

**BEFORE THE SURFACE TRANSPORTATION BOARD
DEPARTMENT OF TRANSPORTATION**

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STB Finance Docket No. 36041

**PETITION OF TESORO REFINING & MARKETING COMPANY, LLC
FOR DECLARATORY ORDER**

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Pursuant to 5 U.S.C. § 554(e) and 49 U.S.C. § 721, Tesoro Refining & Marketing Company, LLC (“Tesoro”), by its attorneys, files this Petition for Declaratory Order to give effect to the provisions of the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10101 *et seq.* (“ICCTA”), protecting the rights of shippers to receive rail service upon reasonable request. The matter is ripe for declaratory action by the Surface Transportation Board (“STB” or “Board”), and declaratory action is necessary to prevent the infringement of federally protected rights to rail service upon which Tesoro relies.

I. Introduction

Petitioner Tesoro seeks a declaratory order under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 affirming its rights as a shipper under federal law to receive transportation service over rail lines that are subject to the jurisdiction of the STB. The Swinomish Indian Tribal Community (“SITC”) brought suit in federal court against BNSF Railway Company (“BNSF”), seeking to prohibit or manage rail service to Tesoro’s refinery in Anacortes, Washington. *See* Ex. A, Compl., No. 2:15-cv-00543, ECF No. 1 (W.D. Wash. filed Apr. 7, 2015) at Section VIII.C. The rail service at issue extends over tribal lands held in trust by the United States government. *Id.* at ¶¶ 3.1, 3.3. SITC objected to the transport of Bakken crude, the number of trains and cars crossing the landowner’s property, and the frequency of rail traffic serving Tesoro’s refinery. *See id.* at ¶¶ 3.12, 3.13, 3.16, 3.31, 7.2. SITC has now moved the court for final judgment on the

landowner's allegedly superior legal authority to manage the rail service supporting Tesoro's refinery.

SITC seeks to restrict the rail service that Tesoro receives based on a contract between SITC and BNSF for the use of tribal land. Tesoro does not ask the STB to interpret the contract or to resolve the allegations between the litigating parties to the court action. *See Township of Woodbridge, NJ v. Consolidated Rail Corp.*, STB Docket No. 42053, 2001 WL 283507, at *2 (STB served Mar. 23, 2001) ("the merits of the contract interpretation dispute. . . are best addressed by the courts"). Tesoro itself is not a party to the lawsuit or to the contract that is in dispute. Tesoro's concern – and the reason for this petition for relief – is that the landowner, SITC, has asked the court for an *injunction* that would abrogate the rights of shippers located on the interstate rail network. SITC's demand directly challenges the validity of federal legal protections afforded to shippers on railroads under the STB's jurisdiction.

Tesoro respectfully petitions the STB to reaffirm that federal law protects the rights of shippers to request and receive rail service from railroads subject to the STB's jurisdiction 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.

II. Background

a. Statement of Facts

Tesoro's Anacortes refinery lies about 70 miles north of Seattle in Washington State. *See* Tesoro, Anacortes Refinery, <http://tsocorp.com/refining/anacortes-wash/>. The refinery's crude capacity is approximately 120,000 barrels per day. *Id.* The refinery primarily supplies gasoline, jet fuel, and diesel fuel to markets in Washington and Oregon. *Id.* It also manufactures heavy fuel oils and liquefied petroleum gas. *Id.* The Anacortes refinery plays a significant role in the

local economy, contributing a significant percent of gasoline consumed in Washington State and the Pacific Northwest. *See* Ex. B at ¶¶ 13-14 (Confidential Verified Statement of Keith M. Casey).¹

The refinery receives its crude feedstock by three modes of transport: (i) a pipeline from Canada, (ii) rail service provided by BNSF, and (iii) maritime tankers. *See* Tesoro, Anacortes Refinery, <http://tsocorp.com/refining/anacortes-wash/>. A significant portion of Tesoro's feedstock is delivered by rail to the Anacortes refinery, and Tesoro also relies on rail to transport certain intermediate and finished products to and from the refinery. *See* Ex. B at ¶¶ 11-12. No other common carrier provides rail service to this area. *Id.* at ¶ 12. Therefore, Tesoro does not have an alternative means for crude and other refining feedstocks and intermediate and finished products to be delivered by rail to and from the Anacortes refinery if its shipments on BNSF's railroad are constrained or enjoined. *Id.*

The crude supplied by rail to the refinery is produced from the Bakken fields in North Dakota. The Bakken's geographic isolation from refineries and end-use markets and the absence of any pipeline infrastructure to the Pacific Northwest region underscore the importance of rail service from the production fields. These factors also moderate the price of the crude and support the efficient operation of the refinery. As a result, the local and state economies benefit directly from the availability of rail service from the Bakken.

¹ Tesoro has simultaneously filed a Motion for Protective Order under 49 C.F.R. § 1104.14 to apply to the redacted material in the Petition and in the Confidential Verified Statement. This protective order is necessary to preserve the confidentiality of commercially sensitive information regarding Tesoro's operations.

Bakken crude oil is a light sweet crude. *See* PHMSA, Safety Alert: Preliminary Guidance from Operation Classification (Jan. 2, 2014).² Its flash point is typically below 73 degrees Fahrenheit, and the boiling point can be below 95 degrees Fahrenheit, making it a flammable substance. *Id.* But, as confirmed by the National Transportation Safety Board, “Bakken crude is not significantly different from other crude oil or flammable liquids.” 80 Fed. Reg. 26,644, 26,713 (May 8, 2015).

b. The Federal Court Action

On April 7, 2015, SITC filed suit against BNSF in the U.S. District Court for the Western District of Washington, alleging breach of contract and trespass. *See Swinomish Indian Tribal Community v. BNSF Railway Co.*, No. 2:15-cv-00543 (W.D. Wash. filed Apr. 7, 2015). Tesoro is not a party to this litigation.

BNSF operates a railroad that crosses land within the Swinomish Indian reservation. Ex. A, Compl. at ¶¶ 3.1-3.4. On July 19, 1991, BNSF and SITC entered into a Right-of-Way Easement Agreement. Ex. A, Compl. at ¶ 3.3. The Right-of-Way Easement Agreement permits BNSF to conduct rail operations over SITC’s property in exchange for annual payments. These annual payments are subject to adjustment based on various factors, including the number of train crossings and cars. Ex. C, Right-of-Way Easement Agreement, at ¶ 7(c). SITC agreed “not to arbitrarily withhold permission to increase the number of trains or cars when necessary to meet shipper needs.” *Id.* Tesoro is not a party to the Right-of-Way Easement Agreement.

The complaint alleges that the number of trains, the number of cars that comprise these trains, and the nature of the crude that BNSF is transporting across tribal lands violate the terms

² Available at <http://www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/1214%20Rail%20Safety%20Alert.pdf>.

of the 1991 Right-of-Way Easement Agreement. Ex. A, Compl. at ¶¶ 3.1-3.32. SITC seeks declaratory judgment and injunctive relief that would constrain the number of trains per day and the cars per train that BNSF can ship across tribal lands and that would completely prohibit BNSF from shipping Bakken crude on the line. Ex. A, Compl. at ¶ 5, 7. SITC claims that BNSF should not be allowed to ship Bakken crude across tribal lands because it is more hazardous than other types of crude. Ex. A, Compl. at ¶¶ 3.21, 3.31.

On May 14, 2015, BNSF filed a motion to refer several questions to the Board under the primary jurisdiction doctrine. *See* BNSF Mot. to Dismiss or Stay, No. 2:15-cv-00543, ECF No. 8 (W.D. Wash. Filed May 14, 2015). The court denied BNSF's motion on September 11, 2015. *See* Order, No. 2:15-cv-00543, ECF No. 19 at 4 (W.D. Wash. filed Sept. 11, 2015) (concluding that the court could resolve the legal question whether ICCTA preempts the claims SITC has raised "without the delay of initiating a separate agency action.").

On March 10, 2016, SITC filed a motion for summary judgment. *See* SITC Mot. for Summary Judgment, No. 2:15-cv-00543, ECF No. 31 (W.D. Wash. filed Mar. 10, 2016). The motion specifically seeks the court's final adjudication that ICCTA does not preempt SITC's alleged legal authority to dictate the operations of the rail service upon which Tesoro relies.

c. Tesoro's Interest

Tesoro has filed this petition with the Board to protect its interest in receiving uninterrupted rail service. Tesoro relies on the federal protection provided by ICCTA to shippers on regulated railroads. *See* Ex. B at ¶¶ 18-20. Tesoro is not a party to the contract dispute between BNSF and SITC regarding the Right-of-Way Easement Agreement. *See* Ex. B at ¶ 18. Tesoro turns to the STB as the statutory authority for protecting Tesoro's rights to receive rail service. By statute, the STB has exclusive jurisdiction over rail transportation, which includes

the rights that shippers have under the statute to receive rail service. 49 U.S.C. § 10501(b). SITC has asked the court for an injunction that would restrict BNSF's transportation and violate rights that Tesoro has as a rail shipper under federal law that is administered by the STB. The STB needs to make it clear that federal law protects rail shippers' interests in receiving rail service over the interstate rail network and does not allow contracts between landowners and railroads to be used to restrict rail service that shippers need.

Tesoro recognizes that the STB is often reluctant to become involved in contract litigation pending in the courts. But Tesoro is not a party to the contract at issue in that court proceeding, and Tesoro does not ask the STB to adjudicate any aspect or allegation of the court proceeding. Rather Tesoro's petition focuses on the injunction that SITC seeks, in derogation of Tesoro's rights as a shipper. A declaratory statement by the STB concerning the federal protection afforded shippers will assist the court as it, not the STB, adjudicates the matter before the court. *See CSX Transp. Inc. – Petition for Declaratory Order*, STB FD No. 34662, 2005 WL 584026, at *5 (STB served Mar. 14, 2005) (“[T]he fact that this matter is also pending in the federal district court does not make Board issuance of this decision inappropriate, particularly if it might assist the court.”).

A declaratory statement by the STB will also provide the assurance that Tesoro needs as a shipper in order to conduct its business at the Anacortes refinery. Tesoro depends commercially upon its right to common carrier rail service under the STB's jurisdiction. BNSF's Anacortes Subdivision is the only rail infrastructure in the area that is capable of serving the Anacortes refinery. While the Anacortes Refinery is currently served under contract with BNSF, Tesoro must rely upon the federal protection of its right to common carrier service to ensure the

continued availability of the rail service it needs to conduct its business.³ SITC's requested relief seeks to vitiate the very rights that Tesoro relies upon. It is to reaffirm these rights under ICCTA that Tesoro comes before the STB.

d. Ripeness

It is ripe for the STB to review and act upon this petition. SITC's Motion for Summary Judgment specifically asks the court to adjudicate whether ICCTA protects the rail service upon which Tesoro relies. *See* SITC Mot. for Summary Judgment, ECF No. 31. Thus, SITC's motion ripens the question whether Tesoro's right to rail service is, or is not, federally protected and makes it necessary for the STB to become involved at this time. *See, e.g., CSX Transp., Inc.*, 2005 WL 584026, at *5 (determining the preemptive effect of ICCTA is a legal question that does not require waiting for evidentiary proceedings to conclude in the parallel court action; rather, issuing a declaratory order "might assist the court").

In other circumstances, an underlying dispute about a contract (analogous to the Right-of-Way Easement Agreement) might conceivably be resolved in a manner that avoids calling into question the protections afforded by ICCTA, but the circumstances here are different. SITC has called the legal question about ICCTA a threshold matter, directly contesting the validity of the federal protections upon which Tesoro relies for the supply of crude and other refining feedstocks and products to and from its refinery.

On March 17, 2016, BNSF moved the court to delay or suspend SITC's Motion for Summary Judgment, pointing out that discovery on factual issues is not yet complete. *See* Def. BNSF Railway Co.'s Mot. Under FRCP 56(d) for Reasonable Continuance of or Denial with Leave to Re-Note Summ. J. Mot., No. 2:15-cv-00543, ECF No. 34 (W.D. Wash. filed Mar. 17,

³ The service contract with BNSF terminates by its terms in [REDACTED]. Ex. B. at ¶ 16.

