NO. 19-35415

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LIGHTHOUSE RESOURCES, INC., et al.,

Plaintiffs-Appellants,

BNSF RAILWAY COMPANY,

Intervenor-Plaintiff,

v.

JAY R. INSLEE, et al.,

Defendants-Appellees,

WASHINGTON ENVIRONMENTAL COUNCIL, et al.,

Intervenor-Defendants-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

No. 3:18-cv-05005-RJB
The Honorable Robert J. Bryan, United States District Court Judge

DEFENDANTS-APPELLEES' JOINT ANSWERING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Constitutional Provisions

State Cases

Federal Statutes

State Statutes

Federal Rules

I. INTRODUCTION

This case, at its heart, is a land use dispute that Plaintiffs Lighthouse Resources and BNSF Railway seek to turn into a constitutional one. Lighthouse proposes to build a large coal export terminal in Longview, Washington. State and local regulators denied several necessary approvals for the project because it did not meet state land use and water quality requirements. The project would, among other things, harm state and local air quality, water quality, traffic, noise, public safety, and tribal fishing opportunities.

Unhappy with the denials, Lighthouse filed simultaneous lawsuits in both state and federal court seeking to undo them. In federal court, Lighthouse and BNSF contend that, under the Commerce Clause, the State must approve the proposed facility regardless of whether it complies with state laws.

Concerned by the breadth of Plaintiffs' constitutional claims, and because there are adequate remedies in the state courts that may obviate the need for the federal court to rule on those claims, the district court stayed Plaintiffs' Commerce Clause claims pending resolution of the state court proceedings. The district court also dismissed Plaintiffs' preemption claims and

all claims against the state Lands Commissioner on Eleventh Amendment grounds.

These decisions are correct and should be affirmed. Contrary to Plaintiffs' overheated rhetoric, this case does not involve a "ban on coal exports" or any other commodity. The State's decisions are project and site specific and were based entirely on one project's adverse impacts on the public health, safety, and welfare. Such decisions are clearly within the State's authority to make.

Plaintiffs' efforts to proceed with their constitutional claims in this Court, notwithstanding the parallel state proceedings involving virtually identical arguments, constitute nothing more than an attempt to run roughshod over state land use laws and procedures, an attempt that the district court properly abstained from entertaining.

II. COUNTERSTATEMENT OF JURISDICTION

Defendants disagree that this Court has jurisdiction under 28 U.S.C. § 1291. The Defendants moved to dismiss Plaintiffs' appeal because neither the abstention order nor the partial summary judgment orders are subject to immediate appeal. Dkt. 7-1. Defendants incorporate their prior briefing why the abstention order is not immediately appealable. Dkt. 7-1, at 12–18. This

brief offers additional argument for why the partial summary judgment orders do not merge with the abstention order even if that order could be appealed at this juncture.

III. COUNTERSTATEMENT OF THE ISSUES

(1) Does this Court lack jurisdiction to review the partial summary judgment orders on preemption and sovereign immunity when the district court declined to certify those orders for immediate appeal and there is not yet a final judgment in the case?

(2) Did the district court abuse its discretion in abstaining when Plaintiffs raised the same issues, albeit couched as different legal claims, in both state and federal court and any state court ruling would moot or substantially affect the issues pending in federal court?

(3) Is the Washington State Public Lands Commissioner immune from federal suit under the Eleventh Amendment when Plaintiffs seek to overturn the Commissioner's proprietary decisions over who uses, and for what purpose, sovereign state-owned aquatic lands?

(4) Do Plaintiffs lack standing for their ICCTA preemption claim when there is no relief the court could grant that would redress Plaintiffs' alleged injury?

(5) Does Plaintiffs' ICCTA preemption claim fail on the merits because Lighthouse Resources is not a rail carrier and does not propose to construct the coal terminal under the auspices of a rail carrier, failing the threshold question for preemption under ICCTA?

IV. COUNTERSTATEMENT OF THE CASE

A. State Environmental Review and Permitting Process for the Millennium Bulk Terminal Proposal

Lighthouse Resources applied to build a coal export terminal on state-owned aquatic lands along the Columbia River near Longview, Washington.[1] SER 069. The proposed terminal would export 44 million metric tons of coal per year to Asian nations, making it the largest coal export terminal in North America. SER 066. If constructed, the terminal would export more tons of dry bulk commodities than all of the existing marine terminals in Washington (and in Oregon on the Columbia River) combined. SER 067.

