

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

The Honorable Robert J. Bryan

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA**

LIGHTHOUSE RESOURCES INC., et al.,  
Plaintiffs,  
and  
BNSF RAILWAY COMPANY,  
Plaintiff-Intervenor,  
v.  
JAY INSLEE, et al.,  
Defendants,  
and  
WASHINGTON ENVIRONMENTAL  
COUNCIL, et al.,  
Defendant-Intervenors.

NO. 3:18-cv-05005-RJB

DEFENDANTS' ANSWER TO  
PLAINTIFF-INTERVENOR'S  
COMPLAINT IN INTERVENTION  
FOR DECLARATORY AND  
INJUNCTIVE RELIEF

**GENERAL DENIAL**

Defendants Governor Jay Inslee, Director Maia Bellon, and Hilary Franz,  
Commissioner of Public Lands, by and through their undersigned counsel, submit the  
following Answer to the BNSF Railway Company (BNSF) Complaint in Intervention for  
Declaratory and Injunctive Relief (Complaint). Except as expressly admitted herein,  
Defendants deny each and every allegation contained in BNSF's Complaint and deny that

1 BNSF is entitled to any of the relief requested. Defendants respond to each numbered  
2 paragraph of BNSF's Complaint as follows:

3 **I. INTRODUCTION**

4 1. Admit.

5 2. Deny.

6 3. Deny.

7 4. Defendants are without information regarding the first sentence of this  
8 paragraph and therefore deny the same. Defendants admit the second sentence.

9 5. Deny the first sentence. Defendants admit the second and third sentences,  
10 except that the coal would not be loaded directly onto ships—it would be stockpiled on site  
11 prior to loading. Defendants deny the last sentence.

12 6. Deny.

13 7. Deny.

14 8. Defendants lack information regarding this paragraph, which addresses a  
15 different project, and therefore deny the same.

16 9. Deny.

17 10. Admit.

18 11. Admit.

19 12. Admit the first sentence. Deny the second sentence.

20 13. Deny the first sentence. The second sentence asserts a legal conclusion to which  
21 no response is required. To the extent a response is required, this sentence is denied.

22 14. Defendant Bellon explained her reasons for denying Millennium's request for  
23 Clean Water Act certification in Order No. 15417. Defendant Franz explained the reasons for  
24 her denial of Millennium's request to construct docks and other facilities on state-owned  
25 aquatic lands in a memorandum dated October 24, 2017. These documents speak for  
26

1 themselves. Defendants deny that these decisions implicate, impact, or harm BNSF as alleged  
2 in this paragraph.

3 15. This paragraph characterizes Plaintiffs' Complaint, which speaks for itself. To  
4 the extent a response is required, Defendants deny the allegations in this paragraph.

5 16. Deny.

6 17. Deny.

7 18. Deny.

8 19. The first two sentences of this paragraph assert legal conclusions to which no  
9 response is required. Defendants deny the remainder of this paragraph.

## 10 II. JURISDICTION AND VENUE

11 20. This paragraph asserts legal conclusions to which no response is required. To  
12 the extent a response is required, Defendants deny that this Court has jurisdiction over  
13 Plaintiffs' or BNSF's claims.

14 21. This paragraph asserts legal conclusions to which no response is required. To  
15 the extent a response is required, Defendants deny that this Court has jurisdiction over  
16 Plaintiffs' or BNSF's claims.

17 22. This paragraph asserts legal conclusions to which no response is required. To  
18 the extent a response is required, Defendants deny that this Court has jurisdiction over  
19 Plaintiffs' or BNSF's claims.

20 23. This paragraph asserts legal conclusions to which no response is required. To  
21 the extent a response is required, Defendants deny that BNSF is entitled to any relief.

22 24. This paragraph asserts legal conclusions to which no response is required. To  
23 the extent a response is required, Defendants deny that venue is proper in this Court.

## 24 III. PARTIES

25 25. Defendants incorporate by reference their answers to Plaintiffs' Complaint,  
26 paragraphs 16–20.

1 26. Defendants incorporate by reference their answers to Plaintiffs' Complaint,  
2 paragraphs 21–23.

3 27. Defendants are without information regarding this paragraph and therefore deny  
4 the same.

5 **IV. STANDING**

6 28. Deny.