2016). On April 4, 2016, the court granted BNSF's motion, and renoted the Motion for Summary Judgment for May 27, 2016, or such later date as may be renoted to reflect the Friday that is at least sixty days after the last production of discovery documents.⁴ *See* Order, No. 2:15-cv-00543, ECF No. 43 (W.D. Wash. filed Apr. 4, 2016). Thus, the court now stands at the point of decision on whether, as a practical matter, Tesoro's rights as a shipper will be protected or not. On this question, the STB has direct authority to speak as the federal entity charged with overseeing these rights. 49 U.S.C. §10501.

It is important to note that SITC has specifically requested an injunctive order immediately prohibiting rail service to Tesoro's refinery. *See* Ex. A, Compl. at Section VIII.C. (seeking "a permanent injunction against BNSF prohibiting it (i) from running more than one train of twenty-five cars or less in each direction over the Right-of-Way per day, and (ii) from shipping Bakken Crude over the Reservation"). Thus, the court's determination of SITC's Motion for Summary Judgment entails the risk of an immediate injunction prohibiting rail service that is, as a matter of law, protected under ICCTA.

For these reasons, Tesoro's request for a declaratory order is ripe for review and action by the STB.

III. Argument

ICCTA protects a shipper's right to service by rail upon reasonable request. 49 U.S.C. § 11101(a) ("A rail carrier providing transportation or service subject to the jurisdiction of the Board . . . shall provide the transportation or service on reasonable request."). "Commitments

⁴ Based on the last discovery produced to date by SITC, its summary judgment motion will be fully briefed on June 24, 2016.

which deprive a carrier of its ability to respond to reasonable requests for common carrier service are not reasonable.” *Id.*

ICCTA is intended to protect shippers by limiting the circumstances in which rail service can be curtailed. For example, once a railroad is authorized to provide service on a line, the carrier cannot later cease providing service on that line without obtaining the STB’s authorization. 49 U.S.C. § 10903(a), (d); *see also Joseph R. Fox – Petition for Declaratory Order*, STB FD No. 35161, 2009 WL 1383503 at *2 (STB served May 13, 2009) (“A railroad may not ‘abandon’ (i.e., permanently close and discontinue service over) a rail line without advance authorization from the Board . . .”). Even when a lease or easement has expired, a railroad cannot be forced to cease providing service without STB approval. *See Pinelawn Cemetery – Petition for Declaratory Order*, STB FD No. 35468, 2015 WL 1813674, at *9 (STB served Apr. 21, 2015). There are even limitations on when a railroad may temporarily suspend operations on a line if service is physically impossible. *See Decatur County Comm’rs v. STB*, 308 F.3d 710, 715 (7th Cir. 2002) (“An embargo can be imposed by a carrier to temporarily cease or limit service when it is physically unable to serve specific shipper locations.”). Aside from such temporary situations, a railroad authorized to operate over a rail line must provide service in response to reasonable requests. *See* 49 U.S.C. § 11101(a).

These statutory provisions protect shippers by making it possible for them to site their facilities along the national rail network with assurance that they will reliably receive rail transportation. The U.S. economy as a whole benefits from a law that ensures that shippers located on the national rail network can rely on receiving the transportation they need to conduct business.

a. Tesoro's Request for Service from BNSF Is Reasonable and Protected by ICCTA

Tesoro receives rail service on BNSF's Anacortes Subdivision. BNSF's Anacortes Subdivision is part of the national rail network of lines subject to the STB's jurisdiction. *See* 49 U.S.C. § 10501. A fundamental principle of ICCTA is that a rail shipper located on a rail line subject to the STB's jurisdiction has the right to request and receive rail service upon reasonable request. *See Boston and Maine Corp. and Springfield Terminal Rail Co. – Petition for Declaratory Order*, STB FD No. 35749, 2013 WL 3788140, at *3 (STB served July 19, 2013) (“The Interstate Commerce Act provides any person the right to ask for common carrier rail service and carriers the obligation to provide such service upon reasonable request.”)

Tesoro receives trainloads of crude oil⁵ on this line. Ex. B at ¶¶ 7, 9-10. Tesoro relies on these shipments to sustain its business operations, *id.* at ¶¶ 11-12, which include running a daily crude throughput of 120,000 barrels per day at the Anacortes refinery. *See* Tesoro, Anacortes Refinery, <http://tsocorp.com/refining/anacortes-wash/>. A significant portion of the refinery's daily crude throughput is delivered by rail. Ex. B at ¶¶ 6, 9. In order to receive sufficient quantities of crude to sustain Tesoro's operations, this crude is often transported on the BNSF Anacortes Subdivision by unit trains. Ex. B at ¶¶ 9. Unit trains are highly efficient and commonly used to move high volume bulk commodities. *Id.*

The origin and nature of the crude delivered to Tesoro's refinery do not render Tesoro's expectation of service unreasonable. As the STB has previously concluded, requests for service to transport hazardous materials such as crude are reasonable. *See Pejepscot Indus. Park Inc. –*

⁵ As already noted, crude is not the only commodity Tesoro ships by rail to and from its Anacortes refinery. Tesoro's rights to rail service apply to all commodities it ships. We focus here on the crude supply because SITC has highlighted its concerns about Bakken crude as justifying an abrogation of rail service.

Petition for Declaratory Order, STB FD No. 33989, 2003 WL 21108198 at *6 (STB served May 15, 2003) (citing *Classification Ratings con Chemicals, Conrail*, 3 I.C.C.2d 331, 337-38 (1986) (railroads may not avoid their obligation to provide rates or service because the commodities in question are hazardous)); *Union Pacific Railroad Co. – Petition for Declaratory Order*, STB FD No. 35219, 2009 WL 1630587 at *2, (STB served June 11, 2009) (“the common carrier obligation requires a railroad to transport hazardous materials where the appropriate agencies have promulgated comprehensive safety regulations.”)

Rail safety is governed by federal statutes and regulations administered by federal agencies such as the Department of Transportation’s (“DOT”) Pipeline and Hazardous Materials Safety Administration (“PHMSA”) and the Federal Railroad Administration. PHMSA in particular actively regulates the safety of transporting flammable liquids, including (but not limited to) Bakken crude.⁶ For example, PHMSA issued a safety alert on January 2, 2014 “reinforcing the requirement to test, characterize, classify, and where appropriate sufficiently degasify hazardous materials prior to and during transportation.” PHMSA, Safety Alert: Preliminary Guidance from Operation Classification (Jan. 2, 2014).⁷ On May 7, 2014, DOT issued an order that applies to all railroad carriers that transport one million gallons or more of Bakken crude oil in a single train within the U.S. *See* U.S. Department of Transportation, Emergency Order (May 7, 2014).⁸ PHMSA also issued a final rule in May 2015 to enhance tank car standards and operations controls for certain trains carrying flammable liquids. *See* 80 Fed. Reg. 26,644 (May 8, 2015). Overall, since 2012, DOT has initiated nearly 30 actions to ensure

⁶ *See* 80 Fed. Reg. at 26,713 (noting DOT’s agreement that the high-hazard flammable train requirements should not be limited to Bakken crude oil).

⁷ Available at http://www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/1_2_14%20Rail_Safety_Alert.pdf.

⁸ Available at <https://www.transportation.gov/briefing-room/emergency-order>.

the safe transportation of flammable liquids by rail. See U.S. DOT, Chronology of DOT Actions on Safe Transportation of Flammable Liquids by Rail.⁹

In short, the rail transport of oil is not rendered unreasonable or unsafe because the oil is crude or because the crude originates in a particular geographic formation, such as the Bakken. Crude shipments by rail are actively regulated by federal agencies with pertinent jurisdiction, including with respect to safety. It is in this context that the crude oil for the Anacortes Refinery is the subject of Tesoro's normal and reasonable request for rail service.

b. Contracts Between Landowners and Railroads Cannot Curtail Rail Service Protected by ICCTA

The protected rights of shippers cannot be superseded by contractual terms contained in agreements to which they are not a party. The U.S. Supreme Court has held that a contract between a railroad and a property owner cannot be the basis for discriminating against certain shippers by refusing to transport certain commodities. See *U.S. v. Baltimore*, 333 U.S. 169 (1948) (carrier could not refuse to transport livestock on its railroad).

The STB itself has recognized that the terms of privately negotiated contracts are subject to limits: "[w]hile the Board encourages privately negotiated agreements, any contractual restrictions that unreasonably interfere with common carrier operations are deemed void as contrary to public policy." *Railroad Ventures, Inc. – Abandonment Exemption*, STB No. AB-556, 2000 WL 1125904, at *2 (STB served Jan. 7, 2000) (it is against public policy to enforce a settlement agreement that would unreasonably interfere with the railroad's future fulfillment of common carrier obligations).

⁹ Available at <https://www.transportation.gov/mission/safety/rail-chronology>.

Specifically, settlement agreements and other types of contracts cannot be used to limit rail operations if those limitations prevent a railroad from complying with obligations under ICCTA. *See Railroad Ventures, Inc. v. STB*, 299 F.3d 523, 560-61 (6th Cir. 2002) (invalidating an agreement between a carrier and a township because it would unreasonably interfere with fulfilling common carrier obligations); *Township of Woodbridge*, 2001 WL 283507, at *2 (noting that a breach of contract claim would be preempted if the interpretation of the contract resulted in an “unreasonable interference with interstate commerce”); *Hanson Natural Resources Co. – Non-Common Carrier Status – Petition for a Declaratory Order*, STB FD No. 32248, 1994 WL 673712, at *4 (ICC served Dec. 5, 1994) (“once common carrier operations commence over all or part of [a] line, any contractual restrictions that unreasonably interfere with those common carrier operations will be deemed void as contrary to public policy.”).

The Right-of-Way Easement Agreement is a private contract apparently conceived by its signatories as a settlement of claims. As such, it cannot bar or restrict the rail service protected by ICCTA. Like the livestock in *Baltimore*, Bakken crude is a permissible – and common – commodity for which shippers seek rail transportation services. Neither ICCTA nor the federal laws governing hazardous materials prohibit the rail transport of Bakken crude.¹⁰ The STB does not need to interpret or adjudicate the terms of the Right-of-Way Easement Agreement in order to affirm the fundamental right of Tesoro to continued rail service to supply its refinery with Bakken crude.

¹⁰ To the contrary, the federal agencies most directly charged with rail transport safety have undertaken extensive studies and initiatives to ensure that Bakken crude can be transported safely. *See, e.g.*, PHMSA, Safe Transportation of Energy Products, <http://www.phmsa.dot.gov/hazmat/safe-transportation-of-energy-products>.

c. Remedies That Curtail Rail Service Are Not Consistent with ICCTA

Remedies that “deprive a carrier of its ability to respond to reasonable requests for common carrier service. . . .” are inconsistent with ICCTA. 49 U.S.C. § 11101(a). For example, common carriers cannot be prohibited from shipping a particular commodity based on safety concerns. *See, e.g., CSX Transp., Inc.*, 2005 WL 584026 (holding that the District of Columbia could not prohibit operation of trains carrying hazardous commodities near the Capitol Building). “Regulating when and where particular products can be carried by rail . . . would not have merely incidental effects on rail operations, . . . but would constitute direct regulation of a railroad’s activities.” *Id.*, at *8. Other remedies that are inconsistent with the protections provided under ICCTA include imposing a limit on the number of trains or number of cars per train. *See Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439, 443 (5th Cir. 2001). Such limitations on service, including the time a train can occupy a rail, length of the train and scheduling, interferes with interstate commerce. *Id.*

While “environmental, public health, and public safety standards” may be imposed on railroads, they are permissible as long as they “are not unreasonably burdensome to interstate commerce and do not discriminate against rail carriers.” 49 U.S.C. § 10910. For example, railroads may be required “to share their plans with the community, when they are undertaking an activity for which a non-railroad entity would require a permit, or to comply with local codes for electrical, building, fire, and plumbing.” *CSX Transp. Inc. – Petition for Declaratory Order*, STB FD No. 34662, 2005 WL 1024490, at *3 (STB served May 3, 2005) (citing *Joint Petition for Declaratory Order – Boston & Maine Corp. & Town of Ayer*, STB FD No. 33971, slip op. at 9-13 (STB served May 1, 2001) *aff’d* 206 F. Supp. 2d 128 (D. Mass. 2002)). However, such measures do not curtail the services on offer to shippers.

