The Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT TACOMA

LIGHTHOUSE RESOURCES INC.; LIGHTHOUSE PRODUCTS, LLC; LHR INFRASTRUCTURE, LLC; LHR COAL, LLC; and MILLENNIUM BULK TERMINALS-LONGVIEW, LLC,

Plaintiffs,

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.

Case No. 3:18-CV-05005-RJB

BNSF'S OPPOSITION TO DEFENDANTS' AND INTERVENOR-DEFENDANTS' MOTIONS FOR PARTIAL DISMISSAL AND ABSTENTION

NOTED ON MOTION CALENDAR: May 15, 2018

ORAL ARGUMENT REQUESTED

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Introduction

Defendants' and Intervenor-Defendants' Motions for Partial Dismissal and Abstention ("Motion") fail based on two structural flaws, and fail on the merits of their arguments as well. The Motions' first structural flaw involves a fundamentally incorrect use of a 12(b)(6) motion under the Federal Rules of Civil Procedure. Specifically, in their Motions, Defendants and Intervenor-Defendants ignore that facts in a complaint must be taken as true and inferences from them construed in the pleader's favor. Defendants try to brush away Plaintiffs' and BNSF's complaints: "The present suit rests on [a] false narrative . . . ."[1] But BNSF Railway Company ("BNSF") has pled, in detail, a case against Governor Inslee, Director Bellon, and Commissioner Franz based on their pretextual and illegal actions under color of state law. Defendants have rested these actions on denials and refusals to act on permits and authorizations that the Millennium Bulk Terminal project ("Terminal") needs to move forward. They insist that state law compels them to block the Terminal, but, Defendants have and continue to misuse state law to justify regulating rail; regulate interstate and international commerce; and interfere with foreign affairs. That case for vindicating Plaintiffs' and BNSF's federal rights has been pled in detail and must survive this stage of the litigation.

The Motions' second structural flaw involves Defendants' and Intervenor-Defendants' mischaracterization of this federal challenge as a collateral attack on a single coal terminal. It is not. As Plaintiffs and BNSF have pled, Defendants and Intervenor-Defendants do not want coal used anywhere in the world. Indeed, Plaintiffs and BNSF have pled facts and claims to support their theory of the case that the Defendants have targeted the coal supply chain, including rail, as part of a broader effort to stop coal use everywhere. Defendants' specific illegal actions underlying this suit are the latest in a broader effort to stop fossil fuel exports through coordinated, official action under color of state law.

The Motions also fail on their merits. First, Commissioner Franz tries to exit the case by invoking immunity she does not have. Second, Defendants and Intervenor-Defendants fail

[1] Dkt. 62 at 1.

to appreciate the fact-bound nature of an ICCTA preemption analysis. If anything, Defendants' and Intervenor-Defendants have presented disputes of fact that highlight the impropriety of their attempts to dispense with this case now. Third, regarding BNSF's federal constitutional rights, Defendants ask this Court to close the federal courtroom's doors and send the railroad to state court, but federal abstention doctrines do not apply to any of the claims in this case. Because Defendants' motion for partial dismissal and abstention fails to meet every relevant standard, this Court should deny it.

Standard of Review

A. Motion to Dismiss

When asked to dismiss a claim, courts accept a complaint's allegations as true and view them in the light most favorable to the pleader. *Soo Park v. Thompson*, 851 F.3d 910, 918 (9th Cir. 2017). Likewise, courts draw all reasonable inferences from a complaint's allegations in the pleader's favor. *Adams v. U.S. Forest Serv.*, 671 F.3d 1138, 1143 (9th Cir. 2012). If a plaintiff pleads one explanation for a case and a defendant who moves to dismiss presents another, the plaintiff's plausible complaint survives a 12(b)(6) motion. *Starr v. Baca*, 652 F.3d 1202, 1216-17 (9th Cir. 2011). "The standard at this stage of the litigation is not that plaintiff's explanation must be true or even probable. The factual allegations of the complaint need only plausibly suggest an entitlement to relief . . . enough fact to raise a reasonable expectation that discovery will reveal evidence to support the allegations." *Id.* (internal quotation marks and citation omitted).

B. Abstention

Federal courts invoke an exception, rather than follow the rule, when they abstain from exercising federal jurisdiction. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976); *Seneca Ins. Co., Inc. v. Strange Land, Inc.*, 862 F.3d 835, 841 (9th Cir. 2017). Accordingly, federal courts must determine, on a case-by-case basis, whether special circumstances justify abstention. *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964). Such special circumstances do not include the mere existence of state-court proceedings that involve similar

subject matter. *See Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 134 S. Ct. 584, 588 (2013). Neither does a state court's ability to decide similar claims count as a special circumstance that justifies abstention. *Colorado River*, 424 U.S. at 813-14. Recognizing the role of state courts "as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law." *Harman v. Forssenius*, 380 U.S. 528, 535 (1965).

Likewise, while a district court's decision to abstain from exercising federal jurisdiction is somewhat discretionary, the Ninth Circuit limits that discretion to avoid having the abstention exception swallow the rule that federal courts must exercise the jurisdiction that Congress gave them. For example, because *Pullman* abstention "is an extraordinary and narrow exception to the duty of a district court to adjudicate a controversy," the Ninth Circuit reviews a district court's decision to invoke *Pullman* abstention under a "modified" abuse of discretion standard. *Courthouse News Serv. v. Planet*, 750 F.3d 776, 783 (9th Cir. 2014) (citation omitted). A modified version of abuse of discretion entails *de novo* review of a district court's determination that "the legal requirements for abstention are satisfied." *Id.* And *Colorado River* abstention requires a similarly careful exercise of discretion – i.e., a district court must exercise its discretion within "narrow and specific" limits that the *Colorado River* doctrine requires. *Holder v. Holder*, 305 F.3d 854, 863 (9th Cir. 2002). Circumstances that justify abstention under *Colorado River* are "exceedingly rare." *Smith v. Cent. Ariz. Water Conservation Dist.*, 418 F.3d 1028, 1033 (9th Cir. 2005).

Notably, Section 1983 cases raise a strong presumption against any kind of abstention. *Tovar v. Billmeyer*, 609 F.2d 1291, 1293 (9th Cir. 1979); *UPS v. Cal. Pub. Utils. Comm'n*, 77 F.3d 1178, 1185 (9th Cir. 1996) (reaffirming *Tovar*). For one thing, State remedies supplement, but they do not supplant, federal remedies under Section 1983. *Pue v. Sillas*, 632 F.2d 74, 81 (9th Cir. 1980). And for another, "conflicting results, piecemeal litigation, and some duplication of judicial effort is the unavoidable price of preserving access to the federal relief which section 1983 assures." *Tovar*, 609 F.2d at 1293.

