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

REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PREEMPTION ISSUES

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I. INTRODUCTION

Plaintiffs Lighthouse and BNSF do not dispute that Lighthouse is not a rail carrier. Nor do they dispute that the facility Lighthouse seeks to construct—a coal export terminal—would not be operated by or on behalf of a rail carrier. As a matter of law there is no preemption under the Interstate Commerce Termination Act (ICCTA). Similarly, Plaintiffs do not dispute that the vessels that would call at the facility would not be "tank vessels" nor do they dispute that the Coast Guard has not adopted vessel traffic regulations for the Columbia River. Hence, as a matter of law, there is also no preemption under the Ports and Waterways Safety Act (PWSA).

In response to Defendants' Motion for Summary Judgment, Plaintiffs largely abandon their preemption arguments and instead contend that summary judgment should be denied (or deferred) because of an alleged factual dispute about whether the State Defendants' denial of permits and approvals for the facility "burdens" rail or vessel transportation. Dkt. 144, at 5. This alleged dispute, however, is not material to the issue of preemption. Before addressing the question of burden, this Court must first decide whether the ICCTA and the PWSA apply at all. These are threshold questions. Since, for the reasons stated above, neither the ICCTA nor the PWSA apply, the question of burden is irrelevant. There is no doubt that the State Defendants have authority to apply state environmental and land use laws to proposals that are neither rail facilities nor vessels.

Plaintiffs' standing arguments also fail. Plaintiffs argue that the Court can provide relief by removing some of the grounds the Department of Ecology relied on in denying the section 401 water quality certification. Dkt. 144, at 21. Plaintiffs, however, do not identify which of the many grounds for denial are preempted. Some of the grounds the State relied on under the State Environmental Policy Act (SEPA)—such as destruction of a historic district and adverse impacts on fish populations from dredging and pile driving—have nothing to do with vessel or rail transportation. Dkt. 1-1, at 12–13. Thus, even if the SEPA grounds were

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what led the State to deny the certification "with prejudice," as Plaintiffs argue, not all of those grounds are preempted. Plaintiffs in effect seek an advisory ruling on preemption that this Court cannot issue.

Finally, with regard to Commissioner Franz and the Department of Natural Resources (DNR), Plaintiffs make the extraordinary claim that the actual reasons for DNR's decisions are irrelevant; according to Plaintiffs, federal law preempts DNR's decisions simply because they allegedly "burden" rail and vessel transportation. Dkt. 144, at 22. This is not a preemption argument, but is instead a claim about the dormant commerce clause that is not germane to this motion. Plaintiffs also allege, without any evidence, that DNR actually did rely on vessel and rail impacts in making its decisions. Dkt. 144, at 23. This contention fails to meet the requirements of Rule 56(e) and must be rejected. The State Defendants are entitled to summary judgment on the preemption claims.

II. ARGUMENT

A. The ICCTA Does Not Apply Because Lighthouse Is Not a Rail Carrier and the Facility Would Not Be Operated for or on Behalf of a Rail Carrier

For ICCTA preemption to apply, the activity in question must fall within the statutory grant of jurisdiction to the Surface Transportation Board (STB). *Or. Coast Scenic R.R., LLC v. Or. Dep't of State Lands*, 841 F.3d 1069, 1072 (9th Cir. 2016). This threshold question requires that the activity being regulated constitute "transportation by rail carrier." *Or. Coast*, 841 F.3d at 1073. In order for an activity to constitute transportation by rail carrier, the activity must either by conducted by a rail carrier or under the auspices of a rail carrier. *Id.*

Plaintiffs do not dispute that Lighthouse is not a rail carrier or that the proposed export terminal would not be operated under the auspices of a rail carrier. Dkt. 144, at 9; Dkt. 146, at 11. Those undisputed facts end the analysis because there are no other facts relevant to this threshold question.

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In response, Lighthouse argues that ICCTA preemption is not limited to the activities of rail carriers, but instead applies to any action the State may take that "burdens" or "effects" rail transportation. Dkt. 144, at 9–13. Lighthouse is flat wrong. There is no question that preemption applies only to "transportation by rail carriers," because that is what ICCTA expressly states in 49 U.S.C. § 10501(b). *See, e.g.*, *Or. Coast*, 841 F.3d at 1073; *Valero Ref. Co.*, S.T.B. No. FD 36036 (Sept. 20, 2016), 2016 WL 5904757, at *3; *N.Y. & Atl. Ry. Co. v. Surface Transp. Bd.*, 635 F.3d 66, 72 (2d Cir. 2011); *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1330–31 (11th Cir. 2001). Lighthouse offers no textual basis for interpreting ICCTA more broadly than its terms allow.

