NO. 18-35704

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SWINOMISH INDIAN TRIBAL COMMUNITY,
a federally recognized Indian Tribe

Plaintiff/Appellee

v.

BNSF RAILWAY COMPANY,
a Delaware Corporation

Defendant/Appellant.

On Appeal by Permission Under 28 U.S.C. § 1292(b) of Orders of the United States District Court for the Western District of Washington, Case No. 2:15-cv-543-0 RSL The Honorable Robert S. Lasnik, United States District Judge

BRIEF OF SUQUAMISH TRIBE, TULALIP TRIBES, AND QUINAULT INDIAN NATION AS AMICUS CURIAE IN SUPPORT OF APPELLEE

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IDENTITY AND INTERESTS OF AMICUS

I. THE SUQUAMISH TRIBE, TULALIP TRIBES, AND QUINAULT INDIAN NATION.

This amicus brief is filed on behalf of the Suquamish Tribe, Tulalip Tribes, and Quinault Indian Nation.[1] The Suquamish Tribe is a signatory to the 1855 Treaty of Point Elliot in which it ceded most of its homeland in exchange for an exclusive reservation on the Kitsap Peninsula and reserved the right to continue fishing at "usual and accustomed fishing grounds and stations," among other rights. The Suquamish Tribe's adjudicated fishing area includes the waters adjacent to the Swinomish Reservation where the BNSF rail line crosses the reservation and tidelands and other waters of Puget Sound from the northern tip of Vashon Island to the Fraser River in British Columbia, Canada. Since time immemorial, the Suquamish Tribe has relied on land and resources in the Salish Sea and along its shorelines for traditional, commercial, economic and cultural purposes.

The Tulalip Tribes is successor in interest to the Snohomish, Snoqualmie, Skykomish, and associated dependent tribes and bands signatory to the 1855 Treaty of Point Elliott. Through the Treaty, the Tulalip Tribes ceded vast

[1] All parties have consented to the filing of this brief. No other party's counsel authored this brief in whole or in part, nor contributed money that was intended to fund the preparation or submission of this brief. No person contributed money that was intended to fund the preparation or submission of this brief.

territories for non-Indian settlement in exchange for modest payments and promises from the U.S. government. In addition, under the Point Elliott Treaty, the Tribe reserved its aboriginal lands within the 22,000-acre Tulalip Reservation, located on the shore of Puget Sound north of Seattle, the Tribe's right to fish in all usual and accustomed areas outside the reservation, and any of the Tribe's inherent sovereign rights not expressly ceded. The Tulalip Reservation is just to the south of the Swinomish Reservation and the rail right of way at issue in this case connects to rails directly adjacent to the Tulalip Reservation. Heavy rail traffic, including fossil fuels transported by rail, pervade the shores surrounding the Salish Sea, within the Tulalip Tribes' Treaty-reserved usual and accustomed fishing areas.

The Quinault Indian Nation is a federally recognized Indian Tribe and sovereign government signatory to the Treaty of Olympia (1856) by which it too reserved the right to take fish from its usual and accustomed grounds. Those traditional fishing areas were confirmed by a federal court to include the marine waters of the Pacific Ocean and Grays Harbor, and all rivers draining to Grays Harbor, including the Chehalis River. The Chehalis River basin drains 2,660 square miles of rivers and tributaries to Grays Harbor. Over 70 miles of rail lines run through the Chehalis River basin and cross over 100 rivers and streams within the Quinault Nation's usual and accustomed fishing area. Through litigation, the

Quinault Nation successfully stopped three crude oil-by-rail proposals in Grays Harbor because of unacceptable risks to its Treaty resources posed by increased rail traffic. Because of these risks, the Quinault Nation is also a party in ongoing federal litigation challenging the lack of stringency of U.S. Department of Transportation's rail tank car safety standards.

II. THE AMICI TRIBES POSSESS TREATY-RESERVED RIGHTS THAT WILL BE AFFECTED BY THE OUTCOME OF THIS CASE.

The Amici Tribes in their respective Treaties reserved important rights both inside and outside the reservations. In addition to reserving lands for their exclusive use, they reserved a right to take fish and shellfish at the Tribes' "usual and accustomed" fishing areas. *See U.S. v. Washington*, 853 F.3d 946, 954 (9th Cir. 2017), r*ehrg. & rehrg. en banc den.*, 864 F.3d 1017 (2017), *aff'd by equally divided court*, 138 S.Ct. 1832 (2018) ("The 'fishing clause guaranteed 'the right of taking fish, at all usual and accustomed grounds and stations ... in common with all citizens of the Territory.'"). For many decades, Washington's Tribes were forced to fight to have these Treaty rights honored, leading to court intervention guaranteeing them half of the salmon harvest. *U.S. v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974). The Ninth Circuit recently confirmed that the state has a duty under the Treaties to prevent salmon habitat degradation that results in diminishment of fish runs. *U.S. v. Washington*, 853 F.3d at 980. All three Amici Tribes are parties to the *U.S. v. Washington* litigation.

