

The Honorable Robert J. Bryan

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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 SUPPLEMENTAL  
OPPOSITION TO DEFENDANTS'  
AND INTERVENOR-DEFENDANTS'  
MOTIONS FOR PARTIAL  
SUMMARY JUDGMENT**

**NOTED ON MOTION CALENDAR:  
December 3, 2018**

**ORAL ARGUMENT REQUESTED**

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## Introduction

Regarding the ICC Termination Act (“ICCTA”), the Ninth Circuit recently observed: “It is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over railroad operations.” *BNSF Ry. Co. v. California Dep’t of Tax & Fee Admin.*, 904 F.3d 755, 772 (9th Cir. 2018). In line with that observation, courts and the Surface Transportation Board (“STB”) have explained that ICCTA preempts state and local actions that attempt to regulate “transportation by a rail carrier.” ICCTA preempts such actions in two different ways: **categorically** and **as-applied** to an action’s context and rationale. On the one hand, state or local actions that have the “effect of governing rail” but are not “generally applicable state laws that have a mere remote or incidental effect on rail transportation” are categorically preempted by ICCTA. Categorically preempted actions come in two forms: (1) state or local permitting or preclearance that, by its nature, could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities that the STB has authorized or (2) state or local regulation of matters directly regulated by the STB. On the other hand, state and local actions that have the “effect of unreasonably burdening or interfering with rail transportation” are preempted by ICCTA on an as-applied basis – i.e., they “require[] a factual assessment” of the effects of a state or local government’s action on rail transportation.

Here, State Defendants’ actions involve attempts to regulate transportation by a rail carrier – i.e., BNSF’s coal shipping services. As an action that attempts to regulate transportation by a rail carrier, Defendant Bellon’s denial of Millennium’s request for a Clean Water Act Section 401 water quality certification is preempted by ICCTA, categorically and as-applied to her denial’s effects on rail transportation.

First, Defendant Bellon’s denial has the effect of managing or governing rail and is categorically preempted by ICCTA. Eight of the nine “substantive SEPA” grounds for her decision cite purported rail impacts from expanded rail transportation to the Millennium Bulk Terminal (“Terminal”). All these impacts derive solely from BNSF’s rail operations:

- train engine emissions causing bad air quality

- 1 • train traffic increases causing congested automobile traffic
- 2 • train horns causing noise pollution
- 3 • train engine emissions increasing cancer risks
- 4 • rail capacity stresses caused by increased train traffic
- 5 • train accident increases caused by increased train traffic
- 6 • train traffic increases causing fish health problems from fugitive coal dust
- 7 • train traffic increases restricting access to tribal fishing areas<sup>1</sup>

8 By substantially basing her water quality certification denial on impacts arising from rail  
9 transportation of coal from the Washington state border all the way to the Terminal, Defendant  
10 Bellon's denial effectively demands a permit or form of preclearance from BNSF before it may  
11 expand and operate its coal shipping services to the Terminal. As demonstrated in this  
12 supplemental brief, Defendant Bellon has newly expanded this form of state permitting beyond  
13 consideration of water quality impacts at the Terminal to deny BNSF the ability to conduct part  
14 of its operations. Bellon's denial also has the effect of managing and governing rail because it  
15 regulates purported environmental impacts by railroads that are directly regulated by the STB –  
16 i.e., purported environmental impacts associated with continuing and expanded BNSF service  
17 to the Terminal. As a result, ICCTA categorically preempts Defendant Bellon's 401 certification  
18 denial with respect to rail transportation impacts that are within STB's jurisdiction.

19 Second, ICCTA preempts Defendant Bellon's denial on an as-applied basis because it  
20 unreasonably burdens and interferes with rail transportation since it will hamper BNSF's ability  
21 to maintain economies of scale, scope, and density associated with its operations. As Dr. William  
22 Huneke, former Chief Economist of the STB, explains in his expert report, the Terminal is rail-  
23 critical infrastructure that would allow BNSF and other railroads to maintain economies of scale,  
24 scope and density and maintain sufficient return on investment into the future. ICCTA preempts  
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28 <sup>1</sup> Dkt. # 1-1 at 4-14 (Director Bellon's water quality certification denial).

1 such unreasonable burdens on and interferences with rail transportation. At a minimum, this  
 2 evidence presents a genuine dispute of material fact that precludes summary judgment.<sup>2</sup>

### 3 **Supplemental Materials and Argument**

4 Consistent with Congress’s intent, ICCTA’s preemption of state and local action  
 5 impacting rail activities is broad. And the specific question of whether ICCTA preempts state  
 6 or local action is a fact-intensive issue. Here, the State’s water quality certification denial  
 7 impacts and interferes with BNSF’s rail operations and is preempted by ICCTA. At a  
 8 minimum, questions concerning the burden on and interference with rail operations present  
 9 questions of fact precluding summary judgment.

