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 SUMMARY JUDGMENT

NOTED ON MOTION CALENDAR: September 7, 2018

ORAL ARGUMENT REQUESTED

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Introduction

A reader might conclude that State and Intervenor Defendants revived the legal arguments from their motions to dismiss BNSF's claim for preemption under the Interstate Commerce Claim Termination Act ("ICCTA") and re-filed them as motions for partial summary judgment.[1] That conclusion would be reasonable, because State and Intervenor Defendants produce no evidence to support their motions. This is unsurprising, because document-based discovery remains ongoing; no depositions have been noticed, let alone taken; and expert witnesses have not been disclosed, because those disclosures are not due for months.

Rather, State and Intervenor Defendants seem content to ground their motions in evidence already in the record (or that otherwise favors BNSF's position) and in argument that the Court has rejected. But, that approach falls short of what State and Intervenor Defendants must show to secure summary judgment on BNSF's ICCTA preemption claim – i.e., that no genuine dispute exists as to any material fact underlying BNSF's ICCTA claim, and that they are entitled to judgment on that claim as a matter of law.

State Defendants' attack on BNSF's standing fares no better, because the Court has already concluded, for purposes of the pleadings, that BNSF has shown standing. State Defendants have produced no evidence that would draw the Court's conclusion into doubt, despite that being their burden when challenging standing at summary judgment. In any event, their legal arguments on standing fail, because the relief BNSF seeks would redress its claimed injuries. Similarly, State Defendants' attempt to remove Commissioner Franz from the dispute over ICCTA preemption fails, because her denial of terminal improvements at the Millennium Bulk Terminal site ("Project") expressly relies on rail impacts.

[1] State Defendants' Motion is captioned "DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PREEMPTION ISSUES." Dkt. # 129. Intervenor Defendants' Motion is captioned "WASHINGTON ENVIRONMENTAL COUNCIL ET AL. MOTION FOR PARTIAL SUMMARY JUDGMENT ON PREEMPTION CLAIMS (Millennium Count III, IV; BNSF Count I)." Dkt. # 128. BNSF refers to these as motions for partial summary judgment, because they seek summary judgment on fewer than all claims.

Because State and Intervenor Defendants have failed to carry their burdens on summary judgment, the Court should deny their motions. Alternatively, because this case remains in the early stages of discovery, the Court should defer consideration of the motions until after discovery closes.

Standard of Review

A. Summary Judgment

A party may seek judgment before trial, only if it shows that an early judgment is warranted. One form of early judgment is summary judgment. Fed. R. Civ. P. 56. "A party may move for summary judgment, identifying each claim . . . on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A party who moves for summary judgment and asserts that a fact cannot be disputed must support that assertion by (1) citing materials in the record; (2) showing that cited record materials do not establish the absence or presence of a genuine dispute; or (3) that an adverse party cannot produce admissible evidence to support that fact. *Id.* 56(c)(1).

When moving for summary judgment, a party without the ultimate burden of persuasion at trial (typically, the defendant) "has both the initial burden of production *and* the ultimate burden of persuasion on a motion for summary judgment." *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000) (emphasis added). To carry its burden of *production*, the moving party must "produce evidence negating an essential element of the nonmoving party's case, or, *after suitable discovery*, the moving party may show that the nonmoving party does not have enough evidence of an essential element of its claim or defense to carry its ultimate burden of persuasion at trial." *Id.* at 1106 (emphasis added); *see also McCrossin v. IMO Indus., Inc.*, No. 3:14-CV-05382-RJB, 2015 WL 753580, at *2 (W.D. Wash. Feb. 23, 2015) (Bryan, J.) (quoting same). And, to carry its ultimate burden of *persuasion* on a summary judgment motion, "the moving party must persuade the court that there is no genuine [dispute] of material fact." *Nissan Fire*, 210 F.3d at 1102.

B. Deferral of Summary Judgment

If, when opposing summary judgment, a nonmovant has not been able to develop a sufficient record for a court to determine whether summary judgment is appropriate, Rule 56(d) "provides a device for litigants to avoid summary judgment when they have not had sufficient time to develop affirmative evidence." *United States v. Kitsap Physicians Serv.*, 314 F.3d 995, 1000 (9th Cir. 2002). Specifically, a court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order, if a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition to summary judgment. Fed. R. Civ. P. 56(d). "The primary purpose of Rule 56(d) is to ensure that parties have a reasonable opportunity to prepare their case and to ensure against a premature grant of summary judgment." *Tarutis v. Wal-Mart Stores, Inc.*, No. C12-5076 RJB, 2013 WL 247710, at *2 (W.D. Wash. Jan. 23, 2013) (Bryan, J.). "A Rule 56(d) 'continuance of a motion for summary judgment for purposes of conducting discovery should be granted almost as a matter of course unless the non-moving party has not diligently pursued discovery of evidence.'" *Id.* (citation omitted).