Lighthouse cites two cases in support of its argument that ICCTA applies more broadly, but neither supports its position. The first, *Norfolk Southern Railway Co. v. City of Alexandria*, 608 F.3d 150 (4th Cir. 2010), involved a city ordinance that prohibited the hauling of ethanol in trucks on city streets. The city applied the ordinance to trucks calling at a transloading facility operated by the railroad. The city issued a permit to the railroad and attempted thereby to condition the railroad's activities. Based on those facts, the court concluded the city was attempting to regulate "transportation by rail carrier" and that ICCTA preempted application of the ordinance to the transloading facility. *Norfolk S.*, 608 F.3d at 158–59. The case does not support the broad reading advocated by Lighthouse because the court expressly concluded that the activity the city sought to regulate *was* transportation by a rail carrier. *Id.* at 159 n.11.

In the other case Lighthouse cites, *Boston & Maine Corp. & Springfield Terminal Railroad Co.*, S.T.B. No. FD 35749, 2013 WL 3788140 (July 19, 2013), the city of Winchester attempted to use its zoning laws to preclude the railroad from operating on a private track adjacent to a warehouse. The STB concluded the ICCTA preempted the city from doing so because, even though the track was a private one, the city's action prevented the railroad from providing service to the adjacent warehouse. *Id.* at *4. Here again, the Board found preemption because the city attempted to regulate the activities of a railroad over which the Board had

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exclusive jurisdiction. *Id*. at *3 ("[s]uch an attempt to prohibit common carrier rail transportation directly conflicts with the most fundamental common carrier rights and obligations provided by federal law and the Board's exclusive jurisdiction over that service.").

In both of these cases, the STB held that the activities involved were within its exclusive jurisdiction and thus local regulation of those activities was preempted. *See Norfolk S.*, 608 F.3d at 156. By contrast, the STB has consistently held that it does not have jurisdiction over transloading facilities that are not operated by a railroad. *See, e.g.*, *Valero*, at *3 n.8. In so holding, he Board has expressly distinguished the two cases cited by Lighthouse here. *Id.* at *4.

The fact is that *Valero* cannot be meaningfully distinguished from the present case. BNSF argues that the present case differs because the rail impacts that constituted one of the many reasons for Ecology's section 401 denial are within BNSF's control. Dkt. 146, at 13–14. But the same exact fact pattern existed in *Valero*. The STB nevertheless concluded that the City of Benicia was not preempted from denying a permit to Valero to construct its terminal even if Benicia would have been preempted from requiring mitigation for the same rail impacts that led to permit denial. *Valero*, at *2, *4.

Plaintiffs try to avoid summary judgment by arguing that whether a particular activity constitutes transportation by rail carrier is a "case-by-case, fact specific determination." Dkt. 144, at 11; Dkt. 146, at 15. That does not mean, however, that the issue cannot be resolved on summary judgment. The State Defendants present undisputed facts that Lighthouse is neither a rail carrier nor does it propose to operate its terminal under the auspices of a rail carrier. These are the only material facts for purposes of resolving the threshold question of ICCTA preemption. Since Plaintiffs do not dispute these facts, the State Defendants are entitled to judgment as a matter of law.

Plaintiffs argue that the ongoing discovery process is grounds to deny or defer summary. However, the discovery Plaintiffs seek relates to whether the State's actions

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unreasonably burden rail or vessel transportation. Dkt. 144, at 9. The question of burden, however, only comes into play if the State's actions regulate transportation by a rail carrier. *See Or. Coast*, 841 F.3d at 1076–77; *Norfolk S.*, 608 F.3d at 160. Since the State Defendants are not regulating transportation by a rail carrier, the discovery Plaintiffs seek is irrelevant and the ongoing discovery process is not grounds to deny the State's motion.[1]

B. The PWSA Does Not Apply Because the State's Actions Do Not Regulate Vessels or Vessel Traffic

Lighthouse concedes that Title II field preemption does not apply because the project would not involve tanker vessels. Dkt. 144, at 16 n.63. Thus, the only question is whether the State Defendants' actions are conflict preempted under Title I.

Lighthouse does not dispute key facts regarding Title I conflict preemption. Lighthouse does not dispute that the Coast Guard has not adopted regulations governing vessel traffic on the Columbia River. *See* Dkt. 144, at 13–17. As explained in Defendants' Motion for Summary Judgment, these facts are dispositive of Lighthouse's claim of preemption under the PWSA. *See* Dkt. 129, at 17–19.