The Amici Tribes rely on land and resources in Washington and along its shorelines—both on and off their reservations—for traditional, commercial, economic, cultural, and spiritual purposes. Since time immemorial, the Tribes have lived, fished, hunted, and gathered in these areas. Salmon and shellfish play a central role in the Tribes' subsistence, economy, culture, spiritual life, and day-to-day existence. These rights are more than just legal rights: they protect land and resources that are inextricable from the Tribes' culture and existence. "The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the existence of which there was not a shadow of impediment, and *which were not much less necessary to the existence of the Indians than the atmosphere they breathed***.**" *U.S. v. Winans*, 198 U.S. 371, 381 (1905) (emphasis added). Even so, as salmon runs have plummeted in recent decades due to pollution and habitat degradation, salmon numbers are not adequate to meet the needs of Amici and other Treaty Tribes. *U.S. v Washington*, 853 F.3d at 966.

Given this reliance, Amici Tribes devote considerable resources to protecting the environment necessary to sustain the exercise of their Treaty rights. One threat of particular concern that has arisen in recent years is the transportation of crude oil—via vessel, pipeline, and rail—through areas where a release would be potentially devastating for the Tribes and the exercise of its Treaty rights. For example, Tulalip and Suquamish are among the U.S. Tribal intervenors in a

proceeding before the Canadian National Energy Board ("NEB") considering a new crude oil pipeline that would result in large amounts of crude oil transiting the Salish Sea in Treaty-protected fishing areas. At a hearing in Canada in 2014, leaders, elders, fishers and youth from these Tribes sought to describe the deep connection between Tribal members and their environment, and how that connection was threatened by the transportation of crude oil through these fishing areas. Tulalip member Patti Gobin testified, "I want to tell you that, long before I was human, I was King Salmon. That's where I come from. That's my grandfather. That's who I am." Tulalip fisheries manager Jason Gobin told the Board:

> [I]t is not possible to overstate the central cultural importance of these activities. Although the economic benefits of fishing to the Tribe are very significant, it is critical to understand that their value is more than monetary—the loss of these resources cannot be mitigated through money or any other means. Fishing represents the continuation of our culture and way of life since time immemorial. While the rules and structures of fishing have changed in modern times, fishing is an integral part of our culture. For thousands of years, our people have lived on the marine waters of the Salish Sea harvesting salmon, many other fish species and shellfish. Fishing constituted our economic base prior to European contact, through both trade and sustenance, and continues to this day.

Many studies document fish consumption rates of Tribal members that are far higher than the average fish consumption rate of non-Native populations. However, salmon and other fisheries are declining due to pollution and habitat loss, threats that are compounded by the risks posed by crude oil transportation.

As another witness told the NEB, "It's devastating to think that our people will no longer have the foods that nourish our spirit and our bodies. They're that important to us." A Tribal fisheries manager testified that while commercial fishing within Tribes is a critical mainstay of Tribal economies, the subsistence and dietary relationship between the people and the Treaty fishing harvest is a strong strand of the Tribal culture that "far transcends the economic value as a commodity. The Treaty fishing right was meant to preserve our culture and way of life revolving around fishing and the fish harvest." These values are directly implicated in this litigation.

Billy Frank, the late Coast Salish leader and former chair of the Northwest Indian Fisheries Commission ("NWIFC"), declared: "Without the salmon there is no treaty right. We kept our word when we ceded all of western Washington to the United States, and we expect the United States to keep its word." Nevertheless, as NWIFC documented in the paper *Treaty Rights at Risk*, habitat in Puget Sound continues to decline to the point where Tribe cannot even perform their most basic ceremonial and spiritual traditions involving salmon.[2] Stillaguamish Chairman Shawn Yanity observed that, without such harvest "our culture faces extinction. We are a living culture and we must have salmon to harvest."

[2] Available at http://nwifc.org/w/wp-content/uploads/downloads/2011/08/whitepaper628finalpdf.pdf

INTRODUCTION

Over a hundred years ago, BNSF built a rail line without permission over the reserved lands of a sovereign Indian nation, the Swinomish Indian Tribal Community ("Swinomish"). The line crossed their reservation immediately adjacent to areas of critical importance to the Tribe's fisheries and economic development. BNSF illegally operated that rail line for a century until the Swinomish initiated litigation against the railroad. That litigation ultimately resulted in the issuance of a limited easement by the Tribe that gave BNSF the right to operate the railroad within the reservation, subject to reasonable conditions to which BNSF voluntarily agreed. In recent years, BNSF has blatantly violated the easement by ignoring these reasonable limits on the line's use. Called to account by the Tribe a second time in this litigation, BNSF now asserts that the federal rail law allows it to violate the easement and leaves Swinomish powerless to enforce its limits, even though they derived from the Tribe's right to decide whether to grant access to its reservation and on what terms, and the federal government approved these easement conditions.