7 29. Deny.

8 30. Deny.

9 **V. FACTUAL BACKGROUND**

10 31. Defendants incorporate by reference their answers to Plaintiffs' Complaint,  
11 paragraphs 24–191.

12 32. Defendants are without information regarding this paragraph and therefore deny  
13 the same.

14 33. Defendants are without information regarding this paragraph and therefore deny  
15 the same.

16 34. Defendants are without information regarding this paragraph and therefore deny  
17 the same.

18 35. Defendants are without information regarding this paragraph and therefore deny  
19 the same.

20 36. Defendants are without information regarding this paragraph and therefore deny  
21 the same.

22 37. Admit the first sentence. Defendants are without information regarding the  
23 remainder of this paragraph and therefore deny the same.

24 38. Defendants are without information regarding this paragraph and therefore deny  
25 the same.

26

1 39. Defendants are without information regarding this paragraph and therefore deny  
2 the same.

3 40. As to the first sentence, Defendants admit that the site has been an active  
4 industrial site since 1941 and that it currently receives some coal shipments. Defendants are  
5 without sufficient information to form a belief as to the truth of the remainder of the allegations  
6 in this sentence, and therefore deny the same. As to the second sentence, Defendants admit that  
7 there is an existing aquatic lands lease on the site between the State and Northwest Alloys, Inc.  
8 The lease speaks for itself, and Defendants deny any characterization of the lease that is  
9 inconsistent with its terms. As to third sentence, Defendants are without sufficient information  
10 to form a belief as to the truth of the allegations in this sentence, and therefore deny the same.  
11 Defendants deny the remainder of this paragraph.

12 41. Admit that Millennium proposes to build a coal export terminal on the site that  
13 would, at full build-out, be capable of handling 44 million metric tons of coal. Admit that  
14 BNSF trains currently serve the site. Deny the remainder of this paragraph.

15 42. Admit that Millennium's coal export terminal would, according to Millennium,  
16 generate some jobs and tax revenue if constructed. Admit further that the site is currently  
17 undergoing environmental cleanup and that development of the site is limited until the cleanup  
18 is completed. Deny the remainder of this paragraph.

19 43. Admit that up to eight trains a day would serve the site if the coal export  
20 terminal is constructed. Deny the remainder of this paragraph.

21 44. Admit.

22 45. Admit.

23 46. Admit.

24 47. Admit.

25 48. As to the first sentence, Defendants admit that Cowlitz County and Ecology  
26 jointly decided that the draft EIS would evaluate impacts beyond the State's borders, including

1 impacts from rail transportation that occurs outside of the project area and outside of  
2 Washington. Defendants deny the second sentence.

3 49. This paragraph purports to characterize a decision by the U.S. Army Corps of  
4 Engineers, which speaks for itself. Defendants deny this paragraph to the extent it is  
5 inconsistent with the Corps' Record of Decision.

6 50. Deny.

7 51. Admit that Defendant Inslee authored a book with the title stated. Admit that  
8 Defendant Bellon issued the quoted tweet. Deny the remainder of this paragraph.

9 52. Deny.

10 53. This paragraph contains legal argument to which no response is required, and  
11 factual allegations about an unrelated project. To the extent a response is required, Defendants  
12 lack information regarding the allegations in this paragraph and therefore they are denied. On  
13 information and belief, Defendants allege that no project applications are currently pending for  
14 Barlow Point.

15 54. This paragraph contains legal argument to which no response is required, and  
16 factual allegations about an unrelated project. To the extent a response is required, Defendants  
17 lack information regarding the allegations in this paragraph and therefore they are denied.

18 55. This paragraph contains legal argument to which no response is required, and  
19 factual allegations regarding an unrelated project. To the extent a response is required,  
20 Defendants lack information regarding the allegations in this paragraph and therefore they are  
21 denied.

22 56. This paragraph contains legal argument to which no response is required, and  
23 factual allegations regarding an unrelated project. To the extent a response is required,  
24 Defendants lack information regarding the allegations in this paragraph and therefore they are  
25 denied.  
26

1           57.     This paragraph contains legal argument to which no response is required, and  
2 factual allegations regarding the Washington Freight Advisory Committee. To the extent a  
3 response is required, Defendants lack information regarding the allegations in this paragraph  
4 and therefore they are denied.