Facts

As to BNSF, Defendants highlight irrelevant procedural histories of state proceedings and mischaracterize those proceedings' nature, skirting allegations in this federal case that show bias and raise a reasonable expectation that BNSF will reveal further evidence through discovery to support its claims.[2] Accordingly, BNSF redirects the Court's attention to the facts that BNSF has pled; those facts which are the proper subjects of a motion to dismiss, not recitals of immaterial matters as Defendants and Intervenor-Defendants have presented in their Motions.

Defendants have long expressed their political opposition to coal.[3] They have leveraged their official positions to transform their political opposition into state action. Under color of state law, Defendants have acted with pretext to regulate rail traffic; block the flow of interstate and international commerce; and interfere with foreign affairs, all because they oppose anyone's use of a commodity that they dislike.

Defendants propped up their pretext by basing a series of denials (1) in small part, on speculative environmental and health concerns about a product that Washingtonians will not use; and (2) in large part, on a method of transportation that Defendants cannot regulate.[4] Rail is the sole transport method for coal to reach Plaintiffs' proposed terminal ("Terminal"), and Defendants have centered their misuse of state power on rail through illegal forms of permitting and preclearance.[5] Defendants' coordinated efforts, rooted in a flawed and biased environmental impact statement, contrast starkly against the State Defendants' treatment of other rail-related project that has required similar state permits and authorizations.[6] If this

[2] Long delays in receiving responses to public records requests for materials related to Defendants' actions – nearly a year in some instances – have resulted in a Washington public records lawsuit, which remains pending.
[3] Dkt. 22-1 ¶¶ 2-8, 51; Dkt. 1 ¶¶ 80-99.
[4] Dkt. 62 at 1; Dkt. 22-1 ¶¶ 5, 13-18; Dkt. 1 ¶ 3-4, 9; Dkt. 1-1 at 4-10, 12-13 (Bellon citing rail impacts to deny a federal water quality certification by misusing Washington's environmental procedure laws); Dkt. 1-2 at 10 (Franz linking Bellon's water quality certification denial, even if illegal, and rail impacts to Franz's decision to deny improvements to and sublease of aquatic lands); Dkt. 1-3 (basing shoreline related permits on biased environmental impact statement, prepared in part by co-lead agency Department of Ecology); Dkt. 1-4 (Bellon citing rail impacts as a basis for refusing to spend staff time on processing any additional coal export applications).
[5] Dkt. 22-1 ¶¶ 15, 76-77, 92 (alleging misuse of power as forms of permitting and preclearance).
[6] Dkt. 22-1 ¶¶ 31, 52-58; Dkt. 1 ¶¶ 10, 117-48.

Court does not reverse Defendants' unconstitutional and preempted actions and enjoin further ones, then pretextual, commodity-based regulation of commerce and railroads by state officials will continue in this context and extend to others.[7]

Defendants' improper Statement of Facts, however, distracts from the true nature of this case, as pled by Plaintiffs and BNSF, and as recounted above. This federal action does not challenge state regulatory decisions under state administrative law. Plaintiffs and BNSF complain here of Defendants' coordinated effort, under color of state law, to block the rail transport of coal in violation of federal law. While underlying state court proceedings comprise part of this federal action's factual basis, they do not enter this forum as an appeal to a federal court for relief from "garden variety" state and local administrative decisions. Yet, Defendants recite the procedural histories of various state proceedings that their illegal actions so far have spurred.[8]

Defendants also mischaracterize the presence of federal constitutional and preemption issues in related state proceedings. Specifically, Defendants suggest that Washington courts and agencies are now considering federal constitutional and preemption claims.[9] They are not. Rather, Plaintiffs raised those issues largely to preserve them.[10] And Director Bellon, through counsel, suggests that her federal water quality certification denial rested on two independent grounds.[11] But, a brief scan of her denial, and facts and circumstances surrounding the denial as alleged in the complaint, show that Director Bellon's flawed and inappropriate SEPA analysis tainted her denial of a federal water quality certification.[12]

Argument

Commissioner Franz has no Eleventh Amendment immunity, and the Court should not dismiss the claims against her on that basis. Federal railroad regulation broadly preempts state

[7] Dkt. 22-1 ¶ 50, 56, 58, 72.
[8] Dkt. 62 at 5-7.
[9] *Id.*
[10] Dkt. 64-8 ¶ 125 (October 24, 2017 state court complaint alleging that federal preemption and constitutional claims are "reserved for Federal District Court."); Dkt. 64-6 at 4 (Pollution Control Hearings Board Order noting federal preemption issues preserved); Dkt. 64-12 at 5 (Shoreline Hearings Board Order noting federal constitutional and preemption issues preserved).
[11] *See* Dkt. 62 at 3-4.
[12] Dkt. 1-1 at 3-13; Dkt. 22-1 ¶¶ 61-63.

action in railroad affairs, especially pretextual actions like Defendants' that discriminate against and have the effect of regulating rail transport. BNSF can find no authority that allows states, in light of ICCTA, to regulate rail transport of a single commodity as the Defendants have orchestrated here. BNSF has adequately pled its ICCTA preemption claim, which now demands a fact-intensive review through discovery and, potentially, trial. Because Defendants have failed to show otherwise, the Court should not dismiss that claim. And BNSF seeks a federal remedy for injuries to its federal constitutional rights that Defendants have caused while acting under color of state law.

By invoking two kinds of federal abstention doctrine, Defendants ask this Court to let their illegal actions slide in this forum. Defendants' call for abstention hinges, however, on this Court's ignoring the broad nature of Defendants' scheme to regulate rail and commerce in a commodity that they dislike. This Court should not abstain under any strand of the federal abstention doctrine; this case is no "garden variety" land use case that calls for a remand to state court.[13] Rather, Defendants broadly regulate interstate and international commerce in contravention of foreign affairs, and these illegal actions violate critical federal rights that call for a federal forum to reverse and enjoin them.

A. Commissioner Franz has no Eleventh Amendment immunity here.

Commissioner Franz cannot avoid suit by asserting Eleventh Amendment immunity here, because Eleventh Amendment immunity does not apply to her in this case. As an initial matter, BNSF seeks only prospective, equitable relief from Washington State officials in their official capacity, including Commissioner of Public Lands, Hilary Franz. Accordingly, Defendants' discussion about the State's own Eleventh Amendment immunity is irrelevant for purposes of deciding whether Commissioner Franz, in her official capacity, enjoys Eleventh Amendment immunity as well.[14]

[13] *Contra* Dkt. 62 at 1; Dkt. 63 at 9.

