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

STATE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON BNSF'S FOREIGN AFFAIRS DOCTRINE CLAIM

NOTE ON MOTION CALENDAR: February 15, 2019



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## I. INTRODUCTION

The foreign affairs doctrine preempts state laws that intrude on the federal government's "exclusive responsibility for the conduct of affairs with foreign sovereignties." *Von Saher v. Norton Simon Museum of Art at Pasadena* (*Von Saher I*), 592 F.3d 954, 967 (9th Cir. 2010) (quoting *Hines v. Davidowtiz*, 312 U.S. 52, 63 (1941)). The doctrine is "rarely invoked"—and even less often successfully. *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1075 (9th Cir. 2012) (en banc). In the past 60 years, the U.S. Supreme Court has invalidated precisely one state law under the doctrine; the federal courts of appeals, only a handful more. *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 401 (2003). Virtually all those cases follow a similar pattern: a state enacted a law aimed at particular foreign countries or companies by facilitating private lawsuits in U.S. courts, despite longstanding federal policies to resolve such claims exclusively by other means. *See, e.g.*, *id.* (California's Holocaust Victim Insurance Relief Act of 1999); *Movsesian*, 670 F.3d at 1069 (law creating jurisdiction and extending statute of limitations for claims by victims of Armenian Genocide); *Von Saher I*, 592 F.3d at 957 (law extending statute of limitations for claims to recover Holocaust-era art); *Deutsch v. Turner Corp.*, 324 F.3d 692, 703–04 (9th Cir. 2003) (law creating cause of action against German and Japanese corporations for forced labor during Second World War).

Plaintiff-Intervenor BNSF's foreign affairs claim is of an altogether different variety. BNSF contends that Washington State's denial of an environmental permit under federal law for a coal export terminal is preempted by a purported pro-coal executive policy. Puzzling on its face, BNSF's foreign affairs theory fails as a matter of law at every step of the analysis: BNSF cannot establish foreign affairs conflict preemption because the State acted pursuant to



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its delegated federal authority under the Clean Water Act, 33 U.S.C. § 1341(a)(1), and BNSF has identified no federal policy with which the State's decision conflicts. Nor can BNSF establish field preemption where the State's regulatory action reflected its traditional responsibilities for managing its natural resources and does not intrude in the federal foreign policy domain. In addition, no cause of action under the foreign affairs doctrine is available to BNSF because it has no constitutional right at stake and is not the regulated party.

For those reasons, pursuant to Rule 56 of the Federal Rules of Civil Procedure, Defendants Jay Inslee and Maia Bellon (the "State Defendants") move for summary judgment dismissal of BNSF's foreign affairs claim. No genuine issues of material fact exist, and the State Defendants are entitled to judgment as a matter of law.

## II. STATEMENT OF RELEVANT FACTS

### A. Millennium Project Background

Since 2010, Plaintiff Lighthouse Resources, Inc., and its subsidiaries (together, "Lighthouse") have sought to build a new coal export facility at the existing Millennium Bulk Terminals in Longview, Washington ("Millennium" or the "Project"). Dkt. 1 ¶¶ 16, 53–54. To that end, Lighthouse applied to the Washington Department of Ecology ("Ecology") for a water quality certification for the Project under Section 401 of the Clean Water Act, 33 U.S.C. § 1341(a)(1). Dkt. 1-1, at 3.

On April 27, 2017, Ecology and Cowlitz County, as co-leads under the State Environmental Policy Act ("SEPA"), issued a final Environmental Impact Statement ("EIS") that concluded that Millennium's proposed coal export project would have, in nine resource

areas, "unavoidable and significant adverse environmental impacts."[1] With respect to water quality, the EIS found that the project would cause numerous significant adverse effects to surface water, including the following: discharges of sediment during construction; releases of contaminants associated with equipment operation; mobilization of pollutants during dredging and pile removal; introduction of contaminants from coal, coal dust, stormwater runoff, rail transport, and vessel transport (including propeller wash, ballast discharge, and spills). Dkt. 130-1, at 24–26. However, the EIS assumed that impacts to water quality could be reduced, provided that Lighthouse complied with the water quality permitting laws and implemented recommended mitigation measures. Declaration of Thomas J. Young ("Young Decl.") Ex. 1, at 39.