In response, Lighthouse shifts its argument away from preemption and instead argues the dormant commerce clause. According to Lighthouse, summary judgment is not appropriate on this claim because there are allegedly unresolved factual disputes as to "whether the Defendants' actions have affected national and international maritime commerce in a way that infringes on federal authority." Dkt. 144, at 14. This alleged factual dispute, however, is not relevant to the issue of preemption under Title I of the PWSA.

Case law clearly establishes the framework for analysis of preemption claims under the PWSA. *See United States v. Locke*, 529 U.S. 89, 109 (2000); *Beveridge v. Lewis*, 939 F.3d 859 (9th Cir. 1991); *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483 (9th Cir. 1984); *Portland*

[1] It is unclear why Plaintiffs seek information from the State about whether the State's actions unreasonably burden their activities. That information is within their own knowledge. *See* Dkt. 146, at 16 (BNSF "intends to present evidence that shows the State Defendants' actions . . . unreasonably interfere with its common carrier operations.").

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Pipe Line Corp. v. City of S. Portland, 288 F. Supp. 3d 321, 436 (Me. 2017). Under that framework, the court looks under Title I to whether the Coast Guard has adopted regulations governing the activity in question and whether the state's actions conflict with those regulations. *See Beveridge*, 939 F.3d at 862. Here, it is undisputed that the Coast Guard has not adopted any relevant regulations. Even if it had, the State's actions would not conflict with them because the State simply denied permits for a facility on land; it did not attempt to regulate vessels or vessel traffic in any way. *See Portland Pipe Line*, 288 F. Supp. 3d at 439 ("On-shore state and local siting restrictions and even prohibitions on industrial activities, large structures, and pollution are quintessential examples of the use of historic police powers.").

Lighthouse ignores this analytical framework, arguing instead that the State must demonstrate "local circumstances" to justify its decisions. Dkt. 144, at 14. This requirement, however, only applies if the State is attempting to regulate vessels or vessel traffic within the scope of Title I, which the State has not done here. The mere fact that the State's denial of permits for the facility results in vessels not calling there, does not bring the State's actions within Title I. The State's permit decisions impose no "duties or restrictions related to vessel navigation or traffic" and no "affirmative duties at all." *Portland Pipe Line*, 288 F. Supp. 3d at 437. Even if they did, the undisputed findings of the Environmental Impact Statement (EIS), detailing the many impacts the coal export facility would have, establish the local conditions on which the State based its decision. *See* Dkt. 130-1. Thus, Lighthouse's argument is without merit.

Lighthouse seeks to distinguish *Portland Pipe Line* on the ground that the court in that case engaged in an extensive discussion of the facts underlying its decision. Dkt. 144, at 16. From this, Lighthouse argues that because the facts here are allegedly undeveloped, summary judgment is not appropriate. This argument misconstrues the *Portland Pipe Line* decision and ignores the record in this case. In this case, the facts regarding the environmental impacts the proposed coal export facility will have are fully described in the EIS and are not disputed.

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Lighthouse repeatedly has represented in state proceedings that it is not challenging the findings of the EIS. *See* Dkt. 130-6, at 21 ("Millennium does not dispute the factual findings in the FEIS."); Dkt. 1-3, at 49 ("[N]either the Applicant or any other party has appealed the FEIS and its findings and conclusions are unchallenged for the purpose of this hearing."). Thus, in this case, unlike *Portland Pipe Line*, there is no need for factual development regarding the reasons for the State's decision.

Because neither conflict nor field preemption under the PWSA applies here, summary judgment dismissing this claim should be granted in favor of Defendants.

C. Plaintiffs Fail the Redressability Prong for Standing

Plaintiffs concede that redressability is an "essential element" of Article III standing. Dkt. 144, at 19. They contend, however, that they satisfy this requirement because a ruling in their favor on their preemption claims would redress "some" of the legal roadblocks to construction of the coal export facility. *Id*. at 20. This contention is wrong—a ruling in their favor on preemption would remove none of the legal roadblocks to construction of the facility. A ruling in their favor on preemption would not reverse the State's section 401 denial (which has now been affirmed by the Pollution Control Hearings Board), or DNR's denial of the sublease (which was not based on rail or vessel impacts), or DNR's denial of authorization to construct the project's in-water facilities (which did not rely on rail or vessel impacts). Each of those decisions is supported by numerous valid reasons that are not preempted.

