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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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FOR IMMEDIATE PRESS RELEASE  
BY THE SWINOMISH INDIAN TRIBAL COMMUNITY

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## **Swinomish Tribe Welcomes Federal Court Ruling in Lawsuit Against BNSF**

Fidalgo Island – The Swinomish Indian Tribal Community today received a favorable decision from the United States District Court in Seattle in the Tribe’s long-running trespass lawsuit against BNSF Railway (BNSF).

In an eighteen-page ruling issued today, District Court Judge Robert S. Lasnik ordered that BNSF disgorge total trespass profits of \$394,517,169 to the Swinomish Indian Tribal Community. Specifically, the Court ordered that BNSF disgorge net profits of \$362,267,169 attributable to its trespass across the Swinomish Reservation from September 2012 to May 2021. In addition, the Court ordered that BNSF disgorge a further amount of \$32,250,000, representing the use value of the after-tax profits arising from the trespass. Taken together, the disgorgement amounts resulted in the total judgment against BNSF and in favor of Swinomish of \$394,517,169.

Steve Edwards, Chairman of the Swinomish Indian Tribal Community, stated “The Tribe is very happy to see the District Court’s decision in our lawsuit with BNSF. Tribal leaders were there in Court every day of the trial. We saw the evidence and heard the arguments presented by both sides. We knew that we were in the right, and we are thankful that the Court has ruled that BNSF must give up the wrongful profits it earned from trespassing on our Reservation again and again for nearly a decade.”

Chairman Edwards continued, “We know that this is a large amount of money. But that just reflects the enormous wrongful profits that BNSF gained by using the Tribe’s land day after day, week after week, year after year over our objections. When there are these kinds of profits to be gained, the only way to deter future wrongdoing is to do exactly what the Court did today – make the trespasser give up the money it gained by trespassing.”

“I want to stress that we tried to resolve this with BNSF without going to Court, as we always do when we have a disagreement,” explained Chairman Edwards. “Former Chairman Brian Cladoosby, Tribal staff and Tribal lawyers all informed BNSF in writing that there were limits on the

allowed use of the Tribe's land and that BNSF's 100-car oil trains were violating the BNSF easement over the Reservation. Chairman Cladoosby, Tribal staff and Tribal lawyers also met personally with BNSF representatives multiple times from 2012 to 2015."

"But in the end," Chairman Edwards said, "none of that mattered. BNSF kept running its oil trains and despite the letters and despite the meetings, BNSF told the Tribe in early 2015 that it was just going to keep running those 100-car trains across the Reservation. That's when we knew we had to ask the Federal Court to protect our Tribal rights in our Reservation lands."

"This land is what we have," concluded Chairman Edwards, "this is what we kept as our homeland when we signed the Treaty of Point Elliott. We have always protected it and we always will."

The Tribe filed suit against BNSF in April of 2015 for violating the terms of an easement agreement it signed in 1991 allowing a limited number of trains and rail cars to cross the Swinomish Reservation in Skagit County.

Train tracks were laid across the northern portion of the Reservation in the late 1800's, over the objection of the Swinomish Tribe and Federal government officials. In 1991, the Tribe and BNSF signed an agreement settling a lawsuit filed by the Tribe and the United States in 1976 for nearly a century of trespass. The agreement granted BNSF an easement but with important conditions: only one train of no more than 25 railcars would cross the Reservation in each direction daily, and BNSF would regularly update the Tribe on the type of cargo. 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.

BNSF never provided notice to the Tribe of its intention to run unit trains of Bakken crude oil across the Reservation. In September 2012, the Tribe learned from media reports that "unit trains" of 100 railcars or more were beginning to cross the Reservation. By April of 2015, BNSF was reportedly running six 100-car "unit trains" per week across the Reservation, more than four times as many railcars daily 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 United States District Court in Seattle ruled early in the Tribe's 2015 lawsuit that there was no dispute that BNSF had breached the easement agreement when "BNSF neither apprised the Tribe of its cargo nor obtained the Tribe's written agreement to an increase in the number of trains and the number of cars in those trains."

But BNSF argued that its obligations to its shippers – in this instance, two refineries located on March Point near Anacortes – superseded its obligation to the Tribe under the easement agreement.

After the District Court issued an order upholding the Tribe's rights in 2017, BNSF filed an appeal to the United States Court of Appeals for the Ninth Circuit. In a 2020 decision, the Court of Appeals rejected BNSF's argument:

We hold that the Interstate Commerce Commission Termination Act does not repeal the Indian Right of Way Act and does not defeat the Tribe's right to enforce conditions in a right-of-way easement agreement issued pursuant to the Right of Way Act. We hold further that the ICCTA does not abrogate the Treaty of Point Elliott and the Tribe's treaty-based federal common law right to exclude and condition a third-party's presence on, and use of, Reservation lands. Finally, we hold that the Tribe has the right to pursue injunctive relief to enforce the terms of the Easement Agreement.

Following the decision of the Court of Appeals, the District Court ruled in 2022 that the trespass was intentional and conducted a trial in March 2023 to determine whether BNSF's trespass over the Swinomish Reservation between September 2012 and May 2021 was also willful, conscious, and knowing, which would allow the Tribe to seek disgorgement of BNSF's ill-gotten gains. Following the three-day trial, the Court found that BNSF's trespass on the Reservation was indeed willful, conscious, and knowing.

The District Court then scheduled a trial that began June 3, 2024 to determine BNSF's wrongful financial gain from its trespass on the Swinomish Reservation. The trial concluded on June 6, and the Court issued its decision today.

Chairman Edwards reflected, "We know that this case is far from over. We expect that BNSF will appeal to the Ninth Circuit, just as they did before in this case. But we have faith and we look forward to defending Judge Lasnik's decision to protect our homeland."

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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