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The Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT  
FOR THE 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

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

GENERAL DENIAL

Defendant-intervenors Washington Environmental Council, Columbia Riverkeeper, Friends of the Columbia Gorge, Climate Solutions, and Sierra Club submit the following Answer to the Complaint in Intervention for Declaratory and Injunctive Relief filed by Plaintiff-intervenors BNSF Railway Company ("BNSF"). Except as expressly admitted herein, Defendant-intervenors deny each and every allegation contained in Plaintiffs' Complaint and deny that Plaintiffs are entitled to any of the relief requested. Defendant-intervenors respond to each numbered paragraph of

DEFENDANT-INTERVENORS' ANSWER  
TO PLAINTIFF-INTERVENOR'S COMPLAINT FOR  
DECLARATORY AND INJUNCTIVE RELIEF

1 Plaintiffs' Complaint as follows:

2 I. INTRODUCTION

3 1. Admit.

4 2. Deny.

5 3. Deny.

6 4. Defendant-intervenors lack information sufficient to form a belief as to the truth of  
7 the allegations in the first sentence of paragraph 4 and, therefore, deny the allegations. Admit the  
8 second sentence.

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

12 6. Deny.

13 7. Deny the first sentence. Defendant-intervenors lack information sufficient to form a  
14 belief as to the truth of the allegations in the second sentence of paragraph 7 and, therefore, deny the  
15 allegations.

16 8. Defendant-intervenors lack information sufficient to form a belief as to the truth of  
17 the allegations in paragraph 8 and, therefore, deny the allegations.

18 9. Deny.

19 10. Admit.

20 11. Admit.

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

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

24 14. Department of Ecology Director Bellon explained the reasons for denying  
25 Millennium's request for Clean Water Act section 401 certification in Order No. 15417.

1 Commissioner Franz explained the reasons for denying Millennium’s request to construct docks and  
2 other facilities on state-owned aquatic lands in a Memorandum date October 24, 2017. The Order  
3 and Memorandum speak for themselves. Defendant-intervenors deny that these decisions implicate,  
4 impact, or harm BNSF as alleged in paragraph 14.

5 15. Paragraph 15 purports to characterize Plaintiffs’ Complaint, which speaks for itself.  
6 To the extent a response is required, Defendant-intervenors deny the allegations in paragraph 15.

7 16. Deny.

8 17. Deny.

9 18. Deny.

10 19. The first two sentences of paragraph 19 assert legal conclusions to which no  
11 response is required. Defendant-intervenors deny the remaining allegations in paragraph 19.

12 II. JURISDICTION AND VENUE

13 20. This paragraph asserts legal conclusions to which no response is required. To the  
14 extent a response is required, Defendant-intervenors deny that this Court has jurisdiction over  
15 Plaintiffs’ or BNSF’s claims.

16 21. This paragraph asserts legal conclusions to which no response is required. To the  
17 extent a response is required, Defendant-intervenors deny that this Court has jurisdiction over  
18 Plaintiffs’ or BNSF’s claims.

19 22. This paragraph asserts legal conclusions to which no response is required. To the  
20 extent a response is required, Defendant-intervenors deny that this Court has jurisdiction over  
21 Plaintiffs’ or BNSF’s claims.

22 23. This paragraph asserts legal conclusions to which no response is required. To the  
23 extent a response is required, Defendant-intervenors deny that BNSF is entitled to any relief.

24 24. This paragraph asserts legal conclusions to which no response is required. To the  
25 extent a response is required, Defendant-intervenors deny that venue is proper in this Court.

III. PARTIES

1  
2 25. Defendant-intervenors incorporate by reference their answers to Plaintiffs’  
3 Complaint paragraphs 16–20.

4 26. Defendant-intervenors incorporate by reference their answers to Plaintiffs’  
5 Complaint paragraphs 21–23.

6 27. Defendant-intervenors lack information sufficient to form a belief as to the truth or  
7 falsity of the allegations in paragraph 27 and, therefore, deny the same.

