned by Indians and when there are minimal or no competing state interests in play, courts find that *Montana* does not apply.²²⁷ In *Water Wheel Camp Recreational Area v. LaRance*, the Ninth Circuit held the tribe had jurisdiction over the company and that the company's owner operated a resort on rented tribal land. The court reasoned that the tribe's status as landowner is enough to support regulatory jurisdiction without considering *Montana*

²²³ *Montana*, 450 U.S. at 565-66. See *Williams v. Lee*, 358 U.S. 217, 223 (1959) (holding that a non-Indian suit against an Indian shop owner to collect goods sold to him on credit should be brought in tribal court); *Morris v. Hitchcock*, 194 U.S. 384, 393 (1904) (upholding a permit tax on animals for non-Indians); *Buster v. Wright*, 135 F. 947, 948 (8th Cir. 1905) (upholding a permit tax for non-Indians who desire the right to conduct business on reservation); *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 152-154 (1980) (upholding sales tax on tobacco products for non-Indians on tribal land).

²²⁴ *Strate v. A 1 Contractors*, 520 U.S. 438, 457-58 (1997).

²²⁵ *Hicks*, 533 U.S. at 360.

²²⁶ *Id.* at 455-56.

²²⁷ Blaire M. Rinne, *In Water Wheel, the Ninth Circuit Corrects a Limitation on Tribal Court Jurisdiction*, 32 B.C. THIRD WORLD L.J. 47, 55-56 (2012).

because the nonmember's conduct "occurred on tribal land, the activity interfered directly with the tribe's inherent powers to exclude and manage its own lands, and there are no competing state interests at play."²²⁸ The *Water Wheel* court relied on *Merrion v. Jicarilla Apache Tribe* and *New Mexico v. Mescalero Apache Tribe*, both of which supported its finding of tribal court jurisdiction without applying *Montana*.²²⁹ In *Merrion*, the Court upheld a tax imposed by the tribe on the oil and natural gas used or taken from the reserve by a non-Indian mining company. The Court found that "the power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management."²³⁰ However, perhaps the unintentional outcome of this jurisprudence is that when the tribe could potentially win a case where *Montana* is applied, the court instead determines that the tribe holds inherent sovereign authority.

When courts do apply *Montana*, an exchange of money or other considerations is considerable evidence of a consensual relationship, but ownership of the land is significant. For example, the Montana Court held that a holder of a right-of-way who sold electricity to individual tribal members "constituted a 'consensual relationship' as defined by *Montana*."²³¹ On the other hand, in *Plains Commerce Bank v. Long Family Land & Cattle Company* the court held that when an Indian couple sued a non-Indian bank for discriminatory lending practices, no consensual relationship existed.²³² The Long family defaulted on its loans; the bank took ownership of the land and proceeded to sell it to non-Indians, but the family sued claiming the bank offered more favorable terms to

²²⁸ *Water Wheel Camp Recreational Area v. LaRance*, 642 F.3d 802, 814 (9th Cir. 2011).

²²⁹ See *Water Wheel*, 642 F.3d at 812 (citing *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144-45 (1982); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 330-31 (1983).

²³⁰ *Merrion*, 455 U.S. at 137.

²³¹ *Big Horn County Elec. Coop. v. Adams*, 53 F. Supp. 2d 1047, 1051-52 (D. Mont. 1999); see also *Reservation Tel. Co-op v. Henry*, 278 F. Supp. 2d 1015, 1023 (D.N.D. 2003) (the consensual relationship exception "has no application to the facts of this case"); and *Burlington N. Santa Fe R. Co. v. Assiniboine & Sioux Tribes of Fort Peck Reservation*, 323 F.3d 769, 772-75 (9th Cir. 2003) (no consensual relationship existed between the recipient of the grant and the tribe, but the court remanded for factual findings on whether the second *Montana* exception applied).

²³² *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 320 (2008).

non-Indians than it had to Indians.²³³ The Supreme Court held “that once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it.”²³⁴ The resale of the land by the bank to non-Indians did not implicate either of *Montana*’s exceptions because “[a]ny direct harm to its political integrity that the tribe sustains as a result of fee land sale is sustained at the point the land passes from Indian to non-Indian hands.”²³⁵ Because rights-of-way, like the type granted to BNSF, do not convey fee title,²³⁶ a tribe should retain fee ownership or the federal government should retain the land in trust, but fee ownership is not always dispositive.²³⁷

The Fifth Circuit walked a fine line between the two positions in *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*.²³⁸ In that case, John Doe, a 13-year-old Tribal member, sued Dolgencorp, the operator of a general store on trust land, and Dale Townsend, the manager of the general store, alleging sexual abuse.²³⁹ Dolgencorp argued that *Plains Commerce Bank* altered how courts should interpret the first *Montana* exception: in order to trigger tribal jurisdiction, the court must find that a consensual relationship exists *and* that it impacts self-governance or internal relations. The Fifth Circuit rejected this argument, noting that “[i]t is hard to imagine how a single employment relationship between a tribe member and a business could ever have such an impact.”²⁴⁰ This decision was affirmed by an equally divided Supreme Court, suggesting that case law upholding a tribe’s civil jurisdiction in cases arising on trust land and from a simple consensual relationship is embattled and perhaps nearing its ineluctable end.

²³³ *Id.* at 321-22.

²³⁴ *Id.* at 328.

²³⁵ *Id.* at 336, 338.

