

Case No. 24-4333

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

SWINOMISH INDIAN TRIBAL COMMUNITY,
Plaintiff-Appellee,

v.

BNSF RAILWAY CO.,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Washington
Hon. Robert S. Lasnik, District Judge | Case No. 2:15-cv-00543-RSL

**BRIEF OF *AMICI CURIAE* 17 TRIBAL NATIONS AND
ORGANIZATIONS IN SUPPORT OF APPELLEE SWINOMISH
INDIAN TRIBAL COMMUNITY**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1(a) and 29(a)(4)(A), undersigned counsel certifies that *Amici Curiae* Coeur d'Alene Tribe, Confederated Salish and Kootenai Tribes, Confederated Tribes and Bands of the Yakama Nation, Confederated Tribes of the Colville Reservation, Confederated Tribes of the Umatilla Indian Reservation, Jamestown S'Klallam Tribe, Kalispel Tribe of Indians, Lower Elwha Klallam Tribe, Lummi Nation, Muckleshoot Indian Tribe, Nez Perce Tribe, Northern Cheyenne Tribe, Skokomish Indian Tribe, Spokane Tribe of the Spokane Reservation, Suquamish Indian Tribe of the Port Madison Reservation, and Tulalip Tribes are federally recognized Tribal Nations, *see* 89 Fed. Reg. 99,899 (Dec. 11, 2024), and not non-governmental corporations, and that *Amicus Curiae* Affiliated Tribes of Northwest Indians is a non-profit corporation with no parent corporation and does not issue stock.

/s/ Malia Gesuale

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INTERESTS OF *AMICI CURIAE*¹

Amici Curiae Coeur d’Alene Tribe, Confederated Salish and Kootenai Tribes, Confederated Tribes and Bands of the Yakama Nation, Confederated Tribes of the Colville Reservation, Confederated Tribes of the Umatilla Indian Reservation, Jamestown S’Klallam Tribe, Kalispel Tribe of Indians, Lower Elwha Klallam Tribe, Lummi Nation, Muckleshoot Indian Tribe, Nez Perce Tribe, Northern Cheyenne Tribe, Skokomish Indian Tribe, Spokane Tribe of the Spokane Reservation, Suquamish Indian Tribe of the Port Madison Reservation, and Tulalip Tribes are sovereign, federally recognized Tribal Nations (collectively, “Tribal *Amici*”). *See* 89 Fed. Reg. 99,899 (Dec. 11, 2024). *Amicus Curiae* Affiliated Tribes of Northwest Indians (“ATNI”) is dedicated to Tribal sovereignty and self-determination, and represents over fifty Northwest Tribal Nations from Alaska, California, Idaho, Oregon, Montana, and Washington.

¹ This brief is filed without leave of the Court because the parties have consented to its filing. Fed. R. App. P. 29(a)(2). None of parties’ counsel authored this brief in whole or in part, and no other person including the parties’ counsel—other than *Amici Curiae*, their members, and their counsel—made monetary contributions intended to fund the preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E).

Tribal *Amici* and *Amicus* ATNI (together, “*Amici*”) represent a diverse group of Tribal Nations across the Pacific Northwest. Tribal *Amici*, along with many of *Amicus* ANTI’s members, are located within the States of Idaho, Montana, Oregon, and Washington; the four states within this Circuit through which the train cars at issue in this appeal travel on Appellee BNSF Railway Co.’s (“BNSF”) tracks before crossing the Swinomish Indian Reservation.

Amici have strong interests in defending and upholding the inherent sovereign authority of Tribal Nations to set conditions on the use of Tribal lands and resources. They also have strong interests in Tribal Nations’ ability to hold trespassers and corporations who violate their terms of entry accountable, and in ensuring courts order and enforce adequate disgorgements to deter wrongdoers and protect Tribal Nations’ sovereignty and myriad sovereign interests. Tribal Nations, including many of the Tribal *Amici* and *Amicus* ATNI’s members, routinely experience third-party trespass, including from railroad companies. As Tribal governments, Tribal *Amici* and *Amicus* ATNI’s members have unique perspectives on harms to inherent Tribal sovereignty caused by trespass on Tribal lands.

