

**GALANDA BROADMAN**

An Indian Country Law Firm

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VIA U.S. MAIL AND EMAIL

Elizabeth Findley  
Bradley Scarp  
Counsel for BNSF  
Montgomery Scarp, PLLC  
Seattle Tower, 27<sup>th</sup> Floor  
1218 Third Avenue  
Seattle, Washington 98101

**RE: *BNSF v. Yakima County*  
Dockets TR-140382 and TR-140383**

Dear Ms. Findley and Mr. Scarp:

This letter is in response to yours dated October 15, 2014 to Mr. Ethan Jones at the Yakama Nation Office of Legal Counsel. As you know, our firm has just appeared as associated counsel with the Yakama Nation Office of Legal Counsel in the above-referenced matter. We have reviewed your October 15 letter regarding the Yakama Nation's responses to your client's discovery requests and offer the following responses and supplementation. First and foremost, nothing in either the Yakama Nation's initial responses, objections, lack of responses, or any other information divulged by the Yakama Nation in the course of discovery may be taken as the Yakama Nation's agreement with the assumptions or argument that you may manufacture on behalf of your client or in support of its arguments in the instant dispute. Secondly, in light of today's Notice Suspending Procedural Schedule and Notice of Telephonic Prehearing Conference, we would respectfully request additional time to determine, through the various governmental and quasi-governmental entities within the purview of the Yakama Nation Tribal Government, whether additional responsive information or evidence is within the control or ken of the Yakama Nation with respect to these requests. I hope we can chat about this before the November 4 prehearing conference and achieve a mutually acceptable plan that permits expeditious supplementation and works with the case schedule otherwise.

**BNSF Data Request No. 5:** Yakama Nation reasserts its objection to the overly broad and unduly burdensome nature of a request for "any record of oral or written complaints of accidents or incidents occurring at the crossings." To clarify this objection, the request is not

only overly broad in both time and scope, but is unreasonably vague in its use of “accidents” or “incidents.” Furthermore, in your October 15 letter regarding the Yakama Nation’s response to this discovery request, you assert that you “interpret the response to mean that no responsive information or documentation exists or it would have been produced.” This is an unreasonable interpretation and should be qualified, to the extent that no further information is provided, to reflect that Yakama Nation does not have in its control or knowledge each and every report of any “accident” or “incident” at the subject railroad crossings, and that to the extent they are not within the control or knowledge of the Yakama Nation at this time, this fact does not lead to a reasonable conclusion that such records or evidence simply do not exist. Subject to and without waiving these objections, discovery is ongoing and Yakama Nation is working with its various agencies to determine whether additional responsive information is available and discoverable in this matter. In addition, Yakama Nation supplements its response regarding witnesses with knowledge about this response to identify Yakama Nation Staff Member Al Pinkham as a witness with knowledge regarding this response.

**BNSF Data Request No. 6:** Yakama Nation reasserts its objection to the vagueness of the terms used in the request and to the otherwise overly broad and unduly burdensome nature of this request. Although you have clarified what you mean by “adjacent properties,” the request remains vague with respect to the request for “all documents relating to ownership of or right to use” the adjacent parcels. Ownership, as you know, is a very expansive topic. The Yakama Nation proper, as a limited and illustrative example, has certain Treaty-protected property rights with respect to the lands at issue here. Thus, the Treaty of 1855 with the Yakama itself might be responsive to this overly broad discovery request. Because that Treaty is publicly available, your client already has access to this document regarding ownership interests in the lands at issue. Subject to and without waiving said objections, discovery is ongoing. Yakama Nation continues working with its various agencies to determine whether additional responsive information is available and discoverable in this matter. Yakama Nation also refers BNSF to its trustee, the United States of America, for land ownership information the federal government must keep in the exercise of its trust responsibilities. Said information may be publicly available under the Freedom of Information Act (“FOIA”).