BNSF's opening brief says barely a word about this history, its unclean hands, or the unique facts that frame this case. By repeatedly calling Swinomish a "local interest," BNSF ignores the nature of the solemn rights at stake here. Under BNSF's theory of the case, a generalized statute governing rail transportation

would effectively supersede Treaties, easement conditions imposed on a railroad's access to reservation lands, and specific statutes governing rights-of-way over Indian lands. BNSF's argument would leave Indian Tribes with no meaningful remedies against actors like BNSF that violate the limitations imposed on their use of reservation lands. Without saying so explicitly, BNSF essentially asks this Court to break new ground in finding that a federal railroad law abrogates Treaties with Indian Tribes, in contravention of decades of settled law, as well as a specific statute enacted to address Tribes' power to determine whether and on what terms to grant rights of way over their lands.

This Court should not accept BNSF's position. Contrary to the parade of horribles that BNSF and its amici postulate, affirming the District Court will not result in significant impacts on either BNSF or the nationwide movement of goods by rail. The facts of this case are unusual, centering around a unique easement between BNSF and Swinomish. BNSF voluntarily agreed to follow the easement conditions; it is easily possible to harmonize the rail statute and hold BNSF to its own voluntary commitment along this particular stretch of railroad. Overturning the District Court, in contrast, could be extraordinarily harmful to Tribes, their Treaty rights, and their sovereignty, and upend decades of settled law establishing a high burden to abrogate Treaty rights. Amicus Tribes respectfully offer this brief

to assist this Court in placing BNSF's arguments in the appropriate factual and legal context.

ARGUMENT

I. THE TRANSPORTATION OF CRUDE OIL BY RAIL POSES SIGNIFICANT THREATS TO TRIBES.

The story of the Western United States is, in many respects, the story of the transcontinental railroads that brought settlers, U.S. military presence, and new markets westward. *See, e.g.*, *U.S. v. Oregon*, 2008 WL 3834169, at *4 (D. Or. 2008). That expansion often came at the expense of Tribes and their Treaties. For example, after the Wenatchi were promised a reservation to protect their fishery at Icicle Creek, the Great Northern Railroad laid tracks through the area and the reservation's survey markers were destroyed. The surveyors were instructed to move the reservation to the mountains and the reservation was eventually ceded entirely. *U.S. v. Confederated Tribes of the Colville Reservation*, 606 F 3d 698, 702-03 (9th Cir. 2010). After the Wahpeton-Sisseton Sioux found railroad surveyors marking a new route through their unceded lands without permission, the Tribe forced the survey to be halted. Undeterred, the line's proponents asked Congress to expropriate the Tribe's lands, continuing a precedent of Congress authorizing the sale of Indian lands to railroads at bargain prices. Richard White, *Railroaded: The Transcontintentals and the Making of Modern America*, at 60. One railroad obtained Cherokee land in Kansas for $1 an acre, and immediately

sold it to settlers at over $9 an acre. *Id*. By the close of the 1800s, native resistance to military occupation "persisted longest at a distance from the railroads." *Id*. at 455. Railroads were also central to the near-extermination of the buffalo that once blanketed a major portion of the continent, an event that imposed incalculable costs on the plains Tribes for whom the buffalo was central to their very existence. "It had taken Anglo-Americans roughly two and a half centuries to secure the continent up to the Missouri River. They used the railroads to control the remainder in a generation." *Id*. at 459.

BNSF's actions in this case should be seen as part of a larger historical pattern of broken promises and the expropriation of lands that has harmed Tribes throughout U.S. history. Today, the threat to Tribes from rail comes not in the form of soldiers and settlers, but from unusually hazardous crude oil that threatens the safety of Tribal communities and the Treaty rights on which they rely. That threat has increased in recent years as crude oil production in the Bakken shale region in North Dakota has undergone a rapid expansion due the emergence of new drilling technologies. The number of rail cars carrying Bakken crude oil out of the basin began expanding drastically around 2012, increasing almost a million barrels

a day between 2012 and 2014.[3] As the U.S. government has repeatedly acknowledged, Bakken crude is unusually flammable.[4] Accordingly, the rapid rise of transporting Bakken crude by rail has been accompanied by a large number of derailments, spills, and explosions, some catastrophic in nature. As the National Transportation Safety Board ("NTSB") observed, "The sharp increase in crude oil rail shipments in recent years as the United States experiences unprecedented growth in oil production has significantly increased safety risks to the public."[5]

On July 6, 2013, one of the worst rail disasters in North American history occurred in Lac Mégantic, Quebec, when a train carrying Bakken crude oil derailed and spilled an estimated 1.6 million gallons of Bakken crude. A river of flaming oil flowed downhill from the derailment site, killing 47 people, including children as young as 4, and destroying a four-block radius in the downtown area.[6]

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[3] *See* Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains, 80 Fed. Reg. 26644 (March 13, 2014).