5           58.     Admit that BNSF submitted comments on the draft EIS for the Millennium coal  
6 export project. Those comments speak for themselves. Admit further that the co-lead agencies  
7 responded to BNSF's comments in the final EIS. Defendants deny the remainder of this  
8 paragraph.

9           59.     This paragraph contains legal argument to which no response is required. To the  
10 extent a response is necessary, the allegations are denied. Defendant Bellon's reasons for  
11 denying Millennium's request for certification under section 401 of the Clean Water Act are  
12 stated in her decision, Order No. 15417, which speaks for itself.

13           60.     Admit.

14           61.     Admit that Ecology staff prepared a draft letter to Millennium regarding the  
15 section 401 certification request that Ecology did not send. Admit that the draft letter referred  
16 to denial of the application without prejudice. Admit that Ecology, after discussion and  
17 consideration, decided to deny the certification request with prejudice instead. Defendants  
18 deny the remainder of this paragraph.

19           62.     Admit that Ecology denied the certification with prejudice after reviewing the  
20 information submitted by Millennium in September 2017. Admit that Ecology has been unable  
21 to determine whether it has previously denied a section 401 certification with prejudice.

22           63.     This paragraph purports to characterize Ecology's denial, Order No. 15417,  
23 which speaks for itself. Defendants deny all allegations inconsistent with the denial Order.

24           64.     Defendants lack sufficient information to form a belief as to the truth of the  
25 allegations contained in this paragraph and therefore deny the same. Defendants affirmatively  
26 allege that Northwest Alloys, Inc., approached the Washington Department of Natural

1 Resources (DNR) regarding a proposed sublease by letter dated October 28, 2010. Defendants  
2 admit that Northwest Alloys, Inc., is the current lessee of the state-owned aquatic lands on the  
3 site.

4 65. As to the first sentence, Defendants are without sufficient information to form a  
5 belief as to the truth of Millennium's characterization of its plan, and therefore deny the same.  
6 Defendants admit that Millennium has requested to construct improvements on state-owned  
7 aquatic lands for the operation of a coal export facility. As to the second sentence, Defendants  
8 admit Millennium is not exempt from permitting or approval requirements. As to the third  
9 sentence, Defendants admit that the proposed facility would be subject to federal and state  
10 environmental review and permitting requirements. Defendants deny all remaining allegations.

11 66. This paragraph attempts to characterize the October 24, 2017 Memorandum  
12 from Commissioner Franz denying the proposed improvements. The Memorandum speaks for  
13 itself, and Defendants deny all allegations insofar as they are inconsistent with said  
14 Memorandum.

15 67. Deny.

16 68. Admit the first sentence. As to the second sentence, Defendants admit that the  
17 Cowlitz County staff issued a staff report that recommended approval of the shoreline permit  
18 applications with conditions. The staff report speaks for itself. As to the remainder of this  
19 paragraph, Defendants admit that the Cowlitz County Hearings Examiner denied Millennium's  
20 shoreline permit applications for reasons stated in his decision. That decision speaks for itself.  
21 Defendants deny all allegations inconsistent with the decision.

22 69. Deny.

23 70. This paragraph purports to characterize a letter written by Ecology to  
24 Millennium, which speaks for itself. Defendants deny all allegations inconsistent with the text  
25 of the letter.

26 71. Deny.



1 72. Deny.

2 73. Deny.

3 **VI. LEGAL AND REGULATORY BACKGROUND**

4 74. This paragraph asserts legal conclusions to which no response is required. To  
5 the extent a response is required, Defendants deny all allegations inconsistent with the text of  
6 the statute and applicable case law. Defendants deny that the ICCTA applies to Millennium's  
7 proposed coal export terminal.

8 75. This paragraph asserts legal conclusions to which no response is required. To  
9 the extent a response is required, Defendants deny all allegations inconsistent with the text of  
10 the statute and applicable case law.

11 76. This paragraph asserts legal conclusions to which no response is required. To  
12 the extent a response is required, Defendants deny all allegations inconsistent with the text of  
13 the statute and applicable case law.

14 77. This paragraph asserts legal conclusions to which no response is required. To  
15 the extent a response is required, Defendants deny all allegations inconsistent with the text of  
16 the statute and applicable case law.