Facts

As State and Intervenor Defendants concede, "BNSF is a rail carrier."[2] And indisputably so: "BNSF Railway is the product of nearly 400 different railroad lines that merged or were acquired over the course of 160 years."[3] The Court has already denied State and Intervenor Defendants' motions to dismiss BNSF's ICCTA preemption claim.[4] In doing so, the Court held that it must assume the factual accuracy of BNSF's Complaint; that ICCTA preemption was "raised reasonably" in it; and that whether the State Defendants' actions violate federal law and whether BNSF's Complaint is factually supported are things that "we shall [] see."[5] And, the

[2] State Mot. at 8.; Intervenor Mot. at 2.
[3] *Our Railroad*, BNSF Railway, http://www.bnsf.com/about-bnsf/our-railroad/index.html (last visited Sept. 4, 2008).
[4] Verbatim Report of Proceedings ("VRP"), at 57-58 (May 30, 2018); Dkt. #. 116.
[5] VRP at 58.

Court so held over the State and Intervenor Defendants' legal arguments otherwise, which they largely repeat in their motions for partial summary judgment.[6]

Substantively, little has changed in this case since the Court denied State and Intervenor Defendants' motions to dismiss. Director Bellon's denial of a Clean Water Act water quality certification still relies primarily and impermissibly on purported rail impacts that Lighthouse cannot control and Director Bellon cannot – legally – regulate. Those purported impacts include:

- train engine emissions causing bad air quality
- train traffic increases causing congested automobile traffic
- train horns causing noise pollution
- train engine emissions increasing cancer risks
- rail capacity stresses caused by increased train traffic
- train accident increases caused by increased train traffic
- train traffic increases causing fish health problems from fugitive coal dust
- train traffic increases restricting access to tribal (U&A) fishing areas[7]

Commissioner Franz's decisions remain part of a larger scheme to prevent coal from being used anywhere, and her denial of authorization for Lighthouse to improve the Terminal relies heavily on rail considerations.[8] The materials that State and Intervenor Defendants have introduced to support their motions for partial summary judgment already exist in the record;[9] say nothing about the issues in this federal litigation;[10] or, as explained below, tend to show that a genuine

[6] *Compare* Dkt. # 105 at 3-7 (State Reply in support of Mot. to Dismiss) *with* Dkt. # 129 at 7-11 (State Mot. for Partial Summary Judgment); *compare* Dkt. # 104 at 2-10 (Intervenor Reply in support of Mot. to Dismiss) *with* Dkt. # 128 at 3-9 (Intervenor Mot. for Partial Summary Judgment).

[7] Dkt. # 1-1 at 4-14 (Director Bellon's water quality certification denial); *see also* State Mot. at 2; Young Decl., Ex. 1 § S.7.

[8] *Contra* State Mot. at 4 n.3; *but see* Dkt. # 1-2 at 8-10 (incorporating rail rationale from Director Bellon's water quality certification denial); BNSF Compl. ¶¶ 66-67.

[9] Young Decl. Ex. 2 (introduced in Dkt. # 64-1 at 10-12); Intervenor Mot., Ex. C (introduced in Dkt. # 64-5 at 31-50); *Id.* Ex. D (same document as Young Decl. Ex. 2).

[10] Young Decl., Exs. 4 & 6 (Cowlitz County Superior Court dismissal of action purely on state jurisdictional grounds and notice of appeal of the same).

dispute of material fact exists as to BNSF's ICCTA preemption claim and, in fact, raises a strong inference in favor that claim.[11]

And, discovery is ongoing. The Court has ordered that expert disclosures are due November 14, 2018; discovery-related motions must be filed by December 24, 2018; and discovery must be completed by January 14, 2019.[12] To proceed efficiently through that discovery timeframe, Lighthouse and BNSF have agreed with State and Intervenor Defendants to use certain materials produced in ongoing state proceedings.[13] But, those proceedings involve different claims from those in this litigation.[14]

Using those materials has required culling, de-duplicating, and searching hundreds of thousands of documents for information to support their preemption claims in this federal litigation.[15] Lighthouse and BNSF have already identified hundreds of significant documents from that large pool of documents, many of which BNSF plans to use in anticipation of deposing key individuals familiar with rail impact analyses underlying the State Defendants' actions.[16] Yet, much work remains, in part because more documents remain to be produced among the parties – and in part because issues with document productions, before and during this federal litigation, have required further coordination among the parties, both to facilitate a complete review and to ensure that privileged or confidential materials from either side are appropriately protected.[17] The Court recently entered a stipulated protective order that will serve this end.[18]

As document production and review continues, BNSF anticipates continued coordination with Lighthouse to narrowly tailor any further interrogatories and requests for production.[19]

