

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,

WASHINGTON ENVIRONMENTAL  
COUNCIL, *et al.*,

Defendant-Intervenors.

NO. 3:18-cv-05005-RJB

PLAINTIFFS LIGHTHOUSE  
RESOURCES, INC., *ET AL.*'S  
SUPPLEMENTAL OPPOSITION  
TO DEFENDANTS' AND  
DEFENDANT-INTERVENORS'  
MOTIONS FOR PARTIAL  
SUMMARY JUDGMENT

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1 INTRODUCTION

2 When the Defendants first moved for partial summary judgment, Lighthouse and  
3 BNSF argued that they should be allowed to continue with discovery, including through  
4 expert witnesses. On November 14, both Lighthouse and BNSF disclosed experts whose  
5 testimony goes directly to the issues now before the Court—whether the Defendants’ actions  
6 unreasonably burden rail transportation and whether the Defendants’ regulation of maritime  
7 commerce is justified by peculiar, local conditions in the Columbia River. As discussed  
8 below, that testimony creates issues of fact that preclude the Defendants’ summary judgment  
9 motions.  
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11 SUPPLEMENTAL INFORMATION

12 **I. Expert testimony will show that Defendants’ actions have the effect of regulating**  
13 **rail transportation.**

14 As discussed in Lighthouse’s prior briefing, the ICC Termination Act (ICCTA)  
15 “preempts all state laws that may reasonably be said to have the effect of managing or  
16 governing rail transportation, while permitting the continued application of laws having a  
17 more remote or incidental effect on rail transportation.”<sup>1</sup> Deciding whether a state action has  
18 the prohibited “effect of managing or governing rail transportation” is, inevitably, a “case-by-  
19 case, fact-specific determination.”<sup>2</sup> To make that determination, the Ninth Circuit evaluates  
20 “the degree to which the challenged regulation burdens rail transportation.”<sup>3</sup>  
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22 On November 14, Lighthouse and BNSF disclosed an expert witness—former Surface  
23 Transportation Board Chief Economist William Huneke—who will testify about the ways in  
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25 <sup>1</sup> *Ass’n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010) (citations and  
26 internal quotation marks omitted).

<sup>2</sup> *Oregon Coast Scenic R.R., LLC v. Oregon Dep’t of State Lands*, 841 F.3d 1069, 1074 (9th Cir. 2016).

<sup>3</sup> *Ass’n of Am. R.R.*, 622 F.3d at 1097 (citation omitted).

1 which the Defendants’ actions significantly burden rail transportation. Dr. Huneke’s expert  
 2 report explains how railroads uniquely rely on economies of scale, scope, and density to  
 3 remain competitive against other modes of transportation.<sup>4</sup> Without the Millennium Bulk  
 4 Terminal, Dr. Huneke explains, “BNSF will be a different, less efficient railroad” that “will  
 5 face higher costs” that lead it to “increase rates.”<sup>5</sup> In the end, those higher rates “will cause  
 6 BNSF to lose more than an additional \$1,000,000,000 dollars in gross revenue – a loss of 6 to  
 7 9%.”<sup>6</sup> Not surprisingly, these facts lead Dr. Huneke to conclude that the Defendants’ actions  
 8 in preventing construction of the Terminal “have serious regulatory consequences and  
 9 *seriously burden* BNSF . . . .”<sup>7</sup>

11 These facts dramatically distinguish this case from the STB decision on which the  
 12 Defendants have repeatedly relied—*Valero Refining Co.*<sup>8</sup> Valero lost because it failed to  
 13 “demonstrate[] that the Planning Commission’s decisions unreasonably interfere[d] with  
 14 [Union Pacific]’s common carrier operations.”<sup>9</sup> Here, by contrast, Dr. Huneke’s report shows  
 15 how the Defendants have taken actions “that interfere unduly with the railroad’s common  
 16 carrier operations . . . .”<sup>10</sup> Valero did not present any such expert testimony, and there is no  
 17 reason to think that the state actions at issue in *Valero* would have caused anything like the  
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21 <sup>4</sup> Expert Report of Dr. William Huneke on Behalf of BNSF Railway Co. (Huneke Expert Report) ¶¶ 34-36. The  
 22 Huneke Expert Report is attached as Exhibit (“Ex.”) A to the Declaration of Bradley B. Jones In Support of  
 Plaintiffs Lighthouse Resources, *et al.*’s Supplemental Opposition to Defendants’ and Defendant-Intervenors’  
 Motions for Partial Summary Judgment (“Jones Decl.”).

