The Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT TACOMA

LIGHTHOUSE RESOURCES INC.; LIGHTHOUSE PRODUCTS, LLC; LHR INFRASTRUCTURE, LLC; LHR COAL, LLC; and MILLENNIUM BULK TERMINALS-LONGVIEW, LLC,

Plaintiffs,

v.

JAY INSLEE, in his official capacity as Governor of the State of Washington; MAIA BELLON, in her official capacity as Director of the Washington Department of Ecology; and HILARY S. FRANZ, in her official capacity as Commissioner of Public Lands of the State of Washington,

Defendants.

Case No. 3:18-CV-05005-RJB

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

AND

OPPOSITION TO STATE AND INTERVENOR DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT ON BNSF'S FOREIGN AFFAIRS DOCTRINE CLAIM

BNSF's Summary Judgment Motion:

NOTED ON MOTION CALENDAR:

March 15, 2019

State and Intervenor Defendants' Motions for Summary Judgment:

NOTED ON MOTION CALENDAR:

February 15, 2019

ORAL ARGUMENT REQUESTED ON ALL MOTIONS

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Introduction[1]

The United States—to ensure its own national security and strong relations with its allies—has developed and is executing a national foreign policy that promotes coal and other energy exports to key trading partners and allies, including Japan and South Korea. Consistent with this foreign policy, Millennium has applied for permits to build a terminal in Washington State to export coal to Japan, South Korea, and others in Asia. Meanwhile, Washington State's leaders have ignored U.S. foreign policy and substituted their own anti-coal policy and blocked Millennium's coal export terminal because coal is an energy source they dislike.

The Foreign Affairs Doctrine, however, preempts state actors from substituting their own policy for the nation's foreign policy for two independent, dispositive reasons. First, State Defendants' actions conflict with an express federal foreign policy promoting coal exports ("Conflict Preemption"). Indisputably, the United States has a clear policy of fostering national security through global energy dominance, which includes encouraging and enabling the export of U.S. coal to its allies, specifically in East Asia. The Executive Branch's foreign and national security policy is unequivocal: Expand coal production and increase coal export capacity, including through new West Coast terminals or ports that deliver coal to U.S. allies in Asia. Indeed, the National Security Strategy identifies specific "Priority Actions" designed to achieve the Executive Branch's policy which include streamlining approval processes for energy infrastructure, such as export terminals; promoting exports by expanding export capacity through private sector development of coastal terminals; and ensuring "universal access" to affordable, reliable energy, including highly efficient fossil fuels.

State Defendants' anti-coal policy is similarly indisputable, unequivocal, and directly conflicts with U.S. foreign policy that promotes coal export for its allies' energy security. Governor Inslee and Ecology Director Bellon are opposed to any country anywhere in the

[1] Intervenor-Plaintiff BNSF Railway Company ("BNSF") files this brief in opposition to State and Intervenor Defendants' motions for summary judgment on BNSF's Foreign Affairs Doctrine claim and in support of its motion for summary judgment on the Foreign Affairs Doctrine claim. State and Intervenor Defendants noted their motions for February 15, 2019. BNSF notes its motion for March 15, consistent with other affirmative summary judgment motions filed February 13, 2019.

world burning coal as an energy resource. And they are intent on doing what they can to achieve their goal of ending fossil fuel consumption. Here, they pursue their end goal by in effect building a coastal "wall" that prohibits coal from being exported from Washington State. But the Constitution does not allow a state to enact a law that blocks the export of coal from its shores. Recognizing this, the State Defendants have attempted something subtler: employing the State's regulatory process in an unprecedented manner to deny approval of projects needed to move coal from other states through Washington ports to the very nations identified in U.S. foreign policy. Although perhaps more subtle than enacting a law to block coal exports, erecting a regulatory wall to block exports is equally proscribed. The State Defendants' action here directly thwarts and conflicts with U.S foreign policy and is preempted. Because there are no material issues of fact BNSF is entitled to summary judgment on its Conflict Preemption claim.

Second, the state action at issue here intrudes on the field of foreign affairs without seriously addressing a traditional state responsibility ("Field Preemption"). Consistent with their anti-coal energy policy, the State Defendants' actions here are ultimately designed and intended to prevent coal from being burned in foreign countries—and the state action at issue here has had that specific desired effect. It thwarts and effectively precludes the U.S from achieving its policy goal of supplying our allies with affordable, reliable energy. This intrusion is magnified by the fact that other coastal states could adopt Washington State's approach to further thwart U.S. foreign affairs and embarrass the United States. And State Defendants accomplished this by employing tactics not only novel and unprecedented but directly contrary to their own historic regulatory practices. Again, all to substitute their own anti-coal policy for U.S. foreign policy, and not for the primary purpose of protecting the health and public welfare of Washingtonians. Their actions contravene federal foreign policy, intrude on the field of foreign affairs, and are preempted by the Foreign Affairs Doctrine.

At minimum, factual issues preclude summary judgment as to BNSF's Field Preemption claim. For example, whether the "real purpose" of the State Defendants' novel and

unprecedented action was to address a traditional state responsibility is a uniquely factual issue. State Defendants built their anti-coal export policy on a foundation of cradle-to-grave—e.g., from mine mouth in the Powder River Basin to furnace in Japan and South Korea—greenhouse gas emissions analyses; an unprecedented invocation of discretionary "substantive SEPA" principles that center on almost anything but water quality (despite claiming to render a decision on water quality); and an unprecedented "with prejudice" permit denial followed by a letter refusing to process any further application materials. In essence saying: "you can't build a coal export terminal here, no matter what." Because State Defendants disclaim any such intent, instead insisting they simply denied a water quality certification in the ordinary course, a genuine dispute of material fact exists.

Argument

The United States Constitution's foreign affairs provisions "stand for the principles that power over foreign affairs is vested exclusively in the federal government." *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 49 (1st Cir. 1999). They encompass congressional and presidential powers. For example, the Constitution grants to Congress the powers "[t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the Unites States", "[t]o regulate Commerce with foreign Nations," and "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." U.S. Const. art. I, § 8, cl. 1, 3, 10. And the Constitution declares that the President is Commander in Chief and empowered, with the advice and consent of the Senate, "to make Treaties" and to "appoint Ambassadors." *Id.* art. II, § 2, cl. 1, 2. Accordingly, the Supreme Court has long held that "[p]ower over external affairs is not shared by the States; it is vested in the national government exclusively." *United States v. Pink*, 315 U.S. 203, 233 (1942) (emphasis added).