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[11] Young Decl., Ex. 3 (excerpt of BNSF testimony at shoreline hearings board); Intervenor Mot., Exs. A & B (same); Young Decl., Ex. 1 (summary of Final Environmental Impact Statement regarding Project).
[12] Dkt. # 84.
[13] Tabor Decl. ¶ 4; Dkt. # 84.
[14] Only Defendant Bellon's Department has been subject to discovery in related state proceedings. Defendant Franz's Department has produced an administrative record. *See* Dkt. # 83 at 4. Defendant Inslee is not party to any such proceeding, except a state public records litigation prompted by his office's delay in responding to public records requests related to the Project. *See id.*
[15] Tabor Decl. ¶ 5.
[16] Tabor Decl. ¶ 6.
[17] Tabor Decl. ¶ 8.
[18] Dkt. # 139 (August 22, 2018 Order).
[19] *See* Tabor Decl. ¶ 7.

And, in addition to anticipated depositions of individuals familiar with rail impact analyses underlying State Defendants' actions, BNSF anticipates consulting with and may present testimony of one or more experts uniquely familiar with the effects of regulatory actions on rail infrastructure planning and markets for rail services.[20]

Argument

State and Intervenor Defendants have asked this Court to render summary judgment in their favor on BNSF's ICCTA preemption claim. Yet, they have failed to show that no genuine dispute of material fact exists as to that claim, because they have not carried their evidentiary burdens as movants for summary judgment. State and Intervenor Defendants have also failed to show that they are entitled to judgment as a matter of law, because they merely repeat the legal arguments from their motions to dismiss BNSF's ICCTA preemption claim, motions that this Court denied. BNSF's standing remains intact, because just as they have failed to carry evidentiary burdens related to ICCTA preemption, State and Intervenor Defendants have failed to carry their evidentiary burdens at summary judgment and produce any evidence that would call BNSF's standing into question. And, Commissioner Franz's denial of terminal improvements for the Project relies on rail impacts, so she is properly a defendant in this case.

A. ICCTA preempts State Defendants' actions. State and Intervenor Defendants have failed to carry their burdens on summary judgment to show otherwise.

A moving party is entitled to summary judgment only if it shows (1) that there is "no genuine dispute as to any material fact" and (2) that it is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). State and Intervenor Defendants have failed to show either as to BNSF's ICCTA preemption claim.

1. State and Intervenor Defendants have not shown that there is no genuine dispute as to any material fact on BNSF's ICCTA preemption claim, because they have failed to carry their evidentiary burdens.

The Ninth Circuit is clear: If a party moves for summary judgment, but it does not have the "ultimate burden of persuasion at trial," it *does* have a burden of production and a burden of persuasion to carry before it can secure a summary judgment in its favor. *Nissan Fire*, 210 F.3d

[20] Tabor Decl. ¶ 9.

at 1102. If the moving party fails to carry its burden of production on summary judgment, then the nonmoving party "may defeat the motion for summary judgment without producing anything." *Id.* at 1103. Here, State and Intervenor Defendants are the moving parties, but they have no ultimate burden of persuasion *at trial*. Accordingly, they have both a burden of production and a burden of persuasion on their motions for partial summary judgment. But, they have not carried their burdens of production, because they have produced no evidence that negates any element of BNSF's ICCTA preemption claim, nor have they shown that BNSF lacks enough evidence to prove ICCTA preemption at trial.

On the contrary, State and Intervenor Defendants have produced comments by BNSF that tend to show ICCTA's preemptive effect here. BNSF has stated that its rail system is not part of the Project and BNSF need not acquire any permit before the Project may proceed.[21] The core of BNSF's ICCTA preemption claim, however, is that State Defendants' actions – including Director Bellon's water quality certification denial, and including Commissioner Franz's terminal improvements denial – *amount to* forms or permitting or preclearance of BNSF's operations and regulate and burden BNSF's rail system in ways that ICCTA preempts.[22] Those actions target rail as a means of blocking the Project. Stated differently: "Because [BNSF is] not a part of this project nor an applicant, it is inappropriate to consider rail impacts. Impacts should be associated with the project – not its transportation provider."[23] Otherwise, as explained more fully below, holding the Project to a standard that requires BNSF to act before the Project could proceed, which is the effect of the rail-based grounds for State Defendants' denials, regulates rail and is preempted by ICCTA.

Accordingly, State and Intervenor Defendants have produced no evidence that negates any element of BNSF's ICCTA preemption claim. At most, they have produced some evidence that tends to support that claim – in the form of comments quoted above. And, the Supreme Court has deemed it axiomatic that, on a motion for summary judgment: "The evidence of the

[21] *See generally*, Young Decl., Ex. 3; Intervenor Mot., Exs. A & B.
[22] BNSF Compl. ¶¶ 75-77.
[23] Intervenor Mot., Ex. A at 2.

nonmovant is to be believed and all justifiable inferences are to be drawn in his favor." *Tolan v. Cotton*, 134 S. Ct. 1861, 1863 (2014) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)) (internal modifications removed).