SUMMARY OF ARGUMENT

This appeal concerns the appropriate disgorgement of profits wrongfully gained through Appellant BNSF Railway Company's ("BNSF") intentional, nine-year-long trespass across Appellee Swinomish Indian Tribal Community's ("Swinomish") reservation, in violation of BNSF's limited easement and Swinomish's undiminished sovereign rights. In this case, core tort principles and Tribal sovereign interests are aligned. Not only is it axiomatic that tortfeasors should not profit from their wrongdoing, but disgorgement of wrongful gains serves the important function of disincentivizing unlawful conduct, deterring would-be-wrongdoers, and upholding Swinomish's sovereignty. The disgorgement award ordered by the District Court accomplishes deterrence and upholds both the principles of tort law and Tribal sovereignty.

Tort law is designed to allocate responsibilities and burdens to incentivize individuals and businesses to comply with the law and societal norms. When properly crafted, tort remedies address the perverse incentives that arise when breaking the law is more profitable than abiding by it. This is critical for ensuring parties' respect for

property rights and compliance with the terms of existing easements, as well as deterring future bad actors and conduct. When burdens are improperly allocated, a remedy's ability to encourage lawful conduct is diminished and this carefully calibrated system breaks down.

Tribal Nations are “separate sovereigns pre-existing the Constitution,” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978), and “retain[] their original natural rights” in matters of self-government and Tribal land management. *Worcester v. Georgia*, 31 U.S. 515, 559 (1832). If a wrongdoer is not required to disgorge all profits earned as the direct result of its willful trespass on Tribal lands, Tribal Nations will be forced to suffer whatever infringements to their sovereignty a wrongdoer deems profitable. The District Court's disgorgement award signals to BSNF and other would-be business partners that wrongdoers will not be permitted to keep profits derived from violating Tribal Nations' land rights and sovereign interests. It also signals to Tribal Nations, who enter into myriad agreements concerning their lands, that their rights and interests will be meaningfully enforced and protected. The result below—including full disgorgement of BNSF's ill-gotten gains—is the only adequate way to

address (and prevent) otherwise profitable violations of a sovereign's rights, injuries which are often not monetary and cannot be measured or compensated as such.

Because the District Court's decision below is in keeping with the principles and goals of disgorgement and the vindication of Swinomish's sovereign land rights, this Court must affirm.

ARGUMENT

I. The power to control Tribal land is an inherent attribute of Tribal sovereignty.

The power to control Tribal land is essential to Tribal Nations' political integrity and is more than "a necessary instrument of self-government and territorial management." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982). For nearly 200 years, the Supreme Court has explicitly acknowledged that "a hallmark of Indian sovereignty is the power to exclude non-Indians from Indian lands[.]" *Id.* at 141; *see Worcester*, 31 U.S. at 520 ("[T]he citizens of Georgia have no right to enter" the Cherokee Nation's territory, except "with the assent of the Cherokee themselves[.]"). This sovereign authority "necessarily includes the lesser power to place conditions on entry, on continued presence, [and] on reservation conduct[.]" *Merrion*, 455 U.S.

at 144; *see also* *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983).

The power to exclude non-Indians and condition or constrain their activity on Tribal lands allows Tribal Nations to secure their economic self-sufficiency and the welfare of their citizens. Tribal Nations' lands are a key resource that raises government revenues through Tribal use or third-party rent. *See Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 818–19 (9th Cir. 2011). And Tribal Nations' authority to exclude empowers them to safeguard community health and preserve irreplaceable natural resources. *See, e.g., Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 849–50 (9th Cir. 2009); Chris Aadland, *As COVID Spikes, Blackfeet Leaders Close Eastern Entrances to Glacier for Summer*, Mont. Free Press (June 26, 2020), <https://montanafreepress.org/2020/06/26/as-covid-spikes-blackfeet-leaders-close-eastern-entrances-to-glacier-for-summer/> (“It’s not a risk worth taking. It’s lives versus dollars.”); Oglala Sioux Tribe Law & Order Code ch. 10 § 2(D), <https://thorpe.law.ou.edu/codes/oglala/chapter10-removal.htm> (“physical loss or damage of any nature

to property on the Pine Ridge Reservation” grounds for exclusion of non-members).