Foreign affairs-related power restrictions on States are nearly as numerous as foreign affairs-related power grants to the federal government. States are forbidden to "enter into any Treaty, Alliance, or Confederation" or to "grant Letters of Marque and Reprisal," may not

"without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing [their] inspection laws," and may not, "without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power." U.S. Const. art. I, § 10. States may not engage in foreign affairs because "[i]t was one of the main objects of the Constitution to make us, so far as regarded our foreign relations, one people, and one nation." *Holmes v. Jennison*, 39 U.S. 540, 575 (1840). Accordingly, "[o]ur system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941). Ultimately, there is no room for states to intrude in the realm of foreign affairs, and the Foreign Affairs Doctrine is designed and applied to prevent states from doing so. As a result, state action that intrudes on exclusively federal foreign affairs powers is preempted. *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1071 (9th Cir. 2012).

In the Ninth Circuit, foreign affairs preemption can take the form of conflict or field preemption. *See id.* As detailed below, State Defendants' actions with respect to the Terminal are preempted under both forms because they: (1) conflict with an express Executive Branch foreign policy ("conflict preemption"); and (2) intrude on the field of foreign affairs without addressing a traditional state responsibility ("field preemption"). At a minimum, evidence below on State Defendants' "real purpose" for blocking the Terminal reveals a genuine dispute of material fact on BNSF's field preemption claim, making summary judgment inappropriate.

I. The State Defendants' Actions Are Preempted Because They Conflict With Express Federal Foreign Policy That Promotes Coal Exports.

"Under conflict preemption, a state law must yield when it conflicts with an express federal foreign policy." *Movsesian*, 670 F.3d at 1071 (citing *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 418–20 (2003)). "The Supreme Court has declared state laws unconstitutional under the Foreign Affairs Doctrine when the state law conflicts with a federal action such as a treaty,

federal statute, or express Executive Branch policy." *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010).

The United States has an express Executive Branch policy of energy dominance regarding U.S. energy exports, including fossil fuels like coal. The 2017 United States National Security Strategy enshrines that policy. Under the heading "Priority Actions," the National Security Strategy states that "[t]he United States will promote exports of our energy resources . . . , which helps our allies and partners diversify their energy sources . . . ."[2] It specifically directs that the United States "will expand [its] export capacity through the continued support of private sector development of coastal terminals . . . ."[3] As discussed below, numerous actions and public statements from U.S. Executive Branch officials buttress this express Executive Branch policy. The Terminal is a critical piece of infrastructure for exporting Western U.S. coal to Japan, South Korea, and other American allies in furtherance of the Express Executive Branch Policy.

Here, substituting their own anti-coal foreign policies, State Defendants took unprecedented actions to thwart the Terminal: they applied an expansively scoped State Environmental Policy Act ("SEPA") Environmental Impact Statement ("EIS") that evaluates transport to and combustion of coal in Asia, and they denied—with prejudice—Millennium's Clean Water Act section 401 certification based on discretionary, non-federally delegated authority under the state's SEPA regulations. In other words, they subjected the Terminal to different—ultimately impossible—environmental review criteria and an unprecedented level of scrutiny because it would allow our allies access to—and ultimately use—U.S. coal, notwithstanding the federal government's strategic foreign policy to promote that. Because State Defendants' actions directly conflict with express federal foreign policy to promote U.S. coal exports, their actions are preempted.

[2] Tabor Decl. at 37 (Ex. A)(United States National Security Strategy (2017)).
[3] *Id.*

A. The United States Has an Express Executive Branch Policy to Export U.S. Energy Resources, Including Coal, to Our Key Allies Through Private Terminals.

Article II, section 1 of the U.S. Constitution provides that "[t]he executive Power shall be vested in a President of the United States." U.S. Const. art. II, § 1, cl. 1. In foreign policymaking, the President has executive authority to decide what that policy should be. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003). *See also Chicago & S. Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103, 109 568 (1948) ("The President . . . possesses in his own right certain powers conferred by the Constitution on him as Commander–in–Chief and as the Nation's organ in foreign affairs."). As the Supreme Court has observed, conducting foreign affairs and protecting the national security are "'central' Presidential domains." *Harlow v. Fitzgerald*, 457 U.S. 800, 812 n.19 (1982). "[N]o governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981).

The United States has an express federal foreign policy of achieving global energy dominance to foster national security and strengthen ties to foreign allies.[4] The policy's goal is to "maximize exports of energy resources (including thermal coal from western U.S. states), technologies, and services to help provide a reliable global supply of affordable and reliable energy, particularly for [U.S.] allies and partners."[5] This includes using new West Coast terminals or ports to achieve this goal.[6] In short, to do exactly what the Terminal is designed to do: export U.S. coal to Asia. This critical foreign policy has been clear and consistent over time, spanning presidential administrations of both parties.[7] For example, in 2015, President Obama and Congress repealed a decades-old ban on oil exports,[8] which has ushered in an era of unprecedented American fossil fuel-based global energy dominance.[9] Along with the repeal, Congress stated a "[n]ational policy on oil export restriction" was "to promote the efficient

[4]Banks Decl. ¶¶ 9-13; Tabor Decl. at 77-78 (Ex. B)(Expert report of George D. Banks).
[5] *Id.* at 78.
[6] Banks Decl. ¶ 14.
[7] Banks Decl. ¶ 15; Ushimaru Decl. ¶ 25.
[8] Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Div. O, Tit. I, § 101.
[9] *See, e.g.*, International Energy Agency—Oil Market Report (Jan. 18, 2019), https://www.iea.org/oilmarketreport/omrpublic/ (reflecting United States' position as world's largest crude producer and forecasting continued dominance).

exploration, production, storage, supply, marketing, pricing, and regulation of energy resources, *including fossil fuels . . . .*"[10]

And the federal foreign policy of American energy dominance has become an even more critical need for U.S. national security in recent years, given geopolitical shifts like China's ascendancy in the Indo-Pacific region on the one hand and the reshuffling of energy portfolios by allies like Japan and South Korea on the other hand.[11] In response, President Trump issued an Executive Order: "It is in the national interest to promote clean and safe development of our Nation's vast energy resources" in part to ensure "the Nation's geopolitical security."[12] Since that Executive Order, the Trump administration has expanded efforts to make America a global energy supplier.

For example, President Trump praised a Ukrainian state-owned energy company's recent purchase of American thermal coal and expressed a goal to sell U.S. coal "to everyone else all over the globe who needs it."[13] In response, the Trump Administration's Energy and Commerce secretaries noted that American coal "will be a secure and reliable energy source" for allies "to promote their own energy security through diversity of supply and source" and become less dependent on energy from opposing global influences.[14]

Consistent with the administration's foreign policy of "unleashing American energy" to sell "to everyone else all over the globe," the Trump administration released its National Security Strategy. The President's National Security Strategy declares that the U.S. Executive Branch foreign and national security policy is to "Embrace Energy Dominance."[15] In relevant part, the National Security Strategy states:

> Energy dominance—America's central position in the global energy system as a leading producer, consumer, and innovator . . . ensures that access to energy is diversified . . . . Given future global energy demand, much of the developing world will require fossil fuels, as well as other forms of energy, to power their

[10] 42 U.S.C. § 6212a(b)(emphasis added).
[11] *See* Tabor Decl. at 79 (Ex. B)(Banks Expert Report).
[12] Executive Order 13783, 82 Fed. Reg. 16,093 (Mar. 28, 2017).
[13] The White House, *Remarks by President Trump at the Unleashing American Energy Event* (June 29, 2017), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-unleashing-american-energy-event/.
[14] Tabor Decl. at 97-98 (Ex. C).
[15] Tabor Decl. at 36-37 (Ex. A)(National Security Strategy).

