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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SWINOMISH INDIAN TRIBAL
COMMUNITY,

Plaintiff,

v.

BNSF RAILWAY COMPANY,

Defendant.

Cause No. C15-0543RSL

MEMORANDUM OF
DECISION

This matter was heard by the Court in a bench trial commencing on June 3, 2024, and concluding on June 6, 2024. The only issue to be determined in this phase of the proceedings is the value of the benefits defendant obtained as a result of its willful, conscious, and knowing trespass over The Swinomish Indian Tribal Community’s Reservation between September 2012 and May 2021. Restatement (Third) of Restitution § 40, cmt. a.¹ By a preponderance of the evidence, the Court finds as follows:

¹ Federal common law governs an action for trespass on Indian lands, and that law generally comports with the consensus of states as summarized in the Restatements. *United States v. Milner*, 583 F.3d 1174, 1182 (9th Cir. 2009); *Cent. States, Se. & Sw. Areas Health & Welfare Fund v. Pathology Lab’ys of Ark., P.A.*, 71 F.3d 1251, 1254 (7th Cir. 1995). Courts, including the United States Supreme Court, rely on the Restatement (Third) of Restitution to determine the contours of the equitable remedy of disgorgement, *see Liu v. SEC*, 591 U.S. 71, 79-80 (2020); *U.S. Commodity Futures Trading Comm’n v. Crombie*, 914 F.3d 1208, 1216 (9th Cir. 2019), and both parties have relied on the Restatements throughout the remedial phase of this litigation.

1 The Swinomish Indian Tribal Community (“the Tribe”) filed this suit in April 2015
2 alleging that defendant BNSF Railway Company (“BNSF”) breached a Right-of-Way Easement
3 Agreement (“Easement Agreement”) and was trespassing on its Reservation. The Court has
4 already found that BNSF’s affirmative defense of preemption under the Interstate Commerce
5 Commission Termination Act (“ICCTA”), 49 U.S.C. § 10501 *et seq.*, did not apply to any of the
6 claims asserted in this litigation (Dkt. # 85 at 5), that BNSF breached the contractual obligations
7 set forth in the Easement Agreement (Dkt. # 75 at 6), that the Tribe did not arbitrarily refuse to
8 consent to BNSF’s unilateral increase in rail traffic (Dkt. # 173 at 22), and that the trespass was
9 willful, conscious, and knowing throughout the trespass period (Dkt. # 216 at 13-15). Consistent
10 with general equitable principles and the Restatements, a conscious wrongdoer will be stripped
11 of the net profits obtained from its unauthorized interference with another’s property.
12 Restatement (Third) of Restitution § 40, cmt. b; Restatement (Third) of Restitution § 51(4). “If
13 liability in restitution were limited to the price that would have been paid in a voluntary
14 exchange, the calculating wrongdoer would have no incentive to bargain.” Restatement (Third)
15 of Restitution § 40, cmt. b. “Even against a conscious wrongdoer, [however,] restitution may be
16 limited to avoid a liability for gains that are unduly remote . . . or disproportionate to the loss on
17 which liability is based *Id.* The Court’s task, therefore, is to establish BNSF’s liability
18 based on the circumstances of the wrong, seeking both to protect the Tribe’s interests and to
19 deter future trespass, all without resort to an arbitrary penalty.
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1 **A. Net Profits**

2 A restitutionary award must be limited “to the net profits from wrongdoing, that is, ‘the
3 gain made upon any business or investment, when both the receipts and payments are taken into
4 the account.’” *Liu*, 591 U.S. at 83 (quoting *Providence Rubber Co. v. Goodyear*, 9 Wall. 788,
5 804 (1870)).
6

7 As a general rule, the defendant is entitled to a deduction for all marginal costs
8 incurred in producing the revenues that are subject to disgorgement. Denial of an
9 otherwise appropriate deduction, by making the defendant liable in excess of net
10 gains, results in a punitive sanction that the law of restitution normally attempts to
11 avoid. . . . By contrast, the defendant will not be allowed to deduct expenses (such
12 as ordinary overhead) that would have been incurred in any event, if the result
13 would be that defendant’s wrongful activities – by defraying a portion of overall
14 expenses – yield an increased profit from defendant’s operations as a whole.