8 IV. STANDING

9 28. Deny.

10 29. Deny.

11 30. Deny.

12 V. FACTUAL ALLEGATIONS

13 31. Defendant-intervenors incorporate by reference their answers to Plaintiffs’  
14 Complaint paragraphs 24–191.

15 32. Defendant-intervenors lack information or knowledge sufficient to form a belief as  
16 to the truth of the allegations in paragraph 32 and, therefore, deny the same.

17 33. Defendant-intervenors lack information or knowledge sufficient to form a belief as  
18 to the truth of the allegations in paragraph 33 and, therefore, deny the same.

19 34. Defendant-intervenors lack information or knowledge sufficient to form a belief as  
20 to the truth of the allegations in paragraph 34 and, therefore, deny the same.

21 35. Defendant-intervenors lack information or knowledge sufficient to form a belief as  
22 to the truth of the allegations in paragraph 35 and, therefore, deny the same.

23 36. Defendant-intervenors lack information or knowledge sufficient to form a belief as  
24 to the truth of the allegations in paragraph 36 and, therefore, deny the same.

25 37. Defendant-intervenors lack information or knowledge sufficient to form a belief as  
26 to the truth of the allegations in paragraph 37 and, therefore, deny the same.

1 38. Defendant-intervenors lack information or knowledge sufficient to form a belief as  
2 to the truth of the allegations in paragraph 38 and, therefore, deny the same.

3 39. Defendant-intervenors lack information or knowledge sufficient to form a belief as  
4 to the truth of the allegations in paragraph 39 and, therefore, deny the same.

5 40. As to the first sentence, Defendant-intervenors admit that the site has been an active  
6 industrial site since 1941 and that it currently receives some coal shipments. Defendant-intervenors  
7 lack information or knowledge sufficient to form a belief as to the truth of the allegations in the  
8 remainder of the first sentence and, therefore, deny the same. As to the second sentence, Defendant-  
9 intervenors admit that there is an existing aquatic lands lease on the site between the State and  
10 Northwest Alloys, Inc. The lease speaks for itself. As to the third sentence, Defendant-intervenors  
11 lack information or knowledge sufficient to form a belief as to the truth of the allegations in this  
12 sentence and, therefore, deny the same. Defendant-intervenors deny the remainder of paragraph 40.

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

16 42. Admit that Millennium's proposed project would, according to Millennium,  
17 generate some jobs and tax revenue if constructed. Defendant-intervenors lack information or  
18 knowledge sufficient to form a belief as to the truth of the allegations in the remainder of paragraph  
19 42 and, therefore, deny the same.

20 43. Admit that up to eight unit trains would serve the site if Millennium's proposed coal  
21 terminal is constructed. Deny the remainder of paragraph 43.

22 44. Admit.

23 45. Admit.

24 46. Admit that, after a document was discovered during the course of litigation showing  
25 that Millennium deliberately misled state and local regulators about the intended size of its proposed  
26

1 project, Millennium withdrew its permit application and began a new process in 2012 that included  
2 the preparation on an EIS.

3 47. Admit.

4 48. Admit that the co-lead agencies, Ecology and Cowlitz County, jointly decided that  
5 the draft EIS for Millennium's proposed project would evaluate impacts beyond the State's borders,  
6 including impacts from rail transportation that occurs outside of the project area and outside of  
7 Washington. Defendant-intervenors lack information or knowledge sufficient to form a belief as to  
8 the truth of the allegations in the remainder of paragraph 48 and, therefore, deny the same.

9 49. Paragraph 49 purports to characterize a U.S. Army Corps of Engineers'  
10 Memorandum, which speaks for itself. Defendant-intervenors deny any allegations to the extent  
11 they are not consistent with the Memorandum.

12 50. Deny.

13 51. Admit that Governor Inslee co-authored a 2007 book title *Apollo's Fire: Igniting*  
14 *America's Clean Energy Economy*. Defendant-intervenors lack information or knowledge  
15 sufficient to form a belief as to the truth of the allegations in the remainder of paragraph 51 and,  
16 therefore, deny the same.

