

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

LIGHTHOUSE RESOURCES INC., et al.,

Plaintiffs,

and

BNSF RAILWAY COMPANY

Intervenor-Plaintiff,

v.

JAY INSLEE, in his official capacity as  
Governor of the State of Washington;  
MAIA BELLON, in her official capacity as  
Director of the Washington Department of  
Ecology; and HILARY S. FRANZ, in her  
official capacity as Commissioner of Public  
Lands of the State of Washington,

Defendants.

No.: 3:18-cv-05005-RJB

Honorable Robert J. Bryan

**INTERVENOR-PLAINTIFF BNSF  
RAILWAY COMPANY'S  
COMPLAINT IN INTERVENTION  
FOR DECLARATORY AND  
INJUNCTIVE RELIEF**

Intervenor-Plaintiff BNSF Railway Company ("BNSF") alleges as follows:

**I. INTRODUCTION**

1. BNSF operates rail lines in interstate commerce. BNSF's rail lines run through Washington, among other places. And, among many other commodities, BNSF transports coal destined for Asia across BNSF's rail lines.

1           2.       Well before his inauguration, Defendant Inslee indicated that, if elected Governor, he  
2 would work to build a regulatory wall to block expanded coal shipments through Washington.

3           3.       Since his inauguration, Governor Inslee, and Defendants Bellon and Franz among  
4 others, have misused their state regulatory authority to prevent interstate and international commerce  
5 involving coal transport, because they oppose the use of coal.

6           4.       No one in Washington would use the export coal that BNSF would transport. Rather,  
7 that coal would flow in interstate commerce from sources in Montana and Wyoming, through  
8 Washington, and over international waters, to destinations in Asia.

9           5.       Washington has few and narrow ties to this flow of coal in interstate and international  
10 commerce. Specifically, the coal would move by rail within Washington, much of which lies within  
11 BNSF's congressionally granted railroad rights of way. Then, upon the coal's arrival at an export  
12 terminal, workers would load the coal from rail cars onto ships destined for Asian coal markets.  
13 Defendants' impermissible actions and inactions show that they intend to stop coal from being used  
14 halfway across the globe by building a regulatory wall to stop the expanded flow of coal in interstate  
15 and foreign commerce.

16          6.       Defendants built this wall through the misuse of a variety of state regulatory  
17 processes. Defendants used these processes to delay, deny, and otherwise prevent activities needed  
18 to effect the flow of coal in interstate and foreign commerce.

19          7.       Departing from ordinary past practices, Defendants' actions specifically impact  
20 railroads, the instrumentality of interstate commerce most essential and efficient for moving coal to  
21 port and then to Asia. Washington normally evaluates projects that rely on rail transport without  
22 examining the ultimate use of the commodity that is moved through the project or examining the rail  
23 system that currently exists.

24          8.       For example, in 2010, Washington's Department of Transportation ("WSDOT")  
25 examined the effects of adding eight roundtrip passenger rail trips per day in roughly the same area  
26 as the proposed site for the Millennium Bulk Terminal project in Longview, Washington

1 (“Terminal” or “Project”). Ultimately, WSDOT and the Federal Railroad Administration issued a  
2 Finding of No Significant Impact under the National Environmental Policy Act. In that document,  
3 both entities concluded that using an existing railroad right of way for that passenger rail project  
4 would mitigate the likelihood of any community or other impact.

5 9. Most recently, Defendants’ efforts to stop new coal exports have focused on the  
6 proposed transloading and export terminal at the Project.

7 10. Plaintiffs designed the Terminal to export coal mined in the Powder River Basin in  
8 Montana and Wyoming, and the Unita Basin in Utah and Colorado, by interstate rail to port in  
9 Washington. BNSF owns large parts of this interstate railway.

10 11. For over five years, Plaintiffs have been pursuing permits and approvals for the  
11 Project from the State of Washington.

12 12. BNSF’s rail system would be used to deliver up to eight unit trains per day from  
13 Plaintiffs’ and other customers’ operations in Montana, Wyoming, and elsewhere to the Terminal.  
14 Defendants’ actions have directly harmed BNSF’s economic interests in the Project.

15 13. With no valid basis to deny the permits and approvals needed to construct the  
16 Terminal, Defendants have instead focused on the transportation of coal via rail to the Terminal.  
17 Defendants’ scrutiny of and desire to regulate rail transport and operations in this way is not  
18 allowed, let alone required, because federal law preempts state regulation of railroad operations.

19 14. Defendants largely justify denying or delaying permits necessary for the Project by  
20 alleging harmful impacts from BNSF’s railway operations. But their decision to rely on those  
21 alleged rail impacts to deny or delay the Terminal further impacts, implicates, and harms BNSF,  
22 because such improper rationale creates uncertainty for future rail transport-dependent projects  
23 where politically disfavored commodities are involved.

24 15. On January 3, 2018, Plaintiff Lighthouse Resources Inc., and others (“Plaintiffs”)  
25 involved in the sale to companies in Asia of coal that can only be delivered by rail, including rail  
26 operated by BNSF, sued Defendants. Plaintiffs’ Complaint (“Compl.”) (Dkt. # 1) asserts that

1 Defendants' conduct violates the United States Constitution and three federal statutes. Plaintiffs'  
2 Complaint also seeks relief from Defendants' pattern of unreasonable delay and denial of permits  
3 and approvals for the Project.

4 16. Consistent with the Complaint's allegations that Defendants improperly justify their  
5 regulatory abuses by relying on purported rail impacts, Defendants have violated BNSF's rights  
6 under the United States Constitution and other federal law.

7 17. Defendants' actions have both the intent and effect of discriminating against and  
8 unduly burdening foreign and interstate commerce, in violation of the United States Constitution's  
9 dormant commerce clause, and the ICC Termination Act ("ICCTA").