[4] Emergency Restriction/Prohibition Order DOT-OST-2014-0025 (Feb. 25, 2014); PHMSA (U.S. DOT) Safety Alert–January 2, 2014; *see also* Meagan Clark, *U.S. Oil from Fracking More Volatile Than Previously Believed*, International Business Times, June 25, 2014.

[5] National Transportation Safety Board: Recommendations 14-1 through 14-3, at 4 (Jan. 23, 2014); *see also* Eric de Place, *Northwest Region Averaging Nine Freight Train Derailments Per Month*, Sightline Daily, May 13, 2014.

[6] Transportation Safety Board of Canada, Rail Recommendations R14-01, R14-02, R14-03, at 1 (Jan. 24, 2014); Testimony of NTSB Chair Deborah A.P. Hersman, Hearing on Railway Safety, Before the Appropriations Subcomm. on

The U.S. government has recognized that accidents like this would continue "as the volume of crude oil shipped by rail continues to grow."[7] As the quantity of Bakken crude transported by rail skyrocketed, the NTSB documented several other rail-related incidents, involving million gallons of crude oil spilled and massive environmental and property damage.[8] A federal environmental analysis for the Keystone XL pipeline predicted dozen of fatalities and hundreds of injuries every year from the continued use of rail cars to transport large volumes of crude oil.[9]

The spate of disasters ultimately led to a proposed federal rulemaking to phase in more robust tank car standards and other safety protocols. *See, e.g.*, 80 Fed. Reg. at 26,644. However, most of these protocols have not yet been implemented and the risk of serious harm from transportation of Bakken crude by rail remains. For example, under the Obama administration, the U.S. Department

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Transportation, Housing and Urban Development and Related Agencies, Senate Appropriations Committee at 5 (Apr. 9, 2014)

[7] Securement of Unattended Equipment, 79 Fed. Reg. 53356 (Sept. 9, 2014); Recommendations for Tank Cars Used for the Transportation of Petroleum Crude Oil by Rail, 79 Fed Reg. 27370 (May 13, 2014) ("demonstrated recent propensity for rail accidents involving trains transporting Bakken crude oil to occur").

[8] NTSB Senior Hazardous Materials Accident Investigator, *Rail Accidents Involving Crude Oil and Ethanol Releases*, Before NTSB Rail Safety Forum: Transportation of Crude Oil and Ethanol at 3-5 (Apr. 22-23, 2014).

[9] Errata Sheet to Keystone XL Project–Final Supplemental Environmental Impact Statement at 1; Keystone XL Project–Final Supplemental Environmental Impact Statement at ES-35 & 5.1-74.

of Transportation implemented a new rule calling for enhanced braking technologies on trains carrying crude oil. 83 Fed. Reg. 48,393 (Sept. 25, 2018). Congress enacted legislation calling for additional study of the issue, *see* Fixing America's Surface Transportation Act, Pub. L. No. 114-94, and DOT subsequently withdrew the braking rule. 83 Fed. Reg. 48,393 (Sept. 25, 2018). To date, the enhanced safety measures have not been implemented.

With five crude oil refineries and multiple vessel loading terminals, Washington state was heavily impacted by the rapid rise in crude oil transportation by rail. In 2014, the state legislature called for a study of how the state could reduce the risks of oil transportation. That report called out the unique risks faced by Tribes:

> There are also potential risks to tribal culture, tribal community subsistence harvest, and tribal treaty rights. With spills and potential fires associated with crude-by-rail transport, there are potential impacts to tribes on lands used for cultural and traditional practices, and lands associated with treaty resources, including U&A [usual and accustomed fishing grounds], tribal ceded areas, and tribal fisheries habitat areas. [10]

These concerns grew when Congress lifted a statutory prohibition on the export of crude oil, increasing the likelihood that large volumes of crude oil would be transported through the state for export overseas. Pub. L. 114-113 (Dec. 18, 2015).