Further, State and Intervenor Defendants do not show that BNSF lacks enough evidence to prove ICCTA preemption at trial. Nor can they. Discovery remains ongoing and will not close until next year.[24] Much of the document-based discovery that BNSF will produce must be scrutinized for redaction under the terms of the recently entered stipulated protective order, and BNSF plans to produce those materials to State Defendants by September 22, 2018.[25] Unsurprisingly, given the current state of discovery, no party has noticed depositions in this litigation that would tend to support or negate any factual basis for ICCTA preemption. And, BNSF anticipates expert consultation, and perhaps expert testimony, to show the effects of State Defendants' actions on rail infrastructure planning and markets for rail services, among other things, which in turn would support ICCTA preemption here.[26] State and Intervenor Defendants have failed to show that BNSF lacks enough evidence to prove ICCTA preemption at trial.

Because State and Intervenor Defendants have failed to carry their burden of production upon moving for summary judgment on BNSF's ICCTA preemption claim, the Court should deny the motions on that basis alone. For the same reason, State and Intervenor Defendants have failed to shift any burden to BNSF to show that a genuine dispute of material fact exists. *See Nissan Fire*, 210 F.3d at 1103. Similarly, other than a bare and irrelevant assertion by the Intervenor Defendants that "[t]here are no disputes of material facts in this motion",[27] neither State nor Intervenor Defendants have carried their burden of persuasion on the motions – i.e., they have not shown that no genuine dispute of material fact exists in this case. *See* Fed. R. Civ. P. 56(b) (requiring moving parties to support, with evidence, any assertions that genuine disputes of fact do not exist); *see also Nissan Fire*, 210 F.3d at 1102.

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[24] See Dkt. # 84.
[25] Tabor Decl. ¶ 10.
[26] *See id.* ¶ 9.
[27] Whether Intervenor Defendants' motion disputes facts has nothing to do with whether genuine disputes of material facts exist between the parties on summary judgment. *See* Fed. R. Civ. P. 56(a).

State and Intervenor Defendants have failed to carry their burdens of production and persuasion upon their motions for partial summary judgment. As a result, the Court should deny the motions. If, however, the Court concludes that State Defendants or Intervenor Defendants have met their evidentiary burdens on summary judgment, they still must show that they are entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a). State and Intervenor Defendants fail to make that showing as well.

2. The State and Intervenor Defendants are not entitled to judgment as a matter of law.

Defendants fail to show that they are entitled to judgment as a matter of law on BNSF's ICCTA preemption claim.[28] ICCTA preempts, among other things, state and local regulation of transportation by a rail carrier and operation of rail infrastructure. 49 U.S.C. § 10501(b); *City of Auburn v. U.S. Gov't*, 154 F.3d 1025, 1030 (9th Cir. 1998). ICCTA defines "transportation" expansively, and it includes any property, "instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail," and "services related to that movement, including receipt, delivery, . . . and handling" of property. 49 U.S.C. § 10102(9). "Whether a particular activity is considered part of transportation by rail carrier under [ICCTA] is a case-by-case, fact-specific determination." *Valero Ref. Co. Petition for Declaratory Order*, FD 36036, 2016 WL 5904757, at *3 (STB Sept. 20, 2016).

Here, the State Defendants and Intervenor Defendants concede that BNSF is a rail carrier under ICCTA.[29] However, they contend that the "regulated activity" is "Millennium's proposal to construct an export terminal," and because BNSF's rail system is not part of the Project and no permits are required of BNSF for the Project, ICCTA preemption does not apply.[30] But, for purposes of BNSF's ICCTA preemption claim, the "regulated activity" is not so limited. No state and local authority from the cases that State Defendants and Intervenor Defendants cite

[28] Defendants' legal arguments here are, in essence, their legal arguments from the motion to dismiss stage. *Compare* Dkt. # 105 at 3-7 (State Defendants' Mot. to Dismiss) *with* Dkt. # 129 at 7-11 (State Defendants' Mot. for Partial Summary Judgment); *compare* Dkt. # 104 at 2-10 (Intervenor Defendants' Mot. to Dismiss) *with* Dkt. # 128 at 3-9 (Intervenor Defendants' Mot. for Partial Summary Judgment). Accordingly, BNSF incorporates here its rebuttal arguments from its opposition to Defendants' motions to dismiss. Dkt. # 74 at 9-14.
[29] State Mot. at 8; WEC Mot. at 2.
[30] State Mot. at 8.

conditioned state or local approval on railroad action.[31] Here State Defendants have done more than tell Lighthouse "no" to certain permits. Specifically, State Defendants' denials – particularly Director Bellon's water quality certification denial and Commissioner Franz's terminal improvements denial – have both conditioned any possible approval of the Project on action that only BNSF can take,[32] and have adversely changed the economic environment for rail services and caused difficulty in BNSF's business planning as a result.[33] Based on State Defendants' actions so far and assuming the alleged adverse rail impacts they cited are founded or accurately characterized (which BNSF denies), whether the Project could proceed depends on changes to rail infrastructure and operation to address adverse rail impacts.[34]