In contrast, SITC does not seek to impose additional public notice requirements or the like, but rather to secure the legal power to prohibit rail service altogether by arrogating to itself the power to regulate the type of commodities Tesoro may ship and the frequency and volume of such shipments. Such constraints directly and unreasonably interfere with interstate commerce. *See CSX Transp., Inc.*, 2005 WL 584026; *Friberg*, 267 F.3d at 443. Even in voluntary agreements, such provisions are not valid or enforceable. *See Pejepscot Indus. Park Inc. v. Maine Cent. R. Co.*, 297 F. Supp. 2d 326, 330, 333 and n.6 (D. Me. 2003).

d. ICCTA's Protections Are Not Subordinate to Contracts Formed Under Other Federal Statutes

SITC argues that its rights under the Right-of-Way Easement Agreement are imbued with special powers to regulate whether, when, and what commodities may be transported by rail across its land. *See SITC Mot. for Summary Judgment at III.C, ECF No. 31.* It reaches this conclusion based on the premise that the Indian Right of Way Act ("IRWA"),¹¹ under which the Right-of-Way agreement was created, constrains ICCTA. The premise is wrong, and the STB should make it clear that rights protected by ICCTA are not limited by landowner type or by other federal law.

The STB does not need to assess the particulars of IRWA. It is sufficient for the STB to recognize and declare that a shipper's right to request service – and a regulated railroad's duty to provide such service – is not conditioned on the circumstances or identity of the individual landowners whose land a railroad crosses.

ICCTA provides:

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

¹¹ 25 U.S.C. §§ 323-328.

request. A rail carrier shall not be found to have violated this section because it fulfills its reasonable commitments under contracts authorized under section 10709 of this title before responding to reasonable requests for service. Commitments which deprive a carrier of its ability to respond to reasonable requests for common carrier service are not reasonable.

49 U.S.C. § 11101(a).

Nowhere in this statement (or elsewhere) does ICCTA limit the rail carrier's responsibility to serve a shipper depending on the identity of landowners along the rail line. Tribes, ranchers, schools, businesses, local or state governments, regional authorities or state-related entities – ICCTA makes no distinction among them, and none is granted regulatory authority over rail service by ICCTA. To do so would be inimical to Congress's policy purpose, notably "to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense." 49 U.S.C. §10101(4). To make railroads and shippers beholden to the individual, conflicting regulatory prescriptions of innumerable landowners – regardless of who they are – would destroy the interstate rail network and defeat the intentions of Congress.

Nor does ICCTA bow to other federal statutes in its authority to regulate rail transportation. ICCTA plainly says that "the remedies provided under [ICCTA] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." 49 U.S.C. 10501(b) (emphasis added). As the Board has previously stated, ICCTA can be consistent with "valid regulation under [other federal statutes] where regulation under these statutes, fairly enforced, does not unreasonably interfere with railroad operations." *In re Boston & Maine Corp. & Town of Ayer*, STB FD No. 33971, 2001 WL 458685, at *6 n.28 (STB Apr. 30, 2001). However, SITC's attempt to regulate the amount and composition of traffic that Tesoro can obtain on rail lines subject to the STB's exclusive jurisdiction

substantially and directly interferes with railroad operations and negates the rights that ICCTA protects.

In short, under the plain language of ICCTA, SITC is wrong to assert that rights under a contract such as the Right-of-Way Easement Agreement are superior to the rights conferred and protected by ICCTA, even if the contract was created under the aegis of another federal statute.

IV. Prayer for Relief

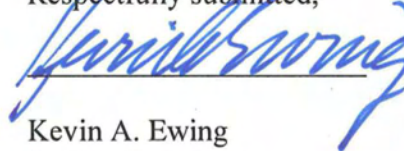
Based upon the foregoing, Tesoro respectfully requests that the Board exercise its authority under 5 U.S.C. § 554 and 49 U.S.C. § 721(a) to issue a declaratory order affirming that:

1. ICCTA protects Tesoro's right to rail service for the delivery of oil, including Bakken crude, and other feedstocks and intermediate and finished products to and from the Anacortes refinery and
2. Tesoro's right may not be infringed on the basis of contracts such as the Right-of-Way Easement Agreement, even if the contract was formed under other federal law.

Such relief is necessary to give effect to ICCTA and to ensure that Tesoro may continue to rely upon the rail services it reasonably requests on BNSF's Anacortes Subdivision.

Dated: June 3, 2016

Respectfully submitted,



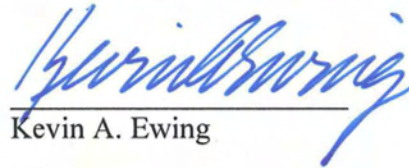
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*Attorneys for Tesoro Refining &
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CERTIFICATE OF SERVICE

I hereby certify that I have served the Board copies of the foregoing Petition of Tesoro Refining & Marketing Company, LLC for Declaratory Order on June 3, 2016 and there are no other parties to this proceeding. As a courtesy, copies of the foregoing Petition have also been provided to BNSF Railway Company and the Swinomish Indian Tribal Community.

Respectfully submitted,


Kevin A. Ewing

LIST OF EXHIBITS

- Exhibit A: Complaint for Declaratory Judgment, Injunctive Relief, Trespass, and Breach of Contract, Case No. 2:15-cv-00543, *Swinomish Indian Tribal Community v. BNSF Railway Company* (W.D. Wash. filed Apr. 7, 2015)
- Exhibit B: Confidential Verified Statement of Keith M. Casey (Jun. 1, 2016) with Attachment
- Exhibit C: Right-of-Way Easement, Burlington Northern Railroad Company (Jul. 19, 1991)

EXHIBIT A

**COMPLAINT FOR DECLARATORY JUDGMENT, INJUNCTIVE RELIEF,
TRESPASS, AND BREACH OF CONTRACT, CASE NO. 2:15-CV-00543,
SWINOMISH TRIBAL COMMUNITY V. BNSF
(W.D. WASH. FILED APR. 7, 2015)**

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SWINOMISH INDIAN TRIBAL
COMMUNITY, a federally recognized Indian
tribe,

Plaintiff,

v.

BNSF RAILWAY COMPANY, a Delaware
corporation,

Defendant.

NO.

COMPLAINT FOR
DECLARATORY JUDGMENT,
INJUNCTIVE RELIEF,
TRESPASS, AND BREACH OF
CONTRACT

Plaintiff alleges as follows:

I. PARTIES

1.1 Plaintiff Swinomish Indian Tribal Community (the “Tribe”) is a federally recognized Indian tribe organized pursuant to Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. § 476, which occupies the Swinomish Indian Reservation located on Fidalgo Island in Skagit County, Washington.

1.2 Defendant BNSF Railway Company (“BNSF”) is a Delaware corporation that regularly conducts business and keeps a registered agent in Washington.

COMPLAINT FOR DECLARATORY JUDGMENT,
INJUNCTIVE RELIEF, TRESPASS, AND BREACH OF
CONTRACT - 1

TOUSLEY BRAIN STEPHENS PLLC
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II. JURISDICTION AND VENUE

2.1 This Court has original subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because this action arises under the Constitution, laws, or treaties of the United States.

2.2 This Court further has original subject matter jurisdiction pursuant to 28 U.S.C. § 1362 because this action is brought by an Indian tribe with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

2.3 This Court has jurisdiction to grant a declaratory judgment pursuant to 28 U.S.C. § 2201, and to grant injunctive relief pursuant to 28 U.S.C. § 2202.

2.4 Venue is proper pursuant to 28 U.S.C. § 1391(b) as the events or omissions giving rise to the claim occurred, and the property that is the subject of the action is situated, in this judicial district.

III. FACTUAL ALLEGATIONS

3.1 The Tribe occupies lands set aside as the Swinomish Indian Reservation (the “Reservation”), which is located on the Southeastern end of Fidalgo Island in Skagit County, Washington. Certain Tribal lands on the Reservation, including those lands that are the subject of this Complaint, are held in trust for the Tribe by the United States.

3.2 BNSF operates a major freight railroad system in Washington and other states.

3.3 The Tribe and BNSF are parties to a Right-of-Way Easement agreement (the “Easement Agreement”) dated July 19, 1991, which was reviewed and approved by the Bureau of Indian Affairs of the U.S. Department of the Interior pursuant to 25 U.S.C. §§ 323–28 and 25 C.F.R. Part 169. The Easement Agreement grants BNSF the right to run a limited number of trains and attached railcars (as further discussed *infra*) across the Reservation.

3.4 The right-of-way easement (“Right-of-Way”) granted by the Easement Agreement is located at the far north end of the Reservation. The Right-of-Way traverses a part of the Reservation uplands that now constitute the heart of the Tribe’s economic development enterprises. The Right-of-Way is in very close physical proximity to multiple

1 elements of the Tribe's economic infrastructure, including the Swinomish Casino and Lodge, a
 2 Chevron station and convenience store, and an RV Park, as well as a Tribal waste treatment
 3 plant serving all of these facilities and a Tribal air quality monitoring facility. Hundreds of
 4 guests and employees are present at the economic development facilities at all times, 24 hours
 5 a day, 7 days a week. This economic development infrastructure serves as the primary
 6 financial source for funding of the Tribe's essential governmental functions and programs.

7 3.5 Since time immemorial, the Tribe and its predecessors have occupied and used
 8 areas of land and water in the Puget Sound region to support its fishing lifestyle, among other
 9 purposes, and Pacific salmon and other marine resources have played central and enduring
 10 roles in the Tribe's subsistence, culture, identity, and economy.

11 3.6 The Tribe is a present day political successor-in-interest to certain of the tribes
 12 and bands that signed the Treaty of Point Elliott, 12 Stat. 927 (1855), a treaty with the United
 13 States that established the Swinomish Reservation and that reserved to the Tribe, as political
 14 successor-in-interest to its predecessor tribes and bands, certain other rights, including without
 15 limitation the "right of taking fish at usual and accustomed grounds and stations." *United*
 16 *States v. Washington*, 459 F.Supp. 1020, 1039, 1041 (W.D. Wash. 1978).

17 3.7 The Right-of-Way crosses a swing bridge over the Swinomish Channel and a
 18 trestle across Padilla Bay, both of which are within the Reservation, and both of which are
 19 many decades old. These water bodies connect with other marine waters of Puget Sound in
 20 which the Tribe has usual and accustomed fishing grounds and stations as recognized by this
 21 Court in *United States v. Washington*, 459 F.Supp. 1020, 1049 (W.D. Wash. 1978).

22 3.8 The Easement Agreement came about as the result of a judicially approved
 23 settlement of a lawsuit in this Court between the Tribe and the United States of America
 24 against BNSF's predecessor-in-interest, Burlington Northern, Inc., in which the Tribe and
 25 United States alleged that Burlington Northern had been trespassing on the Reservation since
 26 the 1890s by running its trains across the Reservation without the Tribe's or the United States'
 27

1 consent. The lawsuit was initially captioned *Swinomish Tribal Community v. Burlington*
2 *Northern Railroad*, United States District Court for the Western District of Washington, Case
3 No. C76-550V.

4 3.9 In the absence of the Easement Agreement, BNSF would have no legal right to
5 run trains across the Reservation. Even though BNSF's predecessor(s)-in-interest had
6 constructed and been using a railroad line on Tribal trust lands for many decades without the
7 Tribe's or the United States' permission, the land's status as property held in trust by the
8 United States for the Tribe precluded title to the property underlying the railroad line from
9 vesting in the railroad company via adverse possession or otherwise. BNSF and its
10 predecessors-in-interest could not have obtained the right to cross the Reservation without the
11 consent of the United States and the Tribe.

12 3.10 Under the terms of the Easement Agreement, BNSF is entitled to use the Right-
13 of-Way for an initial 40-year term, along with two 20-year option periods. Because the parties
14 executed the Easement Agreement in 1991, it will terminate in accordance with its own terms
15 no later than 2071. BNSF pays annual rent for its use of the Right-of-Way, which is subject to
16 periodic adjustments based on the value of the property burdened by the Right-of-Way and
17 remainder/severance damage to adjacent Tribal lands.