[14] *See* Dkt. 62 at 8-9. Defendants' references to *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984) are also irrelevant, because the officials are the real parties in interest, not the State. *See* Dkt. 22-1 ¶¶ 2-7, 9, 13-14, 18, 46-55, 69-73;Dkt. 1 ¶¶ 80-116.

The *Ex parte Young* doctrine generally prevents state officials from asserting Eleventh Amendment immunity in cases like this–i.e., a case in federal court against state officials who violate federal law.[15] The Supreme Court has long accepted the *Ex parte Young* doctrine "as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to the supreme authority of the United States." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (quotation marks and citation omitted). To determine whether *Ex parte Young* applies, "a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 645 (2002) (quotation marks and citation omitted). BNSF's complaint meets the *Verizon* standard, because it alleges ongoing violations of federal law and seeks prospective relief – declaratory judgments and injunctions.[16]

Yet, Commissioner Franz attempts to invoke a narrow exception to *Ex parte Young*, which the Supreme Court announced in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997). Commissioner Franz characterizes this lawsuit as an attempt to prevent her from "exercising her authority over state-owned aquatic lands" that would implicate "the exact issues" in *Coeur d'Alene* and two other cases that Commissioner Franz cites.[17] Not so.

In *Coeur d'Alene*, a tribe asked for injunctive and declaratory relief that was "close to the functional equivalent of quiet title in that substantially all benefits of ownership and control would shift from the State to the Tribe." 521 U.S. at 281. The Supreme Court highlighted that the case was "unusual" in that respect. *Id.* More than the typical stakes of a quiet title action, however, the relief that the tribe sought would also remove the lands from the state's regulatory jurisdiction entirely. *Id.* at 282. "Under these particular and special circumstances, we find [*Ex parte Young*] inapplicable." *Id.* at 287.

[15] Dkt. 62 at 8 (acknowledging *Ex parte Young* doctrine).
[16] Dkt. 22-1 ¶¶ 91-135; *Los Angeles Cty., Cal. v. Humphries*, 562 U.S. 29, 31 (2010)(characterizing declaratory judgments and injunctions as prospective relief).
[17] Dkt. 62 at 10.

The Ninth Circuit confirmed the peculiar nature of *Coeur d'Alene* in another case that Commissioner Franz cites incorrectly for support. In *Lacano Investments, LLC v. Balash*, land patent owners sued Alaskan public officials and requested declaratory and injunctive relief. 765 F.3d 1068 (9th Cir. 2014). Specifically, the land patent owners sought a declaratory judgment that the state officials' navigability determinations, which implied that the officials asserted state ownership of the lands subject to land patents, violated a federal statute. *Id.* at 1070-71. The land patent owners also sought an injunction to prohibit the Alaskan officials from asserting ownership of the submerged lands. *Id.* Just as the Supreme Court in *Coeur d'Alene* looked to see whether that suit amounted to a quiet title action over state lands, the Ninth Circuit did the same in *Lacano*: "The approach we take instead is functional: we compare the relief sought by Plaintiffs to a quiet title action, and dismiss because it was close to the functional equivalent of such an action." *Lacano*, 765 F.3d at 1074 (internal quotation marks omitted).

Unlike the Supreme Court and the Ninth Circuit, Commissioner Franz ignores the uniqueness of *Coeur d'Alene* and urges this Court to stretch that case's narrow exception to the *Ex parte Young* doctrine beyond the exception's bounds: "As with the facts of Coeur d'Alene Tribe, Millennium is seeking declaratory and injunctive relief that would prevent Commissioner Franz from exercising her authority over state-owned aquatic lands"[18] But, neither Plaintiffs' nor BNSF's claims amount to the functional equivalent of a quiet title action. Neither Plaintiffs nor BNSF ask this Court to restrict Commissioner Franz's discretion over aquatic lands any more than the subleasing provision of the lease between Commissioner Franz's agency and Northwest Alloys does – i.e., a sublease of that land "shall not be unreasonably conditioned or withheld."[19]

[18] Dkt. 62 at 9-10.

[19] *See* Dkt. 64-1 at 14-55 of PDF (2008 aquatic lands lease between Washington Department of Natural Resources and Northwest Alloys). And, by definition, a sublessor, unlike any of the parties in *Coeur d'Alene* or *Lacano*, would take only a leasehold to the land, subject to whatever conditions apply - *see* Dkt. 64-1 at 32-34 of PDF (Section 9 of lease, describing terms and conditions of subletting) – not title. *Allen v. Migliavacca Realty Co.*, 74 Wash. 347, 351 (1913) ("That a tenant is usually estopped to deny his landlord's title . . . is law so familiar as to require no citation of authority.").

Rather, Plaintiffs and BNSF have alleged that Commissioner Franz, acting under color of state law, violates federal law by unreasonably withholding a sublease with pretext to stop the Terminal. Those allegations do not present the functional equivalent of a quiet title action. And neither does any discretion by the State over sublease transfers extend to denials based on unconstitutional motives or actions, as they are here. Accordingly, the narrow *Coeur d'Alene* exception to the *Ex parte Young* doctrine does not apply here, and Commissioner Franz cannot invoke it. The Court should not dismiss the claims against her on Eleventh Amendment immunity grounds.

B. Defendants' illegal actions and inactions are preempted.

1. Federal law broadly preempts state and local regulation of rail transport.

Federal courts have long observed that "[r]ailroading . . . is historically the subject of federal regulation, so any state regulation affecting it raises the question of preemption." *New York Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 242 (3d Cir. 2007). Congress originally displaced nearly all state regulation over railroading when it passed the Interstate Commerce Act: "The Interstate Commerce Act . . . has been recognized as 'among the most pervasive and comprehensive of federal regulatory schemes.'" *City of Auburn v. U.S. Gov't*, 154 F.3d 1025, 1029 (9th Cir. 1998) (quoting *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981)). Notwithstanding that backdrop of broad federal preemption of railroad regulation, Congress passed the Interstate Commerce Commission Termination Act ("ICCTA") in 1995, which "explicitly expanded" the scope of federal regulation of railroading. *Fayus Enters. v. BNSF Ry. Co.*, 602 F.3d 444, 450 (D.C. Cir. 2010).