17 78. This paragraph asserts legal conclusions to which no response is required. To  
18 the extent a response is required, Defendants deny all allegations inconsistent with the text of  
19 the statute and applicable case law.

20 79. This paragraph asserts legal conclusions to which no response is required. To  
21 the extent a response is required, Defendants deny all allegations inconsistent with the text of  
22 the commerce clause and applicable case law.

23 80. This paragraph asserts legal conclusions to which no response is required. To  
24 the extent a response is required, Defendants deny all allegations inconsistent with the text of  
25 the commerce clause and applicable case law.

1           81.     This paragraph asserts legal conclusions to which no response is required. To  
2 the extent a response is required, Defendants deny all allegations inconsistent with the text of  
3 the commerce clause and applicable case law.

4           82.     This paragraph asserts legal conclusions to which no response is required. To  
5 the extent a response is required, Defendants deny all allegations inconsistent with the text of  
6 the commerce clause and applicable case law.

7           83.     This paragraph asserts legal conclusions to which no response is required. To  
8 the extent a response is required, Defendants deny all allegations inconsistent with the text of  
9 the constitution and applicable case law.

10          84.     This paragraph asserts legal conclusions to which no response is required. To  
11 the extent a response is required, Defendants deny all allegations inconsistent with the text of  
12 the commerce clause and applicable case law.

13          85.     Deny.

14          86.     This paragraph purports to characterize the General Agreement on Tariffs and  
15 Trade (GATT), which speaks for itself. Defendants deny all allegations inconsistent with the  
16 text of the treaty and case law interpreting it.

17          87.     This paragraph purports to characterize a trade agreement with Korea, which  
18 speaks for itself. Defendants deny all allegations inconsistent with the text of the agreement  
19 and case law interpreting it.

20          88.     This paragraph asserts legal conclusions to which no response is required. To  
21 the extent a response is required, Defendants deny all allegations inconsistent with the text of  
22 the statute and applicable case law.

23          89.     Defendants lack information regarding this paragraph and therefore deny the  
24 same.

**VII. CLAIMS FOR RELIEF**

1  
2 90. Defendants incorporate by reference their responses to the preceding  
3 paragraphs.

4 91. Admit.

5 92. Deny.

6 93. Deny.

7 94. Deny.

8 95. Deny.

9 96. Deny.

10 97. Deny.

11 98. Deny.

12 99. Defendants incorporate by reference their answers to the preceding paragraphs.

13 100. Deny.

14 101. Deny.

15 102. Defendants are without information regarding this paragraph and therefore deny  
16 the same.

17 103. Deny.

18 104. Deny.

19 105. Deny.

20 106. Deny.

21 107. Deny.

22 108. Deny.

23 109. Deny.

24 110. Defendants incorporate by reference their answers to the preceding paragraphs.

25 111. Deny.

26 112. Deny.

1 113. Deny.

2 114. Deny.

3 115. Deny.

4 116. Deny.

5 117. Deny.

6 118. Deny.

7 119. Defendants incorporate by reference their answers to the preceding paragraphs.

8 120. Deny.

9 121. Defendants lack information regarding this paragraph and therefore deny the  
10 same.

11 122. Deny.

12 123. Deny.

13 124. Deny.

14 125. Deny.

15 126. Deny.

16 **VIII. PRAYER FOR RELIEF**

17 Paragraphs 127 through 137 contain BNSF's requests for relief, to which no response is  
18 required. To the extent a response is required, Defendants deny that BNSF is entitled to the  
19 relief sought.

20 **IX. AFFIRMATIVE DEFENSES**

21 A. BNSF's Complaint fails to state a claim for relief.

22 B. Defendant Franz is immune from suit in federal court under the 11th  
23 Amendment to the U.S. Constitution for actions taken in her proprietary capacity.

24 C. To the extent BNSF seeks monetary damages, Defendants are entitled to  
25 qualified immunity.  
26

1 D. Plaintiffs have an adequate remedy in state court for their alleged injuries that  
2 they are actively pursuing. This Court should abstain from ruling on BNSF's constitutional  
3 claims until the state court proceedings are completed.