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[10] Washington State 2014 Marine and Rail Oil Transportation Study (March 1, 2015), at 65. Available at https://fortress.wa.gov/ecy/publications/documents/1508010.pdf

The extraordinary risks have also led to several political and judicial decisions in Washington to reject permits for new crude-by-rail terminals that would increase the amount of crude being transported through the state. For instance, after conducting a thorough environmental review and holding an evidentiary hearing on a major crude oil terminal on the Columbia River, Washington's Energy Facility Site Evaluation Council in 2017 recommended denial of permits for the project.[11] The agency's recommendation cited, among other things, the high likelihood of rail-related crude oil spills and attendant fires and pollution, as well as the significance of those impacts to communities and to the Columbia River. *Id*. at 24-34. The Governor of Washington, who has ultimate regulatory authority over the project, accepted that recommendation, specifically calling out the risks of oil spills in the Columbia and impacts of fires on local communities.[12] The project was abandoned.

Similarly, the Quinault Indian Nation strongly opposed the proposed development of crude-by-rail terminals that threaten Treaty-protected lands near their reservation. Private entities proposed to construct crude oil transloading terminals at the Port of Grays' Harbor, near the Quinault's Reservation on the

[11] Available at https://www.efsec.wa.gov/Tesoro%20Savage/Recommendation/RecommendationPacket/20171219_ReptGov_s.pdf.
[12] Available at https://www.efsec.wa.gov/Tesoro%20Savage/20180129_GovnrDecision.pdf.

Washington coast and adjacent to critical river and estuary habitat used by the Quinault for the exercise of their Treaty rights. The Tribe opposed these proposals, documenting the threats posed by multiple daily trains carrying Bakken crude oil through sensitive aquatic environments. Advocating against issuance of permits for these projects, the Quinault developed an economic study documenting the significant economic losses to the Tribe that would result from a rail accident involving crude oil.[13] After regulatory bodies issued development permits for these terminals, the Quinault appealed, and a state appeals board validated its concerns. The Board found that the projects' environmental analysis failed to adequately account for the cumulative impacts of increased risk of oil spills, among other things. *Quinault Indian Nation v. City of Hoquiam*, 2013 WL 6062377, at *17 (Wash. Shorelines Hearings Bd., Nov. 12, 2013) (the "current record before the Board presents troubling questions of the adequacy of the analysis done regarding the potential for individual and cumulative impacts from oil spills…"). Faced with the obligation to conduct a more thorough environmental review, the proponents abandoned the projects.

As these examples reveal, transporting crude oil by rail carries major risks to Tribal communities near the rail line as well as the natural resources on which Tribes rely. Crude oil moving by train to the disputed line travels along much of

[13] Available at http://www.fogh.org/pdf/QIN-Economic-Study.pdf.

the Washington coast and crosses major rivers like the Skagit, Snohomish, and Stillaguamish. It winds along Padilla Bay and crosses an aging wooden trestle bridge spanning Swinomish channel before crossing the Swinomish Reservation. Notably, the line services two oil refineries with existing deepwater port infrastructure: if the easement was unenforceable, nothing would prevent BNSF from running crude oil trains literally nonstop to service crude exports out of these terminals. Moreover, the rail line is elevated in key places within the reservation such that, in the event of a spill, flammable oil would either flow down to Padilla Bay or directly into the Swinomish hotel and casino and other enterprises—or both.

Swinomish took steps to reduce these risks when it negotiated the easement with BNSF that allowed BNSF to cross its land. An oil spill in any one of these areas would harm not just Swinomish. An oil spill in these areas could devastate Amici and other Tribes whose Treaty fishing rights depend on these habitats. These are not trifling concerns, nor are the Tribes merely "local interests" as BNSF claims. The potential loss of Treaty rights arising from the transportation of crude oil represents an existential threat to Tribal communities and a violation of the solemn promises made to these sovereigns by the U.S. government.

II. THIS CASE THREATENS FUNDAMENTAL SOVEREIGN AND TREATY-RESERVED RIGHTS OF INDIAN TRIBES.

In this case, BNSF seeks to escape the conditions that it agreed to and the federal government approved in the easement allowing BNSF access to the Tribe's land. BNSF asks this Court to find that a statute devoid of any mention of Indian Tribes or Treaties supersedes Tribal sovereign and Treaty-reserved rights as well as a specific statute that governs rights of way over reservation lands. It is a remarkable effort that must fail, for several reasons. First, Indian Tribes are distinct sovereigns with an inherent and Treaty-reserved right to exclude or condition access to their lands. Second, the legal question here is not preemption but abrogation of those rights. That question is governed by a heightened legal standard that requires clear and explicit congressional intent. However, the statute at issue, the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. §10101 et seq., never mentions Treaty rights to control access to Tribal lands, let alone indicates an intent to abrogate such rights. Allowing this Congressional silence to abrogate the Tribe's inherent rights would upend decades of precedent and severely erode Tribal sovereignty over Tribal territory. Finally, accepting BSSF's argument in this case would not just diminish long-established rights held by Indian Tribes, but cause serious adverse practical consequences.

