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

DEFENDANTS' AND DEFENDANT-INTERVENORS' OPPOSITION TO PLAINTIFFS' AND PLAINTIFF-INTERVENORS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON FOREIGN COMMERCE CLAUSE CLAIMS AND MOTION TO STRIKE

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I. INTRODUCTION

Plaintiffs move for summary judgment on their foreign Commerce Clause claim, arguing that the Department of Ecology's section 401 denial "usurps the federal government's exclusive authority over foreign commerce" and "ignores the federal government's pro-coal export policies." Dkt. 212, at 2. These sweeping claims have no foundation in either law or fact. Defendants Jay Inslee, et al. (State Defendants), and Defendant-Intervenors Washington Environmental Council, et al. (WEC), respectfully oppose Plaintiffs' motion for summary judgment in this combined opposition brief.

Plaintiffs' claims under the foreign Commerce Clause fail for multiple reasons. First, contrary to Plaintiffs' argument, there is no consistent federal policy favoring coal exports, and certainly none that elevates coal exports over every other policy objective. To the contrary, by protecting water quality and the environment, Ecology's decision is fully consistent with federal policies that balance energy production with environmental protection. Second, while the foreign Commerce Clause gives the federal government plenary authority to "regulate" international trade, Ecology's section 401 decision does not in any way regulate or make policy regarding foreign trade. Instead, Ecology applied state and federal law to a permit application for a single, in-state, development proposal at a specific site. Ecology simply applied its environmental laws to the proposal before it, without reference to any foreign nation or foreign commerce. Local decisions that have indirect impacts on foreign commerce are not prohibited by the Commerce Clause. Finally, even if Ecology were regulating trade, which it is not, Congress expressly authorized Ecology's decision in section 401 of the Clean Water Act. In section 401, Congress expressly allowed states to exercise local control over facilities needing federal permits, such as the terminal here.

Lighthouse basically contends that it has a constitutional right to construct the coal export terminal in violation of state and federal environmental laws merely because it would export coal to other nations and because the current President favors energy exports. No court

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has ever adopted such a sweeping view of the foreign Commerce Clause, and there is no reason for this court to do so either. Summary judgment should be granted in favor of Defendants.

II. STATEMENT OF FACTS

The parties have briefed the relevant facts of this matter in other summary judgment motions. *See* Dkts. 206, 208, 211, 212, 214, 227. As the Court is aware, Ecology denied section 401 certification for Lighthouse's proposed coal export terminal based on the company's failure to demonstrate compliance with state water quality standards and the project's significant, adverse, unavoidable, environmental impacts. Dkt. 1-1. Plaintiffs claim that this denial violates the foreign Commerce Clause.

III. AUTHORITY AND ARGUMENT

A. Legal Standard Under the Foreign Commerce Clause

As discussed in the State Defendants' and WEC's Motions for Summary Judgment on Commerce Clause Issues, the analysis of claims brought under the foreign Commerce Clause is similar to the analysis under the interstate Commerce Clause. *See* Dkt. 227, at 23; Dkt. 211, at 24; *Antilles Cement Corp. v. Acevedo Vila*, 408 F.3d 41, 46 (1st Cir. 2005) (stating that "essentially the same doctrine" applies). However, when state regulation affects foreign commerce, "additional scrutiny is necessary to determine whether the regulations 'may impair uniformity in an area where federal uniformity is essential' or may implicate 'matters of concern to the whole nation . . . such as the potential for international retaliation.' " *Pac. Nw. Venison Producers v. Smitch*, 20 F.3d 1008, 1014 (9th Cir. 1994) (citation omitted). The federal government must be able to "speak with one voice when regulating commercial relations with foreign governments." *Japan Line Ltd. v. Cty. of L.A.*, 441 U.S. 434, 449 (1979) (quoting *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976)). If national uniformity is not required, traditional dormant Commerce Clause analysis applies. *Smitch*, 20 F.3d at 1014.