10 First, actions that regulate “transportation by a rail carrier” are within ICCTA’s  
 11 preemptive scope. 49 U.S.C. § 10501(a), and ICCTA defines “transportation” broadly to  
 12 include rail capital and services. *See* 49 U.S.C. § 10102(9). ICCTA preempts state or local  
 13 action involving transportation by a rail carrier in two ways: a) categorically and b) as-applied.  
 14 Under 49 U.S.C. § 10501(b), ICCTA categorically preempts two forms of state or local  
 15 actions: (1) any form of state or local permitting or preclearance that, by its nature, could be  
 16 used to deny a railroad the ability to conduct some part of its operations, *CSX Transportation,*  
 17 *Inc.–Petition for Declaratory Order*, FIN 34662, 2005 WL 1024490, at \*2 (May 3, 2005)  
 18 (citing *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998)), and (2) any state or  
 19 local regulation of matters directly regulated by the STB, such as construction, operation, and  
 20 abandonment of rail lines. *Id.* Second, Section 10501(b) also preempts state or local actions on  
 21 an “as-applied” basis, an analysis requiring a “factual assessment of whether that action would  
 22 have the effect of preventing or unreasonably interfering with railroad transportation.” *Id.* at 3.  
 23 What ultimately matters for purposes of Section 10501(b) is “the degree to which the  
 24 challenged regulation burdens rail transportation.” *Ass’n of Am. Railroads v. S. Coast Air*  
 25 *Quality Mgmt. Dist.*, 622 F.3d 1094, 1097–98 (9th Cir. 2010). Here, Defendant Bellon’s denial

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26 <sup>2</sup> Other evidence may bear even more strongly, but State Defendants have provided discovery responses at a  
 27 glacial pace. Depositions are scheduled, but they have not yet begun. BNSF does not ask for another 56(d)  
 28 deferral of summary judgment, but instead asks the Court to consider this supplemental opposition with this  
 context in mind.

1 involves transportation by a rail carrier, and ICCTA preempts that denial both categorically  
2 and on an as-applied basis.

3 **A. Defendant Bellon’s denial involves “transportation by a rail carrier.”**

4 ICCTA governs and preempts “transportation by a rail carrier.” 49 U.S.C. § 10501(a).  
5 ICCTA defines transportation “broadly to include locomotives and equipment related to the  
6 movement of passengers or property.” *Delaware v. Surface Transportation Bd.*, 859 F.3d 16,  
7 21 (D.C. Cir. 2017) (quoting 49 U.S.C. § 10102(9)(A)). “Transportation” also includes  
8 “services related to that movement.” *Id.* § 10102(9)(B). Defendant Bellon’s denial is based to a  
9 large extent on, and indeed regulates, “transportation by a rail carrier.” 49 U.S.C. § 10501(a).

10 Under ICCTA, BNSF is a rail carrier, which no one disputes. Almost all the bases for  
11 Defendant Bellon’s water quality certification denial involve purported impacts from BNSF’s  
12 rail shipping operations, not impacts from constructing the Terminal.<sup>3</sup> State and Intervenor  
13 Defendants do not dispute this either, instead attempting to isolate the “regulated activity” to  
14 “Millennium’s proposal to construct an export terminal,” arguing that because BNSF’s rail  
15 system is not part of the Terminal and no permits are required of BNSF for the Terminal,  
16 ICCTA preemption does not apply.<sup>4</sup> But again, Defendants attempt at sleight-of-hand cannot  
17 avoid the simple fact that almost all of the *bases* underlying the denial directly involve BNSF’s  
18 transportation operations (i.e., “transportation by a rail carrier”). Defendant Bellon’s letter  
19 denying the water quality certification cites “impacts that would result from construction and  
20 operations of the Project,”<sup>5</sup> and then lists purported impacts from the operation of rail  
21 transportation to the Project. By the denial letter’s own terms, then, “operations of the Project”  
22 clearly encompasses rail transportation to and from the Project, not just the construction and  
23 operation of the Terminal itself.

24 For example, Defendant Bellon’s denial cites, as a significant and unavoidable adverse  
25 impact, increased cancer risk for areas “along rail lines and around the Terminal site in

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27 <sup>3</sup> Dkt. # 1-1.