Among other things, ICCTA replaced the Interstate Commerce Commission with the Surface Transportation Board ("STB"). ICCTA preempts activities within the STB's jurisdiction. *Oregon Coast Scenic R.R., LLC v. Oregon Dep't of State Lands*, 841 F.3d 1069, 1072 (9th Cir. 2016). The STB's jurisdiction is broad.[20] The Ninth Circuit has had difficulty

[20] The STB has jurisdiction over, among other things, "transportation by rail carrier that is [ ] only by railroad; or [ ] by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment." 49 U.S.C. § 10501(a). That applies to transportation in the United States between a place in, as relevant here, "a State and a place in the same or another State as part of the interstate rail

imagining "a broader statement of Congress's intent to preempt state regulatory authority over railroad operations" than ICCTA's preemption provisions and their application by the STB. *Oregon Coast Scenic R.R.*, 841 F.3d at 1076 (quoting *City of Auburn*, 154 F.3d at 1030).

The Ninth Circuit has concluded that ICCTA can preempt a wide variety of state or local government actions, depending on surrounding facts and circumstances. For example, in *Oregon Coast*, ICCTA preempted a state land agency's permitting scheme for a track repair contractor's failure to get a permit to remove fill from waters within protected fish habitat. 841 F.3d at 1077. And in *City of Auburn*, ICCTA preempted a local government's ability to review the environmental impact of proposed railroad operations in Washington. 154 F.3d 1025, 1028, 1033. While ICCTA does not preempt state and local laws that have a "remote or incidental effect on rail transportation," *New York Susquehanna*, 500 F.3d at 252 (citation omitted),[21] the Ninth Circuit has held that ICCTA does preempt "all state laws that may reasonably be said to have the effect of managing or governing rail transportation." *Ass'n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010) ("*AAR*") (citation omitted).[22] Similarly, for the STB, "the touchstone is whether the state regulation imposes an unreasonable burden on railroading." *New York Susquehanna*, 500 F.3d at 253. "What matters," when drawing that line, "is the degree to which the challenged regulation burdens rail transportation." *AAR* at 1097-98.

Even the most "pedestrian" of state or local regulations cannot be applied if they "discriminate against" or "unreasonably prevent, delay, or interfere" with railroad operations. *Id*. To avoid ICCTA preemption, state or local regulatory efforts "must address state concerns generally, without targeting the railroad industry" to avoid discriminating against railroad

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network." *Id*. The STB has exclusive jurisdiction over "transportation by rail carriers" and the "operation . . . of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State." 49 U.S.C. § 10501(b). Similarly, except in circumstances not relevant here, remedies under ICCTA "with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." *Id.*

[21] For example, "the Board has explained that uniform building, plumbing, and electrical codes generally are not preempted because they do not unreasonably interfere with railroad operations." *New York Susquehanna*, 500 F.3d at 253.

[22] *AAR* preempted state air quality laws that required train emission reductions. 622 F.3d at 1098.

operations. *Id.* at 254. Further, state regulatory efforts must be "settled and definite enough to avoid open-ended delays" such that the "state cannot easily use them as a pretext for interfering with or curtailing rail service." *Id.* The STB has previously chastised Washington cities for using land use laws as pretext to regulate environmental impacts associated with rail operations. *Cities of Auburn & Kent, Wa-Petition for Declaratory Order-Burlington N. R.R. Co.-Stampede Pass Line,* 2 S.T.B. 330 (1997) ("We do not appreciate having to devote substantial effort to thwarting [BNSF's] plans but [the cities'] actions leave little other choice."). Likewise, the STB has said that "any form of state or local permitting or preclearance that, by its nature, could be used to deny a railroad the ability to conduct some part of its operations" is prohibited. *CSX Transportation, Inc.--Petition for Declaratory Order*, FIN 34662, 2005 WL 1024490, at *2 (S.T.B. May 3, 2005). Despite this rich body of federal law that establishes ICCTA's broad preemptive effect, Defendants try to brush aside Plaintiffs' and BNSF's ICCTA preemption claim in an off-the-mark motion to dismiss.[23]

2. Defendants' and Intervenor-Defendants' arguments for dismissing BNSF's ICCTA preemption claim miss their mark.

Defendants' motion mischaracterizes the Terminal as the sole object of Defendants' illegal actions and inaction.[24] But this case is not about a single permit or a single project. Certainly, Defendants do not want the Terminal project to move forward, because they dislike what commodities would flow through it and be used in other parts of the world. The nub of Defendants' scheme to stop the Terminal project is to stop interstate flow of coal export by rail transport, which here would be the only way to move the coal from source to the Terminal.[25] Defendants ignore this core aspect of the case here.

Defendants argue that ICCTA preemption does not apply here based on an unremarkable statement on rail carrier status: "Although BNSF is a rail carrier, BNSF has made it clear that the BNSF rail system is not part of the Project and no permits are required of

[23] Intervenor-defendants' assertion that ICCTA preemption has limited scope is untenable. Dkt. 63 at 7.
[24] Dkt. 62 at 10-12.
[25] Dkt. 22-1 ¶¶ 15, 85.

BNSF for this Project."[26] Defendants nowhere explain that statement's legal significance to BNSF's ICCTA preemption claim. Intervenor-Defendants add little to illuminate that statement, because their arguments characterize the officials' actions at issue here as extending only to the Terminal, which has not yet been built and cannot be built until Defendants' illegal actions are reversed.[27] But, as described in detail below, Defendants' actions and inactions are not limited in this way. Moreover, the uncontested fact that BNSF's rail system is not part of the Project and that no permits are required of BNSF for the Project underscores, rather than undermines, BNSF's allegations regarding the illegal and discriminatory manner in which Defendants have applied state environmental laws towards BNSF's railroad operations.[28] Defendants' actions are based in large part on alleged impacts from BNSF's rail system well outside the Project area.[29] Even if BNSF were required under federal law to obtain permits for such activity, and it is not, Defendants' discriminatory actions towards railroad operations would invade the STB's exclusive jurisdiction, and would be preempted under that circumstance as well. Defendants cannot escape the same result here – and certainly not at the 12(b)(6) stage – by justifying their actions, which have the "effect of managing or governing rail transportation," *AAR*, 622 F.3d at 1097, on the basis that no permits were required of BNSF.