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B. Plaintiffs Fail to Establish Any Clear or Consistent Federal Policy That Ecology Contravened

At the outset, Plaintiffs' foreign Commerce Clause claim fails because Plaintiffs fail to establish any clear or consistent federal policy that Ecology's section 401 decision contravenes. Plaintiffs' claim that federal policy is "not up for serious debate" (Dkt. 212, at 16) is a major overstatement. They cite no specific federal policy regarding the siting of coal export terminals and instead rely on snippets of Executive Branch speeches and policy statements that, at most, reflect the current President's support for the export of U.S. energy. This thin, one-sided, presentation fails to establish a clear and consistent policy in favor of coal exports for several reasons.

First, the foreign Commerce Clause vests Congress, not the Executive Branch, with authority over foreign commerce. The U.S. Supreme Court has held that Executive Branch statements that do not have the force of law cannot render unconstitutional duly enacted state laws. *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 330 (1994) ("Executive Branch communications that express federal policy but lack the force of law cannot render unconstitutional California's otherwise valid, congressionally condoned, [method of corporate taxation.]"). In that case, the court held that the Executive Branch statements at issue were merely "precatory"—i.e., aspirational—and did not constitute a sufficiently "clear federal directive" to override state law. *Id*. at 328–30; *see also Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983) (holding that to violate "one voice" standard, state law must either implicate foreign policy issues or violate "a clear federal directive").

Here, Plaintiffs rely on similar aspirational statements by the Executive Branch in an effort to establish a "clear federal directive." *See* Dkt. 212, at 5 (quoting remarks by President Trump, an Executive Order, and the National Security Strategy). These statements establish nothing more than that the Executive Branch has a goal of exporting "American energy all over the world." *Id.* This goal falls far short of constituting a clear federal directive sufficient

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to preempt state law. *See Container Corp.*, 463 U.S. at 194 (violation of a "clear federal directive" is "a species of preemption analysis"). Nothing in these statements mentions coal exports specifically or the terminal proposed by Lighthouse. Plaintiffs can point to no Congressionally-derived authority that favors coal exports, and the handful of speeches and vague policy statements they cite do not add up to a "clear federal directive." [1]

Second, even if there is an Executive Branch policy of favoring energy exports generally, such policy does not come at the expense of all other values, as Plaintiffs appear to claim. According to the National Security Strategy, the Administration's position is to "continue to advance an approach that balances energy security, economic development, and environmental protection." Dkt. 216, Ex. A at 36. The federal government is "committed to supporting energy initiatives that will attract investments, *safeguard the environment*, strengthen our energy security, and unlock the enormous potential of our shared region." *Id.* (emphasis added). Similarly, the Clean Water Act—the law of the land since 1970—establishes a policy to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . . ." 33 U.S.C. § 1251(a), (b). Thus, far from contravening any clear federal directive regarding coal exports, Ecology's decision here is entirely consistent with federal policy. The decision protects water quality and safeguards the environment, while remaining neutral regarding commerce.

The federal government demonstrated its policy of balancing energy exports with other values when the U.S. Army Corps of Engineers denied Clean Water Act permits for a nearly identical coal export terminal in Whatcom County. The Corps' decision cited the project's

[1] One of the documents Plaintiffs rely on, the National Security Strategy, was adopted three months after Ecology's section 401 decision. *See* Dkt. 228-11. Plaintiffs cite no authority for the claim that a post-hoc federal policy can invalidate a prior state decision made pursuant to duly enacted state and federal law.

potential to adversely affect tribal fishing rights—a fact that Ecology also relied on here. *See* Dkt. 1-1, at 13; Dkt. 213-15.

Third, Plaintiffs have effectively conceded that no clear federal policy exists here because they have gone to great lengths to change federal policy in their favor. For example, Plaintiffs drafted an executive order that would have authorized the construction of the terminal, would have declared Ecology's section 401 authority to be waived, and would have preempted any state or local laws contrary to its terms. *See* Declaration of Thomas J. Young in Support of State Defendants' Opposition to Plaintiffs' and Plaintiff-Intervenors Motion for Partial Summary Judgment on Foreign Commerce Clause Claims (Young Decl.) Ex. 3 (draft executive order and associated emails). In addition, Lighthouse has extensively lobbied both Congress and the Administration to support the project. Dkt. 213-4, at 151–69 (describing Lighthouse's efforts to lobby the Administration and Congress). The National Coal Council, an industry group on which BNSF sits, has identified several impediments to coal exports in current federal policies and suggested changes to them—few of which have been implemented. Dkt. 213-16. In addition, several Senators from coal-producing states proposed amendments to section 401, apparently in response to Ecology's decision here, which have not been adopted into law. Young Decl. Ex. 4. These efforts to change existing policy would obviously not be necessary if there already was a clear federal directive requiring that the terminal be built. Similarly, the President's rhetoric favoring energy exports is contradicted by his anti-trade actions towards China that have actually curtailed energy exports to that country.[2]