When non-Indians trespass or breach the conditions of their entry, Tribal Nations’ sovereign rights are violated, and their political integrity is threatened. *See Water Wheel*, 642 F.3d at 819 (“[Defendant’s] unlawful occupancy and use of tribal land not only deprived the [Tribal Nation] of its power to govern and regulate its own land, but also of its right to manage and control an asset capable of producing significant income.”); *Norton v. Ute Indian Tribe of Uintah & Ouray Reservation*, 862 F.3d 1236, 1246 (10th Cir. 2017) (noting trespass “imping[ed] upon a ‘hallmark of Indian sovereignty’” and threatened the Tribal Nation’s self-government); *Attorney’s Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Miss. in Iowa*, 609 F.3d 927, 940 (8th Cir. 2010) (nonmembers’ trespass “threatened the ‘political integrity, the economic security, [and] the health [and] welfare of the Tribe, as well as its rights as a landowner” (internal citation and brackets omitted)). Courts have a duty to protect Tribal Nations’ lands—and sovereignty—from these violations. Failure to do so would judicially diminish Tribal Nations’ sovereignty in violation of federal

law. *Cf. Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 800 (2014) (“[I]t is fundamentally Congress’s job, not ours, to determine whether or how to limit tribal immunity. The special brand of sovereignty the tribes retain—both its nature and its extent—rests in the hands of Congress.”); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. Evers*, 46 F.4th 552, 557 (7th Cir. 2022) (“Recall, though, that only *Congress* . . . may act to diminish tribal sovereignty.” (citation omitted, emphasis in original)). In this case, the District Court’s disgorgement award respects Swinomish’s sovereign rights while also achieving the remedy’s equitable goals.

II. Management of Tribal land and Tribal land agreements is a complex sovereign mandate that requires balancing financial, cultural, environmental, and community welfare interests.

Tribal land often represents solemn and binding promises from the federal government to Tribal Nations, establishing “boundary lines which . . . secure [for them] a country and permanent home[.]” *McGirt v. Oklahoma*, 591 U.S. 894, 900 (2020). It should be no surprise that Tribal Nations take equally solemn care in managing their lands, carefully considering what balance of use—or lack thereof—will best

safeguard the health and welfare of their citizens, traditions, values, and resources.

A. Tribal Nations enter a myriad of agreements permitting non-Tribal use of Tribal land.

Land is often “one of [a] tribe’s most valuable assets.” *Water Wheel*, 642 F.3d at 818. Revenues from mineral or surface leases fund crucial Tribal government services. Businesses renting Tribal land produce revenues while fostering economic development and creating employment opportunities for Tribal citizens. And natural and scenic resources attract tourists and sportsmen seeking recreational or business licenses. Tribal Nations’ land-use agreements engage partners ranging from entertainment and hospitality to energy industries. In Arizona, for example, the Salt River Pima-Maricopa Indian Community has leased thirty-five acres for an entertainment complex that includes a 200,000-square-foot aquarium—the largest in the region. Beth Duckett, *Construction begins on OdySea Aquarium*, azcentral.com (Mar. 10, 2025), <https://www.azcentral.com/story/news/local/scottsdale/2015/03/18/construction-salt-river-odysea-aquarium/24863987/>. And in Washington, the Confederated Tribes of the Chehalis Reservation partnered with non-Tribal Great Wolf Resorts to build and lease a

resort on Tribal land. *See Confederated Tribes of the Chehalis Reservation v. Thurston Cnty. Bd. of Equalization*, 724 F.3d 1153, 1154 (9th Cir. 2013).

Tribal Nations often must rely on federal courts to enforce equitable remedies against third parties who choose to flout or overstay their agreements or use Tribal lands without permission. *See, e.g., Bad River Band of Lake Superior Tribe of Chippewa Indians of Bad River Reservation v. Enbridge Energy Co. Inc.*, 626 F. Supp. 3d 1030 (W.D. Wis. 2022) (action for ejectment and damages for trespass after expiration of easement); *United States v. Osage Wind, LLC*, 710 F. Supp. 3d 1018 (N.D. Okla. 2023) (action for ejectment and damages for unpermitted trespass against mineral estate); *Confederated Salish & Kootenai Tribes v. Lake Cnty. Bd. of Comm’rs*, 454 F. Supp. 3d 957 (D. Mont. 2020) (action for quieting beneficial interest in land). These remedies range from a Tribal Nation’s absolute right to ejectment—even at high cost²—to damages for rent past-due, to disgorgement.