Defendants' discrimination against and unreasonable interference with railroad operations arises from their various degrees of reliance on so-called rail impacts, including alleged increased number of cancers, noise, traffic waits, and more as "significant unavoidable adverse impacts" to reject the Terminal. Indeed, the federal government has declined to connect rail and the Terminal in such a way that the Terminal must wait on the railroad to act before the Terminal may proceed.[30] Yet alleged rail impacts that have influenced the

[26] Dkt. 62 at 11 (quoting BNSF's complaint in intervention).
[27] Dkt. 63 at 3-6.
[28] *See e.g.*, Dkt. 22-1 ¶ 49 (The U.S. Army Corps of Engineers declining to expand its own environmental review of the Project to include non-Project rail activities, noting that federal oversight of existing rail lines is limited to Federal Railroad Association authority over rail safety and that if transportation of coal requires new rail lines, the Surface Transportation Board would be responsible for approving those lines).
[29] *See* Dkt. 22-1 ¶¶ 48. 58, 59, 70.
[30] Dkt. 62 at 1; Dkt. 22-1 ¶¶ 5, 13-18; Dkt. 1 ¶ 3-4, 9; Dkt. 1-1 at 4-10, 12-13 (Director Bellon citing rail impacts to deny a federal water quality certification by misusing Washington's environmental procedure laws); Dkt. 1-2 at

defendants essentially require BNSF to act before Plaintiffs can receive relevant permissions, licenses, and so forth for their Terminal. By effectively conditioning the Terminal's operation, indeed existence, on BNSF's actions or inaction, Defendants necessarily regulate rail operations, including transportation, by a rail carrier. Moreover, by blocking the Terminal based on alleged rail impacts that only the railroad could mitigate, BNSF – without a chance to do anything Defendants would require it to do – loses both business that the Terminal would create and certainty for future rail transport-dependent projects where politically disfavored commodities are involved. ICCTA forbids these forms of permitting and preclearance as discrimination against and unreasonable interference with rail operations. *CSX Transportation, Inc.–Petition for Declaratory Order*, 2005 WL 1024490, at *2; *New York Susquehanna*, 500 F.3d at 253. Any non-rail-related impacts that Defendants have used as further pretext to block the Terminal do not erase the rail impacts they do regulate through their illegal actions and inaction.[31]

BNSF is a rail carrier with rights under ICCTA.[32] The non-controlling authorities that Defendants cite do not help their argument that the Terminal's ownership controls the outcome under this challenge,[33] including one heavily cited STB decision.[34] For one thing, none of the claims at issue in the authorities that Defendants and Intervenor-Defendants cite hinge on the same nature of conduct here – i.e., a coordinated effort of state officials to block, under color of state law, coal transport (here, by rail) in interstate commerce with the aim to regulate coal use anywhere in the world.

Even if decisions like *Valero* were relevant here, the *Valero* decision intentionally distinguished itself from other authorities that the non-rail carrier petitioner cited in that case.

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10 (Franz linking Bellon's water quality certification denial, even if illegal, and rail impacts to Commissioner Franz's decision to deny improvements to and sublease of aquatic lands); Dkt. 1-3 (basing shoreline related permits on biased environmental impact statement, prepared in part by co-lead agency Department of Ecology); Dkt. 1-4 (Director Bellon citing rail impacts as a basis for refusing to spend staff time on processing any additional coal export applications).

[31] *Compare* Dkt. 62 at 13.

[32] Dkt. 22-1 ¶ 91; 49 U.S.C. § 10102(5).

[33] Dkt. 62 at 11-12.

[34] Dkt. 62 at 12-13 (citing *Valero Ref. Company Petition for Declaratory Order*, FD 36036, 2016 WL 5904757 (S.T.B. Sept. 20, 2016)); Dkt. 63 at 6.

The STB based its distinction on the entity's status as a non-rail carrier. *Valero*, 2016 WL 5904757, at *4. In addition, the city that denied a permit based, in part, on rail impacts asked the STB whether it could impose approval conditions on the non-rail carrier to mitigate indirect, project-related impacts caused by rail transport that would deliver the non-rail carrier's commodity. *Id.* Reciting much of the same authority BNSF describes above to describe the preemptive scope of ICCTA, the STB stated: "If the offloading facility were eventually to be constructed but the [environmental impact report] or the land use permit, or both, included mitigation conditions unreasonably interfering with [the railroad's] future operations to the facility," then ICCTA would preempt any related enforcement measures. *Id.* The STB did not hold, as Defendants suggest, that states may, as a matter of law, deny non-rail carrier permit applications because ICCTA does not preempt such denials.

Here, Defendants' actions and inaction show that the state intends to regulate the flow of coal in commerce, including the rail system that carries it. Accordingly, BNSF's case is more akin to the latter aspect of *Valero*, because Defendants' coordination over illegal actions under color of state law, including decisions that rely on the FEIS, land use matters, and sublease transfer denials, effectively manages or governs rail transportation by, among other things, limiting the number of trains allowed on BNSF rail lines.[35] Even if *Valero*'s rationale applied to this case, following that rationale would compel the conclusion that ICCTA preempts Defendants' actions and inaction as applied, even if indirectly, against BNSF's rail operations. Plaintiffs and BNSF have pled that case, and they are entitled to prove it.

3. Defendants' and Intervenor-Defendants' Motions are inappropriate.

Defendants' attempt to dismiss BNSF's ICCTA preemption claim at the pleading stage is premature. While BNSF incorporated much of Plaintiffs' factual background into its complaint,[36] BNSF added, among others, factual allegations related to its history as a rail

[35] *See e.g.*, Dkt. 1-1 at 9 ("At full build out of the Project, 16 trains a day (8 loaded and 8 empty) would be added to existing rail traffic. Three segments on the BNSF main line routes in Washington (Idaho/Washington State Line-Spokane, Spokane-Pasco, and Pasco-Vancouver) are projected to exceed capacity with the current projected baseline rail traffic in 2028. Adding the 16 additional Millennium-related trains would contribute to these three segments exceeding capacity by 2028. . . . This impact is inconsistent with . . . substantive SEPA policies.")

[36] Dkt. 22-1 ¶ 31.

carrier and its interest in the Terminal.[37] Moreover, BNSF has alleged that Defendants' actions and inaction related (but not isolated) to the Terminal (1) are forms of permitting or preclearance that are being used to deny, limit, or condition BNSF's ability to provide common carrier service to Plaintiff Lighthouse and its subsidiaries; (2) 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; and (3) have the effect of managing or governing rail transportation.[38] Further, the STB consistently rejects forms of state and local permitting or preclearance, particularly where official actions act as pretext for rail regulation. *Cities of Auburn & Kent, Wa-Petition for Declaratory Order-Burlington N. R.R. Co.-Stampede Pass Line*, 2 S.T.B. 330 (1997) ("We do not appreciate having to devote substantial effort to thwarting [BNSF's] plans but [the cities'] actions leave little other choice.").