In short, Plaintiffs' efforts to depict federal policy as overwhelmingly in favor of coal exports must fail. Federal policy is multi-faceted and requires balancing multiple objectives, including environmental protection, water quality, tribal fishing rights, federalism, and economic development. Nothing in federal policy specifically references the siting of coal

[2] *See* Clyde Russell, *Trump's Positive Rhetoric on China Not Matched by Crude, LNG, Coal Trade*, Reuters (Feb. 26, 2019).

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export terminals or suggests that national uniformity is required with respect to such facilities. Nor has Congress expressed any intent to preempt state laws regarding such facilities. To the contrary, as discussed below, Congress has expressly given states in section 401 veto authority over facilities requiring federal permits. In such circumstances, the foreign Commerce Clause is not implicated. *See Portland Pipe Line Corp. v. City of S. Portland*, 332 F. Supp. 3d 264, 315 (D. Me. 2018) (where Congress has not exempted a facility from state laws, national uniformity is not required).

C. Ecology's Section 401 Decision Regulates a Single Proposal at a Single Site. It Does Not Regulate Foreign Commerce

Plaintiffs wrongly assert that Ecology's section 401 decision regulates foreign commerce merely because it prevents Lighthouse from constructing the proposed coal export facility at its preferred location in Longview, Washington. *See* Dkt. 212, at 18 (claiming that the section 401 denial "prevents the export of U.S. coal to Asian allies through a private port"). In fact, Ecology's decision does not regulate foreign commerce in any conceivable respect. Rather, Ecology considered a single, in-state development proposal at a specific site and found that it did not meet regulatory standards in state and federal law. The decision does not regulate the export of coal by Lighthouse from other locations or the movement of coal through the state, both of which occur despite the decision. Dkts. 229-20, 229-21. The decision says nothing about foreign commerce or any foreign nation. A number of companies export coal to Asia today through other locations. Dkt. 229-22, at 9–10. The mere fact that Ecology's decision prevents Lighthouse from constructing a new facility at its preferred location does not give rise to a foreign Commerce Clause concern. If it did, virtually every decision made by a state on large port projects would potentially violate the Clause.

The relevant test under the foreign Commerce Clause is whether the state has regulated foreign commerce in an area requiring national uniformity. *Japan Line*, 434 U.S. at 449. This test is not satisfied merely because the state has prevented construction of a proposed facility

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that would operate in foreign commerce. *Norfolk S. Corp. v. Oberly*, 822 F.2d 388, 404–05 (3d Cir. 1987); *Portland Pipe Line*, 332 F. Supp. 3d at 314–15. Courts recognize that "[v]irtually all regulation in the state of origin of goods ultimately shipped in foreign commerce affects the cost of those goods and, accordingly, the quantity sold abroad. If such effects were sufficient to trigger Commerce Clause review under the heightened scrutiny standard . . . the Commerce Clause would become a far more restrictive limit . . . than it has traditionally been." *Oberly*, 822 F.2d at 405; *see also Portland Pipe Line*, 332 F.3d at 315–16 ("[a]ny local regulation or prohibition on a large and important industry will inevitably touch on federal commerce in a broad sense, given the realities of a modern globalized economy. But that does not mean it impermissibly interferes with the government's ability to 'speak with one voice' when regulating foreign commerce . . . ."). Here, Plaintiffs establish nothing more than that Ecology's section 401 denial prevents them from exporting coal in the quantity they would like from the location they would like. That is not sufficient to establish a foreign Commerce Clause violation.