18 3.11 The Right-of-Way was granted under the auspices of — and is governed by —
19 25 U.S.C. §§ 323–28 and 25 C.F.R. Part 169. Burlington Northern was required by the
20 parties' settlement agreement and by 25 C.F.R. Part 169 to apply to the Bureau of Indian
21 Affairs of the Department of the Interior for formal approval of the Right-of-Way.

22 3.12 The Easement Agreement places limitations on the number of trains — and the
23 number of cars attached to those trains — that may cross the Right-of-Way each day. It
24 provides:

25 Burlington Northern agrees that, unless otherwise agreed in writing, only one
26 eastern bound train, and one western bound train, (of twenty-five (25) cars or
27 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

1 arbitrarily withhold permission to increase the number of trains or cars when
2 necessary to meet shipper needs.

3 Easement Agreement, at ¶ 7(c).

4 3.13 BNSF never notified the Tribe that it intended to exceed the limitation of one
5 train of 25 cars or less, nor did it request permission from the Tribe before it began to do so.

6 3.14 The Tribe learned in 2012 from a media report that the Tesoro refinery at
7 March Point, near Anacortes, Washington — which is served by the BNSF line over the Right-
8 of-Way — had begun to receive “unit trains” of 100 cars or more, each of which had to cross
9 over the Right-of-Way to reach the Tesoro refinery. BNSF did not seek the Tribe’s agreement
10 to run 100-car unit trains on the Right-of-Way in contravention of the Easement Agreement
11 before it began to do so. Although the Tribe promptly informed BNSF of the continuing
12 requirements of the Easement Agreement, and although the Tribe has repeatedly demanded
13 that BNSF immediately cease the unauthorized use, BNSF has failed and refused to do so. The
14 Tribe has never granted BNSF permission to exceed the express limitations contained in
15 Paragraph 7(c) of the Easement Agreement.

16 3.15 BNSF has acknowledged the requirements of the Easement Agreement and the
17 Tribe’s demands, but has informed the Tribe in writing, including as recently as March 13,
18 2015, that it will continue running trains over the Right-of-Way at current levels regardless of
19 the acknowledged limitations in the Easement Agreement.

20 3.16 Currently, BNSF is reportedly running six 100-car unit trains per week over the
21 Right-of-Way in each direction. This is four times as many railcars per day as are permitted
22 under the explicit terms of the Easement Agreement.

23 3.17 BNSF has indicated that the number of tank cars crossing the Reservation will
24 be increased to ten to twelve 100-car unit trains per week in each direction upon completion of
25 a proposed new crude oil off-loading facility at the Shell Oil Products US Puget Sound
26 Refinery located at March Point.

1 3.18 The substantial increase in train traffic across the Right-of-Way is the result of
2 BNSF's decision to transport large quantities of crude oil to the Tesoro refinery at March Point
3 (and, in the future, to the Shell refinery described in paragraph 3.17). The 100-car unit trains
4 referenced above are dedicated entirely to the shipping of crude oil, and each unit train carries
5 approximately 2,898,000 to 3,402,000 gallons (69,000 to 81,000 barrels) of crude oil.

6 3.19 The particular type of crude oil BNSF is shipping across the Right-of-Way is
7 known as "Bakken" crude ("Bakken Crude"), so named for having originated in the Bakken
8 Shale Formation located in parts of Montana, North Dakota, and southern Canada.

9 3.20 Crude oil is a notoriously dangerous cargo to ship by rail. A May 7, 2014
10 Emergency Restriction/Prohibition Order (Docket No. DOT-OST-2014-0067) (emphasis
11 added) issued by the U.S. Department of Transportation states:

12 The number and type of petroleum crude oil railroad accidents described below that
13 have occurred during the last year is startling, and the quantity of petroleum crude oil
14 spilled as a result of accidents is voluminous in comparison to past precedents. Due to
15 the volume of crude oil currently being shipped by railroads, the demonstrated recent
16 propensity for rail accidents involving trains transporting crude oil to occur, and the
17 subsequent releases of large quantities of crude oil into the environment and the
18 imminent hazard those releases present, this Order requires that railroads take the
19 action described above to assist emergency responders in mitigating the effects of
20 accidents involving petroleum crude oil trains. **Releases of petroleum crude oil,
21 subsequent fires, and environmental damage resulting from such releases
22 represent an imminent hazard as defined by 49 U.S.C. 5102(5), presenting a
23 substantial likelihood that death, serious illness, severe personal injury, or
24 substantial endangerment to health, property, or the environment may occur.**

25 3.21 A July 2014 report prepared by the U.S. Pipeline and Hazardous Materials
26 Safety Administration indicates that Bakken Crude is even more dangerous to ship than other
27 types of crude oil. As that report states:

 [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.

1 3.22 The United States Department of Transportation has recognized in its May 07,
2 2014 Emergency Restriction/Prohibition Order “the unique hazardous characteristics of
3 Bakken crude oil and the risks presented by large quantities of this commodity being
4 transported in single trains.”

5 3.23 A U.S. Department of Transportation discussion of mainline train derailments
6 (Pipeline and Hazardous Materials Safety Administration [Docket No. PHMSA-2012-0082]
7 (HM-251) (July 2014)) states:

8 There is reason to believe that derailments of HHFTs [high-hazard flammable
9 trains] will continue to involve more cars than derailments of other types of trains.
10 There are many unique features to the operation of unit trains to differentiate their
11 risk. The trains are longer, heavier in total, more challenging to control, and can
12 produce considerably higher buff and draft forces which affect train stability. In
13 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.

14 3.24 Upon information and belief, rail tank cars of two different designs, the DOT-
15 111 and the CPC-1232, are used to transport crude oil. More than 20 years ago the National
16 Transportation Safety Board (“NTSB”) observed that the inadequacy of DOT-111A tank cars
17 for dangerous products "has been evident for many years in accidents investigated by the
18 Safety Board" (NTSB Safety Recommendation R-91-19 at 2), and more recent modeling and
19 simulation shows that the shell of a DOT-111 tank car will puncture at 7.4 mph and the heads
20 at 7.6 mph (July 2014 Draft Regulatory Impact Analysis, Hazardous Materials: Enhanced
21 Tank Car Standards and Operational Controls for High-Hazard Flammable Trains, Notice of
22 Proposed Rulemaking, page 73).

23 3.25 The NTSB and rail industry representatives have reportedly determined that the
24 CPC-1232 tank car is also not as robust as is needed. For example, in a March 6, 2014 Senate
25 subcommittee hearing, NTSB vice chairman Christopher Hart testified that “the NTSB is not
26 convinced [the CPC-1232 tank cars] offer significant safety improvements” over the DOT-111
27 cars. *Enhancing Our Rail Safety: Current Challenges for Passenger and Freight Rail:*

1 *Hearing Before the Subcommittee on Surface Transportation and Merchant Marine*

2 *Infrastructure, Safety, and Security, 113 Cong., S. Hrg. 113-376.* At the same hearing, Edward
 3 Hamberger, president and chief executive officer of the Association of American Railroads
 4 (“AAR”), testified that the AAR believes safety standards for tank cars need to “go beyond”
 5 the CPC-1232 standards. *Id.*

6 3.26 Upon information and belief, since July 1, 2014, Tesoro has been using the
 7 CPC-1232 cars for rail shipments of Bakken Crude to the March Point refinery.

8 3.27 Regardless of the type of railcar used, the transport of crude oil by rail has
 9 resulted in repeated and continuing catastrophic derailments, explosions and spills causing
 10 death and injury to human populations, destruction of structures, and contamination of aquatic
 11 and terrestrial environments, including the following reported events:

- 12 a. On March 7, 2015, a Canadian National Railway Company train
 13 carrying crude oil derailed in northern Ontario, with multiple cars on
 14 fire and some leaking oil into a waterway. A bridge over a waterway
 15 had been damaged and five tank cars landed in the water, with some on
 16 fire. The accident involved the purportedly “safer” CPC-1232 tank cars.
- 17 b. On March 5, 2015, a BNSF unit train carrying Bakken Crude derailed
 18 near Galena, Illinois. Twenty-one CPC-1232 railcars left the tracks and
 19 at least five of them ruptured and caught fire.
- 20 c. On February 16, 2015, a CSX Transportation, Inc. unit train loaded with
 21 Bakken Crude derailed in Fayette County, West Virginia, causing a
 22 number of CPC-1232 cars to explode and catch fire, and spilling crude
 23 oil into the Kanawha River.
- 24 d. On July 24, 2014, the locomotive and three tank cars of a BNSF unit
 25 train carrying Bakken Crude to the Anacortes refinery derailed in
 26
 27

1 Seattle, even though the train reportedly was going slower than five
2 mph and derailed while traveling on newly upgraded track.

3 e. On April 30, 2014, a 105-car CSX unit train full of Bakken Crude
4 derailed in Lynchburg, Virginia, resulting in another explosive crude oil
5 fire, spilling up to 30,000 gallons of oil from CPC-1232 cars into the
6 James River, and forcing the evacuation around 300 of the town's
7 residents.

8 f. On December 30, 2013, a two-train collision near Casselton, North
9 Dakota caused the derailment of a 106-car BNSF unit train carrying
10 Bakken Crude. Eighteen of the train's DOT-111 cars ruptured and burst
11 into flames, prompting the evacuation of half of the town's residents,
12 and an estimated 400,000 gallons of crude oil was released into the
13 environment.

14 g. On November 8, 2013, a unit train hauling 90 DOT-111 tank cars
15 loaded with Bakken Crude derailed near Aliceville, Alabama. Several of
16 the tank cars exploded, and hundreds of thousands of gallons of crude
17 oil spilled into adjacent wetlands.

18 h. On July 6, 2013, a Montreal, Maine & Atlantic Railway unit train
19 shipping large volumes of Bakken Crude in DOT-111 cars derailed in
20 the Canadian town of Lac-Megantic, Quebec. The ensuing explosion
21 and fire killed 47 people and destroyed the downtown area of Lac-
22 Megantic. It wasn't until four days after the accident that the fires
23 finally subsided.

24 3.28 The Easement Agreement requires BNSF to report at least once annually to the
25 Tribe as to the nature and identity of all cargo transported over the Right-of-Way:

26 Burlington Northern will keep the Tribe informed as to the nature and identity of all
27 cargo transported by Burlington Northern across the Reservation. Initially, Burlington

1 Northern shall prepare a summary of all such commodities expected to cross the
2 Reservation and the quantities of such commodities. Thereafter, the disclosure shall be
3 updated periodically as different products, or commodities, are added or deleted. Such
4 updates shall occur at least annually. The disclosure updates shall identify any
previously shipped cargo that is different in nature, identity or quantity from the cargo
described in previous disclosures.

5 Easement Agreement, at ¶ 7(b).

6 3.29 Since at least 1999, the Tribe regularly requested that BNSF provide an annual
7 summary of all materials transported by BNSF across the Reservation, as required by the
8 Easement Agreement. Despite these regular requests since 1999, and in contravention of
9 Paragraph 7(b) of the Easement Agreement, BNSF provided the Tribe with just four of the
10 annual update reports required by the Easement Agreement.

11 3.30 Upon information and belief, BNSF began shipping Bakken Crude over the
12 Right-of-Way sometime in 2012. However, BNSF never identified, in accordance with
13 Paragraph 7(b) of the Easement Agreement, the materially different nature of the Bakken
14 Crude when it first started shipping it. The Tribe has never received any written disclosure
15 from BNSF pursuant to the Easement Agreement as to the specific nature of the crude oil
16 being transported across the Right-of-Way, despite the high variability of Bakken crude oil.

17 3.31 Based on the demonstrated hazards of shipping Bakken Crude by rail, paired
18 with the proximity of the Right-of-Way to the Tribe's critical economic and environmental
19 resources and facilities — and the substantial numbers of people who use those resources and
20 facilities on a daily basis — the Tribe is justifiably and gravely concerned with BNSF's
21 shipment of Bakken Crude across the Right-of-Way in a manner and in quantities at odds with
22 the explicit terms of the Easement Agreement.