The factual allegations in BNSF's complaint must be taken as true, and all reasonable inferences from those allegations drawn in BNSF's favor highlight "enough fact to raise a reasonable expectation that discovery will reveal evidence to support" BNSF's claims in this regard. *Starr v. Baca*, 652 F.3d at 1216-17 (citation omitted). Indeed, for ICCTA preemption cases especially, a fact-intensive inquiry is required. "For state or local actions that are not facially preempted, [ICCTA's] preemption analysis requires a factual assessment of whether that action would have the effect of preventing or unreasonably interfering with railroad transportation." *CSX Transportation, Inc.*–Petition for Declaratory Order, FIN 34662, 2005 WL 1024490, at *3 (May 3, 2005). In *New York Susquehanna*, the Third Circuit vacated a district court's blanket injunction against state regulations, stating that railroad regulation and ICCTA preemption analysis "admits of . . . nuance" and demands "a more detailed inquiry" than the district court there had allowed. 500 F.3d at 257. In *Dakota, Minn. & E. R.R. Corp. v. S. Dakota*, the District of South Dakota concluded, after hearing testimony and taking other evidence, that a state eminent domain law posed "an insurmountable barrier" to a rail-related

[37] Dkt. 22-1 ¶¶ 32-35, 43-45.
[38] Dkt. 22-1 ¶¶ 92-94.

project based on the law's *effect* on financing feasibility. 236 F. Supp. 2d 989, 1006-08 (D.S.D. 2002) *vacated in part on other grounds*, 362 F.3d 512 (8th Cir. 2004). And several other STB decisions have, in sum, concluded that an ICCTA preemption analysis is fact-bound:

> Of course, whether a particular Federal environmental statute, local land use restriction, or other local regulation is being applied so as to not unduly restrict the railroad from conducting its operations, or unreasonably burden interstate commerce, is a fact-bound question. Accordingly, individual situations need to be reviewed individually to determine the impact of the contemplated action on interstate commerce and whether the statute or regulation is being applied in a discriminatory manner, or being used as a pretext for frustrating or preventing a particular activity, in which case the application of the statute or regulation would be preempted.

Joint Pet. for Decl. Order--Boston & Maine Corp. & Town of Ayer, MA, STB Finance Docket No. 33971, 5 S.T.B. 500 (2001), *aff'd sub nom., Boston & Maine Corp. v. Town of Ayer*, 191 F. Supp. 2d 257 (D. Mass. 2002). *See also Borough of Riverdale–Petition for Declar. Order–The New York Susquehanna & W. Ry.*, STB Finance Docket No. 33466 (STB served Sept. 10, 1999).

BNSF's ICCTA preemption claim is well-pled, and it should survive Defendants' and Intervenor-Defendants' motion to dismiss on that ground alone. The nature of the ICCTA preemption analysis, however, disfavors claim dismissals at the 12(b)(6) stage. This is especially true where, as here, state actions, rooted in pretext, are forms of permitting or preclearance that have the effect of regulating, conditioning, or restricting rail operations. BNSF's well-pled ICCTA preemption claim demands a fuller investigation through careful discovery. This Court should deny Defendant's and Intervenor-Defendants' motions to dismiss it.[39]

[39] Intervenor-Defendants entirely ignore the fact-bound nature of ICCTA preemption claims against direct and indirect regulation of a rail carrier, citing decisions without any regard to the fact-intensive analysis that applies to the sort of claims that BNSF raises here. Dkt. 63 at 8.

C. BNSF's dormant commerce clause and foreign affairs claims need to be heard now. No extraordinary circumstance calls for abstention. To invoke it here would skirt the strong presumption against preemption in Section 1983 cases

BNSF's suit is not, as Defendants frame it, a challenge to four discrete state and local decisions, most of which BNSF is not a party to. Rather, as its complaint shows, BNSF's suit challenges Defendants' broader scheme to regulate, under color of state law, interstate and international commerce and foreign affairs. The four state decisions that Defendants isolate in their request for abstention are decisions that have most recently required Plaintiffs to act in state forums to preserve whatever state remedies they might have.

But state remedies supplement, not supplant, federal remedies under Section 1983. *Pue v. Sillas*, 632 F.2d 74, 81 (9th Cir. 1980). So, while Plaintiffs are forced to initiate state proceedings to preserve state remedies to Defendants' most recent illegal actions under state law, Plaintiffs and BNSF have come to federal court to seek supplemental federal remedies associated with the larger federal interests that Defendants' broader scheme implicates – commerce clause violations and, for BNSF, illegal interference with foreign affairs. In particular, "[t]he Commerce Clause prohibits states from balkanizing into separate economic units." *Harper v. Pub. Serv. Comm'n of W.Va.*, 396 F.3d 348, 356 (4th Cir. 2005). Remedying Defendants' violations of this nature and magnitude drove this case to federal court.

Accordingly, BNSF has more accurately described the nature of its federal suit in terms that show why any form of abstention is unwarranted, particularly where Defendants have failed to address, let alone overcome, the strong presumption against abstention that applies to BNSF's Section 1983 action.[40] *Tovar*, 609 F.2d at 1293. *UPS*, 77 F.3d at 1185 (reaffirming *Tovar*). Nevertheless, BNSF will, against this backdrop, address Defendants' alternative calls for *Pullman* and *Colorado River* abstention.

1. *Pullman* abstention is unwarranted.

Defendants' begin their call for *Pullman* abstention on a flat note. In *Harris County*, the Supreme Court demanded *Pullman* abstention because that case could be resolved on

[40] Because Defendants have ignored the principle entirely, they cannot address it in their reply brief. *Graves v. Arpaio*, 623 F.3d 1043, 1048 (9th Cir. 2010).

unsettled questions of state constitutional law. *Harris Cty. Comm'rs Court v. Moore*, 420 U.S. 77, 81, 84-85 (1975). BNSF's claims cannot be resolved based on any unsettled state law, let alone state constitutional law. Any state law that Defendants have violated is not necessarily unsettled for abstention purposes; for example, they have not shown any gap in precedent or uncertain application of state statute that resolve or guide the answer to any issue in this federal litigation. Indeed, Plaintiffs have sought to preserve state remedies through straightforward challenges according to state administrative law and procedure.[41] Similarly, BNSF's federal suit does not depend on any unsettled questions of Washington's law for reviewing state agency action.

Defendants address *Pullman*'s first requirement by contending that land use planning and the application of environmental law touch sensitive areas of social policy.[42] Yet, the authorities that Defendants cite for support involve federal challenges to land use or environmental laws only.[43] As BNSF has alleged in its complaint and described above, Defendants have acted under color of state law, and misused their power under state law, to regulate interstate and international commerce and to interfere with foreign affairs through a coordinated scheme.[44] Defendants have influenced land use and environmental decisions as pretext to advance their political cause against a commodity they do not like. Federal authorities do not tolerate this when ICCTA preemption is at issue.[45] No principled distinction supports Defendants' pretextual use of land use and environmental laws to satisfy *Pullman*'s first requirement either.