> economies and lift their people out of poverty. The United States will continue to advance an approach that balances energy security, economic development, and environmental protection.
>
> As a growing supplier of energy resources, technologies, and services around the world, the United States will help our allies and partners become more resilient against those that use energy to coerce. America's role as an energy exporter will also require . . . a resilient American infrastructure.[16]

The National Security Strategy lists several "Priority Actions" to achieve energy dominance. The Priority Actions include reducing barriers to that dominance by streamlining approval processes for energy infrastructure, such as export terminals; promoting exports by expanding export capacity through private sector development of coastal terminals; and ensuring "universal access" to affordable, reliable energy, including highly efficient fossil fuels.[17]

Accordingly, the substance of federal policy concerning coal exports is not subject to serious debate. The Executive Branch's foreign and national security policy pronouncement is unequivocal in its goals and objectives: the federal government seeks to export U.S. energy resources, including coal, through export terminals to "provide true energy security to [U.S.] friends, partners, and allies all across the globe."[18] Numerous statements and actions from high-ranking Executive Branch officials confirm this.[19] *See Am. Ins. Ass'n* , 539 U.S. at 423-424, 423 n.13 (recognizing the import of statements from high-level executive officials in representing the President's chosen policy). Japanese officials have praised this express federal foreign policy publicly, referencing Powder River Basin coal specifically.[20]

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[16] *Id.* at 37.
[17] *Id.*
[18] The White House, *Remarks by President Trump at the Unleashing American Energy Event* (June 29, 2017), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-unleashing-american-energy-event/
[19] *See, e.g.*, Tabor Decl. at 96-116 (Ex. C)(joint cabinet secretary announcement hailing Ukraine coal deal produced at LH00371060); (Ex. D)(Associated Press news article quoting Interior Secretary Zinke: "it's in our interest for national security and our allies to make sure that they have access to affordable energy commodities" produced at LH00336763); (Ex. E)(joint White House press release between Vice President Mike Pence and Deputy Prime Minister Taro Aso regarding, among other things, energy ties and upcoming concrete achievements in a range of energy issues including "highly efficient coal"); (Ex. F)(Secretary Zinke statement supporting Executive Order 13783 including with respect to assisting our allies with American energy).
[20] *See, e.g.*, Tabor Decl. at 406-409 (Ex. U)(Transcript of Interview with Yoichiro Yamada, Japanese Consul-General to the United States, produced as video file at Bates-number LH00335826 ("And for [Japan's clean coal] technology, the lose sulfur, low temperature, for the melting of ashes, a type of coal which is produced in Montana and Wyoming are the best suited. Therefore, we would love to see those coal to be available for Japan . . . [Japan has] great vulnerability in the energy security . . . . The supply of energy is a national security issue . . . . Because without energy we cannot survive and when we cannot survive, not just Japan, but other countries, then there is an important source for really serious international conflict."); *id.* at 411-412 (Ex.

B. The Terminal Is a Critical Piece of Infrastructure for Exporting Western U.S. Coal to Japan, South Korea, and Other American Allies in Furtherance of the Express Executive Branch Policy.

Japan, South Korea, and others want to add Powder River Basin coal to their energy portfolios.[21] Two Powder River Basin states—Montana and Wyoming—account for 43% of U.S. coal reserves and due to various factors, those reserves have excess production capacity.[22] But our Asian allies have not been able to adequately access Powder River Basin coal because the West Coast lacks sufficient export capacity, and the only feasible way to get Powder River Basin coal to U.S. allies in Asia is to export it from the West Coast.[23] The National Security Strategy answers this need by promoting export capacity through private sector development of coastal terminals.[24]

Nevertheless, while several coal export facilities have been proposed along the West Coast, all have failed to secure approval.[25] The Terminal appears to be the last real hope for implementing express federal foreign policy of coal export from the Powder River Basin to Asia.[26] The Terminal would be capable of exporting 44 million metric tons of thermal coal annually to Asian allies.[27] For comparison, Japan's entire thermal coal consumption in 2017 was 141 million metric tons; South Korea's was 114 million metric tons.[28] The Terminal is a

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V)(Transcript of Interview with Masana Ezawa, Director of the Clean Coal Division, Japan Ministry of Economy, Trade and Industry, produced as video file at Bates-number LH00335823 ("[Japan] import[s] coal from Australia so that diversification of exporting countries [is] a crucial policy for [Japan's] energy supply . . . . High quality coal with low ash content and low sulfur, coal is best for Japan because environmental issues . . . . U.S. coal is a good solution for our high efficient coal-powered power plant.")); *see also* Ushimaru Decl. ¶ 30 (explaining that Japanese government clients have "anxiously awaited the approval of six proposed coal export terminals in the Pacific Northwest. These proposals offered us hope of reduced energy prices and a stable, diversified supply. But with these terminals eliminated one by one, the Japanese government is unable to fulfill its promises to its citizens, and the Japanese public now faces rising energy costs and energy insecurity.")

[21] Banks Decl. ¶¶ 11, 20; *see also* Ushimaru Decl. ¶¶ 16, 29 (citing Japanese interests in same); Tabor Decl. at 77-79 (Ex. B)(Banks Expert Report).

[22] Tabor Decl. at 135, 143 (Ex. G)(Schwartz Expert Report).

[23] Banks Decl. ¶ 19; Tabor Decl. at 135 (Ex. G)(Schwartz Expert Report).

[24] Tabor Decl. at 37 (Ex. A)(National Security Strategy).

[25] *See, e.g.*, Tabor Decl. at 160-166 (Ex. H)(environmentalist article shared among Department of Ecology employees, bragging: "A review of these projects makes clear just how successful the region has been in denying permission to dirty energy companies as it stays true to its heritage as a center of clean energy, sustainability, and forward thinking.").

[26] *Compare* Tabor Decl. at 160-166 (Ex. H) *with* Ushimaru Decl. ¶ 31.

[27] *See, e.g.*, Dkt. # 130-1 at 3 (Millennium Bulk Terminals-Longview SEPA EIS Summary).

[28] Tabor Decl. at 132 (Ex. G)(Schwartz Expert Report).

critical piece of infrastructure for implementing the federal government's express foreign policy of achieving global energy dominance through domestic energy exports.

C. State Defendants' Actions to Stop the Terminal's Construction and Coal Exports Are Part of Their Anti-Coal Policy That Conflicts with Express Federal Foreign Policy.