<sup>4</sup> Dkt. # 129 at 8.

<sup>5</sup> Dkt. # 1-1 at 4.

1 Cowlitz County where diesel emissions primarily from trains would increase.”<sup>6</sup> These are  
 2 impacts outside the Terminal but within BNSF’s rail operations. Similarly, Defendant Bellon  
 3 lists several railroad intersections – including two on BNSF’s main line – that, according to  
 4 her, would experience severe level of service degradations at full project build-out.<sup>7</sup> These  
 5 railroad crossings are not part of the Terminal property, but they are part of BNSF’s rail  
 6 operations. And again, the geographic radius is not limited to the Terminal itself or even the  
 7 surrounding area. It stretches over 300 miles to the Washington-Idaho border. These alleged  
 8 impacts result solely from and relate solely to rail operations (e.g., impact from BNSF’s rail  
 9 capacity on main lines).<sup>8</sup>

10 And as Dr. Huneke explains, State Defendants’ actions in this case have blocked the  
 11 Terminal – “rail-critical infrastructure” – based largely on impacts related to rail service, i.e.,  
 12 transportation by a rail carrier.<sup>9</sup> Dr. Huneke’s report details how State Defendants’ actions will  
 13 affect BNSF’s coal shipping operations overall. Accordingly, whether Defendant Bellon’s  
 14 denial involves “transportation by a rail carrier” is, at a minimum, a question of material fact  
 15 subject to genuine dispute between the two sides in this litigation. The Court should deny State  
 16 and Intervenor Defendants’ motions for summary judgment on BNSF’s ICCTA claim.

17 **B. ICCTA categorically preempts Director Bellon’s denial.**

18 ICCTA categorically preempts “any form of state or local permitting or preclearance  
 19 that, by its nature, could be used to deny a railroad the ability to conduct some part of its  
 20 operations or to proceed with activities that the Board has authorized.” *CSX*, 2005 WL  
 21 1024490, at \*2. ICCTA also preempts any “state or local regulation of matters directly  
 22 regulated” by the STB. *Id.* Whether a state or local action falls into either (or neither) category  
 23 requires a factual determination. *Cf. id.* at \*3.

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 26 <sup>6</sup> Dkt. # 1-1 at 5-6.

27 <sup>7</sup> Dkt. # 1-1 at 6-7.

28 <sup>8</sup> See Dkt. # 1-1 at 10.

<sup>9</sup> References to Dr. William Huneke’s report, which accompanies a declaration by him, shall be cited herein as “Huneke Rpt.” with corresponding references to paragraph numbers within that report. Huneke Rpt. ¶¶ 12, 49.



1 Here, State and Intervenor Defendants have submitted no evidence to negate BNSF's  
2 ICCTA claim of categorical preemption based on railroad permitting or preclearance and state  
3 regulation of STB matters. Instead, in their original motions for summary judgment,<sup>10</sup> State  
4 and Intervenor Defendants submitted public testimony by BNSF's General Director of  
5 Construction Permitting that because BNSF's rail system is not part of the Terminal nor is  
6 BNSF an applicant for it, considering rail impacts as a basis to deny the Terminal is  
7 inappropriate.<sup>11</sup> As explained in the previous section, whether or not BNSF is or is not a part  
8 of the Terminal does not end the inquiry. Rather, the question of "categorical preemption"  
9 involves a factual analysis concerning whether a local regulation is a form of permitting or  
10 preclearance that, by its nature, could be used to deny a railroad the ability to conduct some  
11 part of its operations or whether the local regulation attempts to regulate matters regulated by  
12 the STB.

13 BNSF now provides evidence by way of Dr. Huneke's report that the permit denials  
14 here – based on purported rail impacts – are forms of permitting that, by their nature, deny  
15 BNSF the ability to conduct some part its operations, namely, to provide interstate rail  
16 shipping service from Montana and Wyoming, through Washington, and to the Terminal.<sup>12</sup> In  
17 that regard, ICCTA categorically preempts Defendant Bellon's rail transportation-based denial  
18 as an impermissible form of state permitting or preclearance of rail transportation.  
19 Additionally, as Dr. Huneke explains: the type of impacts that Director Bellon's denial  
20 regulates is the type that the STB regulates when, for example, railroads increase capacity on  
21 existing lines or construct new lines.<sup>13</sup> On the evidence that BNSF presents, ICCTA  
22 categorically preempts Defendant Bellon's denial on this basis as well.