A. Tribes Are Distinct Sovereigns.

BNSF attempts to reduce the sovereign status of the Swinomish to that of a "local interest" seeking to exercise control over a federally regulated railroad. BNSF Opening Brief, at 1. This mischaracterization ignores the solemn origins and nature of Tribal sovereignty and Treaty rights, and must fail. Tribes are not "local interests" subject to the same standards as private parties or even state or local governments. Tribes are different, for reasons that stem from the nation's history, the Constitution, and the Treaties that the U.S. government entered with the Tribes. Tribes are sovereign governments that existed prior to European settlement of the United States. Treaties do not constitute rights that are "granted" to Tribes, but rather are "grants of rights *from* them—a reservation of those not granted." *Winans*, 198 U.S. at 380-81 (emphasis added). A long line of Supreme Court case law recognizes the inherent sovereign authority of Tribes over their people and their lands.

Although subject to the plenary power of Congress, Indian Tribes remain "separate sovereigns pre-existing the Constitution." *Michigan v. Bay Mills Indian Cmty*., 572 U.S. 782, 788 (2014). Federal Indian Tribes, including the Amici Tribes, have existed as culturally, politically, and economically distinct sovereigns since time immemorial. *Worcester v. Georgia*, 31 U.S. 515, 559 (1832) ("The Indian nations had always been considered as distinct, independent political

communities, retaining their original natural rights, as the undisputed possessors of the soil....”). Tribal sovereignty and the rights that flow from it derive from “a history in which distinct communities of American Indian peoples lived, created institutions and systems, and governed themselves, sharing territories within North America.” Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty*, 37 Tulsa L. Rev. 661, 683 (2002). Prior to the arrival of Europeans in North America, native communities had complex forms of self-government and an established commercial network of trade in food, clothing, and crafts that spanned the continent. Cohen’s Handbook of Federal Indian law § 4.01[1] [a], at 204 (Nell Jessup Newton et al. eds., 2005) (hereinafter, “Cohen’s Handbook”). Tribal sovereignty is inherent in the Indian Tribes as nations, not something bestowed on them by United States government. Richard A. Monette, *Sovereignty and Survival*, A.B.A. J., Mar. 2000, at 64, 65.

Under international law, European nations recognized the sovereignty and the legal obligation to negotiate Treaties with Indian Tribes to gain access to their lands. The United States similarly followed international law in negotiating Treaties with Tribes in order to obtain land cessions. In exchange, the Treaties typically recognized the reservation of lands for the Tribe’s exclusive use.

Between 1778 and 1871— the year the Appropriations Act ended Treaty-making with Tribes—the United States executed an estimated 400 Treaties with Tribes. These Treaties are an explicit acknowledgement of the sovereign status of Indian Tribes. Frank Pommersheim, *Braid of Feathers: American Indian Law and Contemporary Tribal Life* (1995), at 213 n.18; Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. Rev. 1615, 1658 (2000) ("Indian treaties are a powerful symbol of tribal sovereignty and the pre-constitutional political status of Indian nations."). "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *U.S. v. Wheeler*, 435 U.S. 313, 323 (2004); *Merrion v. Jicarilla Apache Tribe*, 456 U.S. 130, 148 n. 14 (1982) (recognizing that the "Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government....").

Recognition of the distinct nature of Tribal sovereignty is also embedded in the U.S. Constitution. Article 1, Section 8 of the Constitution reads, "Congress shall have the power to regulate Commerce with foreign nations and among the several states, and with the Indian tribes." This constitutional provision acknowledges that Indian Tribes have a sovereign status that is separate and distinct from that of the federal government, States, and foreign nations. Article VI, Clause 2 of the Constitution specifies, "all Treaties made, or which shall be

made, under the Authority of the United States, shall be the supreme Law of the Land...." As the U.S. Supreme Court explained, "the Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and, consequently, admits their rank among those powers who are capable of making treaties." *Worcester v. Georgia*, 31 U.S. at 519.

B. Federal Indian Tribes Have Sovereign Rights Over Their Territory, Including the Right to Exclude or Condition Access to Reservation Lands.

"Indian tribes within 'Indian country' are unique aggregations possessing attributes of sovereignty over both their members and their territory." *Merrion*, 456 U.S. at 140. Tribes "have an unquestionable, and heretofore unquestioned, right to the land they occupy, until that right [is] extinguished by a voluntary cession to [the U.S.] government." *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831). The Amici Tribes, like all the Tribes that executed Treaties with the United States government, ceded claims to most of the lands they occupied since time immemorial, retaining a small land base on reservations for each Tribe. In these Treaties, the United States recognized and guaranteed the Tribes' rights to reservation lands for their exclusive use.