As described above, the Executive Branch policy of promoting coal exports is clear. The federal government, through the National Security Strategy and its predecessor energy dominance policy initiatives, has made it a policy priority to export U.S. energy resources, including fossil fuels such as coal, to our nation's allies through private coastal terminals.[29] What is equally clear is that State Defendants have their own anti-coal policy, and their application of state law and efforts to block the Millennium Terminal undercut the President's Energy Dominance directive and thus conflict with and are preempted by that express Executive Branch policy.[30] *Am. Ins. Ass'n* , 539 U.S. at 419-24 (holding that an executive agreement preempted California law, even though nothing in the executive agreement expressly preempted the California law, because the California law "undercut[] the President's diplomatic discretion and the choice he . . . made in exercising it.").

Defendant Inslee's anti-coal policy is deep-rooted. Before becoming Governor of Washington, he candidly wrote that coal is "killing us" and that carbon emissions associated with its use put "all six billion of us on this little spaceship" at risk.[31] Right after his election, an article reported that environmental groups viewed him as "their best chance to block the coal ports" because they believed he "could push rigorous environmental reviews that could slow and complicate the permitting process or impose so many conditions that it would be difficult for developers to build the terminals."[32] Those groups' hopes proved true, because during his first press conference as Governor, Defendant Inslee discussed his concerns about the "ramifications" of "burn[ing] the enormous amounts of Powder River Basin coal that are

[29] Tabor Decl. at 37 (Ex. A)(National Security Strategy).
[30] *See id.*; *see also* Banks Decl. ¶¶ 13, 20; Tabor Decl. at 75-79 (Ex. B)(Banks Expert Report).
[31] Jay Inslee & Bracken Hendricks, *Apollo's Fire: Igniting America's Clean Energy Economy* (2009), 199-201.
[32] Maria Gallucci, *Will Washington's Super Green Governor Take Up the Fight Against Coal Exports?*, Inside Climate News (Nov. 26, 2012), https://insideclimatenews.org/news/20121119/washington-state-coal-export-terminals-northwest-governor-jay-inslee-clean-energy-economy-oregon-california-epa.

exported through our ports."[33] He called permitting those exports "the largest decision we will be making as a state . . . certainly during my lifetime and nothing comes close to it."[34]

Similarly, early in his governorship, Defendant Inslee announced "bold executive actions," such as eliminating "out-of-state coal-generated electricity," to promote his anti-coal policy.[35] Later, as another example of his anti-coal policy and against Montana's wishes, Inslee signed state legislation to fund the shutdown of coal-powered electricity plants in *that* state.[36] And in 2017, Defendant Inslee indicated at a town hall meeting that "you don't want to lock yourself into infrastructure that is going to be there 50 years to essentially expand fossil fuel. We do not want to get into that mindset for making that kind of decision."[37]

More recently, Defendant Inslee brought the point home that a centerpiece of his governing policy is anti-coal when he announced his "Leap Forward" program before a group of environmental activists: "We climate hawks do not fear the world. We meet it."[38] It comes as no surprise, then, when asked whether he sympathizes with interior states like Wyoming and Montana who want to export their natural resources to the global market, Governor Inslee responded: "[T]here is a significant difference between eating an apple, which is really healthy, and our children eating a bunch of coal smoke, which is not, so no . . . ."[39] Director Bellon's anti-coal policy is just as clear as Defendant Inslee's. Indeed, when she spoke at a gala hosted by one of the Intervenor Defendants in November 16, 2013, she noted the

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[33] Jessica Goad, Governor Inslee Calls Coal Exports "The Largest Decision We Will Be Making as a State from a Carbon Pollution Standpoint," THINKPROGRESS (Jan. 22, 2013, 7:56 PM), https://thinkprogress.org/governor-inslee-calls-coal-exports-the-largest-decision-we-will-be-making-as-a-state-from-a-carbon-9c73e7ba1079/.

[34] *Id.*

[35] Sierra Club Statement on Governor Inslee's Bold New Climate Action Plan, available at https://content.sierraclub.org/press-releases/2014/04/sierra-club-statement-governor-inslees-bold-new-climate-action-plan (April 29, 2014).

[36] The Seattle Times, *Against Montana governor's wishes, Inslee signs bill to fund coal plant shutdown*, available at https://www.seattletimes.com/seattle-news/environment/gov-jay-inslee-signs-colstrip-coal-plant-bill-with-partial-veto/ (April 1, 2016).

[37] 350 Seattle, *Climate Townhall with Gov Inslee Q&A 10 19 2017*, YouTube (Oct. 24, 2017), https://www.youtube.com/watch?v=h_q0hIqCYx8&feature=youtu.be (beginning at 7:41 mark).

[38] Seattle Pi, The Inslee 'Leap Forward' – *Clean power, no coal, electric cars and ferries*, available at https://www.seattlepi.com/local/politics/article/The-Inslee-leap-forward-Clean-power-no-13455179.php (December 10, 2018).

[39] Tabor Decl., Ex. T (Video: Governor Inslee press conference remarks, beginning at 28:18 timestamp).

"pressure" she was under by having to deal with "[n]ot just 1 but 2 proposed coal export proposals that would double coal exports for *our entire country*."[40]

Defendants Inslee and Bellon channeled their anti-coal policies and applied them to the Terminal through a series of unprecedented regulatory turns in the project's permitting and authorization process. Rather than adhere to a streamlined approval process and traditional scope of environmental review, Defendants erected a series of insuperable barriers. Initially, they employed a radically expanded scope of the SEPA EIS, including a full-life cycle analysis of greenhouse gas ("GHG") emissions from increased international vessel transport to Asian markets to combustion of exported coal in Asian countries such as Japan and South Korea.[41] Even the U.S. Army Corps of Engineers, which had initially coordinated with the state and Cowlitz County on a joint SEPA and federal NEPA review process for the Terminal, could not agree to such a broad scope and chose not to continue participating in the joint SEPA / NEPA review process.[42]

After completing the final EIS in April 2017, Defendants continued to apply state law in an unprecedented manner and in a manner wholly inconsistent with Executive Branch policy to streamline federal regulatory review and to promote exports by expanding export capacity through private sector development of coastal terminals. In processing Millennium's request for federal Clean Water Act section 401 certification that "construction or operation of [the Terminal], which may result in any discharge into the navigable waters . . . comply with applicable provisions of [the Clean Water Act]," 33 U.S.C. § 1341(a)(1), Defendants took a