17 52. Deny.

18 53. Paragraph 53 contains legal argument to which no response is required, and factual  
19 allegations about an unrelated project. To the extent a response is required, Defendant-intervenors  
20 lack information or knowledge sufficient to form a belief as to the truth of the allegations in  
21 paragraph 53 and, therefore, deny the same.

22 54. Paragraph 54 contains legal argument to which no response is required, and factual  
23 allegations about an unrelated project. To the extent a response is required, Defendant-intervenors  
24 lack information or knowledge sufficient to form a belief as to the truth of the allegations in  
25 paragraph 54 and, therefore, deny the same.

1           55. Paragraph 55 contains legal argument to which no response is required, and factual  
2 allegations about an unrelated project. To the extent a response is required, Defendant-intervenors  
3 lack information or knowledge sufficient to form a belief as to the truth of the allegations in  
4 paragraph 55 and, therefore, deny the same.

5           56. Paragraph 56 contains legal argument to which no response is required, and factual  
6 allegations about an unrelated project. To the extent a response is required, Defendant-intervenors  
7 lack information or knowledge sufficient to form a belief as to the truth of the allegations in  
8 paragraph 56 and, therefore, deny the same.

9           57. Paragraph 57 contains legal argument to which no response is required, and factual  
10 allegations regarding the Washington Freight Advisory Committee. To the extent a response is  
11 required, Defendant-intervenors lack information or knowledge sufficient to form a belief as to the  
12 truth of the allegations in paragraph 57 and, therefore, deny the same.

13           58. Admit that BNSF submitted comments on the draft EIS for Millennium's proposed  
14 project. Those comments speak for themselves. Admit further that co-lead agencies, Ecology and  
15 Cowlitz County, responded to BNSF's comments in the final EIS. Defendant-intervenors lack  
16 information or knowledge sufficient to form a belief as to the truth of the allegations in the  
17 remainder of paragraph 58 and, therefore, deny the same

18           59. Paragraph 59 contains legal argument to which no response is required. To the  
19 extent a response is required, the allegations are denied. Ecology Director Bellon's reasons for  
20 denying Millennium's request for section 401 certification are stated in her decision, Order No.  
21 15417, which speaks for itself.

22           60. Admit.

23           61. Defendant-intervenors lack information or knowledge sufficient to form a belief as  
24 to the truth of the allegations in paragraph 61 and, therefore, deny the same.

25           62. Admit that Ecology denied Millennium CWA section 401 certification with  
26

1 prejudice on September 26, 2017. Defendant-intervenors lack information or knowledge sufficient  
2 to form a belief as to the truth of the allegations in the remainder of paragraph 62 and, therefore,  
3 deny the same.

4 63. Paragraph 63 purports to characterize Ecology's section 401 denial, Order No.  
5 15417, which speaks for itself. Defendant-intervenors deny any allegations inconsistent with the  
6 Order.

7 64. Defendant-intervenors lack information or knowledge sufficient to form a belief as  
8 to the truth of the allegations in paragraph 64 and, therefore, deny the same.

9 65. As to the first sentence, Defendant-intervenors lack information or knowledge  
10 sufficient to form a belief as to the truth of Millennium's characterizations of its plan and, therefore,  
11 deny the same. As to the second sentence, Defendant-intervenors admit that Millennium is not  
12 exempt from permitting or approval requirements. As to the third sentence, Defendant-intervenors  
13 admit that Millennium's coal export facility would be subject to numerous federal and state  
14 environmental review and permitting requirements, but deny all other allegations in paragraph 65.

15 66. Paragraph 66 purports to characterize an October 24, 2017 Memorandum from  
16 Commissioner Franz denying the proposed improvements, which speaks for itself. Defendant-  
17 intervenors deny any allegations inconsistent with said Memorandum.