**B. Ecology's Section 401 Decision**

Separately, Ecology denied Lighthouse's Section 401 certification based on the EIS findings and the lack of reasonable assurance that the Project would comply with water quality standards. Dkt. 1-1. Ecology identified numerous deficiencies in Lighthouse's certification request, including failures to (1) submit an adequate wetlands mitigation plan; (2) submit accurate wastewater characterization and treatment data; (3) demonstrate compliance with all known, available, and reasonable methods of treatment, prevention, and control; (4) demonstrate compliance with state anti-degradation policy; (5) secure water rights for

[1] Among other impacts, the project would: increase cancer risk rates in Cowlitz County from the emission of diesel particulates, block traffic at several crossings near the site, cause severe noise impacts at nearby residences, block access to federally established tribal fishing sites along the Columbia River and negatively affect fish survival, contribute to at least three rail capacity exceedances, increase rail accidents, increase the rate of vessel accidents, disproportionately affect low income and minority populations in Cowlitz County, and destroy a designated historic district. Dkt. 130-1, at 37, 43–45. The EIS was not appealed and is unchallenged.



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rainwater collection for dust suppression; and (6) address impacts to water quality from construction and potential migration of contaminants at the site. Dkt. 1-1, at 14–19.

Lighthouse appealed Ecology's decision to the Washington State Pollution Control Hearings Board. Dkt. 64-5. The appeal included the following claims: that Ecology's certification denial is *ultra vires* because it is based on concerns that are not related to water quality; that Ecology's certification denial is arbitrary, capricious, contrary to law and unsupported by substantial evidence; that Ecology's application of SEPA substantive authority, RCW 43.21C.060, to support its decision was overbroad; that Ecology's application of SEPA substantive authority, RCW 43.21C.060, is preempted by the Clean Water Act; that Ecology lacked authority to deny the Section 401 certification with prejudice; and that Section 401 did not allow Ecology to use SEPA authority to deny certification. Dkt. 64-5. The Board rejected all Lighthouse's claims and affirmed Ecology's decision. Dkt. 130-6.

**C. Lighthouse's Lawsuit and BNSF's Intervention**

Lighthouse filed this lawsuit challenging Ecology's Section 401 denial, among other State decisions related to the Project. Dkt. 1. BNSF successfully moved to intervene as a plaintiff. Dkt. 22, Dkt. 47. In its Complaint, BNSF alleges that Ecology's Section 401 decision violates the "Foreign Affairs Doctrine" because the "policy of the United States is to favor the expansion of coal exports to foreign countries, including countries to Asia." Dkt. 121 ¶¶ 121–22.

## III. ARGUMENT

The Constitution grants to the federal government "exclusive" authority to administer foreign affairs. *United States v. Pink*, 315 U.S. 203, 233 (1942). The foreign affairs doctrine, though "rarely invoked," *Deutsch*, 324 F.3d at 710 (citation omitted), preempts state laws that



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either (1) pose a "clear conflict" with an "express federal [foreign] policy," *Garamendi*, 539 U.S. at 425, or (2) "intrude[] on the field of foreign affairs without addressing a traditional state responsibility," *Movsesian*, 670 F.3d at 1072. Because Ecology's Section 401 decision does neither, BNSF's foreign affairs claim fails as a matter of law and should be dismissed on summary judgment.

Even if BNSF's foreign affairs theory had any merit, summary judgment is warranted because no such cause of action is available to BNSF (1) under the constitution's foreign affairs provisions directly, which confer no individual rights, nor (2) under 42 U.S.C. § 1983, nor (3) under equitable principles.

**A. Legal Standards**

**1. Summary judgment standards**

Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party meets its initial burden, to defeat the motion the opposing party must then set forth specific facts establishing a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

**2. Foreign affairs preemption standards**

The foreign affairs doctrine consists of two "related, but distinct" forms of preemption: "conflict" preemption and "field" preemption. *Movsesian*, 670 F.3d at 1071. Conflict preemption means "a state law must yield when it conflicts with an express federal foreign policy." *Id.* (citing *Garamendi*, 539 U.S. at 418–20); *see also Von Saher v. Norton Simon Museum of Art at Pasadena* (*Von Saher II*), 754 F.3d 712, 720 (9th Cir. 2014) (plaintiff must



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establish "clear conflict" between a state law and "express foreign policy of the National Government") (quoting *Garamendi*, 539 U.S. at 420–21); *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1184 (E.D. Cal. 2007), *as corrected* (Mar. 26, 2008) ("[A] party asserting preemption on the ground of foreign policy preemption must show 'clear conflict' between a state law or program and the functioning of some agreement, treaty, or program that is the product of negotiations between the administrative branch and a foreign government.").

In the absence of an express and conflicting federal policy, a state law may still be invalid under "field preemption," which is also known as "dormant foreign affairs preemption." *Id.* (quoting *Deutsch*, 324 F.3d at 709 n.6). A state law is field-preempted when it both "(1) has no serious claim to be addressing a traditional state responsibility and (2) intrudes on the federal government's foreign affairs power." *Id.* at 1074 (citing *Garamendi*, 539 U.S. at 426).