[40] Tabor Decl., Ex. O (Director Bellon WEC Gala remarks)(emphasis in original).
[41] *See, e.g.*, Tabor Decl., Ex. I (Email from Col. Estok, of the United States Army Corps of Engineers to Defendant Bellon; *see also* Tabor Decl. at 191-193 (Ex. J); *compare* Tabor Decl. 294-304 (Ex. K)(U.S. Army Corps of Engineers, Memorandum For Record, NWS-2010-1225, limiting NEPA scope to the project area and Cowlitz County) *and* Tabor Decl. at 308-323 (Ex. L)("The study areas consist of the project areas, those areas in the vicinity of the project that could be affected by greenhouse gases resulting from construction and operation of the proposed export terminal, and the lower Columbia River from the project area to the mouth of the river. These study areas are consistent with the Corps NEPA Scope of Analysis Memorandum for Record (MFR)(2014) and adjusted to reflect emissions related to the proposed export terminal.").
[42] *See* Tabor Decl. at 168-169 (Ex. I).

series of actions that, by Defendant Bellon's own admission, are unprecedented in Washington State history.[43]

First, Defendants, for the first time ever, invoked discretionary substantive SEPA authority that was not federally delegated to them to deny the Clean Water Act 401 certification.[44] The stated reasons for the denial of the Clean Water Act section 401 certification under discretionary substantive SEPA authority have nothing to do with the federally delegated authority for states to certify compliance with water quality standards under the Clean Water Act.[45] Despite State Defendants' arguments to the contrary, their exercise of authority under Clean Water Act section 401 is not immunized from challenges under federal constitutional theories. The purported bases for invoking this discretionary substantive SEPA authority were far beyond the pale of any authority delegated to the state under the Clean Water Act. Indeed, as noted, Defendants' actions are without parallel in the history of section 401 water quality certifications for the State of Washington, and BNSF can find no parallel nationwide. Furthermore, State Defendants' actions at issue encompass far more than a simple section 401 water quality certification denial, including the expansively scoped SEPA EIS and Defendants refusal to process any additional state permits or approvals (with no connection to federal authority) for the Terminal. And, the bases for denial under discretionary substantive SEPA authority were predominantly related to BNSF rail operations – and not discharges into navigable waters from the Terminal – including purported significant

[43] *See* Tabor Decl. at 331-332 (Ex. M)(Defendant Bellon Answers to BNSF's Request for Admission Nos. 1 & 2).
[44] *See* Dkt. # 1-1 at 4-14 (401 certification denial). The state's SEPA regulations expressly state that the application of substantive SEPA authority is discretionary; i.e., nothing compels the state to exercise this authority. WAC 197-11-660(1)("Any governmental action on public or private proposals that are not exempt *may be conditioned or denied* under SEPA to mitigate the environmental impact subject to the following limitations").
[45] *See* 33 U.S.C. § 1341. The cases State Defendants cite to support their argument that a section 401 decision cannot be preempted by U.S. foreign policy because it is an exercise of federally delegated authority are inapposite. In all the cases cited, the state actors were only addressing matters within the scope of their delegated authority, not other SEPA issues, not exclusively state issues, and not issues intruding into foreign affairs. *S.D. Warren Co. v. Maine Bd. Of Envtl. Prot.*, 547 U.S. 370, 386 (2006)(authority to include conditions on 401 certifications based on water quality issues pursuant to 33 USC 1341(d)); *PUD No. 1 of Jefferson Cty. v. Wash. Dep't. of Ecology*, 511 U.S. 700, 712-13 (1994)(same); *United States v. Colorado*, 990 F.2d 1565, 1576 (10th Cir. 1993)(state authority over hazardous substances consistent with delegated authority under federal hazardous substances law); *Massachusetts v. EPA*, 549 U.S. 497, 534 (2007)(state authority over air quality regulation permissible under the federal Clean Air Act).

adverse impacts to air quality from locomotive emissions, vehicle transportation delays from train traffic, noise and vibration from train horns, rail transportation impacts from increased train traffic, and to rail safety from increased rail traffic.[46]

Second, Defendants, for the first time in state history, chose to deny the Clean Water Act section 401 certification *with prejudice*, effectively killing the Millennium Terminal project.[47] To underscore the bizarre nature of this action and how it runs entirely counter to the express executive policy as declared in the National Security Strategy, less than one month before the denial with prejudice using discretionary substantive SEPA authority, Defendant Bellon's staff circulated to Defendant Inslee's staff a draft letter to Millennium regarding claims that there were key pieces of information missing from the 401 certification application. The draft letter—which was signed with certified mail postage assigned—stated that if information was still lacking by September 30, 2017, "Ecology will be unable to certify that the proposal will meet water quality standards. Accordingly, in that circumstance we would deny without prejudice" the water quality certification.[48] The letter goes on to state that "receipt of a denial without prejudice would not in any way preclude Millennium from resubmitting" a water quality certification request, and that "[i]n our years of experience working on complex proposals, it is not unusual for an Applicant to do this because of information gaps that were unable to be filled within the necessary timeframe."[49] Just three weeks after sending that draft letter to Defendant Inslee's staff, Defendant Bellon made the unprecedented decision to abandon the valid and normal exercise of the State's federally delegated authority under Clean Water Act section 401 and, instead, elected to deny the 401 certification with prejudice using non-federally delegated, discretionary substantive SEPA authority.[50]

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[46] Dkt. # 1-1 at 4-14 (401 certification denial).
[47] *Id.*
[48] Tabor Decl. at 348 (Ex. N)(signed 401 certification denial "without prejudice"). Defendants admit that Ecology prepared a letter that referred to denial without prejudice and admit that after discussion and consideration, Ecology decided to deny with prejudice. Dkt. # 119 ¶ 61 (State Defendants' Answer to BNSF's Complaint in Intervention).
[49] Tabor Decl. at 349 (Ex. N).
[50] Dkt. # 1-1 at 1.

And finally, shortly after the Defendants denied the Clean Water Act section 401 certification with prejudice and based on discretionary substantive SEPA authority, Defendant Bellon issued a remarkable letter to Millennium stating that significant adverse impacts identified in the SEPA EIS on which it relied to deny section 401 certification, including purported issues related to train horns, train traffic, and train capacity—again, "issues" never before relied upon by Defendants—would "likely preclude Ecology from approving" other permit applications and its "staff will not be spending time on permit preparation" for those other applications should they be submitted.[51]

Taken together, these actions manifest State Defendants' global anti-coal policy by subjecting the Terminal to a different standard and treatment, an unprecedented level of scrutiny, and uncertain—and ultimately impossible—review criteria. The application of this state policy to the Millennium coal export Terminal is antithetical to the express Executive Branch policy to streamline review of export terminals and to promote exports of U.S. energy to our nation's allies by expanding export capacity through private sector development of coastal terminals. Accordingly, Defendants' actions are "at odds with the federal government's policy with respect to federal trade and energy and specifically the policy of encouraging the production and export of U.S. coal," and therefore conflict preempted.[52] BNSF is entitled to summary judgment on its Foreign Affairs Doctrine claim as to conflict preemption.