One of the most fundamental attributes of Tribal sovereignty is the right to exclude nonmembers from lands reserved in the Treaties. This exclusionary power

is of great importance to Tribes because it is "intimately tied to a tribe's ability to protect the integrity and order of its territory and the welfare of its members...." Cohen's Handbook § 4.01[2] [e], at 221; *see also Worcester*, 31 U.S. at 561, *Merrion*, 456 U.S. at 140; *Quechan Tribe of Indians v. Rome*, 531 F.2d 408, 410 (9th Cir. 1976). With respect to the scope of the right to exclude, the U.S. Supreme Court in *Merrion* explained:

> Nonmembers who lawfully enter tribal lands remain subject to the tribe's *power* to exclude them. This power necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct.... When a tribe grants a non-Indian the right to be on Indian land, the tribe agrees not to exercise its *ultimate* power to oust the non-Indian as long as the non-Indian complies with the initial conditions of entry. However, it does not follow that the lawful property right to be on Indian land also immunizes the non-Indian from the tribe's exercise of its lesser-included power ... to place ... conditions on the non-Indian's conduct or continued presence on the reservation. A nonmember who enters the jurisdiction of the tribe remains subject to the risk that the tribe will later exercise its sovereign power.

455 U.S., at 144-145 (emphasis in original).

The Indian Right of Way Act ("IRWA"), and the implementing regulations promulgated by the Secretary of the Interior, serve as one statutory vehicle for Indian Tribes to exercise the Treaty-reserved right to exclude non-Indians from reservations. Enacted in 1948, IRWA specifies that a Tribe's consent is required to obtain a right of way across Tribal Lands. 25 U.S.C. §§ 323–324. The Secretary of the Interior's implementing regulations governing issuance of rights of way across Tribal lands establish that: (1) prior written consent from a Tribe is required

to obtain a right of way; (2) all conditions or restrictions that a Tribe places on its consent will be incorporated into the right of way agreement; and (3) the Act and regulations apply to railroad rights of way. 25 C.F.R. §§ 169.3(a), 169.15, 169.18, 169.20, and 169.23. The easement granted by Swinomish, with United States approval, was issued pursuant to IRWA and its implementing regulations.

C. ICCTA Does Not Abrogate the Indian Treaty Reserved Right to Exclude or Condition Access to Reservations.

Given the fundamental nature of Treaty rights, Congress may not abrogate them without meeting a heightened standard. *U.S. v. Dion*, 476 U.S. 734, 738–40 (1986); *Menominee Tribe of Indians v. U.S.*, 391 U.S. 404, 411-12 (1968). Under this heightened standard, Congress must demonstrate its intention to abrogate Indian Treaty rights in a clear and plain manner. *Dion*, 476 U.S. at 738. Absent explicit statutory language, the abrogation of Indian Treaty rights can only occur 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." *Id*. at 739-40; *Menominee Tribe*, 391 U.S. at 411.

BNSF never acknowledges the heightened legal standard for abrogating Indian Treaty rights. Its silence is unsurprising, as this heightened standard is fatal to its arguments in this case. The real question before the Court is whether there is explicit statutory language, or other clear evidence, that Congress specifically

intended for ICCTA to abrogate the Tribe's ability to enforce reasonable conditions imposed in an easement granting a railroad access to its land. No such language or other evidence can be found. ICCTA simply states that "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." Nothing in ICTTA says a word about Indian Tribes or Treaty rights. The legislative history of ICCTA also contains no evidence that Congress considered the effect of ICCTA on the Indian Treaty-reserved right to exclude, and chose to abrogate that right. Without a clear expression of intent from Congress, the Court cannot find that the Treaty right to exclude was abrogated by ICCTA. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 203 (1999) (concluding that there was no clear evidence of congressional intent for a statute to abrogate Treaty rights where the statute made no mention of such rights and nothing in the legislative history described the effect of the statute on Indian Treaty rights.).

Sidestepping the question of abrogation, BNSF seeks to reframe the issue as preemption. That is, however, the wrong framework. Treaty rights cannot be not "preempted." In order to apply this theory, BNSF tries to equate a sovereign Indian Tribe with any "local interest" who might seek to restrict rail use. As the foregoing discussion demonstrates, however, Tribes are not local interests, and

their sovereign rights must be accorded respect. BNSF's attempt at reframing ignores the relevant legal standard and the effect of BNSF's position on the sovereign and Treaty rights at the heart of this case.