4 E. Plaintiffs have failed to obtain other necessary permits for their proposed coal  
5 export project. As a result, the proprietary and regulatory decisions by Defendants Bellon and  
6 Franz alleged in the Complaint are not the cause of BNSF's alleged injuries.

7 F. Defendants Bellon and Franz had legitimate, non-discriminatory reasons for  
8 making the proprietary and regulatory decisions alleged in the Complaint.

9 G. The proprietary and regulatory decisions by Defendants Bellon and Franz  
10 alleged in the Complaint do not have the purpose or effect of discriminating against interstate  
11 or foreign commerce, nor do they place any undue burden on interstate or foreign commerce.  
12 On information and belief, Defendants allege that substantial amounts of coal move freely  
13 through and around the state by rail, across the country, and are exported to foreign countries,  
14 notwithstanding the proprietary and regulatory decisions alleged in the Complaint.

15 H. Defendants have not interfered in foreign affairs by denying authorizations and  
16 approvals for Millennium's coal export project.

17 I. Neither Plaintiff is a rail carrier and therefore preemption under the ICCTA  
18 does not apply in this case. The Surface Transportation Board does not have jurisdiction over  
19 the construction of Millennium's proposed coal export terminal. The PWSA also does not  
20 apply in this case.

21 J. To the extent BNSF seeks to challenge the EIS for Millennium's coal export  
22 project, its challenge is time barred and it has failed to exhaust administrative remedies.

23 K. BNSF has failed to join necessary and indispensable parties.

24 L. BNSF lacks standing to bring its claims in this Court.  
25  
26

1 M. Despite opportunities to do so, BNSF failed or refused to propose mitigation  
2 measures to offset the impacts found by the EIS. As a result, BNSF's alleged injuries are the  
3 result of its own actions.

4 N. Plaintiffs' claims are not ripe.

5 O. Preemption claims are not cognizable under 42 U.S.C. § 1983.

6 P. Defendants reserve the right to supplement these affirmative defenses.

7 **X. DEFENDANTS' REQUEST FOR RELIEF**

8 Wherefore, Defendants pray that the Court:

- 9 1. Dismiss BNSF's Complaint with prejudice.
- 10 2. Deny all relief requested by BNSF.
- 11 3. Grant Defendants their costs and reasonable attorneys' fees herein.
- 12 4. Grant Defendants such other and further relief as the Court may deem just and  
13 proper.

14 DATED this 13th day of June 2018.

15 ROBERT W. FERGUSON  
16 Attorney General

17 s/ Laura J. Watson

18 s/ Lee Overton

19 s/ Thomas J. Young

20 s/ Sonia A. Wolfman

21 LAURA J. WATSON, WSBA #28452

22 Senior Assistant Attorney General

23 H. LEE OVERTON, WSBA #38055

24 Assistant Attorney General

25 THOMAS J. YOUNG, WSBA #17366

26 Senior Counsel

SONIA A. WOLFMAN, WSBA #30510

Assistant Attorney General

Office of the Attorney General

Ecology Division

P.O. Box 40117

Olympia, WA 98504-0117

Telephone: 360-586-6770

Email: ECYOLYEF@atg.wa.gov

LauraW2@atg.wa.gov

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

LeeO1@atg.wa.gov  
TomY@atg.wa.gov  
SoniaW@atg.wa.gov

*Attorneys for the Defendants  
Jay Inslee, in his official capacity as Governor  
of the State of Washington; and Maia Bellon,  
in her official capacity as Director of the  
Washington Department of Ecology*

s/ Edward D. Callow  
EDWARD D. CALLOW, WSBA #30484  
Assistant Attorney General  
Office of the Attorney General  
Natural Resources Division  
P.O. Box 40100  
Olympia, WA 98504-0100  
Telephone: 360-664-2854  
Email: RESOlyEF@atg.wa.gov  
tedc@atg.wa.gov

*Attorney for Defendant  
Hilary S. Franz, in her official capacity as  
Commissioner of Public Lands*

**CERTIFICATE OF SERVICE**

I hereby certify that on June 13, 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 such filing to all counsel of record.

DATED this 13th day of June 2018.

s/ Laura J. Watson  
LAURA J. WATSON, WSBA #28452  
Senior Assistant Attorney General  
360-586-6743

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26