10 18. Defendants' actions have the effect of choosing where BNSF may haul goods and  
11 what companies may ship which commodities on the interstate rail system upon that rail line's  
12 crossing into Washington. This directly regulates the railroad and violates ICCTA.

13 19. Further, the United States Constitution vests the federal government with exclusive  
14 authority to administer foreign affairs, free from local interference. In giving the federal government  
15 this exclusive authority, the Constitution preempts state laws that intrude on this solely federal  
16 power. Defendants' actions and their application of the law based on political objections to the  
17 international shipment of coal have unduly interfered with the federal government's national policy  
18 regarding coal resources and exports. In so doing, Defendants have also violated the foreign affairs  
19 doctrine.

## 20 II. JURISDICTION AND VENUE

21 20. This Court has jurisdiction under 28 U.S.C. § 1331 and because this controversy  
22 arises under the Constitution and laws of the United States.

23 21. This court has independent jurisdiction under 28 U.S.C. § 1343 and 42 U.S.C. § 1983  
24 because this controversy involves the deprivation, under state law, of rights and privileges secured  
25 by the United States Constitution and acts of Congress.



## V. FACTUAL BACKGROUND

31. This pleading adopts and incorporates by reference, as if fully set forth herein, Plaintiffs' Factual Background. Compl. ¶¶ 24-191.

### A. BNSF's History and Operations

32. BNSF operates one of the largest freight railroad networks in North America, and is one of seven North American Class I railroads, defined as "having annual carrier operating revenues of \$250 million or more." 49 C.F.R. § 1201.1-1. BNSF owns or controls considerable amounts of land, including over 11,700 parcels, covering over 160,000 acres. Congress provided some of that land to BNSF's predecessor railroads as part of congressional land grants.

33. BNSF serves the western two-thirds of the United States (28 states), as well as portions of Canada and key Mexican gateways, with approximately 32,500 route miles. BNSF operates three transcontinental routes in the United States. BNSF moves an average of 1,600 trains per day and shipped over 570 *million* tons of freight in 2016. BNSF also employs more than 40,000 individuals and serves more than 40 ports.

34. BNSF is one of the nation's top transporters of consumer goods; grain and other agricultural products; low-sulfur coal; industrial goods such as petroleum and chemicals; housing materials; and food and beverages. BNSF's shipments help feed, clothe, supply, and power American homes and businesses every day. BNSF also helps connect local businesses with the global supply chain, which is especially critical in Washington State where 40 percent of all jobs are tied to trade.

35. Over the past five years, BNSF has invested approximately \$940 million to expand and maintain its network in Washington. In 2018 alone, BNSF's capital expenditure program in Washington will be approximately \$160 million, which will help keep BNSF's network infrastructure in optimal condition. This year, BNSF's maintenance program in Washington includes approximately 490 miles of track surfacing, undercutting work, or both, as well as the replacement of about 40 miles of rail and close to 230,000 ties. Along the Fallbridge Subdivision, BNSF plans to

1 install new double-track between Washougal and Mt. Pleasant. The company will also begin to  
2 install new double-track along the Spokane Subdivision between Hauser, Idaho and Spokane. Two  
3 bridge replacement projects are also slated to begin this year in Home Valley and North Bonneville.  
4 The construction of a new unloading track and additional parking capacity at the Orillia Automotive  
5 Facility is also planned for 2018.

6 **B. Asian Demand for Coal and the Search for a West Coast Export Facility**

7 36. Coal producers and exporters, such as Plaintiffs, rely on rail transportation to reach  
8 end-user markets, including markets in Asia.

9 37. The five countries that import the most coal in the world are in Asia. They accounted  
10 for 63% of global coal imports in 2014. Historically, the United States has supplied less than five  
11 percent of Asia's demand for imported coal, but recently the federal government has announced and  
12 pursued a policy of aiding coal exports to Asia. Japan and South Korea, both signatories to the Paris  
13 Accord on climate change and both among the world's top five coal-importing countries, seek to  
14 import coal from the United States. Compl. ¶¶ 24-34.

15 38. Lighthouse, through its subsidiaries, operates a coal energy supply chain. It manages  
16 and arranges coal mining, coal transfer from rail to ocean-going vessels, and coal sales to end users.  
17 Lighthouse subsidiaries own and lease mining properties in Montana and Wyoming and have  
18 executed coal sale contracts with customers in South Korea and Japan. Its subsidiary Lighthouse  
19 Products, LLC ("LHP") supplies coal to Asian customers by shipping coal out of a Canadian port.  
20 That port, however, lacks the capacity to fulfill all of LHP's contracts. Lighthouse and its  
21 subsidiaries need more coal export capacity to fulfill all their contracts and meet market demand.  
22 Compl. ¶¶ 35-51.

23 39. Because the west coast of North America lacks sufficient coal export capacity for  
24 Lighthouse and its subsidiaries to fulfill existing contracts and meet increasing Asian market  
25 demand, since 2009 Lighthouse has been working to identify additional existing port capacity and  
26 develop new west coast coal export facilities.

1           40.     The Project site has been an active industrial site since 1941, and it presently receives  
2 weekly coal shipments subject to capacity limits. A 2008 Aquatic Lands Lease between Washington  
3 and Northwest Alloys, Inc. allows coal to be handled at the Project site. BNSF anticipates that at  
4 least some coal will be shipped by BNSF on its rail lines to the Terminal. Accordingly, if  
5 Defendants' actions and inaction are allowed to stand, BNSF's service will be impermissibly be  
6 limited.

7           41.     In 2011, MBT Longview bought the Terminal assets and executed a ground lease  
8 with Northwest Alloys, Inc. Upon completion, the Terminal is expected to export 44 million metric  
9 tons of coal annually, which would satisfy Lighthouse's export requirements and also provide export  
10 capacity to third-party shippers. The Terminal currently receives common carrier service from  
11 BNSF.