**BNSF Data Request No. 7:** Yakama Nation reasserts its objection to the overly broad and unduly burdensome nature of this request insofar as it requires an understaffed police force to comb through five years worth of records to determine whether any responsive information is within the possession or knowledge of the Yakama Nation. You may interpret the Yakama Nation’s response in any way you wish, but the lack of reasonably accessible information specific to this unreasonably broad request does not lead to a reasonable factual conclusion

that no such evidence or information exists. Furthermore, given the overlapping jurisdictional issues imposed on the Yakama Nation Reservation through state and federal policy and laws, various public and private entities furnish police, fire, and emergency response assistance to those residing within the exterior boundaries of the Yakama Nation Reservation. As an illustrative example, Yakima County Fire District No. 5 furnishes fire protection services to a large area of the Yakama Reservation. As an additional example, the United States government likewise provides fire protection services through its Bureau of Indian Affairs. Information with respect to these public agencies is publicly available through requests made pursuant FOIA or through the state Public Record Act. Subject to and without waiving the foregoing objections, discovery is ongoing. Yakama Nation continues working with its various agencies to determine whether additional responsive information is available and discoverable in this matter.

**BNSF Data Request No. 8:** Yakama Nation reasserts its objection offered in its initial response to BNSF Data Request No. 8. To clarify its objection, see supplemental response to BNSF Data Request No. 7. In addition, as with the information requested in BNSF Data Request No. 7, some of the information and evidence responsive to this request may be publicly available to BNSF given the various public and private entities that provide emergency services, police, fire, and medical aid in or around the areas at issue in this dispute. Subject to and without waiving the foregoing objections, discovery is ongoing. Yakama Nation continues working with its various agencies to determine whether additional responsive information is available and discoverable, and Yakama Nation will supplement its response to this data request as appropriate.

**BNSF Data Request No. 11:** Yakama Nation reasserts and herein clarifies its reference to its response to BNSF Data Request No. 10. In said response to BNSF Data Request No. 10, Yakama Nation indicated that its Tribal School “has historically used the Barnhart Road railroad crossing to pick up school children, and may use the crossing for that purpose in the future . . .” but continued with an assertion that the Yakama Nation is presently “unaware of any current school bus routes that use the crossings, but reserves the right to supplement this response . . .” The source of your confusion with respect to BNSF Data Request No. 11 may arise from the vague use of the term “school district bus routes.” At present, Yakama Nation is unaware of any “school district bus routes” that use the “two crossings adjacent to each crossing” but may supplement its response to the extent that it possesses any additional responsive information and said information is discoverable. As indicated previously, Yakama Nation is one of several public and private entities providing various services to people residing on the lands at issue in this dispute. Information requested in BNSF Data

Request No. 11 may also be publicly available from agencies other than the Yakama Nation through a request pursuant to FOIA or through the state Public Records Act.

**BNSF Data Requests Nos. 13 and 14:** These data requests sought the identities and substance of all Yakama Nation witnesses. To clarify, in its response with respect to lay and expert witnesses Yakama Nation may call, Yakama Nation disclosed that it “anticipates . . . [calling] witnesses from the Yakama Nation Engineering Department, Yakama Nation Land Enterprise, and tribal members who reside in the area of the crossings.” Yakama Nation further stated that discovery was beginning and it does not yet know the identities of its specific witnesses. Yakama Nation supplements its response by objecting to the overbreadth and vagueness of BNSF Data Request No. 14’s demand to “state the substance” of all witnesses testimony Yakama Nation intends to offer in this matter. Subject to and without waiving said objection, Yakama Nation identifies Al Pinkham, of the Yakama Nation Engineering Department, Chief James Shike of the Yakama Nation Police Department, Jay Thompson of Yakama Nation Land Enterprise, and the Tribal Historic Preservation Officer, Kate Valdez. These individuals may be called to offer expert and fact testimony with respect to their knowledge and/or field of expertise. Mr. Pinkham is most familiar with the railroad crossings and may be called to testify regarding their importance to the Yakama Nation and its members. As an expert in his field, Mr. Pinkham may also be called to offer expert testimony with respect to the engineering-related impacts of the crossings and their potential closure. Chief Shike may be called to testify to the extent he has information relevant to the crossings at issue from a law enforcement or emergency response perspective, and he may have relevant information with respect to funerals and other major events that occur in and around the Satus Longhouse that is in relatively close proximity to one proposed closure. Chief Shike may further be called to offer expert testimony on the impacts the proposed closures may have on the law enforcement capabilities and response times of the Yakama Nation. Jay Thompson may have information with respect to the title and other real property information relevant to this dispute that he may be called to offer. He may also furnish expert testimony on the character of the land and any other issue that is within his purview and area of expertise as the Chief Executive Officer of Yakama Nation Land Enterprise. Kate Valdez may be called to offer fact and expert testimony on the cultural impacts the proposed closures may have to Yakama tribal members, including, but not limited to the impacts the closure may have to a traditional funerary and memorial route Yakama members currently use to travel between the Satus Longhouse and a nearby cemetery. Discovery is ongoing. Yakama Nation is working presently with its staff to identify various lay witnesses who reside in near proximity to the proposed railroad crossings that may provide further evidence on any matter relevant to this dispute. To the extent