II. The State Defendants' Actions Are Preempted Because They Intrude On The Field Of Foreign Affairs Without Addressing A Traditional State Responsibility.

A. The State Defendants' Actions Do Not Address a Traditional State Responsibility.

Even without an express federal policy, state action "may be preempted under the Foreign Affairs Doctrine if it intrudes on the field of foreign affairs without addressing a traditional state responsibility." *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1072 (9th Cir. 2012). Whether a state action addresses a "traditional state responsibility" requires more than a review of the "general subject area" of the action. *Id.* at 1074. Courts examine the

[51] Dkt. # 1-4.
[52] Tabor Decl. at 79 (Ex. B)(Banks Expert Report); *see generally* Banks Decl.

"real purpose" of state action to determine whether it addresses an area of "traditional state responsibility." *Id.* at 1075.

Unsurprisingly, it is often the "real purpose" of a state action that reveals whether it addresses a "traditional state responsibility." In *Movsesian*, for example, the Ninth Circuit field preempted a state insurance law because its sole application was to insurance policies and people associated with the Armenian Genocide. 670 F.3d at 1075. In *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 964 (9th Cir. 2010), the Ninth Circuit concluded that a state property law was field preempted because its "real purpose" was to provide relief for Holocaust victims and heirs. And in *Zschernig v. Miller*, 389 U.S. 429, 434 (1968), the Supreme Court concluded that an otherwise neutral state probate law was preempted by the Foreign Affairs Doctrine because its application would cause state courts to ask questions about the real-world operation of property rights within foreign countries.

Here, State Defendants ignore that courts look beyond the "general subject area" of a state law or action to determine whether it concerns an area of "traditional state responsibility." Instead, they simply assert that the 401 certification denial concerns Washington's traditional state responsibility over the "management of its natural resources"[53] and, in conjunction with the federal government, responsibility over deciding water quality issues. State Br. at 17-18. Whether those "general subject areas" of natural resource management and water quality control include aspects of Washington's "traditional state responsibility" does not determine whether State Defendants' actions seriously address a traditional state responsibility. Instead, this Court must examine the actions' "real purpose" to determine whether they are field preempted by the Foreign Affairs Doctrine.

[53] State Defendants cite *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) for support. State Br. at 17. But in that case—which had nothing to do with the Foreign Affairs Doctrine—the Supreme Court held in favor of *federal* interests in honoring tribal treaty rights over *state* interests in managing wildlife and natural resources within the state's border. *Mille Lacs Band*, 526 U.S. at 204. State Defendants also cite *Portland Pipe Line Corp. v. City of South Portland*, 288 F.Supp.3d 321, 424 (D.Me. 2017) for support, but that decision nowhere discusses the "real purpose" of the government action in the context of a foreign affairs preemption challenge (it only notes the Plaintiff's use of the phrase in argument regarding *Pike* balancing).

Separately—and incredibly—Intervenor Defendants appear to acknowledge that the "real purpose" inquiry exists, but they attempt to swat it away:

> [E]ven if BNSF makes up stories of Ecology's 'true reasons,' the denial itself remains neutral and supported by uncontested factual evidence in the FEIS as well as Lighthouse's admission that it did not provide reasonable assurances that the Millennium project would meet state water quality standards.

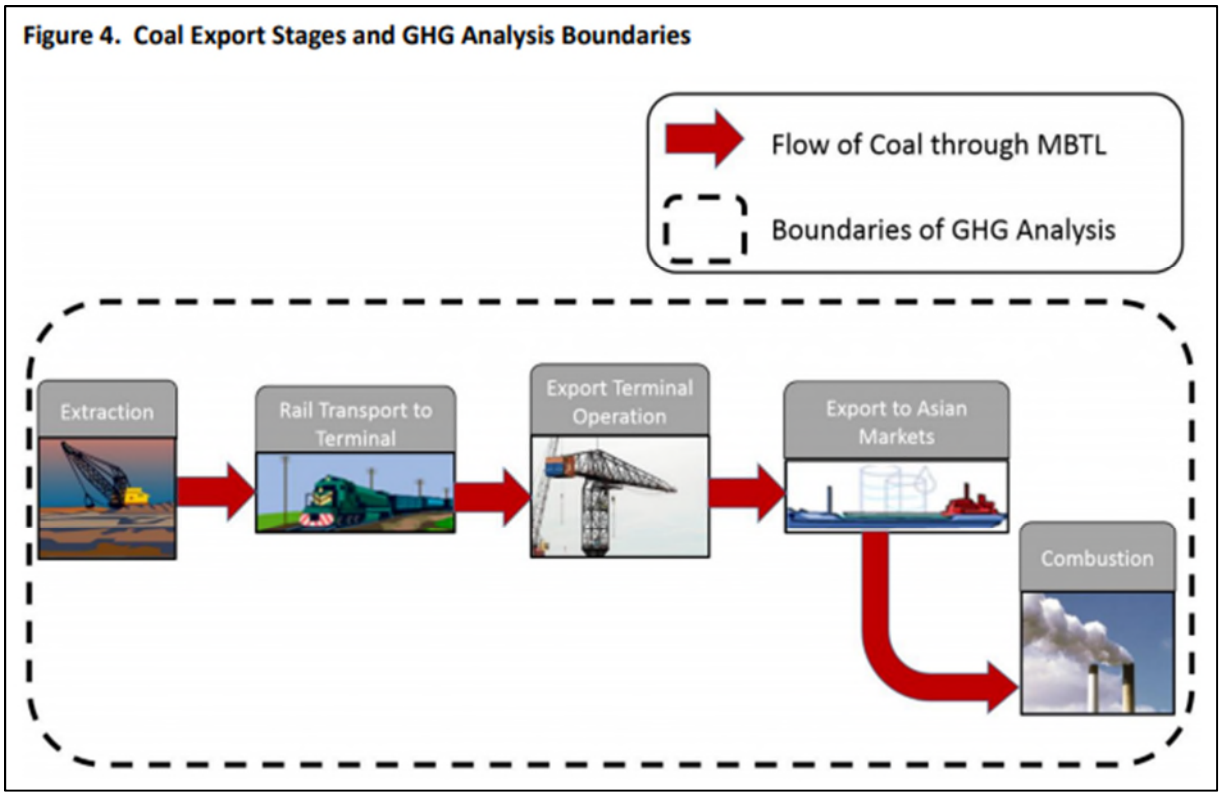
WEC Br. at 13-14. Again, regardless of whether the denial is facially "neutral," the "real purpose" behind it matters when determining whether a state action addresses a "traditional state responsibility." *Movsesian*, 670 F.3d at 1074 (requiring more than a look at the "general subject matter" of a state statute to determine its "real purpose"). And whatever evidence in the FEIS might be uncontested (and BNSF does not concede any is) BNSF contests that State Defendants' actions' "real purpose" was stopping coal exports to Asia. And this is an inherently factual inquiry.