12           42.     In part because the Millennium Bulk Terminal is significantly underutilized, Cowlitz  
13 County suffers serious economic challenges and lags state employment averages. Experts expect that  
14 the Terminal will bring over 1,300 construction jobs and approximately 135 long-term family-wage  
15 jobs to Cowlitz County and the surrounding area. A 2012 economic study estimated that the  
16 Terminal would generate \$146 million in tax revenues over a 30-year period and opined that  
17 investment in the Terminal would attract further investment to improve other infrastructure in the  
18 area. The Terminal would also directly and indirectly support thousands of jobs throughout the  
19 country and generate revenue for Wyoming and Montana. Finally, the Terminal would help shrink  
20 the United States' trade deficit with Asia and give Asian customers options to meet energy demand,  
21 reducing their reliance on higher-sulfur coal from other countries, and on other fuel sources  
22 including wood and trash.

23           **C. BNSF's Interest in the Millennium Bulk Terminal**

24           43.     BNSF's railway system is an integral part of Plaintiffs' proposed transloading and  
25 coal export terminal. Customers would use BNSF's existing railroad system to deliver up to eight  
26



1 unit trains (i.e., rail cars that carry the same commodity) per day from their operations in Montana  
2 and Wyoming to the Terminal for export to Asia.

3 44. BNSF trains would travel on existing BNSF rail lines in Montana, Wyoming, Idaho,  
4 and Oregon to Washington. Trains would then travel on BNSF main line routes in Washington State  
5 and the BNSF Spur and Reynolds Lead in Cowlitz County, Washington, to the Project site.

6 45. While customers would use BNSF's existing rail system to deliver unit trains to the  
7 Terminal, the BNSF rail system is not part of the Project and no permits are required of BNSF for  
8 this Project.

9 **D. Washington's Pretextual Expanded Environmental Review of the Terminal**

10 46. In 2012, MBT Longview began a new process to evaluate the Project's potential  
11 environmental impacts, including preparation of an environmental impact statement.

12 47. In October 2012, the U.S. Army Corps of Engineers (the "Corps"), Washington  
13 Department of Ecology ("Ecology"), and Cowlitz County agreed to collaborate on a joint National  
14 Environmental Policy Act ("NEPA")/State Environmental Policy Act ("SEPA") Environmental  
15 Impact Statement ("EIS") document. The Corps, Ecology, and Cowlitz County memorialized their  
16 agreement in a Memorandum of Understanding.

17 48. In February 2014, Ecology formally decided that the Draft EIS for the Project would  
18 evaluate impacts beyond the State's borders, including impacts from rail transportation that occurs  
19 outside of the project area and outside of Washington. This scope change was inconsistent with  
20 Ecology's position in 2011 and with the Memorandum of Understanding's terms.

21 49. The Corps declined to follow Ecology's move to expand environmental review to  
22 focus on non-Project rail activities. The Corps explained:

23 When considered in accordance with applicable laws and regulations, many of the  
24 activities of concern to the public, such as rail traffic, coal mining, shipping coal  
25 overseas, and the burning of exported coal in other countries, are outside the Corps'  
26 control and responsibility. . . . [W]hile there is general Federal oversight of existing  
rail lines and rail traffic, neither the [Surface Transportation Board] nor the [Federal  
Railroad Association] have a licensing role or are funding any aspect of the proposed

1 project. Federal oversight of existing rail lines is limited to [Federal Railroad  
2 Association] authority over rail safety.

3 ...

4 If transportation of coal requires new rail lines, the Surface Transportation Board  
(STB) would be responsible for approving the new rail lines that might be needed to  
move coal to its ultimate destination.<sup>1</sup>

5 The Corps concluded that Ecology's broader analysis, including rail-related issues, infringed on  
6 numerous areas over which "other Federal agencies may have regulatory control."<sup>2</sup>

7 50. On information and belief, Defendants Inslee and Bellon decided to expand the  
8 Project's environmental review beyond the scope that Ecology and the federal government originally  
9 envisioned solely because of one commodity that would be exported via the Terminal – coal.

10 51. Defendants have consistently and publicly expressed their opposition to the use of  
11 coal. Defendant Inslee co-authored a book, *Apollo's Fire: Igniting America's Clean Energy*  
12 *Economy*, which asserts that coal is "killing us" and cites coal demand growth in Asia as  
13 compounding climate change issues. Defendant Inslee reiterated his opposition to coal use during his  
14 2013 inaugural address, his first press conference as Governor, at campaign fundraisers, and during  
15 various meetings. Defendant Bellon has stated she supports Defendant Inslee's opposition to coal,  
16 and has tweeted that "[t]he proposed coal terminal in Longview would significantly impact the  
17 environment." Defendant Franz campaigned against coal exports when she ran for Commissioner of  
18 Public Lands.

19 52. On information and belief, Defendant Inslee and Defendant Bellon directed the  
20 expansion of the EIS scope to include factors over which Washington State has no jurisdiction,  
21 including rail-related matters as well as the actual use of the coal in other parts of the world,  
22 thousands of miles from Washington. On May 25, 2017, after Ecology published its Final EIS,  
23 Defendant Bellon admitted that Washington subjected the Project to greater scrutiny because the  
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25 <sup>1</sup> U.S. Army Corps of Engineers, Memorandum For Record, NWS-2010-1225, Millennium Bulk  
26 Terminals–Longview, LLC, February 14, 2014, p. 4, fn.1 (last visited on February 7, 2018 at  
[http://www.millenniumbulkeiswa.gov/assets/mbtl-nepa-eis-scope-mfr-\(14feb2014\).pdf](http://www.millenniumbulkeiswa.gov/assets/mbtl-nepa-eis-scope-mfr-(14feb2014).pdf))

<sup>2</sup> *Id.* at 4.

