

II. JURISDICTION AND VENUE

1
2 2.1 This Court has original subject matter jurisdiction pursuant to 28 U.S.C. § 1331
3 because this action arises under the Constitution, laws, or treaties of the United States.

4 2.2 This Court further has original subject matter jurisdiction pursuant to 28 U.S.C.
5 § 1362 because this action is brought by an Indian tribe with a governing body duly
6 recognized by the Secretary of the Interior, wherein the matter in controversy arises under the
7 Constitution, laws, or treaties of the United States.

8 2.3 This Court has jurisdiction to grant a declaratory judgment pursuant to 28
9 U.S.C. § 2201, and to grant injunctive relief pursuant to 28 U.S.C. § 2202.

10 2.4 Venue is proper pursuant to 28 U.S.C. § 1391(b) as the events or omissions
11 giving rise to the claim occurred, and the property that is the subject of the action is situated, in
12 this judicial district.

III. FACTUAL ALLEGATIONS

13
14 3.1 The Tribe occupies lands set aside as the Swinomish Indian Reservation (the
15 “Reservation”), which is located on the Southeastern end of Fidalgo Island in Skagit County,
16 Washington. Certain Tribal lands on the Reservation, including those lands that are the
17 subject of this Complaint, are held in trust for the Tribe by the United States.

18 3.2 BNSF operates a major freight railroad system in Washington and other states.

19 3.3 The Tribe and BNSF are parties to a Right-of-Way Easement agreement (the
20 “Easement Agreement”) dated July 19, 1991, which was reviewed and approved by the Bureau
21 of Indian Affairs of the U.S. Department of the Interior pursuant to 25 U.S.C. §§ 323–28 and
22 25 C.F.R. Part 169. The Easement Agreement grants BNSF the right to run a limited number
23 of trains and attached railcars (as further discussed *infra*) across the Reservation.

24 3.4 The right-of-way easement (“Right-of-Way”) granted by the Easement
25 Agreement is located at the far north end of the Reservation. The Right-of-Way traverses a
26 part of the Reservation uplands that now constitute the heart of the Tribe’s economic
27 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'

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)**

1
2 4.1. Reallegation. The Tribe hereby incorporates by reference the allegations
3 contained in the preceding paragraphs of this Complaint.

4 5. Declaratory Judgment.

5 5.1 The Easement Agreement contains explicit limitations on the number of
6 trains and attached railcars that may cross the Right-of-Way each day, and authorizes the Tribe
7 to withhold permission to an increase in those limitations, so long as the Tribe's withholding
8 of permission is not "arbitrary." In addition, the Easement Agreement requires BNSF to report
9 at least once annually to the Tribe as to the nature and identity of all cargo transported over the
10 Right-of-Way.

11 5.2 There is a real and justiciable dispute between the parties with respect to
12 (1) whether BNSF has materially breached the terms and conditions of the Easement
13 Agreement by failing to abide by the explicit limitations on train traffic contained therein,
14 (2) whether BNSF has materially breached the Easement Agreement by failing to notify and
15 request the permission of the Tribe in advance of its intended expansion of the limited number
16 of trains and cars on the Right-of-Way, and by its continued expanded use over the Tribe's
17 objection thereto, (3) whether BNSF has materially breached the terms and conditions of the
18 Easement Agreement by failing to report at least once annually to the Tribe as to the nature
19 and identity of all cargo transported over the Right-of-Way, and specifically failing to report
20 Bakken crude oil that is different in nature, identity or quantity from the cargo previously
21 transported, and (4) whether, based on the facts alleged herein, the Tribe's withholding of
22 permission for BNSF's increased burden on the Right-of-Way easement is "arbitrary."

23 5.3 The Tribe is entitled to a declaratory judgment finding and concluding
24 (1) that BNSF has failed to comply with the terms and conditions of the Easement Agreement,
25 and is in material breach thereof, and (2) that the Tribe's withholding of permission to increase
26
27

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 DATED this 7th day of April, 2015.

2 **TOUSLEY BRAIN STEPHENS PLLC**

3
4 By: /s/ Christopher I. Brain
5 Christopher I. Brain, WSBA #5054
6 cbrain@tousley.com

7 By: /s/ Paul W. Moomaw
8 Paul W. Moomaw, WSBA #32728
9 pmoomaw@tousley.com
10 1700 Seventh Avenue, Suite 2200
11 Seattle, Washington 98101-1332
12 T: 206.682.5600
13 F: 206.682.2992

14
15 **OFFICE OF THE TRIBAL ATTORNEY,**
16 **SWINOMISH INDIAN TRIBAL**
17 **COMMUNITY**

18 By: /s/ Stephen T. LeCuyer
19 Stephen T. LeCuyer, WSBA #36408
20 slecuyer@swinomish.nsn.us
21 11404 Moorage Way
22 LaConner, WA 98257
23 T: 360.466.1058
24 F: 360.466.5309
25 *Attorneys for Plaintiff*