Similarly, because the effects of the purported rail impacts in this case are under BNSF's control, they are also within the Surface Transportation Board's ("STB") exclusive federal regulatory reach. By denying the Project based on conditions that only BNSF can mitigate and only the STB can regulate, State Defendants took precisely the type of action that ICCTA preempts. *See Valero* , 2016 WL 5904757, at *4 (ICCTA preempts state and local permitting conditions that "unreasonably interfere" with railroads' operations to facilities and enforcement of the same); *Boston & Maine Corp. & Springfield Terminal R.R. Company Petition for Declaratory Order*, FD 35749, 2013 WL 3788140, at *4 (STB July 19, 2013) ("fundamental conflict" between a local government's regulation and the rights of a railroad to provide common carrier rail service resolved in favor of ICCTA preemption).

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[31] *See, e.g.*, *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295, 309 (3d Cir. 2004) (state agency cited a solid waste facility operator for handling solid waste before it reached rail cars and did not require rail carrier action to remedy violation); *Sea-3, Inc.- Petition for Declaratory Order*, FD 35853, 2015 WL 1215490, at *2-3 (STB Mar. 17, 2015) (city requested study of expanded transloading site, not a study of railroad operations, but did not condition permits on rail carrier action); *New York & Atl. Ry. Co. v. Surface Transp. Bd.*, 635 F.3d 66, 68 (2d Cir. 2011) (town issued stop-work order to third-party transloading operator, but did not condition relief from that order on rail carrier action).

[32] Dkt. No. 1-1 (denying water quality certification because potentially mitigatable rail effects are "outside the control of Millennium and cannot be guaranteed").

[33] State Defendants assert that Millennium's request for a water quality certification was denied on "two separate grounds" and fault BNSF for not challenging the denial's water quality grounds. State Mot. at 3. Even assuming those grounds were independent and not intertwined, the water quality certification remains denied for lack of action by BNSF.

[34] *See*, *supra* at 4 (listing purported rail impacts that State Defendants rely on to deny Project permits).

As the STB has explained, the dividing line for ICCTA preemption separates state and local regulations that have a "remote or incidental effect" on rail transportation and those that "may reasonably be said to have the effect of managing or governing" rail transportation. *Id.* at *3 (citation omitted). ICCTA does not preempt the former, but it does preempt the latter. *Id.* Contrary to Defendants' assertions that BNSF has "essentially assert[ed]" state permits in this case are preempted because they may have "an incidental impact" on rail transportation,[35] BNSF has quite clearly asserted its ICCTA preemption claim as one that "may reasonably be said to have the effect of managing or governing rail transportation."[36] In any event, by contending that BNSF's ICCTA preemption claim rests on actions that have only a remote or incidental effect on rail transportation, Defendants have introduced a genuine dispute of material fact between their and BNSF's theories of this case, precluding summary judgment on BNSF's ICCTA claim.

Indeed, State Defendants' attempt to liken this case to *Valero* fails to show that they are entitled to judgment as a matter of law and, instead, highlights the factual disputes looming in this case.

First, *Valero* reaffirms that "[w]hether a particular activity is considered part of transportation by rail carrier . . . is a case-by-case, fact-specific determination." 2016 WL 5904757, at *3. *Valero* does not establish, as a matter of law and as Intervenor Defendants suggest, that only "remote or incidental effect[s] on rail transportation" are possible when state and local authorities deny permits to a non-carrier.[37]

Second, *Valero* also clearly establishes that state actions *other than* state or local permitting or preclearance requirements may be preempted as applied, "if they would have the effect of unreasonably burdening or interfering with rail transportation." 2016 WL 5904757, at *3 n.7. This directly refutes Intervenor Defendants' contention that BNSF has impermissibly cast the State Defendants' denials as "regulation" subject to ICCTA preemption.[38]

[35] Intervenor Mot. at 6.
[36] BNSF Compl. ¶¶ 76-77.
[37] Intervenor Mot. at 7.
[38] Intervenor Mot. at 8.

Third, *Valero* nowhere supports State Defendants' assertion that "denial of a permit to a non-rail carrier does not raise" preemption concerns like potential preemption issues raised by state and local mitigation requirements of rail impacts.[39] Were the Court to constrict ICCTA preemption in that, it would lead to an absurd result that would allow state and local governments to (1) cite adverse rail impacts for projects they do not like; (2) disclaim power to mitigate rail impacts purportedly caused by such projects; and (3) deny the project for rail-based reasons, like Defendants Bellon and Franz did here.[40] That would be a power in disguise that ICCTA's text and purpose of asserting expansive federal regulation over rail transportation and operation does not support.