1 coal that would pass through the Terminal was “meant to be used as an end product for combustion.”  
2 Defendant Bellon’s comments confirm her broad opposition to coal exports to Asian markets.

3 53. The pretext behind Ecology’s Final EIS for the Project is demonstrated by, among  
4 other things, contrasting it with the EIS’s process proposed for similar projects, such as the Barlow  
5 Point terminal, which is adjacent to the Project and is served by the same rail line that serves the  
6 Terminal. Permitting authorities estimated that that the environmental review process for Barlow  
7 Point terminal would take between 1.5 and 2 years, compared to over 6 years for the Project.

8 54. The State of Washington’s expanded review of the Terminal also stands in sharp  
9 contrast to its review of the EGT export grain terminal. The Project was subjected to far greater  
10 expanded environmental review than was the EGT export grain terminal permitted at the Port of  
11 Longview which opened in 2012, despite the fact that the export terminal can accommodate six 110-  
12 car grain trains at any given time from Montana and other states; a comparable number of trains  
13 attributed to the Terminal. And, just as the Terminal would transload coal to ships bound for Asian  
14 markets, so too does the EGT export terminal transload grain to ships bound for Asian markets. The  
15 latter proceeded quickly through the environmental review and permitting process; the former has  
16 faced only delay and obstruction from Washington State officials. There is little to explain why one  
17 facility would be treated so differently than the other, except that the EGT terminal exports grain; the  
18 Project would export coal.

19 55. Defendants’ treatment of the Terminal and non-Project rail activities also contrasts  
20 with the State of Washington’s review of other rail projects within the state. In 2009, WSDOT, in  
21 close coordination with the Federal Railroad Administration, completed an Environmental  
22 Assessment of the Pacific Northwest Rail Corridor project.<sup>3</sup> The purpose of that project is to enhance  
23 intercity passenger rail service in Washington. Both WSDOT and the Federal Railroad

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25 <sup>3</sup> WSDOT, Washington Segment of the Pacific Northwest Rail Corridor, Program Environmental  
26 Assessment (September 2009) (last visited on February 19, 2018  
<https://www.wsdot.wa.gov/NR/rdonlyres/3B84DD70-5569-48FE-BB33-A637193A17F7/0/PNWRCProgramEnvironmentalAssessment.pdf>).

1 Administration determined that the project, which includes the addition of eight trains to the BNSF  
2 rail system in the same geographic area as the Terminal, would result in no significant impacts.<sup>4</sup>  
3 Importantly, unlike Defendants' review of distant rail-related impacts of Terminal, WSDOT  
4 analyzed rail impacts, such as air quality impacts from increased rail operations, consistent with  
5 federal guidance under NEPA and with due deference to the Federal Railroad Administration.  
6 Defendants have treated passenger rail, which is primarily an intrastate program where people move  
7 within Washington, significantly differently than the Defendants treat interstate and international  
8 coal shipments.

9 56. Similarly, in 2009, WSDOT, in conjunction with the federal Surface Transportation  
10 Board, completed an Environmental Assessment for the Northern Columbia Basin Railroad project  
11 in Eastern Washington, which stressed the local economic benefits of building new rail that would  
12 attract new industries. The project includes the construction of two new rail line segments and the  
13 refurbishment of an existing rail segment. The Northern Columbia Basin Railroad project's purpose  
14 is to provide rail service to lands designated for industrial development in the City of Moses Lake  
15 which would, in turn, enhance economic development opportunities and attract new rail-dependent  
16 business to the area. The commodities expected to be shipped via the rail line include steel,  
17 manufactured parts, and specialty chemicals. The Environmental Assessment concluded that if the  
18 mitigation measures identified in the Assessment are imposed by the Surface Transportation Board,  
19 the potential impacts resulting from the proposed rail project would not be significant. Again, unlike  
20 Defendants' review of the far removed rail-related impacts of the Terminal, WSDOT analyzed rail  
21 impacts consistent with federal guidance under NEPA and with due deference to the Surface  
22 Transportation Board. Again, the primary material difference between the Northern Columbia Basin  
23 project and the Terminal is the opposition of State officials to the commodity being exported from  
24 the Terminal.

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25 <sup>4</sup> Federal Railroad Administration, Washington Segment of the Pacific Northwest Rail Corridor,  
26 Finding of No Significant Impact (November 2010) (last visited on February 19, 2018 at  
<https://www.fra.dot.gov/eLib/Details/L01417>).

1           57. As early as 2014, Washington’s Freight Advisory Committee, which is responsible  
 2 for advising WSDOT on freight transportation projects, highlighted Defendants’ improper use of  
 3 SEPA reviews, noting that the “[u]nprecedented use of SEPA to include environmental impacts  
 4 beyond the jurisdiction of the project site and beyond what is normally required under NEPA causes  
 5 concern among rail, ports, and private sector investment interests in Washington,” and that this  
 6 practice “is a significant departure from standard planning and policy work in Washington.”<sup>5</sup> The  
 7 Washington State Freight Advisory Committee recommended that WSDOT “[w]ork with Ecology to  
 8 create a parallel review process with NEPA, and limit a project’s impact area to the location of the  
 9 project.”<sup>6</sup>