**B. The Foreign Affairs Doctrine Does Not Preempt Ecology's Section 401 Decision**

**1. Ecology's Clean Water Act decision is not conflict-preempted**

As a matter of law, BNSF's conflict preemption theory fails for two reasons. First, Ecology's Section 401 decision cannot be conflict-preempted because it was made under an express federal statutory authority delegated to states under the Clean Water Act. Even if there were an executive policy to facilitate coal exports at the expense of all other public values—and there is none—such a policy would not preempt Washington's valid exercise of its congressionally authorized Section 401 duties.

Second, BNSF's Complaint mentions various treaties, statutes, and executive actions or statements, Dkt. 121 ¶¶ 86–89, but none of those establishes a "clear" and "consistent" federal



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policy with which Ecology's Section 401 decision conflicts. *Garamendi*, 539 U.S. at 421. Not only is Ecology's decision entirely compatible with both the General Agreement on Tariffs and Trade and the United States-Korea Free Trade Agreement, Dkt. 121 ¶ 87, but those agreements' implementing statutes expressly disclaim any preemptive effects. Ecology's decision is also consistent with both the Energy Policy and Conservation Act of 1975 and the Energy Policy Act of 1992, Dkt. 121 ¶ 88, neither of which establishes a federal foreign policy favoring coal exports, much less one that conflicts with Ecology's decision. And of the recent presidential or cabinet-level pronouncements BNSF cites, none represents a "clear" and "consistent" foreign policy triggering conflict preemption. *Garamendi*, 539 U.S. at 421.

**a. Because Ecology's Section 401 decision is a lawful implementation of federal law, it cannot conflict with an express federal policy**

As a threshold matter, Ecology's Section 401 decision cannot be preempted by U.S. foreign policy because the decision is itself a valid exercise of federally delegated authority—an authority that supersedes any purported policy statement of the executive. When Congress expressly delegates and empowers a state to act, as it does under Section 401 of the Clean Water Act, executive branch policy may not interfere with legislative intent. *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 534 (2007) (President's foreign affairs "authority does not extend to the refusal to execute domestic laws . . . ."); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb . . . .").



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Ecology's Section 401 decision was a valid exercise of its delegated authority under the Clean Water Act, which in any event is not at issue in this case.[2] The Act establishes a cooperative state and federal partnership to protect and restore the nation's waters, entrusting to states the primary responsibility to prevent, reduce, and eliminate aquatic pollution. 33 U.S.C. § 1251(b). A critical component of that partnership, Section 401 authorizes states to condition or deny federal certification to projects that may impair water quality under applicable state or federal standards. 33 U.S.C. § 1341(a)(1); *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 386 (2006); *PUD No. 1 v. Wash. Dep't of Ecology*, 511 U.S. 700, 712–13 (1994).

Under Section 401, a federal agency cannot issue a license or permit for an activity that may result in a discharge to waters of the United States until the state where the discharge originates grants or waives Section 401 certification. 33 U.S.C. § 1341(a)(1); *see S.D. Warren Co.*, 547 U.S. at 373 ("[A] federal license under § 401 . . . requires state certification that water protection laws will not be violated."). The state from which certification is sought is empowered to condition the federal permit by issuing a certification with limitations; it is also empowered to deny the certification. 33 U.S.C. § 1341(a)(2); *PUD No. 1*, 511 U.S. at 713–14. The purpose of the certification is to declare that the state has reasonable assurance that the discharge will comply with these standards and "any other appropriate requirement of State

[2] BNSF does not argue that the State lacks congressional authorization under the Clean Water Act to issue its decision, or that the State lacks authority under state law to apply the standards it applied, or that the State in any way violated state law in issuing its Section 401 decision. While these were issues in the state proceedings, they are not raised here. *See* Dkt. 75, at 16 ("Lighthouse's complaint does not raise any state law issues"); Dkt. 74, at 17–19 ("BNSF's federal suit does not depend on any unsettled questions of Washington's law for reviewing state agency action . . . . If one of the underlying state proceedings falls away, the nature of BNSF's federal constitutional challenges does not change"). Moreover, the Pollution Control Hearings Board upheld the State's decision, rejecting claims that the decision violated state law or the Clean Water Act. Dkt. 130-2.



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law." 33 U.S.C. § 1341(d). A Section 401 decision implements a congressionally delegated state responsibility.