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26 <sup>10</sup> State Defendants submitted no supplemental materials or argument on November 19, 2018. Intervenor  
Defendants submitted only a 2-page supplemental statement that no factual disputes exist. Dkt. # 181.

27 <sup>11</sup> Dkt. # 128-1 at 5.

<sup>12</sup> Huneke Rpt. ¶ 49.

<sup>13</sup> Huneke Rpt. ¶ 31; *see* 49 C.F.R. § 1105.6.

1 At a minimum, a genuine dispute of material fact exists over whether Defendant  
2 Bellon's denial is either form of categorically preempted state or local action.<sup>14</sup> The Court  
3 should deny State and Intervenor's motions for summary judgment on BNSF's ICCTA  
4 preemption claim.

5 **C. ICCTA, as applied, preempts Director Bellon's denial.**

6 Even if ICCTA does not categorically preempt a state or local action, it can do so "as  
7 applied" to the action's context or rationale. This as-applied analysis of ICCTA preemption  
8 "requires a factual assessment of whether that action would have the effect of preventing or  
9 unreasonably interfering with railroad transportation." *CSX*, 2005 WL 1024490, at \*3. Or, as  
10 the Ninth Circuit has recently confirmed, "what matters is the degree to which the challenged  
11 regulation burdens rail transportation." *Oregon Coast Scenic R.R., LLC v. Oregon Dep't of*  
12 *State Lands*, 841 F.3d 1069, 1077 (9th Cir. 2016). Necessarily, a fact-based inquiry.

13 Here, Dr. Huneke explains that Defendant Bellon's denial impedes BNSF's  
14 transportation of coal and burdens BNSF's ability to remain a financially viable railroad and  
15 continue to serve as a rail transporter.<sup>15</sup> Specifically, Dr. Huneke describes unique economic  
16 conditions that apply to capital-intensive industries like railroads: economies of scale, scope,  
17 and density.<sup>16</sup> Those conditions, according to Dr. Huneke, require that railroads maintain  
18 intense use of their capital to manage average costs.<sup>17</sup> For years, coal has remained the chief  
19 commodity among several that supports railroads' ability to maintain intense use of its capital  
20 and, in turn, manage costs.<sup>18</sup> Although relative shares of commodities shipped by rail are  
21 changing across the railroad industry,<sup>19</sup> Dr. Huneke explains (using the State Defendants' own  
22 assumptions about coal export volumes)<sup>20</sup> that to deny the Terminal would possibly result in

23 <sup>14</sup> In its original opposition, BNSF also noted that "by contending that BNSF's ICCTA preemption claim rests on  
24 actions that have only a remote or incidental effect on rail transportation, Defendants have introduced a genuine  
25 dispute of material fact between their and BNSF's theories of this case, precluding summary judgment on  
26 BNSF's ICCTA claim." Dkt. # 146 at 15.

27 <sup>15</sup> Huneke Rpt. ¶ 24.

28 <sup>16</sup> *Id.* ¶¶ 33-36.

<sup>17</sup> *Id.* ¶ 36.

<sup>18</sup> *Id.* ¶¶ 37 (railroads generally), 41 (BNSF specifically).

<sup>19</sup> *Id.* ¶¶ 38-46.

<sup>20</sup> Huneke Rpt. ¶ 50.

1 BNSF losing significant economies of scale, scope and density – burdening BNSF’s overall  
2 operations at a scale of over \$1 billion dollars in lost gross revenue, or stated differently, a 6%  
3 to 9% loss, according to publicly available materials on which Dr. Huneke relied.<sup>21</sup> It is  
4 difficult to imagine a situation in which economic regulation adversely affecting a firm’s gross  
5 revenues by such a percentage would not be unduly burdensome or interfere with its  
6 operations. At a minimum, Dr. Huneke’s opinion raises genuine issues of material fact as to  
7 the issue of as-applied ICCTA preemption. The Court should deny State and Intervenor’s  
8 motions for summary judgment on BNSF’s ICCTA preemption claim.

9 **Conclusion**

10 The State based its water quality certification denial largely on alleged environmental  
11 impacts resulting solely from rail operations. As explained in Dr. Huneke’s report, if this denial  
12 is upheld it interferes with and substantially burdens BNSF’s rail operations both in Washington  
13 and outside its borders. This is the very type of regulation that Congress reserved to the  
14 preemptive authority of ICCTA. The Court should deny the State and Intervenor Defendants  
15 motions for summary judgment on BNSF’s ICCTA preemption claim.

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<sup>21</sup> *Id.* ¶ 57.

1 DATED November 26, 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: November 26, 2018

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