23 3.32 The Tribe's withholding of permission to amend the Easement Agreement to
24 increase the number of trains or cars is not arbitrary.

IV. FIRST CLAIM FOR RELIEF
(Declaratory Judgment)

4.1. Reallegation. The Tribe hereby incorporates by reference the allegations contained in the preceding paragraphs of this Complaint.

5. Declaratory Judgment.

5.1 The Easement Agreement contains explicit limitations on the number of trains and attached railcars that may cross the Right-of-Way each day, and authorizes the Tribe to withhold permission to an increase in those limitations, so long as the Tribe's withholding of permission is not "arbitrary." In addition, the Easement Agreement requires BNSF to report at least once annually to the Tribe as to the nature and identity of all cargo transported over the Right-of-Way.

5.2 There is a real and justiciable dispute between the parties with respect to (1) whether BNSF has materially breached the terms and conditions of the Easement Agreement by failing to abide by the explicit limitations on train traffic contained therein, (2) whether BNSF has materially breached the Easement Agreement by failing to notify and request the permission of the Tribe in advance of its intended expansion of the limited number of trains and cars on the Right-of-Way, and by its continued expanded use over the Tribe's objection thereto, (3) whether BNSF has materially breached the terms and conditions of the Easement Agreement by failing to report at least once annually to the Tribe as to the nature and identity of all cargo transported over the Right-of-Way, and specifically failing to report Bakken crude oil that is different in nature, identity or quantity from the cargo previously transported, and (4) whether, based on the facts alleged herein, the Tribe's withholding of permission for BNSF's increased burden on the Right-of-Way easement is "arbitrary."

5.3 The Tribe is entitled to a declaratory judgment finding and concluding (1) that BNSF has failed to comply with the terms and conditions of the Easement Agreement, and is in material breach thereof, and (2) that the Tribe's withholding of permission to increase

1 the burden on the Right-of-Way easement is not “arbitrary” and, thus, is fully justified under
2 the terms of the Easement Agreement.

3 **V. SECOND CLAIM FOR RELIEF**
4 **(Injunctive Relief)**

5 6. Reallegation. The Tribe hereby incorporates by reference the allegations
6 contained in the preceding paragraphs of the Complaint.

7 7. Injunctive Relief.

8 7.1 In doing the things herein alleged, BNSF has materially breached the
9 Easement Agreement by (1) exceeding the explicit limitations on train traffic contained in the
10 Easement Agreement and (2) failing to advise the Tribe of the Bakken Crude cargo.

11 7.2 The Tribe is entitled to a permanent injunction prohibiting BNSF from
12 (1) running more than one train of twenty-five cars or less in each direction over the Right-of-
13 Way per day and (2) shipping Bakken Crude across the Reservation.

14 **VI. THIRD CLAIM FOR RELIEF**
15 **(Trespass Damages)**

16 8. Reallegation. The Tribe hereby incorporates by reference the allegations
17 contained in the preceding paragraphs of the Complaint.

18 9. Trespass. BNSF’s overburdening of the Right-of-Way easement constitutes a
19 trespass.

20 10. Damages. As a direct and proximate result of BNSF’s trespass, the Tribe is
21 entitled to damages in an amount to be determined at trial.

22 **VII. FOURTH CLAIM FOR RELIEF**
23 **(Breach of Easement Agreement)**

24 11. Reallegation. The Tribe hereby incorporates by reference the allegations
25 contained in the preceding paragraphs of this Complaint.

26 12. Breach. In doing the things herein alleged, BNSF is in material breach of the
27 Easement Agreement.

1 13. Damages. As a direct and proximate result of BNSF's breach, the Tribe is
2 entitled to damages in an amount to be determined at trial.

3 **VIII. RELIEF REQUESTED**

4 The Tribe requests that the Court grant the following relief:

5 A. Enter a declaratory judgment finding and concluding that BNSF is in material
6 breach of the explicit limitations and reporting obligations contained in the Easement
7 Agreement;

8 B. Enter a declaratory judgment finding and concluding that the Tribe's
9 withholding of permission for an increased burden on the Right-of-Way is not "arbitrary" and,
10 thus, fully justified under the Easement Agreement;

11 C. Enter a permanent injunction against BNSF prohibiting it (i) from running more
12 than one train of twenty-five cars or less in each direction over the Right-of-Way per day, and
13 (ii) from shipping Bakken Crude over the Reservation;

14 D. Enter judgment against BNSF for trespass in an amount to be proven at trial;

15 E. Enter judgment against BNSF for breach of contract in an amount to be proven
16 at trial;

17 F. Award attorneys' fees and costs to the Tribe, to the extent allowed by law;

18 G. Grant leave to amend the Complaint to conform to the evidence produced at
19 trial; and

20 H. Grant such other and further relief as the Court may deem appropriate.

1 DATED this 7th day of April, 2015.

2 **TOUSLEY BRAIN STEPHENS PLLC**

3
4 By: /s/ Christopher I. Brain
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17 **COMMUNITY**

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26
27

EXHIBIT B

**CONFIDENTIAL VERIFIED STATEMENT OF KEITH M. CASEY
(JUN. 1, 2016) WITH ATTACHMENT**

**BEFORE THE SURFACE TRANSPORTATION BOARD
DEPARTMENT OF TRANSPORTATION**

STB Finance Docket No. 36041

CONFIDENTIAL VERIFIED STATEMENT

Keith M. Casey
Executive Vice President
Tesoro Refining & Marketing
Company, LLC
19100 Ridgewood Parkway
San Antonio, Texas 78259
(210) 626-6000 (telephone)

Dated: June 1, 2016

**BEFORE THE SURFACE TRANSPORTATION BOARD
DEPARTMENT OF TRANSPORTATION**

STB Finance Docket No. 36041

CONFIDENTIAL VERIFIED STATEMENT OF KEITH M. CASEY

1. My name is Keith M. Casey, and I am the Executive Vice President, Operations of Tesoro Refining & Marketing Company, LLC ("Tesoro" or the "Company"). Tesoro is a leading independent refiner and marketer of petroleum products, and it is committed to operating responsibly in the communities that it serves. Tesoro's headquarters is in San Antonio, Texas, and its operations extend across 18 states, including an oil refinery on March Point, near Anacortes, Washington, about 70 miles north of Seattle (the "Refinery").

2. I have 3 years' experience with Tesoro and 27 years' industry experience. My responsibilities for Tesoro include oversight of Tesoro's refining, marketing, logistics and marine functions, providing leadership that promotes safe, compliant and profitable strategy execution.

3. I am familiar with the Petition for Declaratory Order (the "Petition") filed by Tesoro with the Surface Transportation Board (the "STB"), with the matters referred to within the Petition, and with the business and operations of Tesoro. I am submitting this Confidential Verified Statement in support of the Petition. The purpose of this Confidential Verified Statement is to provide factual background regarding the Refinery and the necessary rail service it receives from BNSF.

The Refinery

4. The Refinery began operating in 1955, and it has been operated by Tesoro since 1998. The Refinery was built to process light-sweet crude oils. In the last five years, Tesoro [REDACTED] in improvements and expansion at the Refinery to more safely and efficiently process light-sweet crude oils shipped by rail. The projects include a new 100 railcar crude offloading facility, a rail offload facility to handle CCU feedstocks,¹ increased rail storage facilities, and upgraded rail handling facilities. Tesoro spends approximately [REDACTED] per year leasing rail cars to ship crude by rail to the Refinery.

5. Bakken crude is an economically attractive crude that is suitable for the Refinery. Other types of crudes such as Canadian Mixed Sweet and Alaskan North Slope are other regional supply options but are subject to various limitations that make it difficult for the Refinery to 100% rely upon them to meet its customer requirements. If the available supply of these two less reliable Canadian and Domestic sourced crudes are exhausted (absent Bakken crude), Tesoro is exposed to foreign shipments that inherently carry substantial exposure to both supply ratability and economic attractiveness. As such, the Refinery heavily relies on its supply of Bakken crude.

6. The Refinery currently has the capacity to refine approximately 120,000 barrels of oil per day with a typically planned average annual throughput of [REDACTED]. The refinery supplies gasoline, jet fuel, and diesel fuel to markets in Washington, Oregon, and Alaska, as well as to other West Coast markets. It also manufactures marine bunker fuels and liquefied petroleum gas.

¹ To be completed in June 2016.

7. The refinery receives its crude feedstock via: (i) a pipeline from Canada, (ii) maritime tankers, and (iii) rail service provided by a single common carrier, BNSF Railway Company (“BNSF”).

8. Rail is vital for Tesoro to supply the Refinery. BNSF’s Anacortes Subdivision currently provides the largest percentage of Tesoro’s feedstock sourced into the refinery (i.e., rail provides a greater percentage than either pipeline or maritime tanker).

9. Tesoro currently receives five or six unit train deliveries per week. Each unit train is comprised of approximately 100 tanker cars with a total volume of approximately 66,000 barrels of Bakken crude per train. The Bakken crude rail shipments are delivered exclusively by unit trains. Unit trains are highly efficient and are commonly used in the industry to move high volume bulk commodities.

10. The crude shipped by rail to the Refinery originates in the Mid-Continent Bakken Fields in North Dakota. The Bakken Fields’ geographic isolation from refineries and end-use markets, and the lack of available infrastructure between North Dakota and the Pacific Northwest, means that rail transport is essential for Tesoro to supply Bakken crude to the Refinery.

The Refinery’s Dependence on Rail Service


11. The Refinery depends on rail service. In addition to the five or six weekly Bakken unit train crude deliveries, the Refinery is reliant on manifest rail deliveries of ethanol to meet the federally mandated Renewable Fuel Standards.² The refinery also relies on manifest

² Congress created the Renewable Fuel Standard (“RFS”) program in an effort to reduce greenhouse gas emissions and expand the nation’s renewable fuels sector while reducing reliance on imported oil. See <https://www.epa.gov/renewable-fuel-standard-program>.

rail deliveries for gasoline blending, butane, iso-butane, propane, and catalyst to support daily operations. Typically these operations require an additional 80 rail cars to enter and leave the Refinery, per week.

12. No common carrier besides BNSF provides rail service that is accessible to the Refinery. Tesoro has no alternate means for crude oil to be supplied by rail to the Refinery or for liquefied petroleum feedstocks to be delivered by rail, if its shipments on BNSF's railroad are constrained or enjoined.

The Refinery's Importance to the Economy

13. The Refinery plays a significant role in the local economy in Northwest Washington State. It employs approximately 390 full time employees and has, on average, over  contractors on site every day. According to a 2015 study by the Western Washington University Center for Economic and Business Research (the "Study," provided herein as Attachment 1), the Refinery makes a substantial economic contributions to Skagit County and to Washington State. For example, they contribute over \$65 million in business-related taxes and \$900,000 in taxes paid that are related to employee compensation. On its own, Tesoro pays approximately \$60 million a year in state and local taxes.

14. Tesoro is also a significant contributor to local charitable and service organizations. In 2015, the Tesoro Foundation awarded approximately \$342,000 in charitable grants to local organizations.

Rail Service Is Critical to Tesoro's Commitment to Safety and the Environment

15. At our refineries – and everywhere we do business – the health and safety of our employees, customers, and communities is Tesoro's number one priority and an integral part of

Tesoro's culture. Tesoro continually evaluates and invests in technologies and systems to support safe, reliable, and clean operations. Tesoro has proactively led the industry by working collaboratively with tank car manufacturers to develop enhanced rail cars that surpass regulatory standards.

The BNSF Contract

16. The shipments Tesoro receives by rail are governed by three agreements: (i) a Master Transportation Contract dated May 25, 2012; (ii) an Implementing Agreement dated September 1, 2012; and (iii) a Transportation Service Agreement dated September 1, 2012 and amended effective February 5, 2015 (collectively, the "Agreement"). The Agreement grants Tesoro the rights to receive transportation service over rail lines for shipments of petroleum oil, shale oil or crude oil on the BNSF Anacortes Subdivision and obligates BNSF to provide service requested by Tesoro, based on Tesoro's requirements. Specifically, BNSF is required to provide rail transport to the Refinery that originates in North Dakota – the location of the Bakken Fields. The Agreement terminates in [REDACTED].