And fourth, whatever factual similarities exist between *Valero* (which was decided upon a limited, closed record before the STB) and this case in its current posture, those similarities cannot be dispositive, because the record here remains to be developed. *Contra* 2016 WL 5904757, at *3, ("Unlike the facts in *Winchester*, Valero has not identified an attempt by the Planning Commission to regulate [the railroad's] operations."); *id.* at *4 ("Valero has not demonstrated that the Planning Commission's decisions unreasonably interfere with [the railroad's] common carrier operations."). BNSF, a rail carrier, intends to present evidence that shows the State Defendants' actions regulate or intend to regulate BNSF, unreasonably interfere with its common carrier operations, and have the effect of "managing or governing" BNSF's rail transportation.[41]

Valero, which calls for a case-by-case, fact-specific determination of ICCTA preemption, precludes a rush to judgment about whether BNSF can show ICCTA preemption on the record in this case. *See* 2016 WL 5904757 at *3. Accordingly, State and Intervenor Defendants have failed to show that they are entitled to judgment as a matter of law. At best, their legal arguments sweep in factually inapposite decisions and inject a genuine dispute of

[39] State Mot. at 10.
[40] *See*, *supra* at 4 (listing purported rail impacts that State Defendants rely on to deny Project permits).
[41] *See*, *e.g.*, Tabor Decl. ¶¶ 6, 9.

material fact over the effect of the State Defendants' actions on rail transportation by BNSF. The Court should deny the motions for partial summary judgment.

B. BNSF has standing to bring its ICCTA preemption claim.

BNSF pled standing in its Complaint.[42] For redressability, BNSF alleged that "[t]he declaratory and injunctive relief that BNSF requests will likely redress BNSF's injuries, because Defendants' impermissible practices will be reversed, and Defendants would presumably not violate this Court's award of such relief in the future. Further, this Court could further ensure compliance with its orders by retaining jurisdiction over this case."[43] Upon granting BNSF's intervention, the Court concluded that BNSF had adequately pled standing.[44] While the Court also noted that "discovery may otherwise inform the contours of BNSF's claims," and that its "finding [was] limited to the pleadings,"[45] State Defendants have failed to produce any facts outside of the pleadings that would call this finding into question.

In a footnote, State Defendants cite *Gerlinger v. Amazon.com, Inc.*, 526 F.3d 1253 (9th Cir. 2009) for the proposition that BNSF cannot rely solely on its Complaint to establish standing.[46] However, the defendants in *Gerlinger* included evidence with their summary judgment motion to contest the plaintiff's standing. *Id.* at 1255. The court there noted that "[i]n the face of [defendants'] evidence, [plaintiff] needed to show some injury," and, by failing to do so, the plaintiff failed to satisfy his burden. *Id.* at 1256. Here, Defendants' standing challenge suffers the same fatal flaw that the entirety of their motions for partial summary judgment suffers – they offer *no* evidence to support any of their motions' contentions, let alone evidence to refute BNSF's allegation that the requested relief will redress the injury caused by State Defendants' conduct.

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[42] BNSF Compl. ¶¶ 28-30.
[43] *Id.* ¶ 30.
[44] Dkt. 47 at 10.
[45] *Id.* In its Complaint, BNSF acknowledges that the State's 401 Certification denial was not based entirely on rail transportation issues, qualifying that "Ecology based its water quality certification *almost* entirely on various purported rail transportation effects." Dkt. 121, ¶ 63 (emphasis added); *see supra* at 4 (listing purported rail impacts that State Defendants rely on to deny Project permits).
[46] State Mot. at 16 n.5.

Despite this glaring – and dispositive – deficiency in their challenge to BNSF's standing, State Defendants argue that BNSF cannot show that its alleged injuries are redressable, because the State Defendants denied Lighthouse's request for a water quality certification on grounds unrelated to rail impacts and that those grounds are "independent and adequate" enough to render BNSF's preemption claim non-justiciable. State Defendants' argument lacks legal and factual merit.

To satisfy Article III's "case" or "controversy" requirement, a plaintiff must show that it has suffered "injury in fact," that the injury is "fairly traceable" to State Defendants' actions, and that the injury will likely be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). To show redressability, a plaintiff must show "only that a favorable decision is likely to redress his injury, not that a favorable decision will inevitably redress his injury." *White v. Univ. of Cali.*, 765 F.3d 1010, 1022 (9th Cir. 2014) (quoting *Beno v. Shalala*, 30 F.3d 1057, 1065 (9th Cir. 1994)). "If a plaintiff is 'an object of the [challenged action] . . . there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.'" *Wolfson v. Brammer*, 616 F.3d 1045 (9th Cir. 2010) (quoting *Lujan*, 504 U.S. at 561-62). Any relief provided need not be complete. *See Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) (noting that "a plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his every injury."). Here, a favorable ruling as to BNSF's ICCTA preemption claim will likely redress BNSF's injuries for two main reasons.