additional witnesses are identified, Yakama Nation will supplement its response to these data requests.

**BNSF Data Requests Nos. 15 and 16:** Yakama Nation reiterates and incorporates the responsive documents it furnished in its original responses to the above-referenced data requests. To the extent the Yakama Nation understands the October 15 letter regarding these requests as a demand for information relative to the specific individual or entity landowners of said allotments, Yakama Nation objects as the information sought is neither relevant nor reasonably calculated to lead to the production of information that is relevant, and, therefore, outside the scope of the limited discovery permitted under the regulations governing this adjudication. Subject to and without waiving said objection, Yakama Nation refers BNSF to its trustee, the United States of America, for information on land parcels that it holds in trust on behalf of the Yakama Nation and its members; said information may be subject to a request under FOIA.

**BNSF Data request No. 20:** Yakama Nation reincorporates the objections regarding the overbroad nature of BNSF's request for information and its excessive scope beyond that which is permissible under the rules and regulations governing discovery set forth in the supplemental response to BNSF Data Requests Nos. 15 and 16. Subject to and without waiving said objections, discovery is ongoing. Yakama Nation is working with Land Enterprise to identify any documents that are responsive to this request and discoverable. Furthermore, Yakama Nation refers BNSF to its trustee, the United States of America, for land ownership information it must keep in the exercise of its trust responsibilities. Said information may be publicly available under FOIA.

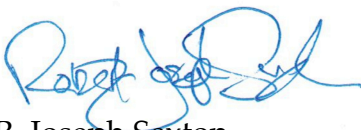
**BNSF Data Request No. 21:** Yakama Nation reiterates its original objection to this data request as overly broad and burdensome. Furthermore, information requested in this data request may be readily and equally accessible to BNSF through FOIA and its own investigative capacities, and the specific information may be beyond the knowledge and control of Yakama Nation, despite the fact that Yakama Nation Land Enterprise has general knowledge of farmers' activities in and around the subject railroad crossings. Subject to and without waiving said objections, discovery is ongoing. Yakama Nation will supplement its response to this data request to the extent that it discovers information or evidence responsive to this request and discoverable under the applicable rules and regulations.

**BNSF Data Request No. 22:** Discovery is ongoing. Yakama Nation will supplement its response to this data request to the extent that it discovery information or evidence responsive to this request and discoverable under the applicable rules and regulations.

**BNSF Data Request No. 23:** Yakama Nation reiterates and reincorporates its objections to this data request. Subject to and without waiving said objections, discovery is ongoing. Yakama Nation will supplement its response to this data request to the extent that it discovery information or evidence responsive to this request and discoverable under the applicable rules and regulations. With respect to specific witnesses who may have information with respect to this request and may furnish testimony in the matter at hand with regards to the cultural issues implicated by BNSF's proposal to close the two subject railroad crossings, Yakama Nation identifies Kate Valdez, the Tribal Historic Preservation Officer.

**BNSF Data Request No. 34:** Yakama Nation reiterates and reincorporates the objections to the BNSF Data Requests Nos. 15, 16, and 20 with respect to overbreadth, scope, and relevance. Yakama Nation also refers BNSF, again, to its trustee who has a more complete record of information with respect to this data request which may be a matter of public record, and, therefore, readily accessible to BNSF through a FOIA request. Subject to and without waiving said objections, discovery is ongoing. Yakama Nation will supplement its response to this data request to the extent that it discovery information or evidence responsive to this request and discoverable under the applicable rules and regulations.

Very truly yours,



R. Joseph Sexton  
Attorney at Law

[joe@galandabroadman.com](mailto:joe@galandabroadman.com)