17. As long as Tesoro provides notice to BNSF, the Agreement does not restrict or limit the number of cars that Tesoro can request per week or per day and recognizes that BNSF can use unit trains to provide rail service to the Refinery.

Effect of Loss of BNSF Rail Service

18. I understand that a Complaint has been filed in a litigation captioned *Swinomish Indian Tribe Community, a Federally Recognized Indian Tribe v. BNSF Railway Company, a Delaware Corporation*, Case No. 2:15-cv-00543-RSL (W.D. Wa.) (the "Complaint") and that the Complaint is asking the Court to enter a permanent injunction against BNSF prohibiting it outright from shipping Bakken crude to the Refinery and, in addition, prohibiting it from running

more than one train of twenty-five cars or less in each direction over the land at issue, per day, carrying commodities other than Bakken crude. Tesoro is not named as a defendant in the Complaint and is not a party to the lawsuit.

19. If BNSF were barred or restricted from serving the Refinery, the adverse consequences for Tesoro and for the community would be severe and far-reaching. As noted above, rail is vital for Tesoro to supply the Refinery, and rail provides a greater percentage of crude oil shipments to the Refinery than either pipeline or maritime tanker today. There is no rail service to the Refinery other than the railroad tracks serviced by BNSF; therefore, Tesoro relies upon BNSF for 100% of the inbound crude and other feedstocks shipped by rail to the Refinery.

20. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Tesoro cannot solely rely on receiving additional inbound crude via pipeline because there are physical and commercial restrictions outside of Tesoro's control that limit availability of pipeline capacity for crude deliveries to Tesoro. Likewise, increasing inbound crude shipped to the Refinery by water may not be ratably available and may prove economically unattractive. The crudes available by water may have qualities that are less economically favorable with the Refinery's current mode of operation.

VERIFICATION

I, Keith M. Casey, verify under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Confidential Verified Statement.

Executed on June 1, 2016.



Keith M. Casey

DA

ATTACHMENT 1

**2015 STUDY BY THE WESTERN WASHINGTON UNIVERSITY CENTER
FOR ECONOMIC AND BUSINESS RESEARCH**

Economic Impacts of the Refineries in Skagit County

February 13, 2015



Prepared for the
Economic Development Association of Skagit County

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Executive Summary

With 825 full time workers, and more than 1,000 full time positions if contract workers are included, the refineries in Skagit County account for roughly 2 percent of the total employment in the county. However, the refinery jobs end up supporting between 10 and 14 percent of the jobs in the county, depending on whether you include the contract jobs in the initial count. The refineries also provide several hundred thousand dollars each year in charitable contributions and make a significant contribution to government revenues through a variety of tax payments.

The economic impacts of the refineries are a significant portion of the Skagit economy allowing for a more robust business community than otherwise may exist.

About the Authors

This report has been prepared by the Center for Economic and Business Research (CEBR) located within the College of Business and Economics at Western Washington University. The Center works in partnership with businesses, government entities and non-profits to bridge the resources of Western students, faculty and staff from throughout the Western Community to create high quality analysis and proposed solutions to challenges. From answering the simple question, creating understandable and thorough analysis documents, creating internships, class projects, to faculty projects we assist in creating an informed path helping business owners and policy shapers make decisions to move forward.

We are always seeking opportunities to bring the strengths of Western Washington University to fruition within our region. If you have a need for analysis work or comments on this report we encourage you to contact us at 360-650-3909. To learn more about CEBR visit us online at <http://cbe.wvu.edu/cebr/>.

Introduction

An article in the Skagit Valley Herald in September 2014 noted that Skagit lead the U.S. in economic growth in 2013. In examining the data it is apparent that the primary reason for Skagit's strong performance was the increased value of output from the refineries, inviting questions about the role of the refineries in the local economy.

There were approximately 47,000 jobs in Skagit County in 2013. Table 1 provides a summary of the distribution of those jobs across the major industry sectors.

Table 1. Employment in Skagit County, by sector, 2013

Industry Sector	Average Annual Employment	Percent of Total
Agriculture	2,744	5.8
Construction	2,690	5.7
Manufacturing	5,546	11.7
Wholesale Trade	1,224	2.6
Retail Trade	6,655	14.1
Transportation & Warehousing	1,171	2.5
Information	318	0.7
Finance & Insurance	1,524	3.2
Professional & Technical Services	1,309	2.8
Health Care & Social Assistance	4,368	9.2
Food Service & Accommodations	3,933	8.3
Government	10,856	23.0
All Other	4,934	10

Source: Washington State Dept. of Employment Security "QCEW" data -

<https://fortress.wa.gov/esd/employmentdata/reports-publications>

The manufacturing, retail trade, and government sectors are clearly very important in Skagit County. It is important to note that within employment data, the government category includes nearly all tribal employment – from tribal government to employees of companies based on tribal land. That issue notwithstanding, the jobs in just those three sectors account for half of the jobs in the county. However, when thinking about the role of different jobs or sectors, it is also important to consider the wages paid. Almost 10 percent of the jobs in the county are in the Health Care & Social Assistance sector. But those jobs, on average, pay less than the county average – reducing the overall influence of the jobs in that sector. Similarly, the retail jobs pay less than the overall average and don't look quite as statistically impactful when looking at salary rather than the number of jobs.

Table 2 details the average wage paid for jobs by sector, as well as the percent of total wages paid in the county – by sector, in 2013. (Data for 2014 are not available at this time.)

Table 2. Wages in Skagit County, by sector, 2013

Industry Sector	Average Annual Wage	Percent of Total
Agriculture	\$32,485	4.7
Construction	57,237	8.1
Manufacturing	58,398	17.1
Wholesale Trade	50,965	3.3
Retail Trade	28,437	10.0
Transportation & Warehousing	42,480	2.6
Information	39,094	0.7
Finance & Insurance	52,039	4.2
Professional & Technical Services	53,254	3.7
Health Care & Social Assistance	33,746	7.8
Food Service & Accommodations	16,655	3.5
Government	46,073	26.4
Overall	40,060	

Source: Washington State Dept. of Employment Security “QCEW” data -

<https://fortress.wa.gov/esd/employmentdata/reports-publications>

The manufacturing sector stands out as significant in terms of the number of jobs, as well as the percent of total wages paid in the county. Government also stands out, but the wages are typically higher in the manufacturing sector and the percent of total wages paid relative to the share of total jobs is higher in manufacturing than government. Again, it is critical to recall that the government sector reported includes all tribal business related positions which impacts the average salary within the sector.

In this report we focus on petroleum refining, a subsector within manufacturing. These jobs have some of the highest wages of all jobs within the county and perhaps the largest multiplier effect of all jobs in the county. As such, they are very important in terms of supporting the overall economy in the area.

Petroleum Refining – Direct Impacts

According to Washington State Department of Employment Security, the refineries in Skagit County reported an average annual employment in 2013 of 825 workers. The refineries directly report 828 full-time equivalent workers at the end of 2014, as well as another 368 contract workers who effectively work full-time at the refineries. These numbers do not include the additional contract workers who are often at the refineries for specific, limited-term projects. These numbers suggest that at least 15-20 percent of the manufacturing jobs in Skagit County are located at the refineries, where the higher estimate includes the full-time contractor workers.

It is important to note that the refineries report a lower average wage than the figure provided by the Department of Employment Security. State data show an average annual wage of \$126,634 for workers in the Petroleum and Coal Products Manufacturing sector in 2013. This figure could be influenced by a

variety of payments tracked by the State, including overtime. The refineries indicate that the average wage is closer to \$104,000.¹

These figures suggest that the refineries account for roughly 2 percent of the jobs in Skagit County, and pay 5-6 percent of all the wages. These direct effects are significant when you consider there are only two firms in this sector. Moreover, the indirect and induced effects are also substantial.

Multiplier effects

The jobs in a given business, or in a given industry sector to be more precise, support jobs in other sectors through business-to-business activities and through spending by the employee on personal items. In economic impact analysis, the task is often to determine the impact of adding or subtracting jobs at a given business. The jobs being added or taken away are referred to as a change in the direct jobs. These are the jobs directly tied to a particular business or sector. They can also be viewed as the jobs directly affected by a given event. The related impacts that arise due to changes in business activities are called the indirect effects, and those that arise due to changes in household spending are called the induced effects.

The relationship between the direct effects and the indirect and induced effects is often described in terms of multiplier effects. That is, the total change (direct, indirect, and induced combined) is a multiple of the direct change.

It can be important to note that the multiplier effects for a given change depend on the sector in which the change occurs, the geographic location, and when the change occurs. The multiplier effects differ depending on whether a job is added or taken away from a clothing store rather than an engineering firm or business in another sector because the firms in different industry sectors interact differently with the firms in other industry sectors. Moreover, the level of pay varies across firms or sectors. In addition, the interactions between businesses and the patterns in household spending change over time. As such, it doesn't make sense to talk about multipliers without specifying the industry sector and time when the data behind the multiplier were collected.

It is also worth noting that there are different multipliers for different measures of economic activity. It does not make sense to talk about the multiplier for, say, petroleum refining. There is a multiplier for changes in employment; a different multiplier for change in income; and a different multiplier for changes in output. To be sure, the different multipliers are all related. You can describe an event in terms of changes in employment, income, and/or output. The point here is simply to highlight the fact that there is not a single multiplier or single way of describing the ripple effects associated with a given event, despite media and promotional coverage. Nor is there always agreement on what the multiplier effects really are, even if you focus on a particular industry and multiplier type.

¹ The Washington Research Council conducted a survey of refiners and reports an average salary of \$121,114. <http://researchcouncil.org/2014/12/26/new-wrc-report-the-economic-contribution-of-washington-states-petroleum-refining-industry-in-2013/>

Not surprisingly, there's a tendency for advocates to hope for the largest possible multiplier. For example, economic development specialists might want a large multiplier to make a particular project look attractive - noting that job creation offers political appeal, so a large employment multiplier can help make a project attractive. Similarly, an industry trade group may want a large employment or income multiplier for the industry they support to show the importance of the industry to a community or region. Part of our job at CEBR and in this report is to provide as plausible an estimate as possible for the relevant multipliers.

CEBR generally relies on two different sources for identifying multipliers: The revised Washington State Input-Output Model and IMPLAN. Using the revised Washington State Input-Output Model, we estimate an employment multiplier of 6.70 for petroleum refining in Washington State. The IMPLAN software package gives an employment multiplier of 8.08 for Washington. The Washington State I-O model gives an employment multiplier of 5.7 for Skagit County and the IMPLAN model gives an employment multiplier of 3.87 for Skagit County. The multipliers are larger for the state than for the county because so many more impacts are captured if you broaden the study area to the state rather than limiting it to the county.

Employment Impacts in Skagit County

As noted, we estimate the employment multiplier for petroleum refining to be between 3.87 and 5.7 in Skagit County. The smaller estimate comes from the IMPLAN model and the larger estimate from the revised Washington State I-O model.

These multipliers suggest that the refineries in Skagit County could support as many as 6,400 jobs in Skagit County, or 14 percent of all the jobs in the County. If we use the multiplier from IMPLAN, a total impact of 4,700 jobs, or 10 percent of all the jobs in the County is suggested.

Looking past the boundaries of Skagit County and using the employment multiplier for the state, we estimate that the two refineries in Skagit County support 7,500 jobs in the state (1,128 direct jobs * 6.7). We imagine most of those jobs would be in Skagit County and the immediate area. Skagit County, along with the northern parts of Snohomish County and Island County, may be a more meaningful economic area than Skagit County by itself.

Tax Impacts

The IMPLAN software suggests that the two refineries pay the following in local and state taxes:

- \$902,000 related to employee compensation
- \$67 million business taxes (including property tax)

The model also suggests that the employees at the refineries pay an additional \$1.2 million in income, motor vehicle, and other household taxes.

Charitable Giving and Other Impacts

The refineries in Skagit County actively support a variety of nonprofits in the area and partner with various organizations in ways that help everyone in the county.