² Greg Henderson, *Judge Orders Wind Turbines Removed from Osage Nation*, Drovers.com (Sept. 27, 2024), <https://www.drovers.com/news/ag-policy/judge-orders-wind-turbines-removed-osage-nation> (“The cost for removal of the turbines is estimated at \$300 million.”).

B. Tribal Nations’ varied land management interests illustrate the importance of the enforceability of their land-use agreements.

In entering the types of agreements discussed above, Tribal Nations, like all sovereigns, owe solemn duties to their citizens and constituents. *Merrion*, 455 U.S. at 146 (Tribal regulation of and interest in land is not merely economic, but also “a sovereign power.”). Tribal governments and officials make, execute, and enforce policies bearing on the employment, housing, education, health, and welfare of their citizens, employees, and residents. Whether the best use of Tribal land entails conservation of a precious waterway, the extraction of a mineral resource, or the granting of a right-of-way is a question that implicates sometimes conflicting sovereign interests and duties. *See id.* at 146 n.12 (“Over tribal lands, *the tribe has the rights of a landowner as well as the rights of a local government, dominion as well as sovereignty.*” (citation omitted, emphasis in original)); *Peabody Coal Co. v. Navajo Nation*, 75 F.3d 457, 464 (9th Cir. 1996) (“[A]n Indian tribe can occupy both the position as landowner and sovereign[.]”). These interests and duties inform Tribal Nations’ determinations on whether, how, where, when,

and at what price a non-Tribal entity can acquire rights to use or cross Tribal lands, and how their use should be constrained.

It is self-evident, including in the present case, that Tribal Nations balance a variety of interests when making land-use decisions. *See, e.g.*, Opening Br. for BNSF Railway Co. (“BNSF Br.”) at 14-15 (describing Swinomish’s response to BNSF’s proposal to lift easement restrictions, asking after BNSF’s efforts “to enhance and ensure the safety of oil transport . . . to limit if not eliminate the potential harm to human health or life, the aquatic ecosystems, and the Tribe’s economic development enterprises.”). Indeed, Swinomish and BNSF’s original easement contains provisions specifically designed to enable Swinomish to protect the health and safety of its resources and people. BNSF Br. at 7 (calling goods transportation transparency an “important limitation[]”).

These types of governance goals are balanced by Tribal Nations across Indian Country through carefully negotiated land-use agreements. In the southwest, Navajo Nation has passed legislation requiring transporters of uranium ore across their lands to enter agreements with the Nation, allowing them to control the presence,

source, frequency, and manner of uranium shipping. Shondiin Silversmith, *‘Respect tribal sovereignty’: The new Navajo law regulating radioactive material transportation*, AZMirror (Sept. 20, 2024), <https://azmirror.com/2024/09/20/respect-tribal-sovereignty-the-navajo-have-a-new-law-regulating-radioactive-material-transportation/>. Navajo Nation’s Environmental Protection Agency Executive Director Stephen Etsitty explained, “This legislation provides the Navajo Nation with the statutory strength and regulatory framework to protect our lands and people from the hazards associated with uranium transport. . . . We will continue to engage with all stakeholders to ensure that our regulations are enforced and our communities are safeguarded.” *Id.*; *see also* Aadland, *supra*. Regardless of how or why Tribal Nations execute land-use agreements, their sovereign interests in compliance with the terms of such agreements are clear.

III. Insufficient disgorgement fails to deter wrongdoing, negatively impacting Tribal Nations’ willingness to negotiate leases on their land.

This Court has recognized that Tribal Nations’ interest in retaining control over their land is so strong that the inability to enforce lease terms might cause them to forgo “financially beneficial leases with

nonmembers for fear of losing control over tribal land.” *Water Wheel*, 642 F.3d at 819. This is because a trespasser’s “unlawful occupancy and use of tribal land not only deprive[s] the [Tribal Nation] of its power to govern and regulate its own land, but also its right to control an asset capable of producing significant income.” *Id.* Trespass against Tribal Nations is nothing less than a theft of Tribal land and an affront to their sovereign prerogatives to manage Tribal property.

