

RIGHT-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 preceding 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, 1991.

UNITED STATES OF AMERICA

RECEIVED OR FILED
FOR INDIAN AFFAIRS
PORTLAND AREA OFFICE

122 731

AUG 13 12 53

BRANCH OF REALTY
TITLES & RECORDS
SECTION

William A. Black
for William A. Black, Superintendent
BURLINGTON NORTHERN RAILROAD
COMPANY

By *J. H. [Signature]*
Its _____

- 122 731

The SWINOMISH INDIAN TRIBAL
COMMUNITY hereby consents to
the foregoing Right-of-Way
Easement this 24th day, of
September, 1989o.

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 Donna 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 Swinomish
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)
)
COUNTY OF _____)

ss.

122 731

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

My commission expires 4-6-94

[SEAL]

STATE OF WASHINGTON)
)
COUNTY OF KING)

122 731

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.



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

My commission expires 1-9-1993