10           58. On June 13, 2016, BNSF submitted 36 pages of comments in response to the  
 11 publication of the Terminal’s draft Environmental Impact Statement. BNSF’s comments echoed  
 12 concerns that the Washington Freight Advisory Committee raised regarding Defendants’  
 13 unprecedented decision to expand the geographic scope of the state SEPA analysis. BNSF’s  
 14 comments alerted Defendants to the fact that ICCTA grants exclusive jurisdiction over railroad  
 15 operations to the Surface Transportation Board. Accordingly, BNSF’s comments advised that the  
 16 SEPA analysis should defer to the Surface Transportation Board and Federal Railroad  
 17 Administration’s consideration and regulation of the interstate rail system. BNSF also commented  
 18 on the draft EIS’s discussion of impacts associated with commodity transport by rail, including  
 19 purported rail capacity issues and other environmental impacts. BNSF’s comments highlighted the  
 20 speculative nature of the impacts identified in the draft EIS and offered information that would  
 21 correct the erroneous assumptions that permeated the draft EIS’s assessment of non-Project rail  
 22 impacts. Defendants ignored BNSF’s comments and recommendations and proceeded with

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24 <sup>5</sup> Washington State Freight Advisory Committee, Washington State Freight Trends & Policy  
 25 Recommendations for Air Cargo, Freight Rail, Ports & Inland Waterways, & Trucking (May 2014),  
 26 [http://www.wstc.wa.gov/Meetings/AgendasMinutes/agendas/2014/June17/documents/2014\\_0618\\_BP9\\_FMSIBFreightTrendsPolicyRecommendations.pdf](http://www.wstc.wa.gov/Meetings/AgendasMinutes/agendas/2014/June17/documents/2014_0618_BP9_FMSIBFreightTrendsPolicyRecommendations.pdf)).

<sup>6</sup> *Id.* at 14.

1 finalizing the EIS based on an unprecedented scope of analysis and assessment impacts from rail  
2 operations.

3 **E. Washington's Denial of the Clean Water Act Section 401 Certification**

4 59. The Final EIS's unusually broad scope is but one of the ways in which the  
5 Defendants have sought to block the Terminal's development. Defendants misused their power  
6 under SEPA to reject MBT Longview's proposal by denying a federally-required water quality  
7 certification, erroneously concluding that the Project would cause significant adverse environmental  
8 effects not reasonably capable of mitigation. Specifically, Defendants concluded that the Terminal's  
9 environmental effects could not be mitigated because those effects are subject to federal jurisdiction,  
10 and not within the state's authority to mitigate. The majority of those purported environmental  
11 effects were alleged rail-related impacts, not Project impacts on water quality.

12 60. In July 2016, MBT Longview requested from Ecology a water quality certification  
13 under section 401 of the Clean Water Act. Obtaining that certification is a key step in securing a  
14 CWA section 404 dredge and fill permit for the Terminal from the Corps.

15 61. On September 6, 2017, Ecology and the Governor's Office indicated they would send  
16 MBT Longview a letter which would state that its section 401 certification request lacked sufficient  
17 information and would be denied *without* prejudice. In other words, that denial would not preclude  
18 MBT Longview from resubmitting its request along with the requested additional information. Upon  
19 information and belief, that letter never arrived.

20 62. On September 26, 2017, only three business days after receiving 240 pages of the  
21 additional information that it had requested, Ecology denied MBT Longview's request for a section  
22 401 certification "*with* prejudice." Ecology has admitted that it does not know that it has ever issued  
23 any other 401 certification denial "*with* prejudice".

24 63. As with the Final EIS, Ecology based its unprecedented "*with* prejudice" denial on  
25 unusual grounds. Specifically, Ecology based its water quality certification denial almost entirely on  
26 various purported rail transport effects, not on findings that the Terminal would significantly and

1 adversely affect water quality. For example, Ecology cited rail impacts of train horn noise, safety,  
2 and rail capacity. None of those impacts relates to or affects water quality, and all of them are  
3 regulated under federal law, not state law.

4 **F. Washington's Pretextual Environmental Review and Section 401 Water Quality**  
5 **Certification and Terminal Improvement Permit and Shorelines Permit Denials**

6 64. In August 2017, the current lessee of the Millennium Bulk Terminal, Northwest  
7 Alloys, sought the consent of the Washington Department of Natural Resources' ("DNR") under its  
8 lease from DNR to make certain improvements to the existing terminal.

9 65. MBT Longview's proposed improvements to the Terminal are part of its plan to build  
10 a coal export facility. The proposed improvements do not exempt MBT Longview from permitting  
11 or approval requirements. But, because the DNR lease already allows transloading of coal, and  
12 because the coal export facility would remain subject to numerous federal and state environmental  
13 review and permitting requirements, DNR approval should have been straightforward and consistent  
14 with the 60-days' review period allowed under the lease.

15 66. On October 24, 2017, however, Defendant Franz, consistent with Defendant Bellon's  
16 objection to approving any coal related project, rejected the requested authorization to make certain  
17 improvements. Defendant Franz's rejection adopted Ecology's rationale for denying MBT  
18 Longview's request for a Clean Water Act section 401 water quality certification, including  
19 Ecology's reliance on the alleged environmental effects of rail transportation.

20 67. Despite having executed a lease which allows a coal export facility at the site, DNR  
21 did not treat the request to make improvements to the Terminal as it had treated similar requests by  
22 others. DNR instead refused to consent to the proposed improvements, because Defendants do not  
23 support a coal export facility's construction at the Terminal.

24 68. As part of its proposal to construct a coal export facility at the Terminal, MBT  
25 Longview also applied to Cowlitz County for a Shoreline Substantial Development Permit and a  
26 Shoreline Conditional Use Permit. The Cowlitz County staff who reviewed MBT Longview's



1 proposal concluded that it met all requirements and recommended that the permits be issued. Despite  
2 Cowlitz County's recommendation, the Hearing Examiner also relied on Ecology's EIS and  
3 Ecology's findings from its unprecedented "with prejudice" denial of a section 401 certification.  
4 Consistent with Ecology's and DNR's baseless rejection of the Terminal, the Hearing Examiner  
5 relied on purported rail impacts to deny the shoreline permits.