Consistent with their anti-coal policy as described above in Section I.B., State Defendants attempted to extend the State's local regulatory authority to a global scale. For example, Director Bellon and her staff have previously captured the end-use of coal to be exported through another coal export terminal to Asia when examining the its "impacts,"[54] just as they have for the Terminal in this case, although the Terminal and the operations there would burn almost no coal and have far fewer carbon emissions than the State Defendants attribute to the commodity's end use.[55] The final Environmental Impact Statement ("EIS") reflects this focus on coal's end-use in Asia.

[54] Tabor Decl. at 361-368 (Ex.P)(Letter from Maia Bellon to Doug Erickson, Wash. State Senator (Aug. 22, 2013) regarding Gateway Pacific Terminal).
[55] Tabor Decl. at 249-258 (Ex. J)(SEPA EIS Greenhouse Gas Emissions Technical Report).

And here, the final EIS's Greenhouse Gas Emissions Technical Report considers greenhouse gas emissions associated with burning coal, beginning with its extraction at mines in the Powder River Basin, to its rail transport to the Terminal, to its transloading at the Terminal, to its export and ocean travel to Asian markets, and finally, to its combustion by consumers in Asia.[56] This graphic from that report shows this well:[57]

Figure 4. Coal Export Stages and GHG Analysis Boundaries



Indeed, Director Bellon's focus on exported coal's end use in Asia evidently caused the United States Army Corps of Engineers to refrain from continuing to pursue a joint NEPA/SEPA EIS for the Terminal.[58] But the EIS, with its focus on coal's end use in Asia, did not end the Terminal's environmental review process.

In early September 2017, Director Bellon's staff prepared a draft denial of a Clean Water Act Section 401 water quality certification, without prejudice.[59] As is routine with

[56] Tabor Decl. at 191-193 (Ex. J).
[57] *See id.*
[58] Tabor Decl., Ex. I at 168-169.
[59] *See* Tabor Decl. at 347-349 (Ex. N)(signed 401 certification denial "without prejudice").

similar denials without prejudice,[60] the early September draft letter would have notified Lighthouse that Ecology had insufficient information to determine whether it had reasonable assurance that the Terminal, as proposed, could satisfy the Clean Water Act's water quality standards.[61] As a result, Lighthouse would need to resubmit its application with all requested information, the draft denial without prejudice stated.[62] Despite being signed and marked with postage, that denial was never received by Lighthouse.

Instead, upon further review by Defendant Inslee's staff and Director Bellon herself, the "without prejudice" denial that concerned only water quality issues, and the need for missing application information related to them, turned into a "with prejudice" denial that added impacts having nothing to do with water quality.[63] Specifically, the "with prejudice" denial of the 401 water quality certification included nearly a dozen such impacts identified in the FEIS.[64] To accomplish this, Director Bellon and Ecology, for the first time ever,[65] invoked purported state authority under the "substantive" aspects of the SEPA to, also for the first time,[66] deny the 401 certification with prejudice.[67] To top it off, a month after her unprecedented "with prejudice" denial of a 401 certification based largely on substantive SEPA grounds, Director Bellon sent Lighthouse a letter stating that her staff would not spend any more time processing any other applications related to the Terminal.[68] In other words, no matter what information Lighthouse might have been prepared to submit to provide reasonable assurance that the Terminal could meet the Clean Water Act's water quality standards and no

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[60] *See* Tabor Decl. at 349 (Ex. N)(signed 401 certification denial "without prejudice" stating "[i]n our years of experience working on complex proposals, it is not unusual for an applicant to" resubmit a 401 certification request "because of information gaps"); *id.* at 374, ll. 18-25 (Ex. Q)(Loree Randall deposition testimony describing the usual course for denials without prejudice, after testifying that in her over 17 years as 401 policy lead for the Shoreline and Environmental Assistance Program in the Department of Ecology, she was never aware of another "with prejudice" denial of a 401 water quality certification request).

[61] *See* Tabor Decl. at 348-349 (Ex. N)(signed 401 certification denial "without prejudice").

[62] *See id.*

[63] Tabor Decl. at 385-389 (Ex. R) (describing September 2017 timeframe surrounding the draft "without prejudice" denial and the final "with" prejudice denial).

[64] Dkt. # 1-1.

[65] Tabor Decl. at 331-332 (Ex. M)(Defendant Bellon Answers to BNSF's Request for Admission Nos. 1 and 2).

[66] *Id.*; *see also*, *id.* at 374, ll. 18-25 (Ex. Q).

[67] Dkt. # 1-1.

[68] Dkt. # 1-4.

matter what actions Lighthouse might have been willing and able to propose to mitigate any of the Terminal's impacts under a substantive SEPA analysis, State Defendants were unwilling to permit a critical piece of coal export infrastructure be built in Washington State.

Although the Ninth Circuit has not decided "how courts might determine the real purpose of a [state action] when that purpose is not apparent from the [] findings and scope" of the action, the evidence of State Defendants' opposition to coal's use anywhere in the world combined with a novel and unprecedented approach, including (1) their decision to examine the impacts of coal from extraction from Powder River Basin mines to combustion in Asian power plants; (2) their unprecedented use of "substantive SEPA" authority to deny Lighthouse's water quality certification application based largely on purported rail impacts; (3) doing so with prejudice, thus denying the permit applicant an opportunity to come back with additional information or mitigation proposals, and (4) refusing to process any additional applications for the Terminal, all demonstrate that State Defendants' "real purpose" behind these unique and unprecedented activities is to stop coal exports from reaching American allies in Asia.

Indeed, the only reasonable explanation for its novel and unprecedented approach here—a dramatic departure from its decades-old practice concerning Section 401 certifications—is that its true purpose was to foreclose Lighthouse from supplementing the record and responding to the State's "concerns" (i.e., through a "with prejudice" denial) and ultimately blocking the Terminal's construction. At a minimum, this evidence presents a genuine dispute of material fact as to field preemption that makes BNSF's foreign affairs field preemption claim unsuitable for resolution on summary judgment. Fed. R. Civ. P. 56(a).

B. The State Defendants' Actions Intrude on the Field of Foreign Affairs Because They Have More Than "Incidental" or "Indirect" Effects on Foreign Relations.

State actions that have more than an incidental or indirect effect on foreign relations are field preempted under the Foreign Affairs Doctrine. *See Movsesian*, 670 F.3d at 1076. But a state's creation of its own foreign policy or its direct targeting of another country are not the

threshold for state actions that have more than incidental or indirect effects on foreign relations, as the State and Intervenor Defendants' briefing suggests. *See* State Br. at 18-19; WEC Br. at 14-15. Rather, as the First Circuit has indicated, numerous factors considered together determine whether a state's action has more than an incidental or indirect effect on foreign relations.