First, State Defendants ignore that BNSF seeks multiple forms of relief in this case. Among other things, BNSF asks this Court to (1) declare that ICCTA preempts any decision by any state or local entity relying on the water quality certification denial when such decision would be based on purported rail impacts and (2) enjoin State Defendants from denying Lighthouse's water quality certification or *any other* permit or approval on the basis of rail

traffic.[47] Even if the water quality certification denial, for example, rests on non-rail grounds independently, declaratory and injunctive relief would prevent State Defendants from relying on rail-related grounds for any subsequent water quality certification decision. That, at the very least, would redress injury to BNSF's economic and legal interests as a rail carrier transporting commodities and operating under the exclusive regulatory jurisdiction of the federal government, rather than being subjected to a new state-level regulator – here, State Defendants. This is all that standing's redressability prong requires, even if a subsequent decision on the Project results in a non-rail-based denial. *See Larson*, 456 U.S. at 244 n.15; *Beno*, 30 F.3d at 1065 ("the mere fact that . . . the Secretary might again issue a waiver does not defeat plaintiffs' standing"). Further, BNSF's requests for a declaratory order, injunctive order, and vacatur of all the State Defendants' illegal decisions are not limited to the water quality certification but would apply to all State Defendants' actions that ICCTA preempts.[48]

Second, State Defendants ignore the significance of the water quality certification's denial as one "with prejudice." Instead, State Defendants claim rather boldly that this Court would have no basis to vacate the water quality certification denial, because that denial also cited water quality-related issues with Lighthouse's application.[49] However, State Defendants' decision here to deny a water quality certification *with* prejudice is unprecedented.[50] Any claim by State Defendants that, absent the rail-related bases for that denial, Defendant Bellon would have still denied the water quality certification *with* prejudice is refuted by materials uncovered by discovery review in this case.[51]

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[47] Dkt. 121 ("BNSF Compl.") ¶¶ 127 & 135 (emphasis added).
[48] BSNF Compl. ¶¶ 127 & 135.
[49] For support, State Defendants cite *Hells Canyon Preservation Council v. U.S. Forest Service*, 593 F.3d 923 (9th Cir. 2010). But *Hells Canyon* is factually inapposite. There, the plaintiff's alleged injury was the Forest Service's failure to maintain an original map that it was required to keep on file and available for public inspection. *Id.* The court found that this "injury" was already addressed by the Forest Service providing plaintiffs with copies of the map and that no available remedy could have cured the Forest Service having lost the original map. *Id.* The court added that a declaratory judgment that the Forest Service violated the requirement to keep the original map is not only worthless to plaintiffs, but seemingly worthless to all the world. *Id.* at 930. Court-ordered relief that would prevent State Defendants from regulating BNSF's rail operations in no way compares to the Forest Service's maintaining copies of a map where the original was lost.
[50] BSNF Compl. ¶¶ 62 & 63. State Defendants have admitted that they cannot identify any instance where Ecology has previously denied a 401 certification with prejudice. Dkt. 119 ¶ 62.
[51] *See generally* Tabor Decl., Ex. A at 4-6.

Defendant Bellon's decision to deny Lighthouse's water quality certification request with prejudice, which forecloses any opportunity to cure any defects with Lighthouse's water quality certification application, is based entirely on purported rail and vessel impacts and primarily on those ascribed to rail infrastructure and capital within BNSF's control or ownership.[52] Correspondence among key staff for Defendants Inslee and Bellon supports this conclusion.[53] For example, a draft letter from Ecology dated September 6, 2017, regarding Lighthouse's 401 certification request claims that there are key pieces of information missing from the 401 certification application, and that if information is still lacking as of September 30, 2017, "Ecology will be unable to certify that the proposal will meet water quality standards. Accordingly, in that circumstance we would deny *without* prejudice" the water quality certification.[54] The letter goes on to state that "receipt of a denial without prejudice would not in any way preclude Millennium from resubmitting" a water quality certification request, and that "[i]n our years of experience working on complex proposals, it is not unusual for an Applicant to do this because of information gaps that were unable to be filled within the necessary timeframe."[55]

But, after three weeks' worth of coordination between the offices of Defendants Bellon and Inslee, Defendants issued the water quality certification denial *with* prejudice, citing BNSF's rail operations as the primary basis for that denial.[56] That document shows that if State Defendants had been ordered to limit the water quality certification decision to the purported water quality issues, then it would not have made the same decision: (1) at most, State Defendants could have denied the certification without prejudice and (2) in the case of a denial without prejudice, Lighthouse would then have the opportunity to provide additional

[52] *See, supra* at 4 (listing purported rail impacts that State Defendants rely on to deny Project permits).
[53] Tabor Decl., Ex. A at 3.
[54] *Id.* at 5 (emphasis added). Defendants admit that Ecology prepared a letter that referred to denial without prejudice and admit that after discussion and consideration, Ecology decided to deny with prejudice. Dkt. 119, ¶61. The only meaningful change in Ecology's final decision is that it imported rail impacts as basis for denial.
[55] Tabor Decl., Ex. A at 5.
[56] *See supra* at 4 (listing purported rail impacts that State Defendants rely on to deny Project permits).

information in order to cure purported deficiencies associated with water quality-related issues.[57] Accordingly, vacatur of State Defendants' water quality certification would likely redress BNSF's injuries, because the "*with prejudice*" denial was animated solely by federal concerns that ICCTA preempts state and local officials from regulating or intending to regulate. BNSF has standing to bring its ICCTA preemption claim.