Because Ecology's Section 401 decision is a valid exercise of its delegated federal authority, it cannot be preempted. *See, e.g.*, *United States v. Colorado*, 990 F.2d 1565, 1576, (10th Cir. 1993) (Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") did not preempt state hazardous waste cleanup requirements because "EPA has authorized Colorado to enforce" such requirements pursuant to federal Resource Conservation and Recovery Act of 1976 ("RCRA"), "we cannot say that Colorado's efforts to enforce its EPA-delegated RCRA authority is a challenge to the Army's undergoing CERCLA response action"); *Cent. Valley*, 529 F. Supp. 2d at 1181 ("[E]xecutive branch policy cannot interfere with the congressionally-established pathway in the Clean Air Act that enables California to . . . require compliance with the more protective [air quality] regulations."). In light of the Clean Water Act, the only way Ecology's Section 401 authority could be conflict-preempted is if Congress enacted a law specifically cabining such authority. As explained below, no such statute exists.

**b. BNSF fails to identify an express federal policy favoring coal exports**

BNSF alleges that U.S. foreign policy "favors the expansion of coal exports to foreign countries, including to countries in Asia." Dkt. 121 ¶ 102. Yet BNSF fails to identify a "federal action such as a treaty, federal statute, or express executive branch policy" to support its conflict preemption claim. *Von Saher I*, 592 F.3d at 960. None of the sources BNSF cites for its purported pro-coal policy establishes a "concrete set of goals, objectives," or "means to be undertaken to achieve a predetermined result," *Cent. Valley*, 529 F. Supp. 2d at 1186, let



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alone one with which Ecology's Section 401 decision "clear[ly] conflict[s]," *Garamendi*, 539 U.S. at 421.

**i. General Agreement on Tariffs and Trade**

BNSF first asserts that Ecology's Section 401 decision conflicts with the General Agreement on Tariffs and Trade ("GATT"). Dkt. 121 ¶ 86. Its argument fails for four reasons.

**First,** the GATT provision BNSF invokes prohibits only "quantitative restrictions" on trade (*e.g.*, quotas). GATT art. XI, § 1, Oct. 30, 1947, 61 Stat. A-3, A-32 to -33, 55 U.N.T.S. 194, 224.[3] That general provision has nothing to do with coal, so it does not support BNSF's supposed federal policy favoring coal exports specifically.

**Second,** GATT's prohibition on quantitative restrictions does not apply to a permit denial based on adverse environmental impacts. The World Trade Organization ("WTO") has explained that "quantitative restrictions" include outright bans, quotas, or license denials, on imports from or exports to signatory nations. World Trade Org., *WTO Analytical Index: Guide to WTO Law and Practice* 315–45, https://docs.wto.org/gtd/anindGATT/ART11.doc. As a textual matter, a Section 401 water quality certification is not even arguably a ban, quota, export license, or the equivalent, so there is no conflict with GATT. *See, e.g.*, *Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1347 (11th Cir. 2004) ("Simply put, a permit requirement is wholly different from a ban . . . ."). Where an international agreement does not apply to the challenged state action, there can be no conflict under the foreign affairs doctrine.

[3] Article XI, § 1 provides: "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party." GATT art. XI, § 1.

*See, e.g.*, *Portland Pipe Line Corp. v. City of S. Portland*, 288 F. Supp. 3d 321, 443 (D. Me. 2017) (city's restrictions on oil tankers in local harbor not conflict-preempted under foreign affairs doctrine because treaty governing tanker emissions standards did not apply).

**Third,** Ecology's exercise of its federal Section 401 authority cannot conflict with GATT because the agreement's implementing legislation does not allow it. That statute provides that "[n]o provision of any of the Uruguay Round Agreements"—which include GATT, 19 U.S.C. § 3511(a)(1), (d)(1)—"nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States[,] shall have effect." 19 U.S.C. § 3512(a)(1). It further provides that nothing in GATT "shall be construed . . . to amend or modify any law of the United States . . . or . . . to limit any authority conferred under any law of the United States . . . unless specifically provided for in this act." 19 U.S.C. § 3512(a)(2). Thus, even if there were a conflict between GATT and Section 401, Congress explicitly determined that the trade agreement would yield. *See, e.g.*, *Cent. Valley*, 529 F. Supp. 2d at 1181 ("[W]hatever the foreign policy of the executive branch might be, it does not conflict with or prevent EPA from carrying out its congressionally mandated regulatory duties.").

**Fourth,** to the extent Ecology's Section 401 decision represents an exercise of state law, GATT's implementing statute also precludes a private litigant from challenging it. The statute provides that, except in an action by the federal government, "[n]o State law, or the application of such a State law, may be declared invalid as to any person or circumstance on the ground that the provision or its application is inconsistent with any of the Uruguay Round Agreements," including GATT. 19 U.S.C. § 3512(b)(2)(A). The GATT statute further



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specifies that "[n]o person other than the United States . . . may challenge, in any action brought under any provision of law, any action or inaction by . . . any State, or any political subdivision of a State, on the ground that such action or inaction is inconsistent with such agreement." 19 U.S.C. § 3512(c)(1). In other words, GATT cannot be the source of a preemptive federal foreign policy because its own implementing act disclaims any such effect.