18 67. Defendant-intervenors lack information or knowledge sufficient to form a belief as  
19 to the truth of the allegations in the first sentence of paragraph 67 and, therefore, deny the same.  
20 Deny the second sentence.

21 68. Admit the first sentence. As to the second sentence, admit that Cowlitz County staff  
22 prepared a staff report that recommended approval of shorelines permits, with conditions. The staff  
23 report speaks for itself. As to the remainder of paragraph 68, admit that the Cowlitz County  
24 Hearing Examiner issued a decision denying Millennium's application for shoreline permits. The  
25 Hearing Examiner's decision speaks for itself. Defendant-intervenors deny any allegations



1 inconsistent with the Hearing Examiner’s Decision.

2 69. Deny.

3 70. Paragraph 70 purports to characterize an October 23, 2017 letter from Ecology to  
4 Millennium, which speaks for itself. Defendant-intervenors deny any allegations inconsistent with  
5 the text of the letter.

6 71. Deny.

7 72. Deny.

8 73. Deny.

9 V. LEGAL AND REGULATORY BACKGROUND

10 74. Paragraph 74 asserts legal conclusions and contains Plaintiffs’ characterizations  
11 regarding the ICC Termination Act (“ICCTA”). The ICCTA speaks for itself. To the extent a  
12 response is required, Defendant-intervenors deny any allegations contrary to the plain language,  
13 meaning, and case law interpretations of the ICCTA. Defendant-intervenors deny that the ICCTA  
14 applies to Millennium’s proposed coal export terminal.

15 75. Paragraph 75 asserts legal conclusions to which no response is required. To the  
16 extent a response is required, Defendant-intervenors deny these allegations to the extent they are  
17 inconsistent with text of the statute and applicable case law.

18 76. Paragraph 76 asserts legal conclusions to which no response is required. To the  
19 extent a response is required, Defendant-intervenors deny all allegations to the extent they are  
20 inconsistent with text of the statute and applicable case law.

21 77. Paragraph 77 asserts legal conclusions to which no response is required. To the  
22 extent a response is required, Defendant-intervenors deny all allegations to the extent they are  
23 inconsistent with text of the statute and applicable case law.

24 78. Paragraph 78 asserts legal conclusions to which no response is required. To the  
25 extent a response is required, Defendant-intervenors deny all allegations to the extent they are

1 inconsistent with text of the statute and applicable case law.

2 79. Paragraph 79 asserts legal conclusions to which no response is required. To the  
3 extent a response is required, Defendant-intervenors deny all allegations to the extent they are  
4 inconsistent with text of the commerce clause and applicable case law.

5 80. Paragraph 80 asserts legal conclusions to which no response is required. To the  
6 extent a response is required, Defendant-intervenors deny all allegations to the extent they are  
7 inconsistent with text of the commerce clause and applicable case law.

8 81. Paragraph 81 asserts legal conclusions to which no response is required. To the  
9 extent a response is required, Defendant-intervenors deny all allegations to the extent they are  
10 inconsistent with text of the commerce clause and applicable case law.

11 82. Paragraph 82 asserts legal conclusions to which no response is required. To the  
12 extent a response is required, Defendant-intervenors deny all allegations to the extent they are  
13 inconsistent with text of the commerce clause and applicable case law.

14 83. Paragraph 83 asserts legal conclusions to which no response is required. To the  
15 extent a response is required, Defendant-intervenors deny all allegations to the extent they are  
16 inconsistent with text of the U.S. Constitution and applicable case law.

17 84. Paragraph 84 asserts legal conclusions to which no response is required. To the  
18 extent a response is required, Defendant-intervenors deny all allegations to the extent they are  
19 inconsistent with text of the U.S. Constitution and applicable case law.

20 85. Deny.

21 86. Paragraph 86 purports to characterize the General Agreement on Tariffs and Trade  
22 (“GATT”), which speaks for itself. Defendant-intervenors deny all allegations to the extent they are  
23 inconsistent with the text of GATT and/or case law interpreting GATT.