15 Restatement (Third) of Restitution § 51, cmt. h. In determining net profits, the Tribe has the
16 initial “burden of producing evidence permitting at least a reasonable approximation of the
17 amount of the wrongful gain.” Restatement (Third) of Restitution § 51(5)(d). Once that hurdle is
18 met, BNSF bears the “[r]esidual risk of uncertainty in calculating net profit.” *Id.* See also
19 Restatement (Third) of Restitution § 51, cmt. g, illustration 14 (noting that the risk of
20 uncertainty in accounting for profits attributable to the wrongdoing is assigned to the
21 wrongdoer).
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23 Prior to the start of the damages phase of the trial, the parties reached an agreement
24 regarding the number of trespassing cars that passed over the Easement between September
25 2012 and May 2021, the gross revenues generated by those cars, whether the cars were part of a
26 local/manifest train or a unit train, and the costs BNSF attributed to those cars or trains in its
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1 activity-based costing system (“ABS”). Trial Exhibit (“Tr. Ex.”) 64. The parties’ experts agreed
 2 that ABS captures all costs that “vary with changes in traffic volumes that can be attributed
 3 directly to individual shipments.” Dkt. # 236-3 at 6 (Rebuttal Report of Michael R.
 4 Baranowski). The captured costs include portions of fixed costs, such as salaries, railway
 5 maintenance, and equipment, that BNSF could attribute to individual movements using various
 6 service units. Using the agreed gross revenue and ABS data, the amount of revenues available
 7 from the trespassing shipments to contribute toward BNSF’s fixed costs and other operating
 8 expenses was:
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11	Unit Train Contribution:	\$402,259,513
12		
13	Local Train Contribution:	<u>\$42,697,024</u>
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15	Total:	\$444,956,537

16 At the dispositive motion stage, BNSF argued that contribution is not an appropriate
 17 proxy for net profit because it does not take into account a proportional share of fixed costs or
 18 overhead expenses that were incurred in the same time frame and without which BNSF could
 19 not have provided services to Fidalgo Bay at all.² The Restatements’ calculation of unjust
 20 enrichment differs from general accounting principles and is not bound by the way BNSF
 21 calculates or reports profit, however. Rather, net profits for disgorgement purposes are
 22 calculated by subtracting only marginal costs – *i.e.*, those that vary with the production of one
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 27 ² In its “Order Regarding Motions for Summary Judgment,” the Court found that BNSF could
 28 not reduce its disgorgement liability by the amounts it paid during the trespass period to service its debts
 or as income taxes. Dkt. # 260 at 7-8 and 10.

1 additional unit or, in this case, the shipment of one additional car or train – from gross revenues.
2 If it were otherwise, a defendant could use revenues from its wrongful activities to offset its
3 overhead and fixed expenses, costs that would have been incurred in any event, thereby placing
4 it in a better position than it would have been had it not trespassed. *See* Restatement (Third) of
5 Restitution § 51, cmt. h. The Court noted in its summary judgment ruling that while it was
6 entirely possible that a cost or expenditure which varied with traffic volume across the Easement
7 was not captured in ABS, BNSF’s listing of certain expenses that probably varied over nearly a
8 decade of trespass was insufficient to satisfy its burden of showing costs that were actually
9 incurred in generating the revenues at issue. Dkt. # 260 at 9.