C. Commissioner Franz is a proper defendant.

BNSF has pled a factual basis for its ICCTA preemption claim against Commissioner Franz. When she denied Lighthouse's request to make terminal improvements at the Project, Commissioner Franz adopted Director Bellon's rationale for denying Lighthouse's request for a water quality certification, including Ecology's reliance on the alleged environmental effects of rail transportation.[58] State Defendants now argue, without introducing any new evidence, that BNSF's ICCTA claim against Commissioner Franz should be dismissed because her Department's denials did not rely on rail impacts, despite conceding that the terminal improvements denial did rely on rail impacts at least in part.[59] State Defendants' argument fails on this basis alone.

Further, whether Commissioner Franz in fact relied on rail when denying sublease decisions and whether that action is preempted by ICCTA is a fact-intensive inquiry. *See e.g.*, *Boston & Maine Corp. & Town of Ayer*, STB Finance Docket No. 33971, 5 S.T.B. 500 (2001) ("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."). As described in detail above, the record in this case, including facts relevant to BNSF's ICCTA preemption claim against Commissioner Franz, remains to be developed through ongoing

[57] Defendants inaccurately cite to *Donahue v. City of Boston*, 304 F.3d 110 (1st Cir. 2002) for the proposition that if a government actor would make the same decision regardless of improper grounds, the injury is not redressable. First, the Ninth Circuit has reached the opposite conclusion. *See Beno*, 30 F.3d at 1065 ("the mere fact that, on remand, the Secretary might again issue a waiver does not defeat plaintiffs' standing"). Second, *Donahue* held that the plaintiff had no cognizable injury (which Defendants here do not argue) to support his claim for damages (relief that BNSF does not seek). *Donahue*, 304 F.3d at 117-18.

[58] BSNF Compl. ¶¶ 64-67. Dkt 1-2, Ex. B.

[59] State Mot. at 16-17.

discovery. Commissioner Franz is not entitled to dismissal of BNSF's ICCTA preemption claim, nor is she entitled to judgment as matter of law at this stage in litigation.

D. The Court may defer decision on the motions for partial summary judgment.

At a minimum, the Court should delay consideration of State and Intervenor Defendants' motions for partial summary judgment until further factual development has occurred. "The primary purpose of Rule 56(d) is to ensure that parties have a reasonable opportunity to prepare their case and to ensure against a premature grant of summary judgment." *Tarutis v. Wal-Mart Stores, Inc.*, No. C12-5076 RJB, 2013 WL 247710, at *2 (W.D. Wash. Jan. 23, 2013) (Bryan, J.). "A Rule 56(d) 'continuance of a motion for summary judgment for purposes of conducting discovery should be granted almost as a matter of course unless the non-moving party has not diligently pursued discovery of evidence.'" *Id.* (citation omitted).

Neither Lighthouse nor BNSF has had a chance to develop a record sufficient for the Court to determine whether summary judgment is appropriate in this case. Document-based discovery has encountered several difficulties that the parties continue to navigate, and document-based discovery relevant to BNSF's ICCTA preemption claim remains ongoing as well.[60] Depositions have not yet been taken, because questions for deposition candidates must be narrowly tailored based on the voluminous discovery from state proceedings and relevant materials that BNSF anticipates remains forthcoming from State and Intervenor Defendants.[61] And, BNSF may use one or more experts to opine on the merits of its preemption claim; expert disclosures are not due for another three months.[62]

Given the fact-bound nature of ICCTA preemption claims,[63] these sources of information and their contents will bear directly on the Court's rendering of any judgment, summary or otherwise. Accordingly, if the Court does not deny State Defendants' and Intervenor Defendants' motions for partial summary judgment outright (and it should), BNSF asks the Court to defer consideration of those motions until discovery has concluded.

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[60] Tabor Decl. ¶ 8.
[61] *See id.* ¶ 6.
[62] *Id.* ¶ 9.
[63] *See*, *supra* at 4 (listing purported rail impacts that State Defendants rely on to deny Project permits).

Conclusion

For the foregoing reasons, the Court should deny the State and Intervenor Defendants motions for partial summary judgment. Alternatively, the Court should defer decision on those motions until discovery has closed.

DATED September 4, 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: September 4, 2018

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