The District Court in this case rightly rejected BNSF’s proposal to measure profits in a distance-based apportionment because

allocation schemes that would allow BNSF to retain between 94.1% and 99.9% of the profits earned from a line of business . . . provided only because BNSF was willing to intentionally, consciously, and knowingly interfere with the Tribe’s property rights would not deprive BNSF of its unjustly earned gains *or deter future wrongful conduct*.

Swinomish Indian Tribal Cmty. v. BNSF Ry. Co., C15-0543RSL, 2024 WL 3027911, at *3 (W.D. Wash. June 17, 2024) (emphasis added). The District Court’s order reflects its understanding of the most basic principles of equity: that deterrence is necessarily a central goal of disgorgement. Restatement (Third) of Restitution & Unjust Enrichment § 51(f) (2011) (“A court’s decision that one item of profit is properly attributable to the defendant’s wrongdoing, while another is unduly

remote, depends finally on its assessment of these and other factors affecting *not only justice between the parties but the incentives to be created for others.*” (emphasis added)). Without clear signals from the courts that trespassers will not be permitted to keep any, let alone substantially most, of their ill-gotten gains, wrongdoers will see trespass or non-compliance with terms of entry onto Tribal lands as economically efficient.

This result would hamper Tribal Nations’ willingness to engage in the market and expose themselves to violations of their land rights and harms to their carefully balanced sovereign interests.³ *Cf. Water Wheel*, 642 F.3d at 819. It would also disincentivize wrongdoers from entering into these consensual agreements, motivating them to instead forgo the costs of negotiating entirely. Restatement (Third) of Restitution & Unjust Enrichment § 40 cmt. b (“If liability in restitution were limited

³ Even where Tribal Nations do choose to engage in such risk and enter into land-use agreements with non-Tribal parties, insufficient restitution and disgorgement may prevent Tribal Nations from bringing lawsuits to enforce land-use terms and conditions. If insufficient restitution might not even cover the cost of vindicating Tribal Nations’ rights in court, the remedy would not only fail to deter *wrongdoers*, it would also deter *Tribal Nations* from defending their sovereign rights.

to the price that would have been paid in a voluntary exchange, the calculating wrongdoer would have no incentive to bargain.”). The District Court’s order below successfully prevents these perverse incentives and concurrent harms to Tribal sovereignty.

IV. BNSF’s focus on market harms prevents deterrence and ignores incalculable harms to Swinomish’s sovereign interests.

BNSF acknowledges that effective deterrence “requires that disgorgement be greater than the market price of” an easement. BNSF Br. at 50. “This ensures that the wrongdoer is incentivized to bargain . . . rather than willfully trespass.” *Id.* at 51. But the principle that disgorgement should exceed market costs to incentivize bilateral bargaining does not mean that proper disgorgement is somehow shackled to the market price of an easement. Restatement (Third) of Restitution & Unjust Enrichment § 3 cmt. c (“When the defendant has acted in conscious disregard of the claimant’s rights, the whole of the resulting gain is treated as unjust enrichment, even though the defendant’s gain may exceed . . . the reasonable value of a license[.]”). Particularly where a defendant “anticipates (accurately) that unauthorized interference with B’s entitlement may yield profits

exceeding any damages B could prove[.]” restitution must be profit-based. *Id.* And for wrongs involving violations of property rights, tethering disgorgement to the market value of an easement would judicially “legitim[ize] a kind of private right of eminent domain . . . and subject the claimant to a forced exchange.” *Id.*⁴

BNSF asserts that simply because its wrongful gains were a large multiple of the market cost of the easement, that somehow means those gains were “unduly remote” from the trespass, and disgorgement of those gains is “not reasonable” and “amount[s] to a penalty.” BNSF Br. at 43–44 (first), 51 (second and third) (citation and quotation marks omitted). Setting aside the preposterous suggestion that each marginal million in profit, *dependent on the same trespass as the previous million*, is somehow more “remote” from BNSF’s wrongdoing than the previous, if the law were as BNSF urges, the goals of disgorgement would never reach multibillion dollar trespasses such as appellant’s rail shipping. Corporations such as BNSF could force landowners, including sovereign

⁴ This result cannot be accepted, especially in the circumstances presented in this case, as Tribal land cannot be condemned. *See Pub. Serv. Co. of N.M. v. Barboan*, 857 F.3d 1101, 1104 (10th Cir. 2017) (“[F]ederal law does not permit condemnation of tribal land[.]”).

