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Swinomish Indian Tribal Community

A Federally Recognized Indian Tribe Organized Pursuant to 25 U.S.C. § 476
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BY THE SWINOMISH INDIAN TRIBAL COMMUNITY
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Fidalgo Island – The United States District Court for the Western District of Washington Monday issued a decision concluding the liability phase of trespass litigation filed by the Swinomish Indian Tribal Community against BNSF Railway (BNSF), ruling that “BNSF willfully, consciously, and knowingly exceeded” limitations in an easement to cross the Tribe’s land.

In response to Monday’s ruling, Swinomish Chairman Steve Edwards stated that “the Tribe takes its agreements very seriously and it expects them to be honored, and we are thankful that BNSF is being held to the promises it made.” Chairman Edwards continued, “We look forward to proceeding with the compensation phase of this case and finally concluding this dispute with BNSF.”

In its decision Monday, the court ruled:

BNSF has not shown that it had good faith belief that its common carrier obligations overrode the easement limitations at any point after the unit trains started running. It failed to acknowledge, much less evaluate, the unique circumstances impacting its ability to provide the service requested. BNSF willfully, consciously, and knowingly exceeded the limitations on its right of access from September 2012 to May 2021.

In previous rulings, the court held that BNSF intentionally trespassed and breached the easement by running more trains and cars than the easement allowed. In its ruling issued Monday, the court held that BNSF had willfully, consciously, and knowingly exceeded the easement’s limitations, and that BNSF could not rely on its claimed belief that its common carrier duty to its shipping customers allowed it to do so. Monday’s ruling concludes the liability phase of the case, which will now proceed to the second phase dealing with compensation for the trespass.

[Additional Background](#)

A 1991 easement agreement between the Tribe and BNSF allows rail traffic to cross the Swinomish Reservation in Skagit County but limits the size and frequency of the trains. In September 2012, BNSF began exceeding the easement's limitations by shipping hundred-car "unit trains" of Bakken crude oil across the Reservation without the Tribe's required consent. The Tribe filed suit against BNSF for violating the easement in April 2015.

The District Court had ruled in 2017 that BNSF's common carrier duty under federal law was "not a defense to any of the claims asserted in this litigation" and did not allow it to ignore the requirements of the easement agreement. BNSF appealed, and in March of 2020, the United States Court of Appeals for the Ninth Circuit affirmed the District Court and held that the Tribe's lawsuit against BNSF was not precluded by the Interstate Commerce Commission Termination Act and could proceed. In 2022, the District Court entered a partial summary judgment in favor of the Tribe, but deferred to trial a ruling on whether the BNSF's trespass was willful, conscious, or knowing. The trial began on March 20 and concluded on March 22, 2023.

Train tracks running across the northern edge of the Reservation were laid in the late 1800's without consent from the Swinomish Tribe or federal government. In 1991, the Tribe and BNSF signed an agreement settling a prior lawsuit filed by the Tribe and the United States in 1976 for nearly a century of trespass. This agreement granted BNSF an easement, but subject to important conditions: only one train of 25 railcars would cross the Reservation in each direction daily, and BNSF would regularly update the Tribe on the type of cargo crossing Tribal land. In return, the Tribe agreed not to "arbitrarily withhold permission" if there should be a future BNSF request to increase the number of trains or cars.

In late 2012, the Tribe learned from media reports that crude oil "unit trains" of 100 railcars or more were beginning to cross the Reservation. By April 2015, BNSF was reportedly running six 100-car "unit trains" per week across the Reservation, more than four times as much traffic as permitted by the easement. The tracks are adjacent to the Tribe's economic center, including a hotel and casino and other facilities. The intended development of this economic center was one of the primary reasons for the limitation of the number of trains and cars incorporated into the easement.

The Swinomish Indian Tribal Community is a federally recognized Indian Tribe with more than 1000 members. Swinomish is a legal successor to signatories of the 1855 Treaty of Point Elliott. Its Reservation is located 65 miles North of Seattle, Washington on Fidalgo Island.

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