Also without merit is Plaintiffs' cumulative impact argument to the effect that if other jurisdictions do the same as Ecology, "U.S. coal exports to Asia would be completely stymied." Dkt. 212, at 18. For one thing, this claim is wholly speculative—Plaintiffs offer no evidence to show that other states have banned coal exports, and indeed coal is exported from many different states today. *See* Dkt. 213-2, at 25; Dkt. 213-5, at 36. More fundamentally, as the court held in *Portland Pipe Line*, this argument fails to establish a foreign Commerce Clause concern: "not only is [this] fear speculative, this type of regulation is not the type of 'asymmetry' or lack of uniformity that concerned the Supreme Court in *Japan Line*. . . . [t]he nightmare scenario [the company] presents is not perplexing disuniformity, it is simply unfavorable uniformity." *Portland Pipe Line*, 332 F.3d at 315.

Plaintiffs make much of the fact that Ecology's denial of the section 401 certificate under the State Environmental Policy Act (SEPA) was discretionary. Dkt. 212, at 13.

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According to them, the discretionary nature of the decision means that the state elevated state environmental policy over federal trade policy. *Id.* There are two problems with this argument. First, Ecology denied section 401 certification in part because Lighthouse failed to demonstrate compliance with state water quality standards. That part of Ecology's decision was not discretionary—reasonable assurance of compliance with state water quality standards must be shown in order for the state to issue the section 401 certificate. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 589 (2004). It would have been contrary to state and federal law for Ecology to grant certification without such a showing.

Second, whether or not Ecology's decision was discretionary is simply not relevant to the foreign Commerce Clause analysis. The relevant test is whether Ecology has impaired the federal government's ability to speak with one voice regarding foreign commerce. Plaintiffs can identify no such impairment here because none exists. Ecology has no policy against the import, export, transportation, or consumption of coal and Ecology did not apply any such policy in making its decision. *See* Young Decl. Ex. 1; Dkt. 261 ¶ 2. The decision does not reference any particular foreign nation or instrument of foreign commerce and it is agnostic as to the commodity involved. *See* Dkt. 229-13, at 12:6–7 ("when I made the decision, I was agnostic to who the user was"). Plaintiffs' original theory of the case—that the Governor, Ecology, and others conspired to block coal exports based on hostility to coal itself—has completely collapsed because there is no evidence to support it.

Ecology denied certification to protect state water quality and the health, safety, and welfare of state citizens. In doing so, Ecology relied on the undisputed findings of the Environmental Impact Statement and the company's failure to demonstrate compliance with water quality standards. *See* Dkt. 229-13, at 13:5–10 ("[y]ou don't appeal the EIS. Your CEO says it's the best, most thorough environmental impact statement he has ever seen . . . I rely on the findings in the EIS. That's what I did here."). These are quintessential matters of state concern. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981)

(environmental protection an area of legitimate local concern); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 523–24 (1959) (safety measures "peculiarly local" in nature and "carry a strong presumption of validity"); *Pac. Merchant Shipping Ass'n v. Goldstene*, 639 F.3d 1154, 1181 (9th Cir. 2011) (prevention of air pollution an "exceptionally powerful state interest"); 33 U.S.C. § 1251(b) (states are the primary protectors of water quality); Dkt. 227, at 20–21 (citing cases). To the extent Lighthouse wishes to challenge whether Ecology applied section 401 and state law correctly, this Court is not the proper forum to do so. This case concerns only the constitutionality of Ecology's decision.[3]

Under Plaintiffs' theory, virtually any state or local decision denying a project on environmental grounds would be unconstitutional if it had an incidental effect on commerce. Their theory would encompass not just port projects, but warehouses, manufacturing facilities, and a full range of businesses that operate in the global economy. No court from any jurisdiction has ever adopted such a sweeping view of the foreign Commerce Clause.[4]

D. Congress Expressly Authorized the State to Deny Certification in Section 401 of the Clean Water Act. National Uniformity Is Not Required in Making Such Decisions

As discussed in the State Defendants' Motion for Summary Judgment on Commerce Clause Issues (Dkt. 227, at 13–15), Plaintiffs' foreign Commerce Clause claims also fail because Ecology's section 401 denial was expressly authorized by Congress. State actions that are expressly and unambiguously authorized by Congress do not violate the Commerce Clause. *Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 174 (1985); *Mabey Bridge & Shore, Inc. v. Schoch*, 666 F.3d 862, 873 (3d Cir. 2012).

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[3] Lighthouse's state law challenge to the section 401 decision was rejected by the Pollution Control Hearings Board. Dkt. 130-6. The Board's decision is currently on appeal.