24 87. Paragraph 87 purports to characterize a trade agreement between the United States  
25 and Korea, which speaks for itself. Defendant-intervenors deny all allegations to the extent they are  
26

1 inconsistent with the text of the agreement and/or case law interpreting the agreement.

2 88. Paragraph 84 asserts legal conclusions to which no response is required. To the  
3 extent a response is required, Defendant-intervenors deny all allegations to the extent they are  
4 inconsistent with text of the statute and applicable case law.

5 89. Defendant-intervenors lack information or knowledge sufficient to form a belief as  
6 to the truth of the allegations in paragraph 89 and, therefore, deny the same.

7 VI. CLAIMS FOR RELIEF

8 COUNT I – ICCTA PREEMPTION

9 90. Defendant-intervenors incorporate the answers to paragraphs 1 through 89 as though  
10 fully set forth herein.

11 91. Admit.

12 92. Deny.

13 93. Deny.

14 94. Deny.

15 95. Deny.

16 96. Deny.

17 97. Deny.

18 98. Deny.

19 COUNT II – FOREIGN COMMERCE CLAUSE

20 99. Defendant-intervenors incorporate the answers to paragraphs 1 through 98 as though  
21 fully set forth herein.

22 100. Deny.

23 101. Deny.

24 102. Defendant-intervenors lack information or knowledge sufficient to form a belief as  
25 to the truth of the allegations in paragraph 102 and, therefore, deny the same.

1 103. Deny.

2 104. Deny.

3 105. Deny.

4 106. Deny.

5 107. Deny.

6 108. Deny.

7 109. Deny.

8 COUNT III – INTERSTATE COMMERCE CLAUSE

9 110. Defendant-intervenors incorporate the answers to paragraphs 1 through 109 as  
10 though fully set forth herein.

11 111. Deny.

12 112. Deny.

13 113. Deny.

14 114. Deny.

15 115. Deny.

16 116. Deny.

17 117. Deny.

18 118. Deny.

19 COUNT IV – FOREIGN AFFAIRS DOCTRINE

20 119. Defendant-intervenors incorporate the answers to paragraphs 1 through 118 as  
21 though fully set forth herein.

22 120. Deny.

23 121. Defendant-intervenors lack information or knowledge sufficient to form a belief as  
24 to the truth of the allegations in paragraph 121 and, therefore, deny the same.

25 122. Deny.

1 123. Deny.

2 124. Deny.

3 125. Deny.

4 126. Deny.

5 VII. PRAYER FOR RELIEF

6 Paragraphs 127 through 137 contain BNSF’s requests for relief, to which no response is  
7 required. To the extent a further response may be required, Defendant-intervenors deny that BNSF  
8 is entitled to the relief requested or to any relief whatsoever.

9 VIII. AFFIRMATIVE DEFENSES

10 Defendant-intervenors incorporate by reference the affirmative defenses asserted by the  
11 State Defendants in their Answer filed with this Court on June 13, 2018, ECF No. 119.

12 IX. DEFENDANT-INTERVENORS’ REQUEST FOR RELIEF

13 Wherefore, Defendant-intervenors’ pray that the Court:

- 14 1. Dismiss BNSF’s Complaint with prejudice.
- 15 2. Deny all relief requested by BNSF.
- 16 3. Grant Defendant-intervenors their costs and reasonable attorneys’ fees herein.
- 17 4. Grant Defendant-intervenors such other and further relief as the Court may deem


18 just and proper.

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24 //

1 Respectfully submitted this 18th day of June, 2018.

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15 *Attorneys for Defendant-Intervenors Washington*  
16 *Environmental Council, Columbia Riverkeeper,*  
17 *Friends of the Columbia Gorge, Climate Solutions,*  
18 *and Sierra Club*

**CERTIFICATE OF SERVICE**

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I hereby certify that on June 18, 2018, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

Dated this 18th of June, 2018.

s/ Kristen L. Boyles  
Kristen L. Boyles, WSBA #23806  
EARTHJUSTICE