Tribal Nations, states, and even the federal government, to accept an easement at a “reasonable multiple” of the market rate and still profit on the order of hundreds of millions of dollars. *But see Barboan*, 857 F.3d at 1104. BNSF urges a result that ignores restitution’s demand that “[g]ains realized . . . in violation of another’s legally protected rights[] must be given up to the person whose rights have been violated.” Restatement (Third) of Restitution & Unjust Enrichment ch. 5, topic 1, intro. note. BNSF’s trespass, even over Swinomish’s explicit objections, was incentivized by the significant profits it generated. *Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, 664 F. Supp. 3d 1218, 1226 (W.D. Wash. 2023) (“[T]here is nothing to contradict the evidence of a conscious breach in pursuit of profits.”). Deterring future trespass requires the removal of that significant incentive.

By suggesting that equity is better served by adhering to what Swinomish *lost* rather than what BNSF *wrongfully gained*, BNSF misapprehends the nature of disgorgement and its goals of deterrence. *See Depot, Inc. v. Caring for Montanans, Inc.*, 915 F.3d 643, 663 (9th Cir. 2019) (citing Restatement (Third) of Restitution & Unjust Enrichment § 51 cmt. a) (“Disgorgement is . . . measured by the

defendant’s wrongful gain rather than by the plaintiff’s loss[.]” (quotation marks omitted); Restatement (First) of Restitution § 202(c) (1937) (disgorgement “operates as a deterrent upon the wrongful disposition of the property of others.”). Not only do BNSF’s arguments clearly attempt to avoid the principle that wrongdoers should not profit from their tortious conduct, they dismiss the incalculable harms BNSF’s trespass inflicted on Swinomish’s sovereignty.

V. Intentional infringements on sovereignty must be disincentivized by adequate equitable relief.

Swinomish’s request for disgorgement seeks to fully protect its sovereign interests by ensuring sufficient deterrence against future trespasses on its territory. BNSF writes, “Here, the Tribe did not seek to quantify (let alone prove) any monetary or compensatory injury resulting from BNSF’s trespass.” BNSF Br. at 43. BNSF’s myopic focus on Swinomish’s “injury” is effectively an attempt to malform disgorgement into compensatory damages, which it proceeds to “estimate[.]” “as the likely price of a license or the fair market value of the land[.]” *Id.* at 43-44. But Swinomish’s injuries are not simply monetary. Despite BNSF’s admission before this court that its trespass “ignored the Tribe’s rights and sovereignty,” *id.* at 1, it is clear that

BNSF fails to actually comprehend the gravity of its actions and their impacts on Swinomish’s sovereignty and the potential risks to the health and welfare of its citizens.

Amicus Curiae Chamber of Commerce of the United States of America (“the Chamber”) similarly fails to comprehend the sovereign nature of the harms in this case. The Chamber suggests that disgorgement of profits derived from BNSF’s 0.7-mile trespass is a “disproportionate windfall” when considering the “degree of trespass” in the context of the 1,500 miles of rail line traveled by the trains. Br. of the Chamber of Com. of the United States of Am. (“Chamber Br.”) at 3, 6. But, as the Supreme Court has observed, it is “more appropriate to give the [injured] party the benefit even of windfalls than to let the fraudulent party keep them.” *Randall v. Loftsgaarden*, 478 U.S. 647, 663 (1986).