Rough estimates from United Way and others suggest that the refineries provide more than \$350,000 per year in charitable contributions. They are also active in the community supporting efforts such as Leadership Skagit and the Economic Development Association of Skagit County (EDASC).

Authors' Note

No attempt was made in the study to consider certain benefits, including health care and the opportunity for overtime pay, or costs, such as the risks or hazards inherent to moving and refining oil products. The study is not a comprehensive study that examines the net benefits of refinery operations, but rather a simple impact assessment that shows the employment, income, and other impacts in the county that can be attributed to the refineries.

Appendices and Notes

We used the Revised Washington State Input-Output Model to create three broad categories of multipliers: output, labor income and employment. Table A-1 contains these multipliers for each industry as well as the average across industries - a simple average, not weighted by output. Each of these categories of multipliers reports estimates of total activity in Skagit County per unit of direct activity. For example, within the crop production sector, total sales of all industries in Skagit County are estimated to be \$1.703 per \$1 of direct output. It is estimated that 1.45 total jobs in Skagit County are created for each direct job in Crop Production, and it is estimated that \$1.56 in labor income is created per dollar of direct income in the crop production sector.

One of the reasons why input-output models are so widely used is because of their ability to capture different multiplier relationships for sectors. The linkage structure of sectors, as well as their magnitude of direct labor income influence these values. Sectors with relatively low labor income per worker have relatively low income multipliers. Sectors with weak linkages to other sectors in the local economy have low output multipliers. Sectors high wages have high employment multipliers, as the spending of this income translates in these models into high levels of consumption expenditures through the induced-effects channel of impacts. There is no easy way to sort-out the reasons why values for a particular sector are high or low on a particular multiplier measure.

Table A-1. Multipliers for Skagit County (based on Washington State I-O model)

Sector	Output Multiplier	Employment Multiplier	Income Multiplier
	1.703	1.405	1.564
1. Crop Production	1.981	1.881	1.874
2. Animal Production	1.819	2.559	2.186
3. Forestry and Logging	1.748	2.321	1.581
4. Fishing, Hunting, and Trapping	1.703	1.848	1.906
5. Mining	1.743	3.546	1.686
6. Electric Utilities	1.318	4.533	2.796
7. Gas Utilities	1.779	2.073	1.739
8. Other Utilities	1.687	2.346	1.770
9. Highway, Street, and Bridge Construction	1.692	2.132	1.848
10. Other Construction			

11. Food, Beverage and Tobacco Manufacturing	1.571	2.774	2.647
12. Textiles and Apparel Mills	1.545	1.727	1.867
13. Wood Product Manufacturing	1.942	2.580	2.510
14. Paper Manufacturing	1.501	2.914	2.023
15. Printing and Related Activities	1.565	1.638	1.584
16. Petroleum and Coal Products Manufacturing	1.098	5.701	2.373
17. Chemical Manufacturing	1.432	2.426	1.551
18. Nonmetallic Mineral Products Manufacturing	1.414	1.945	1.775
19. Primary Metal Manufacturing	1.545	2.904	2.341
20. Fabricated Metals Manufacturing	1.530	1.865	1.741
21. Machinery Manufacturing	1.550	2.472	2.091
22. Computer and Electronic Product Manufacturing	1.512	2.506	1.804
23. Electrical Equipment Manufacturing	1.409	2.207	1.803
24. Aircraft and Parts Manufacturing	1.275	2.114	1.422
25. Ship and Boat Building	1.609	2.279	1.655
26. Other Transportation Equipment Manufacturing	1.338	2.117	1.893
27. Furniture Product Manufacturing	1.586	1.646	1.656
28. Other Manufacturing	1.575	1.863	1.808
29. Wholesale	1.488	1.789	1.493
30. Non-Store Retail	1.516	1.416	1.605
31 Other Retail	1.563	1.342	1.437
32. Air Transportation	1.492	2.217	1.689
33. Water Transportation	1.671	2.523	1.851
34. Truck Transportation	1.778	1.745	1.660
35. Other Transportation/Postal Offices	1.873	1.776	1.522

36. Support Activities for Storage, Transportation and Warehousing	1.848	2.111	1.770
	1.458	2.948	1.509
37. Software Publishers & Data Processing & related services	1.448	2.497	1.865
38. Telecommunications	1.531	1.755	1.398
39. Other Information	1.836	3.375	2.279
40. Credit Intermediation and Related Activities	2.084	2.242	1.991
41. Other Finance and Insurance	1.347	1.226	1.548
42. Real Estate and Rental and Leasing	1.865	1.605	1.350
43. Legal /Accounting and Bookkeeping /Management Services	1.677	1.750	1.415
44. Architectural, Engineering, and Computing Services	1.905	1.436	1.761
45. Educational Services	1.980	1.934	1.643
46. Ambulatory Health Care Services	1.761	1.994	1.640
47. Hospitals	1.821	1.348	1.547
48. Nursing and Residential Care Facilities, Social Assistance	1.775	1.453	1.742
49. Arts, Recreation, and Accommodation	1.774	1.310	1.669
50. Food Services and Drinking Places	1.753	1.280	1.351
51. Administrative/Employment Support Services	1.839	1.629	1.752
52. Waste Management/Other, and Agriculture Services	1.639	2.174	1.788
Average			

References

Miller, Ronald E. & Blair, Peter D. (2009) Input-Output Analysis. Foundations and Extensions. Cambridge: Cambridge University Press. Chapter 8.2, Location Quotients and Related Techniques, pp. 349-359.

Washington State Office of Financial Management

Further Notes

The Washington Research Council released a report in December 2014 titled “The Economic Contribution of Washington State’s Petroleum Refining Industry in 2013”.² That report is an update of previous reports on the impacts of petroleum refining. The report offers that the employment multiplier for petroleum refining in Washington is 12.88. That claim suggests that adding one job at a petroleum refinery in Washington would support an additional 11.88 other jobs in the state. In comparison, a report prepared for the Western States Petroleum Association (WSPA) in 2011 showed an employment multiplier for the sector of 2.51 in the State of California.³ That is, adding a job at a refinery in California would support an additional 1.51 jobs in the state.

While we would expect the employment multipliers for a change in employment in one state to differ from the employment multiplier for a similar change in a different state, we would not expect the addition, or subtraction, of jobs in the petroleum industry to be so dramatically different in two western states - even noting the focus on petroleum refining in the report for Washington and a much broader definition of the petroleum industry in the report for California.

We note that the Washington Research Council used the Regional Economic Models, Inc. (REMI) software to estimate the impacts of petroleum refining in Washington State. The REMI software is not a basic input-output (I-O) model like the Washington State model or IMPLAN. It considers more linkages and interactions. Some of the interactions that can be considered in the REMI model may or may not be appropriate when analyzing the employment impacts of jobs in very capital intensive like computer chip manufacturing or petroleum refining. For example, adding a few jobs at a refinery suggests large increases in capital expenditures that can trigger in the model a need for more employment in the public sector and perhaps more housing than is reasonable to expect – and therefore higher employment multipliers than are truly meaningful.

² <http://researchcouncil.org/2014/12/26/new-wrc-report-the-economic-contribution-of-washington-states-petroleum-refining-industry-in-2013/>

³

<https://www.wspa.org/sites/default/files/uploads/documents/Industry%20Issues/Purvin%20%26%20Gertz%20Economic%20Impacts%20FINAL.pdf>

EXHIBIT C

**RIGHT-OF-WAY EASEMENT, BURLINGTON NORTHERN RAILROAD
COMPANY (JUL. 19, 1991)**

122

731

ORIGINAL
3701617RIGHT-OF-WAY EASEMENT - BURLINGTON NORTHERN

This Right-of-Way Easement is between the United States of America, the Swinomish Indian Tribal Community and Burlington Northern Railroad Company, a Delaware corporation.

R E C I T A L S

A. Burlington Northern ("BN"), the Swinomish Indian Tribal Community (the "Tribe"), and the United States have been engaged in a dispute concerning whether or not the existing line of railroad of BN passes through lands forming part of the Swinomish Indian Reservation held in trust by the United States for the benefit of the Tribe, without appropriate permission or easements having been granted to BN.

B. The dispute has taken the form of a lawsuit entitled: Swinomish Tribal Community v. Burlington Northern Railroad, et al., United States District Court for the Western District of Washington, Cause Number: C76-550V (the "Action").

C. Burlington Northern, the Tribe and the United States have now settled the dispute among them pursuant to the Settlement Agreement dated September 24, 1990 (the "Settlement Agreement"). The Settlement Agreement provides, among other things, for the dismissal of the Action by and against BN and the granting of a forty (40) year right-of-way easement with two twenty (20) year options to Burlington Northern for its existing railroad, or successor methods provided by paragraph 6 herein, over and across any and all lands of the Tribe held in trust for its benefit by the United States that such railroad crosses.

D. This right-of-way easement is intended to grant and convey to BN, despite any questions of survey, or any uncertainty as to the location of (a) the boundaries of the Swinomish Indian Reservation, and (b) any lands within the Reservation (whether tidelands, submerged lands, or uplands) held in trust by the United States for the benefit of the Tribe, a forty (40) year easement with two twenty (20) options over any and all lands comprising part of the Swinomish Indian Reservation and held in trust by the United States for the benefit of the Tribe over which the existing railway of BN passes.

NOW THEREFORE, in consideration of the sum deposited with the application for this right-of-way easement and the agreement and covenants contained in said application and in this agreement, the United States hereby grants and conveys to BN, under authority of the Act of February 5, 1948 (62 Stat. 17; 25 U.S.C. 323-328) and the regulations in 25 C.F.R. 169 promulgated thereunder, a right-of-way easement as follows:

1. Legal Description: The easement hereby conveyed shall be sixty (60) feet in width, being thirty (30) feet on the North Side and thirty (30) feet on the South Side of the center line described in Exhibit "A" hereto, located in Skagit County, Washington.

2. Term: The term of this easement is forty (40) years from the date hereof.

3. Payment: (a). As partial consideration for this Settlement, BN will deposit with the BIA along with said

application the sum of \$5,000 in the form of a check payable to the BIA. Upon the BIA's delivery to BN of the approved, executed easement, BN shall immediately deliver to Allan Olson, or his successor as named by the Tribe ("Tribal Attorney"), as attorney for the Tribe, a check payable to the Tribe in the sum of \$120,000. The sum of these checks, \$125,000, shall reflect payment in full for all rent, damages and compensation of any sort, due for past occupancy of the right-of-way from date of construction in 1889 until January 1, 1989. The BIA and the Tribal attorney shall hold said \$125,000, which they are to deliver or return as provided in paragraphs 9 and 10 of the Settlement Agreement.

(b). Pay an annual rental ("rental") commencing on the 1st day of January 1989, totaling a minimum of TEN THOUSAND DOLLARS (\$10,000) per year, and a like or adjusted sum on each January 1st thereafter during the term of the Right-of-Way Easement granted under this Agreement.

i. CPI-U Adjustment. On each January 1st after January 1, 1989, the rental shall be increased by a percentage equal to the percentage change in the All Items Consumer Price Index of the United States Department of Labor, Bureau of Labor Statistics for All Urban Consumers in the Seattle-Tacoma, Washington area ("CPI-U") based on the 1982-1984 base = 100 (or, if not available, the most nearly comparable index), from the CPI-U used to calculate the previous year's adjustment to the most recent calculation of the CPI-U. The annual rental

commencing on January 1, 1989 is based on the CPI-U for the first half of 1988 (CPI-U = 111.9).

ii. Appraisal Adjustment. In addition to the annual CPI-U adjustments, described in subparagraph (b)(i) of this paragraph, the rental shall be increased at five (5) year intervals to reflect changes in property values such as, but not limited to, changes in the real estate market, the acquisition of applicable permits for the development of nearby property, proposed or actual marina construction or other land development near said right-of-way. The rental shall be increased to an amount equal to TWELVE PERCENT (12%) of the sum of the "right-of-way value" of the property which is the value of the property subject to the right-of-way, and the "remainder damage" which is the severance damage to Reservation lands north of State Highway 20 as determined by normal real estate appraisal methods considering the highest and best use of such adjacent lands.