²³⁶ See PROCEDURAL HANDBOOK, *supra* note 213; see also 7-60 THOMPSON ON REAL PROPERTY, THOMAS EDITIONS § 60.02(c) (2015) (“The right in land held by an easement owner differs from the fee interest or even the leasehold interest in that it is a ‘use’ interest, but not a ‘possessory’ interest in land.”).

²³⁷ *Nevada v. Hicks*, 533 U.S. 353, 360 (2001) (quoting *Montana v. United States*, 450 U.S. 544, 564 (1981) (“[T]he ownership status of land ... is only one factor to consider in determining whether the regulation of the activities of nonmembers is ‘necessary to protect tribal self-government or to control internal relations,’ though ‘[i]t may sometimes be a dispositive factor’”).

²³⁸ *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 169 (5th Cir. 2014) (*aff’d* by an equally divided Court in *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, ___ U.S. ___ 136 S. Ct. 2159 (2016)).

²³⁹ *Id.* at 169.

²⁴⁰ *Id.* at 175.

The BIA's final rule simply states that the regulations "do not limit the tribe's inherent sovereign power to exercise civil jurisdiction over non-members on Indian land" rather than define what the limit might be.²⁴¹ Section 169 of the new regulations also add the grant of the right-of-way will not diminish to any extent [] [t]he Indian tribe's jurisdiction over the land subject to, and any person or activity within, the right-of-way."²⁴² However, if the *Montana* exceptions apply to a right-of-way grant, the BIA does conclude in its response to comments that, because tribal consent is required for a right-of-way, the grantee and the Tribe do enter into a consensual relationship.²⁴³ But this "represents [the] BIA's authoritative and contemporaneous interpretation of its own regulation and was itself the product of the same notice-and-comment rulemaking."²⁴⁴ Whether the BIA's interpretation of a consensual relationship will prevail is unclear.

Tribes could increase the probability that conditions placed on the right-of-way contract are valid by "includ[ing] [a] reservation of tribal dominion or control over the right-of-way"²⁴⁵ emphasizing the "landowners right to occupy and exclude."²⁴⁶ When concluding that the ICCTA and the IRWA can be read in harmony, Judge Lasnik noted that the IRWA's implementing regulations were recently revised and "do not include any mechanism for STB review of a right of way termination." The Secretary of the Interior "does not share BNSF's opinion that the ICCTA abrogated the BIA's authority to terminate a railroad right of way across tribal lands." Arguably, this only furthers the perception that the ICCTA and the IRWA really are in conflict. If so, until the issue is settled, tribes agree to the grant of rights-of-way to railroads and many other entities at their own peril without the knowledge that they retain inherent control.

CONCLUSION

The United States Government should hesitate before placing any limitation on the transportation of oil and other hazardous

²⁴¹ Right-of-Way on Indian Land, 80 Fed. Reg. 72,327, 72,504 (Nov. 19, 2015).

²⁴² 25 C.F.R. § 169.10 (2016).

²⁴³ *Id.* at 72, 504.

²⁴⁴ Opposition to Plaintiff's Motion for Preliminary Injunction at 34, *Western Energy Alliance v. D.O.I.*, 16-cv-00050-DLH-CSM (W.D. N.D. April 4, 2016).

²⁴⁵ *Nord v. Kelly*, 520 F.3d 848, 855 (8th Cir. 2008).

²⁴⁶ *Strate v. A-1 Contractors*, 520 U.S. 438, 455-56 (1997).

materials. Oil plays a critical role in our daily lives; it fuels our cars and our homes and creates useful conveniences such as plastics. Hazardous materials like oil are “essential to the economy of the United States and the well being (sic) of its people.”²⁴⁷ That being said, the efficient transportation of oil is not—nor should it be—the only concern of the federal government.

It is the duty of federal courts to uphold the law. It was Chief Justice Marshall who originally held that Indian tribes were “distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial.”²⁴⁸ Although tribes no longer retain such broad “natural rights,” the trust relationship and the canons of construction preserve the sense of duty and responsibility to tribes within the United States.

Even if the BIA’s interpretation of its newly promulgated rules stands under *Montana*, it faces another stiff test when rights-of-way on railroads or other methods of transportation are challenged as preempted under the ICCTA. And they will be. For all parties involved and those Indian tribes not directly involved, *Swinomish v. BNSF* is an important case. On the merits, it has the potential to drastically decrease crude oil transportation or severely diminish the scope of tribal and BIA authority. Courts should embrace the canons of construction and the trust relationship and give deference to the Tribe’s authority under the Treaty of Point Elliott and the IRWA. According to the Swinomish Tribe, acceptance that the ICCTA preempts the IRWA means that it would “eviscerate the IRWA and render it meaningless” if the shipper could show that the contract interfered with its needs and interstate commerce.²⁴⁹

Tribes should expressly reserve tribal dominion or control and assert that any contract constitutes a consensual relationship between the tribe and the entity with which it is contracting. The Tribe should attempt to include provisions in any right-of-way contract which clearly limit and prescribe the grant of the right-of-way. Most importantly, the tribe should recognize that the unilateral “right” to termination within BIA’s new regulations may not be absolute even if it is so stated in the contract.

²⁴⁷ Hazardous Materials: Transportation of Explosive by Rail, 68 Fed. Reg. 34,370, 34,472 (June 9, 2003).

²⁴⁸ *Worcester v. Georgia*, 31 U.S. 515, 559 (1832).

²⁴⁹ Motion for Summary Judgment, *supra* note 13, at 15.