BNSF appears to concede that a railroad cannot build a rail line across an Indian Reservation without obtaining the Tribe's permission. However, by arguing that its terms cannot be enforced, it would turn that permission into an empty letter. BNSF built and operated the railroad for a century without permission from the Swinomish, and when it finally obtained an easement, it agreed voluntarily to limitations. These conditions are part and parcel of BNSF's right to access Swinomish land. Yet, BNSF takes the position that it can defy the easement and invoke ICCTA to prevent the Tribe from enforcing the conditions. However, a Tribe's Treaty right to grant or deny access to its lands is inseparable from its power to limit such access and enforce such limitations.

Finally, BNSF acknowledges that courts will seek to harmonize ICCTA preemption and Swinomish's rights and interests. Under what it offers as harmonization, a Tribe can decide whether to grant a railroad an easement to build a railroad, but cannot enforce any conditions imposed through the easement. This is not harmonization, but a wholesale evisceration of the Tribe's rights to determine whether to grant access to its lands. It would nullify any easement

conditions on Tribal land, even ones approved by the federal government and that a party voluntarily agreed to.

D. Invalidating the Conditions Imposed by a Tribe in a Right of Way Agreement Would Have Severe Consequences.

Allowing the conditions that Tribes have set for entry and continued presence on their lands to be cast aside would deeply diminish the sovereign rights over their lands that Tribes inherently possess and retain under the Treaties. It would impede Tribal sovereign and Treaty reserved rights to impose conditions on grants of access to Tribal reserved lands, which IRWA and its implementing regulations explicitly authorize. Reservations, including the Swinomish Reservation, constitute permanent homelands reserved by Treaty, and set aside from once vast landholdings that Tribes ceded. Indian lands hold social, cultural, spiritual, and economic value that is irreplaceable, and the consequences of encumbering the ability of Tribes to impose and enforce conditions in easement agreements are particularly acute. Cohen's Handbook, §15.02, at 994-995. "Tribes have a multi-generational, cultural bond to their land that makes that land unique and nonfungible." Hope M. Babcock, *A Civic-Republican Vision of "Domestic Dependent Nations" in the Twenty-First Century: Tribal Sovereignty Re-Envisioned, Reinvigorated, and Re-Empowere*d, 2005 Utah L. Rev. 443, 486–90 (2005).

Losing the ability to impose and enforce conditions in right of way agreements may expose Tribes to serious economic repercussions. Reservation lands are one of the most important economic resources for many Tribes, as they provide the land base for enterprises like tourism, gaming, manufacturing, mining, logging, and other forms of resource management. Cohen's Handbook, § 15.02, at 995. Of the more than 56 million acres of Indian trust lands in the continental United States, there are 44 million acres of range and grazing land, 5.3 million acres of commercial forest, and 2.5 million acres of crop lands. *Id*. As for mineral resources, Tribal trust lands comprise 4% of the United States oil and gas reserves, 40% of the United States' uranium deposits, and 30% of western coal reserves. *Id*. Tribes also lease their land to facilitate investment, jobs, goods and services on their reservations. These ventures account for billions of dollars of business with nonmembers. Last year, Indian energy generated more than $1 billion in revenue; in 2017, gaming generated $32.4 billion. Tribes often use these revenue sources to repurchase lands that were lost to them because of historic federal government policies. Without the ability to enforce the conditions of entry imposed in a right of way agreement, Tribal economic activity could be disturbed. For example, allowing unrestricted numbers of crude-oil-carrying railcars to pass through the Swinomish economic hub could affect tourism, gaming, and other commercial activities. A significant increase in rail traffic, particularly of crude oil, amplifies

the likelihood of a rail accident, which could devastate fishery resources. Tribes rely on the fishery resources in marine waters for subsistence, commercial purposes, and to preserve their way of life that has existed since time immemorial.

CONCLUSION

BNSF seeks to avoid its obligations under an easement allowing its railroad to traverse the Swinomish Reservation by mounting a frontal assault on Tribal rights and interests. Amici Tribes, like many other Tribes, rely on both on- and off- reservation lands to meet their cultural, spiritual, subsistence, and economic needs. One of the core attributes of Treaty-protected land rights is the ability to exclude non-Indians, or condition their entry. For a century, BNSF violated this principle by illegally appropriating Swinomish land. Today, it is violating the conditions in the easement that granted it limited access to those lands. It asks this Court to eviscerate Tribes' rights to condition access to Treaty-reserved reservation lands. Doing so would fundamentally undermine core principles of Tribal sovereignty and Treaty rights. It would compound the shameful history of the expropriation of Indian lands and the marginalization of Treaty rights. It would both defy settled law requiring clear and explicit congressional intent to abrogate Treaty rights as well as the statutory scheme established under IRWA that allows Tribes to condition access to their lands. It would also have several impacts on

Tribes' ability to use their lands and resources for the well-being of their members and future. For these reasons, the District Court should be affirmed.

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Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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