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[41] Dkt. 64-1 (Millennium's petition for judicial review of Commissioner of Public Lands decision, now pending appeal in the Washington Court of Appeals); Dkt. 64-5 (Millennium's notice of appeal of Ecology water quality certification denial to the Washington State Pollution Control Hearings Board, currently set for hearing in Fall 2018); Dkt. 64-8 (Millennium's petition for judicial review of Ecology water quality certification denial, which has been dismissed and, effectively, consolidated with its Pollution Control Hearings Board appeal of the same decision); Dkt. 64-10 (Millennium's Notice of Appeal to the Washington Court of Appeals of a non-merits decision by Cowlitz County Superior Court); Dkt. 64-11 (Millennium's petition for review to the Washington State Shoreline Hearings Board, in which the Board has denied Millennium's motion for summary judgment).

[42] Dkt. 62 at 17-18.

[43] *Id.* at 17.

[44] Dkt. 22-1 ¶¶ 100-126.

[45] *Cities of Auburn & Kent, Wa-Petition for Declaratory Order-Burlington N. R.R. Co.-Stampede Pass Line*, 2 S.T.B. 330 (1997) ("We do not appreciate having to devote substantial effort to thwarting [BNSF's] plans but [the cities'] actions leave little other choice.").

Defendants contend that BNSF's federal constitutional claims would be mooted or presented in a different posture, depending on the state proceedings' resolution.[46] Consistent with their argument addressing *Pullman*'s first requirement, Defendants isolate the current state law proceedings from one another and fail to address the broader allegations of commerce clause and foreign affairs doctrine violations. Defendants have enjoyed a years-long delay of the Terminal by pretextually denying one permit or authorization after another,[47] violating federal constitutional law as BNSF has alleged. If one of the underlying state proceedings falls away, the nature of BNSF's federal constitutional challenges does not change. In that regard, Defendants ignore those challenges as pled and urge the Court to do the same by invoking *Pullman* abstention. That, however, would promote the "delays inherent in the abstention process and the danger that valuable federal rights might be lost in the absence of expeditious adjudication in the federal court." *Harris Cty. Comm'rs Court*, 420 U.S. at 83. Defendants seek to hide their unconstitutional conduct by forcing Plaintiffs to play "whack-a-mole" with the state court and administrative proceedings. A change in the state court proceedings would not change the nature of the federal challenges that BNSF has pled. Defendants have failed to satisfy the second *Pullman* requirement.

Finally, Defendants conjure an odd, self-serving characterization of state law uncertainty to satisfy the third *Pullman* requirement. Specifically, they state, without explaining how, that state law issues are "novel enough" that this Court cannot predict how the state proceedings will turn out.[48] But as BNSF has explained above, none of the state administrative, environmental, land use or other laws appear uncertain. Further, none of the state proceedings challenge the constitutionality of a particular provision of state law.

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[46] Dkt. 62 at 18.

[47] Defendants' cite *Rancho Palos Verdes Corp. v. City of Laguna Beach*, 547 F.2d 1092 (9th Cir. 1976) for support. While the Ninth Circuit invoked *Pullman* abstention in that Section 1983 action that involved a federal conspiracy case, *Rancho Palos* preceded *Tovar v. Billmeyer*, 609 F.2d 1291, 1293 (9th Cir. 1979), which announced a strong presumption against preemption in Section 1983 cases. The Ninth Circuit has reaffirmed *Tovar*. *UPS v. Cal. Pub. Utils. Comm'n*, 77 F.3d 1178 (9th Cir. 1996). Defendants also fail to discuss the strong presumption against preemption in Section 1983 cases. Further, the federal conspiracy case in *Rancho Palos* was bound up with state contract and constitutional claims, unlike the nature of BNSF's federal constitutional claims here.

[48] Dkt. 62 at 19-20.

Defendants have actions under state law have been challenged in state forums. Here, however, Defendants' scheme to block the Terminal regulates interstate and international commerce and interferes with foreign affairs. Any novelty to Defendants' application of state laws stems from their acting, under color of state law, to regulate interstate and international commerce and interfere with foreign affairs in violation of BNSF's federal constitutional rights. This is precisely the sort of injury for which Section 1983 provides a supplementary federal remedy. *Pue v. Sillas*, 632 F.2d 74, 81 (9th Cir. 1980). This Court should reject Defendants' attempt to turn Section 1983 on its head as a self-serving way to satisfy *Pullman*'s third requirement.

All three *Pullman* requirements must be met before this Court can invoke that doctrine. Defendants have failed to show that any of them are satisfied. This Court cannot abstain from deciding this case under *Pullman*.

2. *Colorado River* abstention is unwarranted.

Circumstances that justify abstention under *Colorado River* are "exceedingly rare." *Smith v. Cent. Ariz. Water Conservation Dist.*, 418 F.3d 1028, 1033 (9th Cir. 2005). A district court may exercise only "narrow and specific" discretion when determining whether to invoke this "exceedingly rare" justification to decline to hear a case. *Holder v. Holder*, 305 F.3d 854, 863 (9th Cir. 2002). As Defendants describe, a court must weigh eight factors when deciding whether to exercise its "narrow and specific" discretion and invoke *Colorado River*. Defendants concede that the first two of the eight *Colorado River* factors do not apply here and do not need to be considered.[49] Accordingly, BNSF does not address them. Defendants incorrectly apply the remaining factors.

First, Defendants accuse Plaintiffs of forum shopping (*Colorado River* factor 7), asserting that it has a "unique flavor" and that Plaintiffs "fling their claims across as many forums as possible in the hopes of finding a single sympathetic one."[50] This accusation is innately incorrect. Defendants fault Plaintiffs for pursuing and preserving state remedies that *must* be sought in different state forums. Plaintiffs could not, for example, fold an appeal of

[49] Dkt. 62 at 20 n.8.
[50] Dkt. 62 at 24.

Commissioner Franz's illegal state lands decisions into its appeal of Ecology's water quality certification denial at the Pollution Control Hearings Board. But both are part of Defendants' broader scheme to stop the Terminal and regulate rail to accomplish their aims. And the federal remedy that Plaintiffs seek here supplements the state remedies that Millennium seeks. *Pue v. Sillas*, 632 F.2d 74, 81 (9th Cir. 1980). Further, other principal Plaintiffs and BNSF cannot be forum shopping, because they are not the principal injured parties in the state proceedings. Because no plaintiff is forum shopping, this factor weighs against invoking *Colorado River* abstention.