[4] This case is very different from the ones Plaintiffs rely on in their motion. In *Japan Line*, for example, the court considered the constitutionality of a local property tax imposed on foreign-owned shipping containers. *Japan Line*, 441 U.S. at 436. The court noted that a tax on instrumentalities of foreign commerce could "frustrate the achievement of federal uniformity in several ways" including by creating an "asymmetry in the international tax structure." *Id.* at 450. This case, by contrast, does not involve a tax, does not involve state regulation of any instrumentality of foreign commerce, and does not involve any risk of "asymmetry."

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With respect to the "one voice" requirement of the foreign Commerce Clause, the courts have held that the challenged state action need not be expressly authorized by Congress—it is enough if Congress has "passively indicate[d] that certain state practices do *not* 'impair federal uniformity in an area where federal uniformity is essential.' " *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 323 (1994); *see also Wardair Canada, Inc. v. Fla. Dep't of Revenue*, 477 U.S. 1, 9 (1986). Congress "need not convey its intent with the unmistakable clarity required to permit state regulation that discriminates against interstate commerce . . . ." *Barclays Bank*, 512 U.S. at 323.

In this case, Congress expressly and unambiguously authorized states to deny certification under section 401 of the Clean Water Act if the applicant fails to demonstrate reasonable assurance of compliance with state water quality standards. 33 U.S.C. § 1341(a)(1) (applicant must obtain certification from the State that discharge "will comply with the applicable provisions of [the Clean Water Act]"); *PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 712 (1994). In addition, under the Clean Water Act, Congress has expressly allowed states to adopt water quality standards that are more stringent than federal standards. 33 U.S.C. § 1370; *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996). Section 401 also allows states to require compliance with "any other appropriate requirement of State law." 33 U.S.C. § 1341(d). Thus, Congress has both expressly and impliedly indicated that national uniformity is not required when it comes to the protection of water quality and the exercise of state authority under section 401. As in *Barclays Bank*, 512 U.S. at 330, Ecology's decision here was "congressionally condoned."

In essence, Plaintiffs argue that the dormant foreign Commerce Clause trumps section 401. Under their theory, Ecology would be required to issue a section 401 certificate for the project despite its undisputed failure to comply with state water quality standards. This cannot be correct—if it were, section 401 would be eviscerated. Plaintiffs' effort to elevate the President's generic support for energy exports over Congress's specific grant of authority to

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states to protect water quality must be rejected. *See Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1182 (E.D. Cal. 2007) (executive branch policy cannot interfere with Congressional intent).

E. The Declarations of David Banks and Kenju Ushimaru Should Be Stricken

Plaintiffs rely on the Declarations of G. David Banks (Dkt. 218) and Kenji Ushimaru (Dkt. 220) to support their claims regarding federal policy. Dkt. 212, at 5–6, 17–18. These declarations, however, are improper for several reasons and should be stricken.

1. Banks Declaration

Mr. Banks, a lawyer and former federal government official, purports to offer expert opinion testimony on the subject of federal trade policy relating to coal. His declaration should be stricken for multiple reasons. First, the testimony fails because it is essentially argument about one of the key *legal* questions before this Court on this motion: specifically, whether U.S. policy supports the export of coal over other policy objectives, such as protection of clean water or compliance with Tribal treaties. Mr. Banks' legal opinions about U.S. export policy are not the kind of expert opinion testimony that "will help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. Instead, it is prohibited legal argument. *See Crow Tribe of Indians v. Racicot*, 87 F.3d 1039, 1045 (9th Cir. 1996) ("Expert testimony is not proper for issues of law."); *United States v. Scholl*, 166 F.3d 964, 973 (9th Cir. 1999) ("Experts 'interpret and analyze factual evidence. They do not testify about the law . . . .' "); *see also Marx & Co. v. Diners' Club Inc.*, 550 F.2d 505, 506 (2d Cir. 1977) (reversible error to admit legal "expert" on matters of contract interpretation).