**ii. United States-Korea Free Trade Agreement**

BNSF next alleges that Ecology's Section 401 decision conflicts with Article 2.8 of the United States-Korea Free Trade Agreement ("U.S.-Korea Agreement"). Dkt. 121 ¶ 87. Again, however, neither the text of that agreement nor its implementing legislation supports BNSF's reading. The text states that "neither Party may adopt or maintain any prohibition or restriction on the importation of any good of the other Party or on the exportation or sale for export of any good destined for the territory of the other Party, except in accordance with Article XI of GATT 1994 . . . ." U.S.-Korea Agreement, art. 2.8, June 30, 2007, 46 I.L.M. 642, 2007 WL 2197648, https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text. As with GATT, there is no conflict because a Section 401 certification is not an export license or its equivalent. *See supra* at 10–11.

Also like GATT, the U.S.-Korea Agreement's implementing statute forecloses BNSF's conflict preemption theory. The statute provides that (1) "[n]o provision of the agreement . . . inconsistent with any law of the United States shall have effect," (2) "[n]othing in this Act shall be construed . . . "to amend or modify any law of the United States, or . . . to limit any authority conferred under any law of the United States," and (3) "[n]o State law, or the application thereof, may be declared invalid as to any person or circumstance on the ground

that the provision or application is inconsistent with the Agreement, except in an action brought by" the federal government. United States-Korea Free Trade Agreement Implementation Act, Pub. L. 112-41, § 102(a), (b)(1), 125 Stat. 428 (codified as amended at 19 U.S.C. § 3805 note (United States-Korea Free Trade Agreement)). The U.S.-Korea Agreement does not conflict-preempt Ecology's Section 401 decision implementing state and federal environmental law.

**iii. Energy Policy and Conservation Act of 1975 and Energy Policy Act of 1992**

Next, BNSF suggests that the Section 401 decision conflicts with the Energy Policy and Conservation Act of 1975 and the Energy Policy Act of 1992. Dkt. 121 ¶ 88. Neither statute supports BNSF's foreign policy preemption claim. The 1975 Act, if anything, connotes a policy antithetical to BNSF's theory by authorizing the president to "restrict coal exports of . . . coal." 42 U.S.C. § 6212 (2012), *repealed* Pub. L. 114-113, Div. O, Title I, § 101(a), Dec. 18, 2015, 129 Stat. 2242, 2987. Yet BNSF asserts that because no president has "used this power to impose significant coal export restrictions," a preemptive pro-coal-export policy may be inferred from such inaction. Dkt. 121 ¶ 88. Such a preemption-by-inaction theory is inconsistent with basic preemption principles. *See, e.g.*, *Fellner v. Tri-Union Seafoods, LLC*, 539 F.3d 237, 247 (3d Cir. 2008) ("[M]ere deliberate agency inaction—an agency decision *not* to regulate an issue—will not alone preempt state law.").

As for the 1992 Act, BNSF's position is that it preempts Ecology's Section 401 decision because it "directs the Secretary of Commerce to create a plan for *expanding* coal exports." Dkt. 121 ¶ 88; *see* 42 U.S.C. § 13367. If the secretary ever developed any such plan, BNSF does not identify it—let alone one with which Ecology's Section 401 decision would



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conflict. Again, BNSF's foreign affairs preemption theory lacks a critical ingredient: a "federal *action*" establishing an "express executive branch policy." *Von Saher I*, 592 F.3d at 960 (emphasis added).

**iv. Recent administration actions**

Last, BNSF relies on a hodgepodge of actions by the "current presidential administration" that, it claims, "pursue a policy of 'exporting American energy all over the world.'" Dkt. 121 ¶ 89. None of the four pronouncements remotely establishes a "clear federal foreign policy position" in conflict with Ecology's Section 401 decision. *Faculty Senate of Fla. Int'l Univ. v. Winn*, 616 F.3d 1206, 1211 (11th Cir. 2010).

**First,** BNSF cites remarks made by the president about energy exports that do not even mention coal exports. Dkt. 121 ¶ 89. Instead, the president stated simply, "And we're going to be an exporter — exporter. (Applause.) We will be dominant. We will export American energy all over the world, all around the globe." The statement says nothing about coal exports, let alone set forth a coherent policy to displace state and federal environmental regulations. *See, e.g.*, *Portland Pipe Line Corp.*, 288 F. Supp. 3d at 444 (no conflict between ordinance restricting oil tanker loading and "federal foreign affairs policy in favor of international pipelines" because executive actions do not reveal "intent to displace state and local authority over their ports and oil transfer facilities"). In any event, even Lighthouse's Rule 30(b)(6) designee acknowledged that presidential statements by themselves "cannot constitute federal policy." Young Decl. Ex. 2, at 42.