In *National Foreign Trade Council v. Natsios*, the First Circuit concluded that a state law restricting the state's ability to buy goods and services from companies that did business with Myanmar was field preempted under the Foreign Affairs Doctrine. 181 F.3d 38, 45 (1st Cir. 1999). When analyzing whether the state law had more than incidental or indirect effects on foreign relations, the Court in *Natsios* stated that "incidental" and "indirect" effects on foreign relations were the *maximum* effects a state law could have on foreign relations before it would be field preempted. *Id.* at 52. The Court then weighed five factors to determine whether the state law had more than "incidental" or "indirect" effects on foreign relations. Those factors are: (1) whether the state law's design and intent was to affect the affairs of a foreign country; (2) whether the state could effectuate that design and intent and has had an effect; (3) whether the state law's effects may be magnified should the state "prove to be a bellwether for other states (and other governments)"; (4) whether the law resulted in serious protests from other countries; and (5) whether the state chose a course "divergent" from federal law, "raising the prospect of embarrassment for the country." *Id.* at 53.

Here, at least four of the *Natsios* factors weigh in favor of concluding that State Defendants' actions have more than "incidental" or "indirect" effects on foreign relations. First, as discussed above, the State Defendants' actions are ultimately designed and intended to prevent coal from being exported through Washington ports and burned in foreign countries, including Japan, South Korea, and other Asian countries.[69] Second, the State Defendants' actions have had that designed effect insofar as at least some thermal coal from the Powder River Basin that would be mined there and shipped through the Terminal to Asian countries

[69] *See, supra*, Sections I.C & II.A (describing unprecedented, pretextual SEPA EIS and 401 certification review processes).

for power production is not being mined, shipped, and burned in Asian countries that desire the coal.[70] Third, the effects of State Defendants' actions may be magnified, because other coastal states that seek to use their own environmental laws to manage or prevent fossil fuel exports will likely use this case as a blueprint for taking similar action, if State Defendants prevail.[71] Fourth, State Defendants' actions show that they have chosen a course "divergent" from federal law that raises the prospect of embarrassment for the United States.[72] Specifically, where federal law allows fossil fuel export, and federal policy encourages it, the United States faces embarrassment because Washington State's officials, by making parochial decisions for a coastal state with disproportionate power over exports vis-à-vis landlocked states, are preventing critical infrastructure for coal exports to Asian allies that want it for their energy security.[73] As Mr. Kenji Ushimaru has stated in his declaration, his Japanese government clients and he "are frustrated" at the prospect of "greater energy insecurity because their closest geopolitical ally – the United States – cannot ship Japan a critical commodity its own government says it wants to provide."[74] Accordingly, State Defendants' actions intrude on the field of foreign affairs because they have more than an "incidental" or "indirect" effect on foreign relations.

III. A Cause Of Action Is Available To BNSF.

BNSF is an interested party in this case – a stakeholder directly affected by its outcome, not a bystander or third party without a stake. The Court said as much when it allowed BNSF to intervene as of right. Dkt. # 47. There, the Court stated that BNSF showed a

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[70] Tabor Decl. at 155 (Ex. G) (Schwartz Expert Report, Exhibits comparing Southern and Northern Powder River Basin coal production with and without the Terminal).

[71] *See* Tabor Decl. at 401, ll. 10-24 (Ex. S) (Governor's Office deposition claiming that the Governor's Office has influenced the scoping of greenhouse gas analysis in EISs "[v]ery little . . . [b]ecause so far the Courts have not necessarily, you know, agreed on either side with what's been done"); *cf.* Dkt. # 136 (Amici States California, Maryland, New Jersey, New York, and Oregon, and the Commonwealth of Massachusetts have already opined—in this case—that other federal law should not preempt them from using state environmental law to consider rail and vessel effects when reviewing and permitting projects in their states).

[72] *See* Tabor Decl. at 79 (Ex. B)("[V]alid concerns have been raised as to whether preventing coal exports interferes with our nation's treaty obligations under World Trade Organization agreements including the General Agreement on Tariffs and Trade . . . . [E]ven the appearance of export restrictions can create political tensions that could interfere with U.S. trade policy goals.").

[73] BNSF is unaware of any "serious protests" from other countries arising from State Defendants' actions, yet.

[74] Ushimaru Decl. ¶ 31.

significant protectable interest in this litigation as "the common carrier expected to transport Lighthouse coal from the interior west to the [Terminal]." *Id.* at 5. Going further, the Court recognized that State Defendants' actions "in their effect, limit BNSF's ability to transport coal." *Id.*

Since BNSF's intervention, Dr. William Huneke has explained how, and by how much, BNSF could be aggrieved due to State Defendants' actions. According to Dr. Huneke, without the Terminal BNSF could lose $771 million in annual revenue associated with lost coal transport business and another $1 billion in annual revenue associated with other lost business resulting from the potential need to raise shipping rates. *See* Dkt. # 191-1 at 15-16.

State Defendants agree that "a person directly aggrieved by state regulation may seek injunctive or declaratory relief if such action is preempted." State Br. at 21 (citing *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015)). But they fail to acknowledge what the Court and Dr. Huneke have said about BNSF's being directly aggrieved by the State Defendants' actions. Instead, for example, they liken BNSF to the sheriffs in *Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865 (10th Cir. 2017), who claimed they were forced to choose between honoring their federal and state oaths "in some unspecified fashion" and might face "legal exposure" as a result. *Id.* at 905-06. Unlike those sheriffs, BNSF has specific federally protected interests in operating as a common carrier that is expected to transport Powder River Basin coal across state lines to an export terminal destined for ultimate delivery to Asian allies. *See, e.g.*, 49 U.S.C. §§ 10101-11908.

Again, State Defendants' actions limit BNSF's ability to perform its federally protected common carrier functions and transport coal at issue in this case. As a result, BNSF may seek injunctive or declaratory relief from those actions if they are preempted by the Foreign Affairs Doctrine. BNSF meets State Defendants' own standard for when an equitable cause of action may be asserted.

Conclusion

The federal government has an express foreign policy of energy dominance that favors coal exports. State Defendants do not want coal mined, let alone shipped to our allies for use in a diverse and secure energy portfolio. Because the latter conflicts with the former, the federal Foreign Affairs Doctrine preempts State Defendants' actions in this case.

Even absent such an express federal foreign policy, State Defendants intrude on the inherently and exclusively federal arena of foreign relations without seriously addressing a traditional state responsibility. Their real purpose behind denying permits for the Terminal is to stop coal exports from leaving the United States through Washington State – not simply to protect the public health and welfare of Washingtonians as they insist. And that intrusion is not merely incidental or indirect but instead represents an effective design to prevent coal from being burned in foreign countries that may serve as a bellwether for other coastal states that seek to use their own environmental laws to manage or prevent fossil fuel exports; in turn, this raises the prospect of embarrassment for the United States. For these reasons, the Foreign Affairs Doctrine field preempts State Defendants' actions.

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