23 <sup>5</sup> *Id.* ¶ 57; *see id.* ¶¶ 50-51.

24 <sup>6</sup> *Id.* ¶ 57; *see id.* ¶¶ 52-53.

25 <sup>7</sup> *Id.* ¶ 54 (emphasis added).

26 <sup>8</sup> *See* Defendants’ Partial Summ. J. Br. at 6 (citing *Valero Refining Co.—Petition for Declaratory Order*, 2016  
 WL 5904757, STB Dkt. No. FD 36036 (Sept. 20, 2016)). The STB specifically noted in *Valero* that preemption  
 “is a case-by-case, fact-specific determination.” *Valero*, 2016 WL 5904757, at \*3.

<sup>9</sup> *Id.* at \*4.

<sup>10</sup> *Id.* (internal quotation marks omitted).

1 forecasted \$1 billion burden on rail transportation that the Defendants' actions would have in  
2 this case.

3 To the extent the Defendants continue to argue that ICCTA preemption extends only  
4 to activities "conducted by a rail carrier or under the auspices of a rail carrier,"<sup>11</sup> they are  
5 making mistakes of law and fact. In *Norfolk Southern Railway Co. v. City of Alexandria*, the  
6 Fourth Circuit plainly held that city rules aimed directly at private trucking companies were  
7 preempted under ICCTA because they unreasonably burdened rail transportation.<sup>12</sup> As already  
8 noted, the facts to which Dr. Huneke will testify show a similarly significant burden on rail  
9 transportation from the Defendants' actions in this case. On that basis, he concludes that "the  
10 Terminal represents rail-critical infrastructure that would allow BNSF and other railroads to  
11 maintain economies of scale, scope and density . . . ."<sup>13</sup> Regulating the Terminal thus  
12 regulates BNSF.  
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15 If the Defendants claim that BNSF is not entitled to any protection from the higher  
16 costs and lower revenue that will result from their actions, they mistake the purposes of  
17 ICCTA. The statute exists in recognition of the special economics of the rail industry, and  
18 gives STB authority to protect railroads and their customers against harmful market forces.<sup>14</sup>  
19 Based on his decade of experience as STB's Chief Economist, Dr. Huneke affirms that federal  
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22 <sup>11</sup> Defendants' Br. at 8; WEC Br. at 3.

23 <sup>12</sup> 608 F.3d 150, 154, 158-59 (4th Cir. 2010); see also *Boston & Maine Corp. & Springfield Terminal R.R. Co.—*  
24 *Petition for Declaratory Order*, 2013 WL 3788140 STB Dkt. No. FD 35749, at \*4 (July 19, 2013).

25 <sup>13</sup> Huneke Expert Report ¶ 49, Ex. A to Jones Decl.

26 <sup>14</sup> See 49 U.S.C. § 10101 (listing ICCTA's rail policies, including among other things, "to promote a safe and  
efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by [STB]";  
"to ensure the development and continuation of a sound rail transportation system with effective competition  
among rail carriers and with other modes, to meet the needs of the public and the national defense"; and "to  
ensure competition and coordination between rail carriers and other modes.").

1 regulation of railroads has long “focused on achieving and maintaining the financial viability  
2 of the railroad industry.”<sup>15</sup>

3 The Defendants’ actions in this case are preempted under ICCTA because they  
4 manage or govern rail transportation by threatening the financial viability of the railroads that  
5 would serve the Millennium Bulk Terminal. The Defendants have not presented an expert to  
6 rebut Dr. Huneke’s calculations. At a bare minimum, this presents an issue for trial, and  
7 summary judgment should be denied.  
8

9 **II. Expert testimony will show that the Defendants are burdening national and**  
10 **international maritime commerce.**

11 Similar to its longstanding regulation of the railroad industry, the federal government  
12 has historically exercised primary authority over national and international maritime  
13 commerce.<sup>16</sup> The states’ “vast” powers in this area are inherently “residual,” and any state  
14 regulation of maritime commerce must be “based on the peculiarities of local waters” such as  
15 “water depth and narrowness, idiosyncratic to a particular port or waterway.”<sup>17</sup>

16 Given the opportunity to identify in supplemental briefing the “peculiarities of local  
17 waters” that led them to identify maritime commerce as one of their justifications for denying  
18 Lighthouse’s request for water quality certification, the Defendants were silent. When asked  
19 the same question during discovery, they simply (and circularly) point back to their decision  
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23 <sup>15</sup> *Id.* ¶ 55.