The Chamber forgets that BNSF dispatched every trespassing train and car on that 1,500-mile journey in the full knowledge that they would all necessarily trespass over Swinomish’s reservation. BNSF’s apathy towards Swinomish’s rights cannot be rhetorically reduced just because its trains and cars traveled 1,500 miles before they trespassed

over sovereign Tribal lands. The Chamber’s suggestion that full disgorgement does not “bear some reasonable relationship” to the sovereign harms stems from the Chamber’s failure to understand those harms, not from the remedy’s imagined “eliminat[ion]” of the wrong-to-harm relationship. Chamber Br. at 11-12; *accord Merrion*, 455 U.S. at 145 (admonishing those who would “confuse the Tribe’s role as [a] commercial partner with its role as a sovereign.”). Complete disgorgement necessarily bears a reasonable relationship to the harm because any lesser remedy would discount the sovereign nature of Swinomish’s land rights and fail to “vindicate the claimant’s right to insist that the . . . use by the defendant of the claimant’s property[]take place by agreement with the claimant or not at all.” Restatement (Third) of Restitution & Unjust Enrichment § 3 cmt. c.

Tribal Nations seek disgorgement and other equitable remedies, such as ejectment, precisely because injuries to their sovereignty “cannot be satisfied through a monetary award.” *United States v. Osage Wind, LLC*, No. 4:14-cv-00704-JCG-JFJ, 2024 WL 5158188, at *24 (N.D. Okla. Dec. 18, 2024) (citation omitted) (explaining that continuing trespass is an interference with the Osage Nation’s sovereignty,

requiring injunction rather than monetary damages). Simply because Swinomish has withdrawn its request for injunctive relief following BNSF's acquiescence to act in compliance with the easement does not mean the injuries to its sovereignty can be addressed through a compensatory scheme.

BNSF's unilateral trespass deprived Swinomish of its opportunity to balance and protect its sovereign interests. Swinomish's solemn, sovereign prerogatives must be meaningfully protected by restitution and disgorgement's removal of BNSF's perverse (but economically convenient) incentives to trespass. Restatement (Third) of Restitution & Unjust Enrichment § 3 cmt. c ("Restitution requires full disgorgement of profit by a conscious wrongdoer, not just because of the moral judgment implicit in the rule of this section, but because any lesser liability would provide an inadequate incentive to lawful behavior."). The disgorgement award must be sufficient to protect Swinomish's interests in the future—including against BNSF, who, along with its predecessor, knowingly and repeatedly violated Swinomish's sovereignty and property rights in pursuit of profit for a collective span of ninety-nine years. BNSF Br. at 5, 12; *Swinomish Indian Tribal Cmty. v. BNSF Ry.*

Co., No. C15-0543RSL, 2024 WL 2274336, at *2 n.3 (W.D. Wash. May 20, 2024) (“If, as the Tribe posits, BNSF would not have been able to earn any profit except for its willingness to consciously trespass across the Reservation, the loss of all of the net profits would . . . serve the deterrence purpose for which a restitution remedy is designed.”).

BNSF’s trespass against Swinomish undermined its sovereign prerogative to manage its land for the benefit, health, and welfare of its citizens. All parties agree: Swinomish did not consent to BNSF’s trespassing cars and trains, and Swinomish was within its sovereign and contractual rights to withhold that consent. By asking this Court to reduce disgorgement to any amount below the full profits directly derived from the trespass, BNSF attempts to force Swinomish into a non-consensual, retroactive easement, effectively permitting a private company to convey a Tribal Nation’s land rights to itself. No private party has such authority, nor does any court. *Accord Barboan*, 857 F.3d at 1104; *Bay Mills*, 572 U.S. at 800. This Court must reject BNSF’s invitation to disregard the sovereign nature of Tribal lands and reduce its trespass to a compensable business transgression. To do so would

vitiating Swinomish's sovereignty and flouting basic principles of disgorgement.

The District Court's order below is in line with the principles and goals at the heart of equity and tort. It is also the only remedy available that can meaningfully address BNSF's uncompensable injury to Swinomish's sovereignty and protect Swinomish's sovereign interests moving forward.

CONCLUSION

For the foregoing reasons, and the reasons set forth in Swinomish's brief, this Court should affirm the District Court.

RESPECTFULLY SUBMITTED this 14th day of March, 2025.

/s/ Malia Gesuale

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of March, 2025, I electronically filed this document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users.

/s/ Malia Gesuale

Malia Gesuale

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FOR THE NINTH CIRCUIT**

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