Second, regarding whether federal or state law provides the rule of decision on the merits (*Colorado River* factor 5), Defendants contend that because Washington state courts can decide the federal constitutional claims asserted here, "this factor does not weigh against abstention,"[51] because "[i]f the state and federal courts have concurrent jurisdiction over the federal claims, this factor becomes less significant." *Nakash v. Marciano*, 882 F.2d 1411, 1416 (9th Cir. 1989).[52] Defendants' logic does not follow from the authority they cite – i.e., a "less significant" factor does not imply a "zero weight" factor. And "[a]ny doubt as to whether a factor exists should be resolved against a stay." *R.R. St. & Co. v. Transp. Ins. Co.*, 656 F.3d 966, 979 (9th Cir. 2011) (citation omitted). Accordingly, this factor also weighs against invoking *Colorado River* abstention.

Third, the piecemeal litigation factor (*Colorado River* factor 3) also weighs against invoking *Colorado River* abstention. The "mere possibility" of piecemeal litigation does not weigh in favor of *Colorado River* abstention. *Id.* Instead, a "special concern" about piecemeal litigation that a stay or dismissal can fix must be present. *Id.* Defendants claim a "highly interdependent" relationship between this case and the state proceedings,[53] but "[m]ultiple defendants, claims, and cross-claims are routine" and do not alone weigh in favor of abstention, even in traditionally state-centric cases, like tort and insurance disputes. *Strange*

[51] Dkt. 62 at 23.
[52] *Id.*
[53] *Id.* at 22.

Land, 862 F.3d at 843. Defendants' claim that this federal case and related state proceedings are "highly interdependent" cannot, alone, justify abstention. Absent a special concern, such as a "clear federal policy" against piecemeal litigation in a particular area of the law, this factor generally does not support abstention. This is especially true in Section 1983 actions, where "conflicting results, piecemeal litigation, and some duplication of judicial effort is the unavoidable price of preserving access to the federal relief which section 1983 assures." *Tovar*, 609 F.2d at 1293. And Defendants, acting under color of state law, have driven this unavoidable price upward, because nothing in the possible outcomes of the state proceedings will prevent them from continuing to pursue their policy of opposition to coal exports.[54] Only a federal remedy can protect Plaintiffs and BNSF from Defendants' illegal regulation of interstate and international commerce and interference with foreign affairs. This factor weighs against invoking *Colorado River* abstention.

Fourth, the order of jurisdiction factor (*Colorado River* factor 4) weighs against invoking *Colorado River* abstention. Federal courts must apply this factor "in a pragmatic, flexible manner with a view to the realities of the case at hand." *R.R Street*, 656 F.3d at 980. They may not "simply to compare filing dates," but instead must "analyze the progress made in each case." *Strange Land*, 862 F.3d at 843. Defendants pay lip service to these aspects of this *Colorado River* factor,[55] but Defendants' contentions are nevertheless outdated and misplaced. The water quality certification denial proceedings have consolidated into the Pollution Control Hearings Board. The state court did not rule on the merits there, let alone resolve any "foundational legal claims." *Id*. Nor did the state court in that proceeding find any facts that would affect this case. The sublease denial case is the only proceeding to have a ruling on the merits in state court. Further, BNSF intervened in only one of the state proceedings, the shorelines permits denial proceeding before the Shorelines Hearings Board; for practical purposes, this Court is first to have jurisdiction over BNSF's claims. A pragmatic,

[54] *See, e.g.*, Dkt. 1-4 (Bellon refusing to process future permit applications for the Terminal).
[55] Dkt. 62 at 22-23.

flexible look at this factor shows that it weighs against invoking *Colorado River* abstention to avoid deciding BNSF's federal constitutional claims.

Fifth, the adequacy of a state forum factor (*Colorado River* factor 6) is, at most, neutral. Defendants simply misunderstand how courts weigh this factor. Specifically, Defendants contend that a state court is an adequate forum to protect federal constitutional claims because it can hear them, and so this factor weighs in favor of abstention.[56] However, while "inadequacy of the state forum . . . may preclude abstention, the alternative[i.e., adequacy of a state forum] never compel[s] abstention." *Strange Land*, 862 F.3d at 845. This factor is, at most, neutral, because it does not provide "the clearest of justifications" for why this Court should decline to hear this case. *Id.*

Sixth, the "parallelism" factor (*Colorado River* factor 8) requires courts to examine whether state proceedings will resolve the federal action. When comparing the federal action to the state proceedings, courts must consider first whether claims in parallel proceedings are "substantially similar" claims. *Id.* Even then, "parallelism" is necessary, but not sufficient, for this factor to weigh in favor of abstention. *Id.* Like the effect of the "adequacy of the state forum" factor, the "parallelism" factor only works one way: insufficient parallelism may preclude abstention, but the alternative never compels it. *Id.* Defendants mischaracterize this federal case as a mere "spin-off" of various underlying state proceedings.[57] Incredibly, Defendants cite the *preservation* of federal claims as creating substantial similarity of claims between the state proceedings and this federal case.[58] Yet, Defendants cite no authority where preservation of claims amounted to "substantially similar" claims between state and federal proceedings. Because Millennium merely preserved its federal claims in the state proceedings,

[56] Dkt. 62 at 21-22.
[57] Dkt. 62 at 21.
[58] Dkt. 64-8 ¶ 125 (October 24, 2017 state court complaint alleging that federal preemption and constitutional claims are "reserved for Federal District Court."); Dkt. 64-6 at 5 (December 1, 2017 Pollution Control Hearings Board Order noting federal preemption issues preserved); Dkt. 64-12 (Shoreline Hearings Board Order noting federal constitutional and preemption issues preserved).

and because BNSF has not raised them anywhere, this factor weighs against invoking *Colorado River* abstention.[59]

This Court should decline to invoke *Colorado River* abstention, because two of the *Colorado River* factors do not apply; one is neutral; and five weigh against it.

Conclusion

For the foregoing reasons, the Court should deny Defendants' motion for partial dismissal and abstention.

[59] Even if this Court disagrees and concludes that this federal case is parallel, that would not compel a finding that the parallelism factor weighs in favor of *Colorado River* abstention here, because Defendants have not shown "the clearest of justifications" for it. *Strange Land*, 862 F.3d at 845. At most, this factor would be neutral.

DATED May 8, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on the date below, 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: May 8, 2018

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