24 <sup>16</sup> *United States v. Locke*, 529 U.S. 89, 108 (2000).

25 <sup>17</sup> *Id.* The State Defendants have acknowledged this limit on their authority: “[S]tates may adopt regulations that  
26 relate to vessel traffic *and are directed at local circumstances* unless the Coast Guard has already adopted  
regulations on the same subject or determined that particular regulation is unnecessary.” Dkt. 129, State  
Defendants Motion for Summary Judgment at 11-12 (emphasis added); *see also id.* at 12 (acknowledging that  
“state regulation of vessel traffic is permissible if aimed at addressing local conditions . . .”).

1 and the Final EIS.<sup>18</sup> Lighthouse, by contrast, has proffered expert testimony indicating that the  
2 local benefits of the Defendants' decision are minimal at best.

3 Lighthouse's expert, Dr. Mark Berkman, looked specifically at the Final EIS and  
4 related Technical Reports that the Defendants cite to explain how they considered local  
5 conditions in concluding that the Terminal "would have significant adverse effects on vessel  
6 transportation that cannot be mitigated."<sup>19</sup> Even the 401 Decision itself acknowledges that  
7 "the likelihood of a serious Millennium-related vessel incident is low . . . ."<sup>20</sup> Dr. Berkman's  
8 Expert Report explains exactly how low.

9  
10 The Final EIS predicts that the increased vessel traffic from the Terminal would result  
11 in 1.56 additional vessel "incidents" each year.<sup>21</sup> That includes *all* incidents, of *all* severity,  
12 and *all* vessel types.<sup>22</sup> But not all vessel types have the same rate of incidents and not all  
13 incidents result in damage. The Defendants' conclusions about the significance of vessel  
14 incidents fail to mention that a mere 2% of all vessel incidents resulting in damage involved  
15 bulk carriers like the ones that would transport coal from the Terminal.<sup>23</sup> The Final EIS also  
16 overstates the likelihood of and harmfulness of oil spills, which the Defendants specifically  
17 mention as one of the risks that they will avoid by denying the Section 401 certification for  
18 the Terminal.<sup>24</sup> Dr. Berkman's data shows that those risks are actually quite small, amounting  
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22 <sup>18</sup> See Plaintiffs' Third Set of Interrogatories and Requests for Production to Defendant Maia Bellon *and*  
*Defendant's Answers Thereto*, Response to Interrogatory 13, attached as Ex. B to Jones Decl.

23 <sup>19</sup> Dkt. 1, Compl. Ex. A, Order In the Matter of Denying Section 401 Water Quality Certification to Millennium  
Bulk Terminals-Longview, LLC (401 Decision) at 10.

24 <sup>20</sup> *Id.* at 11.

25 <sup>21</sup> Expert Report of Dr. Mark Berkman (Berkman Expert Report) ¶ 93. The Berkman Report is attached as Ex. C  
to the Jones Decl.

26 <sup>22</sup> *Id.* ¶¶ 93-94.

<sup>23</sup> *Id.* ¶ 97 & Table 13.

<sup>24</sup> 401 Decision at 10-11.

1 to an annual economic value of just over \$130,000.<sup>25</sup> The cost of increased cargo vessel  
2 incidents is even smaller.<sup>26</sup>

3 The Defendants' dubious characterization of increased vessel effects as "significant"  
4 does not comport with the information in the Final EIS and accompanying Technical Reports,  
5 as interpreted by Dr. Berkman. Again, this at least represents a genuine dispute of material  
6 fact that must be resolved at trial.  
7

### 8 CONCLUSION

9 For the reasons stated above, in Lighthouse's original opposition to the Defendants'  
10 partial summary judgment motion, and in BNSF's original and supplemental oppositions, the  
11 Defendants' motions should be denied.  
12

13 Dated this 26th day of November, 2018.  
14

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26 <sup>25</sup> Berkman Expert Report ¶ 109.

<sup>26</sup> *Id.* ¶ 110.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 26, 2018 I caused to be served on counsel of record a true and correct copy of the foregoing via email:

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