13 At trial, BNSF presented the testimony of its Vice President and Controller, Candace
14 Palmarozzi, who explained how BNSF distinguishes between variable and fixed costs and that
15 long-term costs that appear to be “fixed” over a one-year period actually vary over a period of
16 two to five years. She specifically identified types of costs that would change over the years as a
17 result of a consistent change in traffic volume, such as the number of support staff at
18 headquarters, the number of field workers, capital investments in locomotives, rail, tie, and
19 ballast, and property taxes. The argument has some appeal. Property taxes, for example, are
20 based on the amount of profits accrued in a particular county over a five-year period. Despite
21 being categorized as “fixed” costs in BNSF’s system, they vary with the amount of traffic
22 volume (at least to the extent that traffic volume corresponds with profit). But other categories
23 of expenses identified by Ms. Palmarozzi are more problematic. Some railway maintenance
24 costs are included in ABS and have already been deducted from gross revenues. Neither Ms.
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1 Palmarozzi nor Mr. Baranowski testified that there were any extraordinary maintenance or
2 replacement costs incurred on the segments between North Dakota and Fidalgo Bay during the
3 trespass period. Instead, BNSF simply assigned long-term operating costs to the trespassing
4 shipments in proportion to their variable costs, switch events, financial metrics, train miles, or
5 other service-related units. While the Court is willing to assume that certain long-term, fixed
6 costs were incurred because BNSF added approximately 2,290 unit trains and 37,655 local cars
7 to its network between September 2012 and May 2021, allocating a portion of all long-term and
8 overhead expenses to the trespassing units is not appropriate where BNSF has not provided
9 evidence that those expenses would have been avoided had it honored the Easement Agreement.
10 *See* Restatement (Third) of Restitution § 51, cmt. h (“[T]he defendant will not be allowed to
11 deduct expenses (such as ordinary overhead) that would have been incurred in any event, if the
12 result would be that defendant’s wrongful activities – by defraying a portion of overall expenses
13 – yield an increased profit from defendant’s operations as a whole.”). The capital assets and
14 human resources that support BNSF’s overall operations supported its lawful use of both the
15 Easement and the other segments of the North Dakota to Fidalgo Bay route. To the extent those
16 costs would have been incurred in the absence of the trespass, allowing a deduction from gross
17 profits would be inconsistent with the Restatements.
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24 Keeping in mind that BNSF bears the “[r]esidual risk of uncertainty in calculating net
25 profit,” Restatement (Third) of Restitution § 51(5)(d), the Court finds that a deduction of one-
26 third of the long-term, fixed costs Mr. Baranowski assigned to the trespassing shipments, Tr. Ex.
27 510, is equitable, fair, and appropriate to ensure disgorgement without penalty. Thus, the
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1 contribution amount of \$444,956,537 is reduced by \$47,685,160, leaving net profits attributable
2 to the wrongdoing of \$397,271,377.

3 4 **B. Apportionment**

5 As set forth in the Court's summary judgment order, the Tribe has a colorable claim to all
6 of the net profits BNSF obtained from transporting cars and trains that exceeded the terms of the
7 Easement Agreement to the Shell and Tesoro/Marathon refineries located on March Point, just
8 to the northwest of the Reservation. That being the case, the burden then shifts to BNSF to show
9 that some portion of the net profits earned from the March Point refineries arose from its
10 legitimate activities and would have been realized even in the absence of the wrongful trespass.
11 Restatement (Third) of Restitution § 51, cmt. g.

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14 BNSF's efforts to show that it could have used the locomotives and crews that were
15 assigned to the Fidalgo Bay routes elsewhere in its network to make a profit by servicing other
16 customers and refineries are unavailing. The question is what portion of the net profits at issue
17 here – the \$397,271,377 received for hauling Bakken crude and other goods to the March Point
18 refineries – would have been realized had BNSF not trespassed. If BNSF's theory of
19 apportionment were part of the law of disgorgement, any business with more than one customer
20 or product could argue that it would have profitably used its assets and expertise in service of
21 another customer or in producing another product. The theory would absolve an intentional
22 trespasser of all liability by pretending that the profits earned on the trespassing line of business
23 were (or could have been) earned through a separate, legitimate line of business. BNSF has not
24 identified any case in which such an argument was made, much less adopted.

1 BNSF bears the burden of proof on the apportionment issue and initially offered three
2 possible allocation schemes, all of which break the North Dakota to Fidalgo Bay route into
3 segments of various lengths and assign profits proportionally to those segments. But the
4 evidence shows that BNSF was paid for completed movements to the refineries, not for
5 completed miles or segments of the route. Had BNSF brought unit or local trains to the eastern
6 edge of the Reservation (or to within 100 miles of the Reservation), it would have earned no
7 revenues, much less profit. BNSF's proposed allocation schemes break the route into
8 unworkable segments that do not align with any rail facilities and would not result in the
9 delivery of materials to the March Point refineries. They do not, therefore, establish that a
10 portion of the net profits earned from the March Point refineries arose from BNSF's legitimate
11 activities and would have been realized even in the absence of the wrongful trespass. In
12 addition, allocation schemes that would allow BNSF to retain between 94.1% and 99.9% of the
13 profits earned from a line of business that was negotiated and provided only because BNSF was
14 willing to intentionally, consciously, and knowingly interfere with the Tribe's property rights
15 would not deprive BNSF of its unjustly earned gains or deter future wrongful conduct.