6 **G. Defendants Try to Use Rail Transport to Justify Their Illegal Actions**

7 69. Defendants have improperly used claims about rail transport impacts that are  
8 speculative and beyond their authority to regulate to justify their regulatory actions and inactions.

9 70. In an October 23, 2017 letter, Ecology said that the environmental effects outlined in  
10 the SEPA EIS which it relied on to deny section 401 certification, including purported issues related  
11 to train horns, train traffic, and train capacity, would "likely preclude Ecology from approving" other  
12 permit applications and its "staff will not be spending time on permit preparation" for those other  
13 applications.

14 71. Defendants, in their capacity as Washington public officials, are misusing  
15 Washington's regulatory power to undermine international economic and foreign policy set by the  
16 United States.

17 72. Any bulk commodity shipped by train would have essentially the same rail effects  
18 that Defendants claim increased coal transport to the Terminal would have. Applying the same  
19 environmental review processes and regulatory standards that Defendants have applied to the Project  
20 to similar projects involving commodities other than coal would result in a chilling effect on  
21 virtually all interstate and foreign commerce where major rail transport is involved.

22 73. The SEPA EIS concludes that the Project can in fact meet all state and federal  
23 environmental standards. But Defendants have effectively blocked foreign and interstate commerce  
24 by refusing to process, let alone approve, permits required for the Terminal.



1 **VI. LEGAL AND REGULATORY BACKGROUND**

2 **A. ICC Termination Act**

3 74. Congress has recognized a need to regulate railroad operations at the federal level.  
4 Today, the federal government regulates railroad operations under ICCTA. Specifically, ICCTA  
5 created the Surface Transportation Board and gave it complete and exclusive jurisdiction over the  
6 regulation of railroad operations.

7 75. ICCTA further provides that “remedies . . . with respect to regulation of rail  
8 transportation are exclusive and preempt the remedies provided under Federal or State law.”  
9 49 U.S.C. § 10501(b).

10 76. Any form of state or local permitting or preclearance that, by its nature, could be used  
11 to deny, or place conditions on, a railroad’s ability to conduct some part of its operations is  
12 “categorically” preempted by ICCTA.

13 77. Even when state officials’ actions are not categorically preempted, they are still  
14 preempted if they may reasonably be said to have the effect of managing or governing rail  
15 transportation.

16 78. Courts have repeatedly and consistently upheld these Congressional directives.

17 **B. The Dormant Commerce Clause**

18 79. The United States Constitution’s commerce clause provides that “Congress shall have  
19 Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the  
20 Indian Tribes.” U.S. Const. art. I, § 8, cl. 3.

21 80. Though the commerce clause explicitly only mentions Congress’ affirmative power to  
22 regulate commerce, federal courts have long read into it a “dormant” or negative limitation that also  
23 constrains the states’ power to regulate foreign and interstate commerce.

24 81. States violate the dormant commerce clause if their actions discriminate against or  
25 unduly burden foreign or interstate commerce. More specifically, state regulation runs afoul of the  
26 foreign commerce clause if it (1) creates a substantial risk of conflicts with foreign governments, or

(2) undermines the federal government’s ability to speak with “one voice” concerning foreign commercial affairs.

82. Dormant interstate commerce clause claims are analyzed using a two tier framework: If an action is facially discriminatory, either in purpose or “practical effect,” it is unconstitutional unless it serves a legitimate local purpose that could not be served by available nondiscriminatory means. Nondiscriminatory actions, on the other hand, are unconstitutional when the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits.

### **C. The Foreign Affairs Doctrine**

83. The United States Constitution grants the federal government plenary power to administer foreign affairs. U.S. Const. art. IV, § 2; art. II, § 2; art. I, § 8. This is the source of the foreign affairs doctrine.

84. The foreign affairs doctrine preempts states intruding on the exclusively federal power to direct the nation’s foreign affairs. A state law or action must yield if it conflicts with an express federal foreign policy, such as a treaty, federal statute, of executive branch policy.

### **D. Federal Support for Coal Exports**

85. Multiple federal treaties, statutes, and policy statements preempt Defendants’ scheme to prevent coal exports to Asia, including:

86. *The General Agreement on Tariffs and Trade*. The United States has been a party to the General Agreement on Tariffs and Trade (GATT) since January 1, 1948, and a member of the World Trade Organization (WTO) since January 1, 1995. Article XI:1 of the GATT provides: “No prohibition or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party . . . on the exportation or sale for export of any product destined for the territory of any other contracting party.”

87. *The United States-Korea Free Trade Agreement*. Article 2.8 of the U.S.-Korea Free Trade Agreement provides that “Except as otherwise provided in this Agreement, neither Party may

1 adopt or maintain any prohibition or restriction on the importation of any good of the other Party or  
 2 on the exportation or sale for export of any good destined for the territory of the other Party, except  
 3 in accordance with Article XI of GATT 1994 . . . .”

4 88. *Energy Policy and Conservation Act of 1975 and Energy Policy Act of 1992.* The  
 5 Energy Policy Act of 1975 authorizes the President to restrict coal exports. Over the past four  
 6 decades, however, the President has not used this power to impose significant coal export  
 7 restrictions. Instead, section 1338 of the Energy Policy Act of 1992 directs the Secretary of  
 8 Commerce to create a plan for *expanding* coal exports.