The cases Lighthouse cites in support of its argument are not helpful to it. Those cases establish the proposition that the plaintiff need not show a certainty that relief will address its injury; the plaintiff need only show that relief will "likely" address his injury. *E.g.*, *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 993 (9th Cir. 2012). Plaintiffs here, however, do not meet even this standard. A finding by this Court that some of the State's reasons for denial of the section 401 certificate are preempted would have no effect on the remainder of the reasons and the denial would still stand. Plaintiffs never specify what particular grounds in the

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section 401 decision they contend are preempted, nor do they explain why any particular ground is preempted. Their primary argument is that, if the court finds preemption of the SEPA grounds for denial, then the State would deny the certification "without prejudice" based on water quality grounds alone. Dkt. 144, at 22.

However, not all of the SEPA grounds for denial involve rail or vessel traffic and thus there is no basis for this Court to find all of those grounds preempted. At least two of the grounds—destruction of a historic district and impacts to fish populations from dredging and pile driving—have nothing to do with rail or vessel traffic and are not preempted under any conceivable interpretation of the PWSA and ICCTA. *See* Dkt. 1-1, at 12–13. More fundamentally, as Plaintiffs point out, the State Pollution Control Hearings Board recently affirmed the State's denial of the section 401 certificate. Dkt. 130-6. Plaintiffs do not explain how a ruling by this Court on preemption could affect that decision. Plaintiffs rest on the mere speculative assertion that a ruling by this Court would "help" in the ongoing state proceedings. Dkt. 144, at 21. This vague allegation is insufficient to withstand summary judgment. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (plaintiff must set forth "specific facts" to survive a motion for summary judgment based on lack of standing).

Lighthouse ignores those cases holding that plaintiffs lack standing if they would suffer the same injury regardless of whether the court grants the requested relief. *See Donahue v. City of Bos.*, 304 F.3d 110, 117–18 (1st Cir. 2002); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285–86 (1977); *Braunstein v. Ariz. Dep't of Transp.*, 683 F.3d 1177, 1186 (9th Cir. 2012). These cases stand for the proposition that where there are both proper and improper reasons for the defendant's decision, plaintiffs lack standing to seek retrospective relief if the defendant would have made the same decision based solely on the proper grounds. *See Donahue*, 304 F.3d at 117; *see also Mt. Healthy Sch. Dist.*, 429 U.S. at 286 (finding lack of causation if the defendant shows it would have made the same decision absent the improper rationale). Here, the State denied the section 401 certificate on a variety of grounds, many of

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which have nothing to do with rail or vessel traffic. Even if the State relied on the SEPA grounds to deny the certificate with prejudice (Dkt. 145-1), Plaintiffs fail to show that all (or indeed any) of those grounds are preempted. Consequently, Plaintiffs' injury is not redressable.

D. Plaintiffs Fail to Establish a Basis for Deferring Ruling on the Motion for Summary Judgment

Plaintiffs request deferral of Defendants' summary judgment motion because discovery is not yet complete. Dkt. 144, at 17–19; Dkt. 146, at 7, 22. This request should be denied. Plaintiffs have not filed a motion for deferral which, alone, is grounds to deny the request. *United States v. Kitsap Physicians Serv.*, 314 F.3d 995, 1000 (9th Cir. 2002).

Even if Plaintiffs had filed the required motion, the Court should deny the request. A party is entitled to deferral only if "it cannot present facts essential to justify its opposition" to the summary judgment motion. Fed. R. Civ. P. 56(d). Here, Plaintiffs admit that they have nearly 850,000 documents from the State Defendants. Dkt. 145 ¶ 13. BNSF claims that it has already identified hundreds of documents relevant to their claims. Dkt. 146, at 9. Yet the Plaintiffs do not submit a single document that even hints at a material factual dispute sufficient to defeat summary judgment.

The cases cited by Plaintiffs are easily distinguished. In *Burlington Northern*, BNSF filed a summary judgment motion less than a month after the case had been filed and before any discovery had taken place. *Burlington N. Santa Fe R.R. Co. v. Assiniboine & Sioux Tribes of Fort Peck Reservation*, 323 F.3d 767, 773 (9th Cir. 2003). In *Jacobson*, the defendant also moved for summary judgment before any discovery had taken place. *Jacobson v. U.S. Dep't of Homeland Sec.*, 882 F.3d 878 (9th Cir. 2018). And in *Tarutis*, the minor plaintiff's failure to obtain discovery prior to summary judgment was not the fault of the minor plaintiff but, rather, was the fault of a different uncooperative plaintiff who was no longer a party in the action. *Tarutis v. Wal-Mart Stores Inc.*, 2013 WL 247710, at *3 (W.D. Wash. 2013).