21 In his rebuttal report, Mr. Baranowski mentioned that, at least with regards to unit trains
22 in 2021, BNSF had an alternative to trespass that would have involved moving trains from
23 North Dakota to Portland, where the crude oil could be transloaded onto barges for delivery to
24 the Fidalgo Bay. Dkt. # 236-3. The shorter rail route and the extra costs associated with
25 transloading and shipping meant that this option would have been less profitable for BNSF.
26 Evidence admitted at trial shows that the average profit per car was reduced by 27.48%, from
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1 \$1,157 to \$839, when using the Portland transloading option. Tr. Ex. 68.³ The Restatements
2 address this type of situation in two ways. First, where the evidence reveals an alternative to
3 trespass, an intentional trespasser's liability in restitution is limited to the avoided costs of that
4 alternative. Restatement (Third) of Restitution § 40, Illustrations 2, 6, and 7. Second, where the
5 evidence supports a finding that a proportion of the profits are attributable to the wrongdoing
6 while the remainder arises from the defendant's legitimate activities, plaintiff is entitled to only
7 that which arises from the wrongdoing. Restatement (Third) of Restitution § 51, cmt. g and
8 Illustration 14. Applying these principles here suggests that, if the Portland transloading
9 alternative were available during the trespass period, BNSF's unjust enrichment should be
10 measured by what it was paid over and above the non-trespassing alternative while retaining net
11 profits arising from the legitimate use of its rail network to get Bakken crude to Portland. If,
12 however, there were no viable alternative available at the time, BNSF's use of its rail network
13 could not generate any profits without the trespass, and the measure of its unjust enrichment
14 would include all net profits earned as a result of the trespass.
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19 Cary Hutchings, who joined BNSF in 2011 as a regional manager of economic
20 development, and John Hack, the director of rail operations for Tesoro/Marathon since 2013,
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24 ³ In his rebuttal report, Mr. Baranowski assumed that profits were earned equally for every mile
25 of the route and simply divided the profit by the miles from North Dakota to Portland and the miles from
26 Portland to Fidalgo Bay to calculate the profits lost in the transloading option. Dkt. # 236-3 at 21. Trial
27 Exhibit 68, on the other hand, is based on BNSF's actual shipping records rather than an assumption
28 regarding per-mile profits. Because BNSF is not entitled to favorable assumptions when calculating the
disgorgement award (much less when those assumptions are contradicted by evidence), the Court has
adopted the per car profit figures in Trial Exhibit 68.

1 testified that the companies investigated a number of options for getting Bakken crude oil to the
2 Pacific Northwest, including transloading at facilities in Seattle, Tacoma, Portland, Clatskanie,
3
4 and further south in Oregon. The only three options that Tesoro/Marathon was interested in
5 pursuing were a new facility that Tesoro/Marathon hoped to build in Vancouver, Washington,
6 the Zenith facility in Portland, Oregon, and the Global/Port Westward facility in Clatskanie,
7
8 Oregon. Each is considered below.

9 **1. Vancouver Energy Project**

10 From 2013-017, Tesoro/Marathon attempted to develop rail infrastructure in Vancouver,
11
12 Washington, to facilitate the off-loading of unit trains into tanks and then onto ships. The goal
13 was to build a large capacity facility that could handle unit trains and supply crude oil to
14 Tesoro/Marathon's West Coast facilities and to other customers. The facility did not get the
15 regulatory approvals it needed to proceed and was never built. Vancouver Energy Project was
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17 not, therefore, a viable alternative to direct rail shipments to the March Point refineries.