9 89. The current presidential administration continues to pursue a policy of “export[ing]  
 10 American energy all over the world,” including to Asian markets.<sup>7</sup>

- 11 a. On March 29, 2017, Secretary of the Interior Ryan Zinke published Secretary’s Order  
 12 3348, which lifted a moratorium on the federal coal leasing program that had been put  
 13 in place by the prior administration. Secretary Zinke issued a statement  
 14 accompanying Order 3348 in which he explained that “it is better to develop our  
 15 energy here under reasonable regulations and export it to our allies . . . . [A]chieving  
 16 American energy independence will strengthen our national security by reducing our  
 17 reliance on foreign oil and allowing us to assist our allies with their energy needs.”
- 18 b. The United States also recently forged an agreement with the Government of Ukraine  
 19 which facilitates Ukraine’s purchase of American coal.<sup>8</sup>
- 20 c. In December 2017, the White House released its updated National Security Strategy,  
 21 which explains directs that “[t]he United States will promote exports of our energy  
 22

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23 <sup>7</sup> Office of the Press Secretary, Remarks by President Trump at the Unleashing America Energy  
 24 Event, THE WHITE HOUSE, p. 23 (June 29, 2017) (last visited on February 7, 2018 at  
 25 <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-unleashing-american-energy-event/>).

26 <sup>8</sup> See Compl. ¶ 202; Alessandra Prince, *After Trump meeting, Ukraine to import U.S. thermal coal for the first time*, REUTERS (July 31, 2017) <https://www.reuters.com/article/us-ukraine-usa-coal/after-trump-meeting-ukraine-to-import-u-s-thermal-coal-for-the-first-time-idUSKBN1AG208>.

resources,” including by “expand[ing] our export capacity through the continued support of private sector development of coastal terminals . . . .”<sup>9</sup>

## VII. CLAIMS FOR RELIEF

### Count I - ICCTA Preemption

90. BNSF incorporates and re-alleges the foregoing paragraphs.

91. BNSF is a rail carrier with rights under ICCTA.

92. Defendants’ actions and inactions with respect to the Project are forms of permitting or preclearance that are being used to deny or condition BNSF’s ability to provide common carrier service to Plaintiff Lighthouse and its subsidiaries.

93. Defendants’ actions and inactions with respect to the Terminal have the effect of managing or governing rail transportation, including BNSF rail operations and Lighthouse’s subsidiaries’ request for BNSF’s common carrier service.

94. Defendants’ actions and inactions with respect to the Terminal have the effect of choosing where BNSF may haul goods and what companies may ship which commodities on the interstate rail system upon that rail line’s crossing into Washington. This directly regulates the railroad and violates the ICCTA.

95. Defendants’ conclusion that potential environmental effects cannot be mitigated under SEPA if those effects are within the jurisdiction of the federal government, and their actions in denying permits and approvals on that basis, have the effect of managing or governing rail transportation, including BNSF’s rail operations and Lighthouse’s subsidiaries’ request for BNSF’s common carrier service.

96. Defendants’ actions also injure BNSF by impacting the willingness of the private sector to invest in the development of coal export facilities in the state of Washington, and along the entire Pacific Coast, that would be served by BNSF rail lines.

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<sup>9</sup> WHITE HOUSE, NATIONAL SECURITY STRATEGY FOR THE UNITED STATES OF AMERICA at 23 (Dec. 2017) (last visited on February 7, 2018 at <https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf>).

1           97. Defendants' actions have injured BNSF directly and have created a disincentive to  
2 build or expand other coal export facilities that would be served by BNSF rail lines, which will  
3 negatively U.S. economic growth, job creation, and exports generally.

4           98. For all these reasons, Defendants' actions in their capacities as public officials of the  
5 State of Washington are preempted by ICCTA and violate BNSF's common carrier rights under 42  
6 U.S.C. § 1983.

7           **Count II - Violation of the Foreign Commerce Clause**

8           99. BNSF incorporates and re-alleges the foregoing paragraphs.

9           100. By unreasonably denying and refusing to process permits for the Terminal,  
10 Defendants have discriminated against and interfered with BNSF's ability to engage in foreign  
11 commerce through the transport of coal to the Terminal for export to Asian markets, in violation of  
12 the dormant foreign commerce clause.

13           101. Defendants' illegal actions and inaction have created a substantial risk of conflict  
14 with foreign governments, which rely on American coal exports for power production.

15           102. In addition, the federal government has made clear that the United States' policy  
16 favors the expansion of coal exports to foreign countries, including to countries in Asia.

17           103. By misusing their regulatory power in a way which is at cross-purposes with the  
18 federal government's coal export policies, Defendants have severely undermined the United States'  
19 ability to speak with one voice in foreign commercial affairs and to implement its National Security  
20 Strategy.

21           104. By concluding that potential environmental effects, including alleged rail-related  
22 effects, cannot be mitigated under SEPA because those effects are within the federal government's  
23 jurisdiction, the Defendants unduly burden, and in effect seek to regulate, foreign commerce.

24           105. Defendants' refusal to license a coal export facility is prohibited under the United  
25 States' obligations as a member of the WTO. Indeed, Defendants' refusal constitutes a prohibition or  
26

1 restriction under GATT Article XI:1; is not covered by any of the exceptions set out in GATT  
2 Articles XI:2 or XX; and, in any case, is a “disguised restriction on international trade.”

3 106. Defendants’ actions could be cited and leveraged by respondents in WTO disputes  
4 involving export restrictions brought by the United States, and may interfere with the ability of the  
5 United States to compel other nations through the WTO dispute settlement process and other  
6 available bilateral, regional, and multilateral mechanisms to reduce or remove export restrictions that  
7 impair the foreign commerce of the United States.

8 107. Defendants’ actions amount to an embargo or quota on American coal exports to  
9 Asia, including coal that would be shipped to the Terminal by BNSF, in violation of the dormant  
10 foreign commerce clause.

11 108. On information and belief, the Defendants’ true reason for denying the Plaintiffs’  
12 permit applications is the desire to prevent American coal exports to Asia.

13 109. In all of these ways, the Defendants in their capacities as public officials of the State  
14 of Washington have violated the dormant foreign commerce clause and 42 U.S.C. § 1983.

15 **Count III - Violation of the Interstate Commerce Clause**

16 110. BNSF incorporates and re-alleges the foregoing paragraphs.