**Second,** BNSF invokes a statement by former Interior Secretary Ryan Zinke encouraging "American energy independence." Dkt. 121 ¶ 89.a. In lifting a moratorium on

federal coal leasing, Zinke said that "it is better to develop our energy here under reasonable regulations and export it to our allies." *Id.* That this action came just over a year after the prior administration's moratorium shows that, whatever policy it may reflect, it is neither "longstanding" nor "consistent." *Garamendi*, 539 U.S. at 415, 421; *see, e.g.*, *Portland Pipe Line Corp.*, 288 F. Supp. 3d at 443 ("The foreign affairs cases require a greater conflict with a more consistent federal policy; they do not authorize preemption of local restrictions whenever an industry as a whole is economically powerful enough to affect this Country's national and by extension international interests."). Moreover, neither Zinke's order nor his statement says anything about whether he considered Section 401 a "reasonable regulation" or how his order might affect such regulations. To the contrary, the order expressly states, "To the extent there is any inconsistency between the provisions of this Order and any Federal laws or regulations, the laws or regulations will control." Order No. 3348, Secretary of Interior (Mar. 29, 2017), https://www.doi.gov/sites/doi.gov/files/uploads/so_3348_coal_moratorium.pdf. There is no conflict between Zinke's action and Ecology's Section 401 decision.

**Third,** BNSF invokes an "agreement" between the "United States" and the "Government of Ukraine which facilitates Ukraine's purchase of American coal." Dkt. 121 ¶ 89.b. By that, BNSF is referring to a "trial contract" between Ukraine's state-run energy company and Xcoal, a private coal company based in Pennsylvania. *See* Alessandra Prentice, *After Trump Meeting*, *Ukraine to Import U.S. Thermal Coal for the First Time*, Reuters, July 17, 2017 (cited at Dkt. 121 ¶ 89.b n.8). It is difficult to see how that private contract to deliver Appalachian coal from the east coast to Europe implicates Millennium at all. That Ukraine-Xcoal contract is simply inapposite.



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**Fourth,** BNSF relies on yet another broad, precatory statement in the White House's National Security Strategy, which was issued three months after Ecology made its Section 401 decision. According to BNSF, that document "explains directs [sic] that '[t]he United States will promote exports of our energy resources,' including by 'expand[ing] our export capacity through the continued support of private sector development of coastal terminals.' " Dkt. 121 ¶ 89.c (quoting White House, Nat'l Sec. Strategy for the United States of America at 23 (Dec. 2017) ("Nat'l Sec. Strategy"), https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf). BNSF does not quote the document's preceding paragraph, which states: "The United States will promote clean and safe development of our energy resources" and "streamline the Federal regulatory approval processes for energy infrastructure . . . *while also ensuring responsible environmental stewardship.*" Nat'l Sec. Strategy at 23 (emphasis added). Again, the document neither specifies coal nor purports to preempt any existing regulatory procedures of its own force. Rather, its general, high-level goal to "streamline" regulatory processes seems to acknowledge that specific statutory or regulatory action would be necessary to achieve it. Like the other sources BNSF posits to support its purported pro-coal foreign policy, the strategy document does not support conflict preemption.

**2. Ecology's Section 401 decision is not field-preempted**

Only one time in its history has the U.S. Supreme Court struck down a state law under foreign affairs field preemption. *Deutsch v. Turner Corp.*, 324 F.3d 692, 710 (9th Cir. 2003). More than 60 years ago, in *Zschernig v. Miller*, 389 U.S. 429 (1968), the Supreme Court considered an Oregon probate law that, in operation, prohibited inheritance by citizens of Communist countries. *Id.* at 430–31; *see Garamendi*, 539 U.S. at 439. Although the Oregon

law conflicted with no federal law, the *Zschernig* Court held that the law was preempted because state "regulations must give way if they impair the effective exercise of the Nation's foreign policy." 389 U.S. at 440. Because the law necessitated "judicial criticism of [other] nations," it "affect[ed] international relations in a persistent and subtle way." *Id*.

Although the Supreme Court has not since *Zschernig* invalidated a state law under foreign affairs field preemption, it has—along with other federal courts—clarified the doctrine.[4] This "dormant" foreign affairs preemption occurs "when a state law (1) has no serious claim to be addressing a traditional state responsibility and (2) intrudes on the federal government's foreign affairs power." *Movsesian*, 670 F.3d at 1074 (citing *Garamendi*, 539 U.S. at 419 n.11). A state law intrudes on the foreign affairs power only if it has "'more than some incidental or indirect effect' on foreign affairs." *Id.* at 1076 (quoting *Zschernig*, 389 U.S. at 434). BNSF's field preemption claim fails at each step of the analysis.