18 **2. Zenith**

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20 The Zenith facility is located on the Willamette River near Portland, Oregon. It was not
21 authorized to conduct marine crude loading operations until November 11, 2018. *See, e.g.,* Tr.
22 Ex. 94. It began loading Bakken crude onto ships in March 2019. *See, e.g.,* Tr. Ex. 95. Given the
23 operational limitations at Zenith before November 11, 2018, bringing crude from North Dakota
24 to the facility before that date would not have resulted in a completed delivery to the March
25 Point refineries and was not, therefore, a viable alternative until November 12, 2018.
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1 The question thereafter is whether Zenith had any excess capacity that BNSF could
2 utilize for additional Tesoro/Marathon shipments from November 2018 through May 2021. Mr.
3 Hack testified that, as a practical matter, the maximum capacity at Zenith was roughly one unit
4 train every other day and that as the volume of one commodity (such as Bakken crude) went up,
5 the volume of other commodities (such as AWB crude) had to go down. The reports Zenith filed
6 with the Oregon Department of Environmental Quality (“DEQ”) show commodity volumes and
7 overall throughput on a monthly basis and support Mr. Hack’s testimony. Tr. Exs. 94-99. While
8 total throughput varied widely, there were three consecutive months between August and
9 October 2023 when Zenith was able to handle an average of 50,477,436 gallons of fossil fuels
10 (Bakken crude and diesel), which equates to 1,683 cars or 16-17 unit trains per month. Tr. Ex.
11 99. Based on the existing record, the Court adopts that number as the maximum throughput for
12 the Zenith facility.⁴ Comparing the capacity utilized each month with the capacity that was
13 available shows how many of the rail cars that were shipped directly to Fidalgo Bay could have
14 been transshipped at Zenith:
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27 ⁴ Mr. Hutchings testified that Zenith eventually had the capacity to handle the same volume of
28 Bakken crude oil that was being shipped directly by rail to Fidalgo Bay, which was a unit train every
day. That does not appear to be the case.

Month	Volume Transshipped ⁵	Capacity Available ⁶	Capacity Available in Cars ⁷
November 2018	14,770,252	0 ⁸	0
December 2018	0	50,477,436	1,683
2018 Total:			1,683
Month	Volume Transshipped	Capacity Available	Capacity Available in Cars
January 2019	14,827,681	35,649,755	1,188
February 2019	21,191,190	29,286,246	976
March 2019	14,960,551	35,516,885	1,184
April 2019	10,600,728	39,876,708	1,329
May 2019	24,148,045	26,329,391	878
June 2019	23,049,981	27,427,455	914
July 2019	13,325,670	37,151,766	1,238
August 2019	5,609,390	44,88,046	1,496
September 2019	11,340,091	39,137,345	1,305
October 2019	8,103,059	42,374,377	1,412
November 2019	8,359,465	42,117,971	1,404
December 2019	11,699,997	38,777,439	1,293
2019 Total:			14,617

Month	Volume Transshipped	Capacity Available	Capacity Available in Cars
January 2020	17,171,779	33,305,657	1,110
February 2020	21,177,199	29,300,237	977
March 2020	28,172,348	22,305,088	744
April 2020	25,136,646	25,340,790	845
May 2020	12,597,122	37,880,314	1,263

⁵ From DEQ reports, Trial Exhibits 94-97.

⁶ Maximum capacity as described in the text minus the volume actually shipped that month, except for November 2018 (discussed below in fn. 8).

⁷ Divide the gallons of capacity available by 30,000 gallons/car.

⁸ Until December 1, 2018, Zenith had only 12 rail spots for off-loading cars, less than 30% of the capacity it had in 2023. Tr. Ex. 91. The 14,770,252 gallons transshipped in November 2018 likely utilized all of Zenith's then-existing capacity.

Month	Volume Transshipped	Capacity Available	Capacity Available in Cars
June 2020	2,497,958	47,979,478	1,599
July 2020	22,348,041	28,129,395	938
August 2020	18,551,348	31,926,088	1,064
September 2020	4,005,118	46,472,318	1,549
October 2020	27,383,572	23,093,864	770
November 2020	11,338,873	39,138,563	1,305
December 2020	44,484,634	5,992,802	200
2020 Total:			12,364
Month	Volume Transshipped	Capacity Available	Capacity Available in Cars
January 2021	48,048,946	2,428,490	81
February 2021	24,027,329	26,450,107	882
March 2021	32,370,903	18,106,533	604
April 2021	27,899,708	22,577,728	753
May 2021	22,882,776	27,594,660	920
2021 Total:			3,240