17 111. By unreasonably denying and refusing to process permits for the Terminal,  
18 Defendants have discriminated against BNSF’s efforts to transport coal into Washington from  
19 Montana, Wyoming, and other states, in violation of the dormant interstate commerce clause.

20 112. By expanding the scope of SEPA review beyond the boundaries of Washington, to  
21 include purported environmental effects of rail transport of coal from states other than Washington,  
22 Defendants have discriminated against BNSF’s efforts to transport into Washington coal from  
23 Montana and Wyoming.

24 113. By concluding that potential environmental effects cannot be mitigated under SEPA  
25 if those effects are within the jurisdiction of the federal government, including alleged effects related  
26

1 to rail transportation, the Defendants are unduly burdening, and in effect regulating, interstate  
2 commerce.

3 114. Defendants' actions and inactions with respect to the Terminal discriminate against  
4 interstate commerce in both purpose and practical effect, and they serve no legitimate local purpose  
5 that could not be served by nondiscriminatory means.

6 115. Defendants' actions and inactions with respect to the Terminal also burden interstate  
7 commerce excessively when weighed against any putative local benefits of Defendants' abuse of  
8 their regulatory power.

9 116. Defendants' actions also injure BNSF by discouraging private sector willingness to  
10 invest in the development of coal export facilities in Washington that would be served by BNSF rail  
11 lines.

12 117. Defendants' actions have injured BNSF directly by impacting BNSF's economic  
13 interest in providing rail delivery services for the Project and have created a disincentive to build or  
14 expand other coal export facilities that would be served by BNSF rail lines, which will negatively  
15 impact U.S. economic growth, job creation, and exports.

16 118. In all of these ways, the Defendants in their capacities as public officials of the State  
17 of Washington have violated the dormant interstate commerce clause and 42 U.S.C. § 1983.

18 **Count IV - Violation of the Foreign Affairs Doctrine**

19 119. BNSF incorporates and re-alleges the foregoing paragraphs.

20 120. On information and belief, the Defendants' true reason for denying the Plaintiffs'  
21 permit applications is their desire to prevent coal exports to Asia.

22 121. The federal government has made it clear that the policy of the United States is to  
23 favor the expansion of coal exports to foreign countries, including countries in Asia.

24 122. By unreasonably denying and refusing to process permits for the Terminal based on  
25 their policy of opposing the export of coal for the purposes of energy generation by U.S. allies in  
26

1 Asia, Defendants have intruded on the exclusively federal power to direct the nation's foreign affairs  
2 in violation of the foreign affairs doctrine.

3 123. By expanding the scope of SEPA review beyond the Washington's boundaries, and  
4 especially by including the environmental effects of coal shipments destined for foreign nations as a  
5 basis to deny permits for the Project, Defendants fail to address any area of traditional state  
6 responsibility.

7 124. Defendants have created a substantial risk of conflict between the United States and  
8 foreign governments that rely on coal imports for power production.

9 125. Defendants' actions have injured BNSF directly and have created a disincentive to  
10 build or expand other coal export facilities that would be served by BNSF rail lines, which runs  
11 counter to the federal government's foreign policy.

12 126. In all of these ways, the Defendants in their capacities as public officials of the State  
13 of Washington have violated the foreign affairs doctrine and 42 U.S.C. § 1983.

#### 14 **VIII. PRAYER FOR RELIEF**

15 BNSF respectfully requests the following relief:

16 127. A declaration that ICCTA preempts any decision by any state or local entity relying  
17 on the Defendants' denial of the sublease or the Defendants' denial of the CWA section 401  
18 certification, including the denial of MBT Longview's requested shoreline permit, when such denials  
19 are based on the purported rail-related impacts of a proposed project.

20 128. A declaration that Defendants' denial of MBT Longview's requested sublease for the  
21 Millennium Bulk Terminal violates the dormant commerce clause.

22 129. A declaration that Defendants' denial of MBT Longview's requested CWA section  
23 401 certification violates the dormant commerce clause.

24 130. A declaration that any environmental reviews of the proposed coal export facility at  
25 the Millennium Bulk Terminal—or any future coal export terminal that Plaintiffs or BNSF may  
26 propose—may not be used to deny or unreasonably condition a permit beyond the standards applied



1 to other non-coal terminal projects, including denying or unreasonably conditioning a permit based  
2 on the effects of transporting coal to and from the Terminal by rail traffic in interstate or foreign  
3 commerce.

4 131. A declaration that potential environmental effects within the jurisdiction of the  
5 federal government cannot be the basis of a conclusion that the Project's environmental effects—or  
6 any future coal export terminal that Plaintiffs or BNSF propose—are not mitigatable.

7 132. An order vacating any and all of the Defendants' unconstitutional and illegal  
8 decisions regarding the Project, as well as any federal, state, or local decisions relying on  
9 Defendants' unconstitutional or illegal actions.

10 133. An injunction ordering the Defendants to apply the same review standards to the  
11 Project—or any future coal export terminal that Plaintiffs or BNSF propose—that are applied to  
12 other non-coal terminal proposals.

13 134. An injunction ordering the Defendants not to deny MBT Longview's requested CWA  
14 section 401 certification or any other permit or approval for the Terminal on the basis of rail traffic,  
15 or any other potential environmental effects within the jurisdiction of the United States.

16 135. An injunction ordering the Defendants to continue processing any and all current and  
17 future MBT Longview permit applications.

18 136. An order awarding to BNSF the costs of this litigation, including attorneys' fees and  
19 expert witness fees, including those awardable under 42 U.S.C. § 1988.

20 137. Such other relief as the court deems just and proper.

21 Dated this 27th day of February, 2018.

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 27, 2018, I caused the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of the filing to all counsel of record.

DATED: February 27, 2018

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