Second, Defendants' deposition of Mr. Banks reveals that his testimony is based simply on general sentiments arising out of his experience. It is not based on "facts or data," nor is it "the product of reliable principles and methods." Fed. R. Evid. 702(b), (c). Indeed, Mr. Banks repeatedly struggled to offer *any* factual support for his opinions beyond his generalized governmental experience. Young Decl. Ex 5, Banks Dep. Tr. at 43–44; 47:19–21 ("a lot of the

sourcing comes through my own sort of direct knowledge of the issue"); 51–52 (testimony based on "information in [Mr. Banks'] head"); 57–58 (discussing lack of support for opinions); 73–74. Lighthouse is free to make legal arguments about the state of U.S. policy on coal exports, and support those arguments with *factual* evidence such as authenticated government reports, studies, or policy statements. But offering a lawyer's unsupported opinions as to the state of policy is not permissible under Federal Rules of Evidence 702.

Finally, if any further reason to strike Mr. Banks' declaration is needed, Mr. Banks was not properly identified by Plaintiffs as an initial expert. Young Decl. Ex. 2. Instead, he was identified as a rebuttal expert in response to the state's expert report on the market impacts of operating the terminal—a report that no party has relied on in moving for summary judgment. Dkt. 218 ¶ 8 ("I have prepared a rebuttal expert report in this case . . . ."). As a rebuttal expert, Plaintiffs may not rely on his testimony in support of their summary judgment motion. *See Truckstop.Net, L.L.C. v. Sprint Commc'ns Co.*, 537 F. Supp. 2d 1126, 1133–34 (D. Idaho 2008) (on summary judgment, party cannot use rebuttal opinion as direct opinion); *George v. Sonoma Cty. Sheriff's Dep't*, 2010 WL 4117372, at *7 (N.D. Cal. 2010) (same); s*ee also Smith v. Wal-Mart Stores, Inc.*, 2012 WL 4051925, at *1–2 (D. Nev. 2012) (rebuttal report is not the proper place for presenting new testimony).

2. Ushimaru Declaration

Mr. Ushimaru is a Seattle-based consultant and businessman with experience in energy policy and trade issues. Plaintiffs never identified him as an expert witness under Federal Rules of Evidence 702, disclosed any expert report, or made him available for deposition. *See* Young Decl. Ex. 2. Accordingly, Mr. Ushimaru's testimony can only be offered under Federal Rules of Evidence 701, which says that a lay witness's testimony must be rationally based on the witness's perception. While Mr. Ushimaru's personal perceptions are fair game for lay witness testimony, what Plaintiffs have provided instead is an extensive catalogue of Mr. Ushimaru's opinions on the ultimate legal issues before the Court. For example, he views

the denial of coal export capacity "as creating political tension with the Japanese." Dkt. 220 ¶¶ 26–28. This is not a "fact" based on Mr. Ushimaru's direct perceptions. It is an opinion that is purportedly offered on the basis of his experience working in the field. Notably, this opinion is based on nothing more than the declarant's say-so: he does not offer evidence of any statement or policy of the Japanese government reflecting such claimed tension.

The declaration is impermissible for another reason, which is that it is almost completely comprised of inadmissible hearsay. Fed. R. Evid. 802; *Orr v. Bank of Am.*, 285 F.3d 764, 773 (9th Cir. 2002) (hearsay inadmissible on summary judgment motion). For example, he purports to offer the views of the Japanese Ministry of Economy, Trade and Industry (METI) about coal's role in Japan's power generation. Dkt. 220 ¶¶ 14–15. Yet again, he notably does not support these claims with any documentary or other evidence, such as the established policies of the agency. In virtually every paragraph, he not only offers his own opinions about Japanese coal policy but also the views of his "clients." *Id.* ¶¶ 18–19, 22–25, 29–31. Even if otherwise qualified and addressing relevant matters, Mr. Ushimaru cannot offer the "views" of anyone else but himself. His declaration should be stricken.

IV. CONCLUSION

For the reasons stated above, the declarations of David Banks and Kenji Ushimaru should be stricken, and summary judgment dismissing Plaintiffs' claims under the foreign Commerce Clause should be entered in favor of Defendants. Plaintiffs' claim that they have a constitutional right to build a coal export facility at their preferred location in Longview, despite its inconsistency with state and federal law. No court, however, has ever accepted such a sweeping interpretation of the foreign Commerce Clause, nor is it consistent with decades of

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case law interpreting the Clause. Plaintiffs' arguments must therefore be rejected.

DATED this 8th day of March 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on March 8, 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 8th day of March 2019.

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