Each of the annual totals representing available car capacity is less than what was actually shipped to Fidalgo Bay via rail during that period. BNSF's liability in restitution is limited only to the extent that there was an alternative actually available to it, such that it could have delivered that Bakken crude to Fidalgo Bay without trespassing on the Reservation. At most, BNSF could have delivered 33,094 of the trespassing cars to Zenith between November 2018 and May 2021, thereby avoiding the trespass and legitimately earning 72.52% of the average profit per car.⁹

⁹ Per Mr. Baranowski's calculations, BNSF's average profit from carrying Bakken crude directly to the March Point refineries in 2021 was \$1,157/car. Tr. Ex. 68. If the shipments stopped in Portland and Tesoro/Marathon had to pay to transload and ship the crude by barge, BNSF's average profit per car dropped to \$839. *Id.* The ratio of those numbers shows the percentage profit BNSF could have earned

Year	Total Net Profits ¹⁰	Net Profits Per Car ¹¹	Number of Cars that Could Have Been Transshipped	Deduction from Net Profits ¹²
2018	\$28,003,438	\$937	1,683	\$1,576,971
2019	\$38,822,371	\$1,169	14,167	\$12,010,199
2020	\$37,851,918	\$1,919	12,364	\$17,206,469
2021	\$10,681,030	\$1,792	3,240	\$4,210,569

BNSF's net profits from the unit train shipments will therefore be reduced by \$35,004,208 to reflect the amount BNSF could have legitimately earned from the use of its rail lines had it utilized the non-trespassing alternative Zenith offered, maxing out Zenith's remaining capacity and reducing the scope of its trespass.

3. Global/Port Westward

The Global/Port Westward facility is located in Clatskanie, Oregon, west of Portland along the Columbia River. It is not on BNSF's rail lines: any shipments of Bakken crude to Global/Port Westward would have to be handed to a short line railroad in Oregon and then transloaded at the facility onto ships. Although BNSF used Global/Port Westward to service

had it adopted an alternative plan and honored plaintiff's property rights. The remainder is the cost (or loss) avoided through the trespass.

¹⁰ Tr. Ex. 101, Column (3) reduced by 10.72% to reflect the fixed costs that the Court deducted from contribution to arrive at net profits.

¹¹ Total unit train contribution in a given year divided by the number of unit train rail cars shipped. Tr. Ex. 101, Columns (2) and (3).

¹² Contribution per car multiplied by the number of cars that could have been transshipped through the Zenith facility

1 other customers, none of the Bakken crude shipped to the March Point refineries went through
2 there, and BNSF has not provided any numbers regarding the profitability of this option¹³ or
3 whether Tesoro/Marathon would agree to it. In the absence of any cost data, the Court would
4 have to speculate regarding the impact this alternative would have had on BSNF's profits.
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6 In addition, the testimony regarding Global/Port Westward's capacity for handling crude
7 oil during the trespass period is extremely vague. The facility was originally constructed to
8 produce ethanol, but the production facility was mothballed in the late 2000s and for a few years
9 the rail infrastructure was used to transship various fuel types, including crude oil. Mr.
10 Hutchings and Mr. Hack gave varying estimates of the facility's maximum capacity over time,
11 from a low of 15 unit trains per month to a high of 20-25 unit trains per month, with a plan for
12 54 unit trains per month. Regardless, Mr. Hutchings testified that BNSF helped Global/Port
13 Westward maximize its throughput, shipping as much ethanol as the facility could handle when
14 markets for ethanol were good and switching to crude when that market peaked. Although not
15 entirely clear from the record, there does not appear to have been any excess capacity to handle
16 shipments for Tesoro/Marathon prior to 2016 or 2017, at which point Global/Port Westward
17 stopped handling crude oil in favor of ethanol.
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22 BNSF has not met its burden of showing that it could have earned some portion of its net
23 profits by using the Global/Port Westward facility. It provided no cost or revenue data, nor did it
24 establish that the facility had excess capacity to handle crude oil for Tesoro/Marathon during the
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28 ¹³ Mr. Hutchings testified that it would generate less profits than the direct run to Fidalgo Bay.