Development proposed for the property north and south of the Railroad is anticipated to include several separate and distinct land uses including a marina boat basin (with approximately 800 boat slips) to the north, upland commercial development to the south, and in the event the "South Lagoon" (adjacent to and south of the Railroad) is developed, an additional marina basin providing additional boat slip moorage facilities. The Railroad right-of-way is located between and adjacent to these land areas and uses. Acreage values used to calculate the right-of-way value shall be based on the use and

development of lands either to the north or south of the Railroad, whichever has the higher appraised value.

iii. Proposal. Either the Tribe or BN may initiate an appraisal adjustment by a written proposal forwarded by U.S. Mail prior to the end of the five (5) year increment or any time thereafter until an appraisal adjustment is made and a new 5 year increment is commenced. The Tribe may initiate an appraisal adjustment at any time after receiving all necessary federal permits for the development of all or part of the Reservation lands north of State Highway 20. The Tribe may also initiate an appraisal adjustment under paragraph 7.c. of this Right-of-Way Easement. If a party chooses to initiate an appraisal adjustment before the last six months of any five (5) year period, a new five (5) year increment will begin when the new rental begins.

If the parties are unable to agree upon a rental adjustment, such adjustment shall be determined in accordance with the Commercial Arbitration Rules of the American Arbitration Association and the provisions set forth herein by binding arbitration. Arbitration shall be initiated when one party, or the other, nominates an arbitrator in writing, and requests that the other party nominate an arbitrator. The other party shall nominate an arbitrator within 20 days of receipt of the written notice. Both arbitrators must be residents of the State of Washington and shall not be subject to disqualification. Thereafter, both arbitrators nominated shall meet and select a neutral third arbitrator. If they are unable to agree, a third

arbitrator will be selected under applicable rules of the American Arbitration Association. Arbitration proceedings shall be conducted informally with each party presenting evidence as may be appropriate to its proposed annual rental payment. The arbitration award shall not be subject to judicial review or other appeal unless it be determined that the arbitrators have ignored, or failed to enforce, any of the provisions of this Settlement Agreement.

iv. South Lagoon. In the event that the Tribe determines that it would be profitable to construct additional marina facilities in the area described as the South Lagoon on attached Exhibit A, and in the further event the Tribe secures the necessary Federal permits for such construction, the BN shall either provide a fifty (50) foot wide boat access at a location acceptable to the Tribe to said Lagoon with an appropriate bridge, which will admit at tide levels of mean higher high water boats with masts sixty (60) feet high, or as damage to that portion of remaining lands, compensate the Tribe for net income loss attributable to the inability to construct the South Lagoon portion of the marina. Such loss shall be compensated on the basis of expected rental or other income less costs of planning, development, construction, management, and operation.

4. Holdover: In the event that Burlington Northern fails to surrender and vacate the lands covered by this agreement, pursuant to the provisions herein, after expiration of either the

original term of this right of way or of any extended term, except pursuant to an option to extend, Burlington Northern shall pay to the Tribe a monthly rent in an amount equal to one-twelfth (1/12th) of the yearly rental in effect at the expiration of the preceding term adjusted upward but not downward by the percentage change in the CPI-U, as defined in paragraph 3(b), from the CPI-U in effect at the time of the most recent rental adjustment to the most recent calculation of the CPI-U prior to the date the payment is due. Payments under this paragraph will not be less than \$1000 a month. The payment shall be due monthly on the last day of every month following the expiration of the preceeding term.

In any proceeding brought by the Tribe to evict Burlington Northern and/or seek damages for Burlington Northern's failure to surrender, the Tribe shall be entitled to payment for the holdover period in an amount equal to the fair rental value of the right of way so used by Burlington Northern; provided that such fair rental value shall not be less than the monthly payments provided for in the preceding sub-paragraph. Should Burlington Northern refuse or fail to make said monthly payments to the Tribe, the Tribe shall be entitled to apply to any court of competent jurisdiction for injunctive relief to compel such payments and shall be entitled to reasonable attorney fees therefor.

5. Options: In addition to the forty (40) year term, BN shall have an option to extend such term twenty (20) years. Each

option may be exercised by giving written notice to the United States and the Tribe as provided in paragraph 9 below; no later than thirty (30) days prior to the expiration of the prior term.

6. Rights of BN: Under this easement BN, its successors and assigns: (a) shall have the right to maintain, operate, inspect, repair, protect, and remove the existing line of railroad and to replace the existing line with another line for the transportation of general commodities by railroad or other comparable successor methods of transportation; to keep the right-of-way easement clear of underbrush and trees; to have the right of ingress and egress to and from the same for the aforesaid purposes; to construct and reconstruct bridges, culverts and other facilities necessary for the operation of the railroad; said right-of-way easements and privileges herein granted being assignable or transferable; and (b) shall have an exclusive easement across and over said right-of-way easement and no further easements maybe granted on said strip except as provided in paragraph 7 following. Upon discontinuance of the right-of-way granted under this Agreement, BN or its successors, may at its option, leave the railroad or other installations provided for herein on the ground or may pick up and remove said railroad.

7. Rights of the United States and the Tribe:

a. The United States and the Tribe may permit the construction, operation, repair and maintenance of utility lines, streets, or roadways under, across or along said

right-of-way easement. Should the United States or the Tribe wish to place or alter any body of water over the right-of-way easement, it will first present to BN, for review and comment, detailed plans and drawings of any proposal. If any such crossing or changes in any body of water are made in the future, it is agreed that the United States and the Tribe will reimburse, or cause BN to be reimbursed, for all of the reasonable and necessary costs for labor and materials incurred by BN in altering, or protecting, said railroad from said activities. Should the United States or the Tribes cause any damages to the railroad, they shall indemnify and hold BN harmless from any and all actual damages caused to said railroad by the United States or the Tribe. It is agreed that neither the United States nor the Tribe will permit any permanent buildings, or other structures, trees, underbrush, or any other unreasonable obstructions, to be placed upon the right-of-way easement without BN's consent. Should the United States or the Tribe wish to have the railroad relocated within the Reservation, BN will relocate the railroad provided the United States or the Tribe provides or secures for BN an alternate, feasible right-of-way with all necessary permits that gives BN all the rights it enjoys under this right-of-way easement at no additional cost to BN and with no interruption of service and provided further that the United States or the Tribe pays all costs directly, or indirectly, associated with said relocation.

b. Burlington Northern will keep the Tribe informed as to

the nature and identity of all cargo transported by Burlington Northern across the Reservation. Initially, Burlington Northern shall prepare a summary of all such commodities expected to cross the Reservation and the quantities of such commodities.

Thereafter, the disclosure shall be updated periodically as different products, or commodities, are added or deleted. Such updates shall occur at least annually. The disclosure updates shall identify any previously shipped cargo that is different in nature, identity or quantity from the cargo described in previous disclosures. Burlington Northern will comply strictly with all Federal and State Regulations regarding classifying, packaging and handling of rail cars so as to provide the least risk and danger to persons, property and the natural environment of the Reservation.

c. 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 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. Train speeds over Reservation grade crossings shall not exceed

ten (10) miles per hour.

d. Burlington Northern will cooperate fully with the Tribe in providing appropriate landscaping on either side of Burlington Northern's railroad tracks in order to make Burlington Northern's facilities compatible with the Tribe's development of adjacent lands. It is understood and agreed that Burlington Northern requires an area clear of brush and flammables to a distance of at least 15 feet on either side of the center line of the railroad.

8. Liability of BN: BN will protect, indemnify and hold harmless the United States and the Tribe against any loss, damage or expense that may be incurred, suffered or had by either of them, resulting from the death or injury to any person or persons or any loss, damage or injury to property, from any intentional or negligent acts or omissions of BN its agents, servants or employees.

9. Notices: Any notices provided for in this agreement shall be given as follows:

(a) Swinomish Tribal Community:

Tribal Attorney
Swinomish Indian Tribal Community
P.O. Box 817 - 950 Moorage Way
LaConner, Washington 98257

(b) United States of America:

Department of Interior
Bureau of Indian Affairs
Puget Sound Agency
Federal Building
Everett, Washington 98201

(c) BN:

Burlington Northern Railroad Company
General Manager
2200 First Interstate Center
999 Third Avenue
Seattle, WA 98104

Any party may by written notice to other parties change the
address to which subsequent notice shall be sent.

DATED this 19 day of July, 19~~89~~⁹¹.

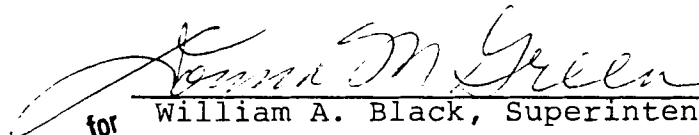
UNITED STATES OF AMERICA


RECEIVED OR FILED
FOR INDIAN AFFAIRS
PORTLAND AREA OFFICE

122 731

AUG 13 PM 12 53

BRANCH OF REALTY
TITLES & RECORDS
SECTION


for William A. Black, Superintendent
BURLINGTON NORTHERN RAILROAD
COMPANY

By 
Its _____

- 122 731

The SWINOMISH INDIAN TRIBAL
COMMUNITY hereby consents to
the foregoing Right-of-Way
Easement this 24th day, of
September, 19890.

SWINOMISH INDIAN TRIBAL COMMUNITY

By Robert J. S.
Its CHAIRMAN

STATE OF WASHINGTON)

COUNTY OF Wash)

ss.

122 731

On this 19 day of July, 1991, before me personally appeared Dennis Green, of the UNITED STATES OF AMERICA DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, to me known to be the individual who executed this within instrument and acknowledged that he signed the same as his free and voluntary act and deed for the uses and purposes herein mentioned.

IN WITNESS WHEREOF I have hereunto set my hand and affixed by official seal the day and year first above written.

P. Teresa Melton
NOTARY PUBLIC in and for the State
of Washington, residing at Snahomish
My commission expires 8-20-91

[SEAL]

STATE OF WASHINGTON)

COUNTY OF SKAGIT)

ss.

On this 24th day of September, 1990, before me personally appeared Robert Joe, Sr., to me known to be the CHAIRMAN of the SWINOMISH TRIBAL COMMUNITY that executed this within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument.

IN WITNESS WHEREOF I have hereunto set my hand and affixed by official seal the day and year first above written.

Alla Algor
NOTARY PUBLIC in and for the State
of Washington, residing at LACONNER WA
My commission expires 4-6-94

[SEAL]

STATE OF WASHINGTON)

) ss.

122 731

COUNTY OF _____)

On this _____ day of _____, 19____, before me personally appeared _____, of the UNITED STATES OF AMERICA DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, to me known to be the individual who executed this within instrument and acknowledged that he signed the same as his free and voluntary act and deed for the uses and purposes herein mentioned.

IN WITNESS WHEREOF I have hereunto set my hand and affixed by official seal the day and year first above written.

NOTARY PUBLIC in and for the State
of Washington, residing at _____

My commission expires _____

[SEAL]

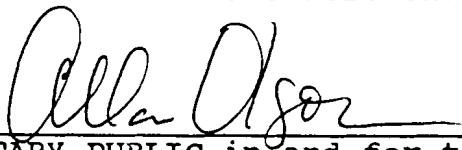
STATE OF WASHINGTON)

) ss.

COUNTY OF SKAGIT)

On this 24th day of September, 1990, before me personally appeared Robert Joe, Sr., to me known to be the CHAIRMAN of the SWINOMISH TRIBAL COMMUNITY that executed this within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument.

IN WITNESS WHEREOF I have hereunto set my hand and affixed by official seal the day and year first above written.



NOTARY PUBLIC in and for the State
of Washington, residing at LACONNER WA

My commission expires 4-6-94

[SEAL]

STATE OF WASHINGTON)

122 731

COUNTY OF KING)

ss.

On this 20th day of NOVEMBER, 1989, before me personally appeared J.H. ILKKA, of BURLINGTON NORTHERN RAILROAD COMPANY, the corporation that executed this within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument and that seal affixed is the corporate seal of said corporation.

IN WITNESS WHEREOF I have hereunto set my hand and affixed by official seal the day and year first above written.

R. E. Wilhelm

NOTARY PUBLIC in and for the State
of Washington, residing at SEATTLE, WA

My commission expires 1-9-1993