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Here, the Plaintiffs have already obtained voluminous discovery through this case, in the other five state lawsuits, and through public disclosure requests. The federal lawsuit was filed on January 3, 2018 (Dkt. 1), and State Defendants' motion to dismiss the preemption claims was originally filed on February 22, 2018. Dkt. 20. In denying the motion, the Court noted that the issues raised were more appropriately resolved through summary judgment rather than at the Rule 12(b)(6) stage. Hr'g Tr. 59–60:21–5.[2] The Plaintiffs have thus had ample notice that the State Defendants would seek to dismiss their preemption claims and have had ample time to acquire evidence to show a material factual dispute. Yet, they do not produce a single relevant document in response to the State Defendants' summary judgment motion. Even if they had properly moved for deferral under Rule 56(d), which they did not, their request for deferral should be denied.

E. Plaintiffs' Preemption Claims as to Defendant Franz Lack a Factual Basis

Plaintiffs' preemption claims as to Defendant Franz should be dismissed because they lack a factual basis—neither Defendant Franz nor her predecessor relied on rail or vessel impacts in making their leasing decisions. *See* Dkt. 130-2 (denial of sublease based on failure to demonstrate financial viability); Dkt. 1-2 (denial of authorization to construct based on inconsistency with the existing lease). In response, Lighthouse essentially admits that its claims as to Defendant Franz lack a factual basis but asserts that (a) this does not matter; and (b) discovery allegedly will show that she actually did rely on vessel and rail impacts. Dkt. 144, at 22. Neither of these claims have any merit.

Lighthouse's first argument, like much of its response brief (e.g., Dkt. 144, at 23–24), is really an argument about the dormant commerce clause, not one about preemption. Lighthouse asserts that, if DNR's decisions "burden" maritime commerce or rail transportation, they are preempted. Dkt. 144, at 22–23. As discussed above, this is not the

[2] The Court also asked the parties to file separate single-issue summary judgment motions, which necessarily requires that motions be spaced over a period of months prior to the dispositive motion deadline of February 12, 2019. Hr'g Tr. 60:6–11; Dkt. 84.

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proper test for preemption under either the ICCTA or the PWSA. Consequently, this argument must be rejected. Lighthouse's second argument, alleging a need for discovery, also should be rejected because Lighthouse fails to make the required showing under Rule 56(d). Lighthouse offers no reason to think that discovery will reveal any relevant facts that will support its claim. *See Getz v. Boeing Co*., 654 F.3d 852, 868 (9th Cir. 2011) (Plaintiffs failed to "proffer sufficient facts to show that the evidence sought exists, and that it would prevent summary judgment.").

Under state law, Defendant Franz could not have approved Lighthouse's proposed terminal expansion until Lighthouse first obtained all necessary permits, including a section 401 certification from Ecology, as well as a federal permit for dredging and constructing improvements in navigable waters under section 10 of the Rivers and Harbors Appropriations Act (33 U.S.C. § 403). *See* Wash. Admin. Code § 332-30-122(1)(c); Wash. Rev. Code § 79.130.030. Regardless of any alleged improper motives against Defendant Franz by the Plaintiffs, it is undisputed that Lighthouse does not have the necessary permits needed to construct the expanded facility. Dkt. 1, at 33; Dkt. 1-2 Ex. B at 10. Under Washington Administrative Code § 332-30-122(1)(c), "[a]ll necessary federal, state and local permits *shall be acquired* by those proposing to use aquatic lands. Copies of permits *must be furnished to the department prior to authorizing the use of aquatic lands.*" (emphasis added). *See also* Wash. Rev. Code § 79.130.030 (federal permits required before DNR can approve an application to place structures or improvements in navigable waters).

The requirement that those proposing to use state-owned aquatic lands must first obtain all necessary permits before DNR will approve their use is an undisputed matter of law, not fact. Defendant Franz explained the requirements of Washington Administrative Code § 332-30-122(1)(c) to Northwest Alloys in the October 24, 2017 decision denying the proposed terminal expansion. Dkt. 1-2 Ex. B at 10. Unless Lighthouse had all necessary permits first, which it is undisputed that it did not, Defendant Franz could not have approved their request.

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There are no material facts that Plaintiffs could develop through discovery that would change this outcome. Defendant Franz is therefore entitled to judgment as a matter of law.

III. CONCLUSION

For the reasons stated above, Plaintiffs' preemption claims must be dismissed as a matter of law. Based on undisputed facts, neither the ICCTA nor the PWSA apply here. Plaintiffs fail to show any basis for deferring ruling on the motion, because the factual disputes they allege are not material. In essence, Plaintiffs abandon their preemption claims and instead argue their dormant commerce clause claims, which are not before the Court. Consequently, the Court should dismiss Plaintiffs' preemption claims.

DATED this 7th day of September 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on September 7, 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 7th day of September 2018.

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