1 trespass period. Ultimately, Global/Port Westward was rejected in favor of Zenith, with the
2 reasonable inference being that it was not financially advantageous and/or it had capacity
3 limitations.
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6 BNSF was unjustly enriched in the amount of its net profits (\$397,271,377) minus the
7 portion of the net profits that could have been realized on the legitimate use of the rail network
8 (\$35,004,208) for a total disgorgement award of \$362,267,169.
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10 **C. Supplemental Enhancement**

11 A person who is found liable for the disgorgement of profits is also liable for
12 “supplemental enrichment in the form of interest, rent, or other measure of use value, to the
13 extent that such further enrichment is either realized in fact or appropriately presumed.”
14 Restatement (Third) of Restitution § 53(1). A conscious trespasser is liable for assets received as
15 a direct product of the trespass (in this case, \$362,267,169) as well as the consequential gains
16 obtained as a result of its subsequent investment or use of those profits. *Id.* at § 53(2) and (3).
17 “[A]ny question of liability for supplemental enrichment is necessarily decided so as to exclude
18 the possibility that the defendant might retain a benefit from the underlying wrong. The usual
19 consequence is that use value at a market rate is readily imputed, even in the face of evidence
20 that the actual benefit to the defendant was something less.” *Id.*, cmt. b. *See also id.*, Illustration
21 4 (conscious wrongdoer held liable for market interest on the funds unlawfully withheld or the
22 amount of interest actually earned on the funds, whichever is greater).
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1 The first step in the supplemental enhancement analysis is to account for the income
2 taxes defendant paid on the revenues received because only after-tax funds were available to
3 BNSF for use or investment. Mr. Baranowski calculated the taxes paid on the \$898,917,735 in
4 revenues arising from the trespassing shipments, less expenses, deductions, and interest costs, to
5 be \$98,634,070. Tr. Ex. 510. Mr. Fapp accepted that figure for purposes of calculating
6 supplemental enhancement. While BNSF now objects to that number on the ground that the
7 Court excluded deductions for certain fixed costs and interest expenses when calculating the
8 disgorgement amount, how disgorgement is calculated under the Restatements has nothing to do
9 with the taxes BNSF paid. As Mr. Baranowski acknowledged at trial, BNSF deducted all
10 operating expenses when filing its consolidated tax returns. The amount of taxes paid does not
11 vary based on the Court's restitutionary calculations in this case. Thus, the amount BNSF had to
12 use or invest over the trespass period was the total disgorgement award of \$362,267,169 minus
13 taxes paid of \$98,634,070, for a total of \$263,633,099.

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18 The next step is to calculate the consequential gains earned with that amount or the
19 market rate, whichever is higher. BNSF does not track particular dollars or income streams in a
20 way that would allow it to show how it used the funds it obtained from the trespassing
21 shipments. Ms. Palmarozzi, testified that BNSF uses its after-tax profits to pay down debt, as a
22 dividend for its sole shareholder (Berkshire Hathaway, Inc.),¹⁴ to fund capital improvements, or
23 as part of its cash reserves. While a dividend payment to a shareholder would not directly
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28 ¹⁴ BNSF transfers three to five billion dollars a year to its shareholder.


1 benefit BNSF, the retirement of debt, purchase or improvement of capital assets, and investment
 2 in a money market account undoubtedly would, resulting in varying rates of return.

3
 4 Although the many unknowns regarding the uses to which BNSF put its ill-gotten profits
 5 and the return rates on those investments should be resolved in the Tribe’s favor to ensure that
 6 BNSF does not retain any benefit from its wrongdoing, doing so would add hundreds of millions
 7 of dollars to an already large restitutionary award. The Court finds that, in the interests of justice
 8 and equity, supplemental enhancement in an amount that approximates the money market return
 9 is appropriate here. While not an exact calculation of the compound returns BNSF received over
 10 the years, the Court hereby awards \$32,250,000 as a measure of the use value of after-tax
 11 profits.
 12
 13

14
 15 For all of the foregoing reasons, the Clerk of Court is directed to enter judgment in favor
 16 of plaintiff and against defendant as follows:
 17

18	Net profits attributable to the trespass	\$362,267,169
19	Use value of the post-tax profits arising from the trespass	<u>\$32,250,000</u>
20	Total:	\$394,517,169

21
 22
 23 Dated this 17th day of June, 2024.

24
 25
 26 
 27 Robert S. Lasnik
 28 United States District Judge