**a. The Section 401 decision addresses a traditional state responsibility**

BNSF cannot meet the first field preemption prong because Ecology's Section 401 decision concerns a traditional state responsibility, namely Washington's management of its natural resources. *See, e.g.*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999) (recognizing that "[s]tates have important interests in regulating wildlife and natural resources within their borders"). As to navigable waters, state and federal governments

[4] The Ninth Circuit has twice found a state law field-preempted under the foreign affairs doctrine. In *Von Saher I*, a California statute extended the statute of limitations for civil actions to recover looted Holocaust-era artwork. The court held it was field-preempted because it would require courts to review the reparation decisions of foreign nations, and thus intruded on the federal government's power "to make and resolve war." 592 F.3d at 960. In *Movsesian,* the Ninth Circuit struck down a law that "establishe[d] a particular foreign policy for California—one that decries the actions of the Ottoman Empire and seeks to provide redress for 'Armenian Genocide victim[s]' by subjecting foreign insurance companies to lawsuits in California." 670 F.3d at 1076.



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exercise "concurrent regulatory authority." *John v. United States*, 247 F.3d 1032, 1035 (9th Cir. 2001) (per curiam); *see also United States v. Rands*, 389 U.S. 121, 127 (1967). In the Clean Water Act, the federal government left it to the states to grant or deny water quality certificates for "any activity . . . which may result in any discharge into the[ir] navigable waters." 33 U.S.C. § 1341(a)(1). Ecology's decision to deny the certificate to Lighthouse falls squarely within the state's traditional areas of responsibility. For that reason alone, foreign affairs field preemption does not apply. *See, e.g.*, *Portland Pipe Line Corp.*, 288 F. Supp. 3d at 444–45 (ordinance regulating crude oil loading on tankers in harbor not preempted under foreign affairs doctrine because it was "law of 'general applicability' within the traditional realm of state and local police power—local land use restrictions for on-shore port facilities").

**b. The Section 401 decision does not intrude on federal foreign affairs powers because any effects are "incidental" and "indirect"**

Because BNSF's field preemption claim fails at the first prong, it is unnecessary to consider the second prong, which asks whether the state action "intrudes on the federal government's foreign affairs power." *Movsesian*, 670 F.3d at 1074 (citation omitted). But it is clear that there could be no such intrusion here because Ecology's Section 401 decision has no " 'more than some incidental or indirect effect' on foreign affairs." *Id.* at 1076 (quoting *Zschernig*, 389 U.S. at 434). Unlike *Zschernig* and *Garamendi*, Ecology's Section 401 decision does not target any foreign country, let alone "some aspect of that foreign country's conduct that was the subject of United States foreign policy activity." *Cent. Valley*, 529 F. Supp. 2d at 1188; *see also Museum of Fine Arts, Boston v. Seger-Thomschitz*, 623 F.3d 1, 14 (1st Cir. 2010) (upholding generally applicable statute in area of traditional state responsibility because it did not target foreign countries); *Portland Pipe Line Corp.*, 288 F. Supp. 3d at 442



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(same). BNSF and Lighthouse allege that the denial of the Millennium project will have economic consequences, but that is nowhere near enough to trigger foreign affairs preemption. As the *Portland Pipe* court observed in upholding a city's ban on oil tanker loading, "the Ordinance impacts a large and important industry and therefore inevitably will touch on federal foreign affairs in a broad sense, given the realities of a modern globalized economy." 288 F. Supp. 3d at 445. Nevertheless, the ordinance did so "in a facially neutral manner and ha[d] no more than an incidental or indirect effect on foreign relations." *Id.* For the same reason, Ecology's Section 401 decision is not field-preempted.

**C. BNSF Lacks a Valid Cause of Action for Its Foreign Affairs Claim**

Finally, BNSF's foreign affairs claim should be dismissed because it has no cause of action to assert foreign affairs preemption of a regulatory action that did not affect BNSF's own rights. No cause of action is available to BNSF under the constitution's foreign affairs provisions (or the Supremacy Clause) directly, nor under 42 U.S.C. § 1983, nor under equitable standards.

**1. The constitution's foreign affairs provisions and Supremacy Clause confer no individual right**

While numerous clauses of the constitution confer various foreign affairs powers on the federal government, none creates any individual right. *See, e.g.*, U.S. Const. art. II, § 2, cls. 1–2 (presidential foreign affairs powers); *id.* art. I, § 8, cls. 1, 3 (congressional foreign affairs powers). Those provisions "do not confer any rights on their face," and no court in this circuit—nor any other, of which the State Defendants are aware—has ever held that "the foreign affairs provisions of the Constitution . . . contain an implicit individual right." *Gingery v. City of Glendale*, 831 F.3d 1222, 1232 (9th Cir. 2016) (Korman, J., concurring); *see also*



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*Gerling Glob. Reinsurance Corp. v. Garamendi*, 400 F.3d 803, 810 (9th Cir. 2005), *opinion amended on denial of reh'g*, 410 F.3d 531 (9th Cir. 2005) (noting that district court "may have been correct" that "the foreign affairs power did not 'implicate a right, privilege or immunity secured by the Constitution or laws of the United States'"). Nor does the Supremacy Clause confer an individual right through which BNSF may invoke federal foreign affairs powers. *See, e.g.*, *Dennis v. Higgins*, 498 U.S. 439, 450 (1991) ("The Supremacy Clause . . . is not a source of any federal rights; rather, it secures federal rights by according them priority whenever they come in conflict with state law.") (quotation marks, citations, and brackets omitted); *Berg v. Obama*, 574 F. Supp. 2d 509, 522–23 (E.D. Pa. 2008), *aff'd*, 586 F.3d 234 (3d Cir. 2009) ("Like the Supremacy Clause and the foreign affairs powers, the Natural Born Citizen Clause does not confer an individual right on citizens or voters."). BNSF cannot rely on the constitution directly for its foreign affairs preemption claim.

**2. Section 1983 does not support a foreign affairs preemption claim**

BNSF's reliance on 42 U.S.C. § 1983 for its cause of action is also unavailing because a Section 1983 plaintiff "must assert the violation of a federal *right*, not merely a violation of federal *law*." *Blessing v. Freestone*, 520 U.S. 329, 340 (1997). As explained above, the foreign affairs powers confer no such right on BNSF. *See Gerling*, 400 F.3d at 811 (Graber, J., concurring in the result) ("In short, the foreign affairs power, like the Supremacy Clause, creates no individual rights enforceable under 28 U.S.C. § 1983.") (citing *inter alia Golden State Transit Corp. v. City of L.A.*, 493 U.S. 103, 107 (1989)); *accord Gingery*, 831 F.3d at 1233 (Korman, J., concurring). Because BNSF does not allege the deprivation of any



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constitutional right, Section 1983 does not provide a vehicle for it to invoke foreign affairs preemption.

**3. An equitable cause of action is unavailable to BNSF**

Finally, BNSF may not assert an equitable cause of action to enjoin an allegedly preempted state regulatory decision because it was not a party subject to that decision. While a person directly aggrieved by state regulation may seek injunctive or declaratory relief if such action is preempted, *see Armstrong v. Exceptional Child Ctr., Inc*., 135 S. Ct. 1378, 1384 (2015), a third party may not, *see Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865, 906, 909 (10th Cir. 2017) (because sheriffs "do not assert . . . federal defenses to enjoin Colorado from *enforcing* [state law] *against them*," they lack "causes of action in equity to enforce [federal statute's] preemptive effects"). While Millennium's proponent may have had an equitable cause of action to assert foreign affairs preemption, Lighthouse does not plead that claim. As a third party, BNSF has no recourse to such equitable principles. *See, e.g.*, *Gingery*, 831 F.3d at 1234 (Korman, J., concurring) ("Because the [city] . . . does not subject plaintiffs to an enforcement or other regulatory action, it does not come within the category of cases in which an equitable cause of action would be available to restrain conduct that touches on the power of the President or Congress in the area of foreign affairs.").[5]

In sum, BNSF has no basis to raise a foreign affairs doctrine claim under the constitution directly, under § 1983, or under equitable principles.

[5] BNSF alleges that the "Court has jurisdiction under its inherent equitable powers to enforce federal law and to enjoin state actions that federal law preempts." Dkt. 121 ¶ 22. But whether a court has equitable jurisdiction is a separate question from whether a plaintiff may assert a particular cause of action under the court's equitable powers. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 n.4 (2014) ("[T]he absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the court's statutory or constitutional *power* to adjudicate the case.") (quotation marks and citation omitted).



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## IV. CONCLUSION

For the reasons stated above, the State Defendants respectfully request that the Court grant them summary judgment on BNSF's foreign affairs claim because BNSF (1) cannot meet the requirements of conflict or field preemption as a matter of law, and (2) has no cause of action to challenge Ecology's Section 401 decision under the foreign affairs doctrine.

DATED this 24th day of January 2019.

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 24, 2019, 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 24th day of January 2019.

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