Before considering permits for the proposal, Cowlitz County and the state Department of Ecology completed an environmental impact statement

[1] The actual applicant was Millennium Bulk Terminals-Longview, LLC. Lighthouse Resources, Inc., is the sole owner of Millennium Bulk Terminals-Longview, LLC. Unless context requires otherwise, this brief refers to Lighthouse Resources and Millennium Bulk Terminals collectively as "Lighthouse."

(EIS) under the State Environmental Policy Act (SEPA), Wash. Rev. Code § 43.21C. The EIS identified nine categories of unavoidable and significant adverse environmental impacts, including: (1) increase in the cancer risk rate in Cowlitz County from diesel particulate emissions; (2) serious traffic delays at several street-level rail crossings near the site; (3) severe noise impacts to nearby residences; (4) 22 percent increase in the rate of rail accidents; (5) disproportionate impact on low-income and minority neighborhoods; (6) destruction of a historic district; (7) blocked access to federally established tribal fishing sites and impacts on fish survival; (8) increase in the rate of vessel accidents on the Columbia River by approximately 2.8 accidents per year; and (9) capacity exceedances on portions of the rail line. SER 109–111. No party challenged the EIS, and its findings are now binding under state law. SER 342; SER 140.

After the EIS was complete, Lighthouse applied to the Department of Ecology for a Clean Water Act section 401 certification. *See* 33 U.S.C. § 1341. Lighthouse needed a 401 certification in order to obtain a Clean Water Act section 404 permit from the Army Corps of Engineers to dredge the Columbia River. SER 112. To qualify for a 401 certification, Lighthouse needed to demonstrate reasonable assurance that its project would comply with state and

federal water quality requirements. *See PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 728 (1994).

Ecology denied the 401 certification on two separate grounds. SER 195–214. First, Ecology denied based on significant adverse unavoidable impacts under SEPA. SER 199–209. *See* Wash. Rev. Code § 43.21C.060 (authorizing an agency to deny a permit based on significant adverse impacts that cannot reasonably be mitigated). Second, Ecology denied based on Lighthouse's failure to demonstrate reasonable assurance that its project would meet water quality requirements. SER 209–14.

Lighthouse also applied to Cowlitz County for a shoreline substantial development permit and conditional use permit. After an evidentiary hearing, the County's hearing examiner denied the permits on two grounds: (1) significant adverse unavoidable impacts under SEPA; and (2) failure to meet mandatory criteria under the state Shoreline Management Act. SER 342–49. Lighthouse challenged the County's denial in state court, and it is not at issue in this federal litigation.

B. Denial of a Sublease to Build the Terminal on State-Owned Aquatic Lands

In addition to regulatory permits, Lighthouse's subsidiary, Millennium, needed a sublease to construct and operate its terminal on state-owned aquatic

lands.[2] Washington law vests management authority over state-owned aquatic lands in the Department of Natural Resources (DNR) and its Commissioner of Public Lands. *See, e.g.*, Wash. Rev. Code § 79.105.010; Wash. Rev. Code § 43.12.075. Northwest Alloys currently leases the property in question, and Millennium sought to sublease it. SER 264; ER 233. *Nw. Alloys, Inc. v. Dep't of Nat. Res.*, 447 P.3d 620, 623–24 (Wash. Ct. App. 2019).

DNR denied the sublease because Northwest Alloys refused to provide requested documents to demonstrate that Millennium could financially perform under the lease. SER 257; *Nw. Alloys*, 447 P.3d at 624–26. Concerns about Millennium's ability to perform were heightened by the poor market conditions for coal and by the bankruptcy of Arch Coal Company, which at the time owned a significant stake in the project. SER 257–58; *Nw. Alloys*, 447 P.3d at 624–26. DNR also had concerns about Millennium's deception in initially concealing the size of its project in order to evade full environmental review under SEPA. SER 259; *Nw. Alloys*, 447 P.3d at 624.

In addition to seeking a sublease, Northwest Alloys (on behalf of Millennium) requested approval to construct substantial improvements on

[2] "State-owned aquatic lands" are "all tidelands, shorelands, harbor areas, the beds of navigable waters, and waterways owned by the state and administered by the department. . . ." Wash. Rev. Code § 79.105.060(20).

state-owned aquatic lands for the proposed terminal. DNR denied that request without prejudice. SER 371.

C. Lighthouse's State Court Lawsuits

The state and local decisions were challenged in five separate state lawsuits.[3] First, Millennium challenged DNR's sublease denial in Cowlitz County Superior Court. The denial was initially reversed by superior court but subsequently upheld by the Court of Appeals. *Nw. Alloys*, 447 P.3d at 620. Millennium seeks discretionary review in the state supreme court. Dkt. 29, at 24.

Second, Lighthouse appealed Ecology's 401 certification denial to the state Pollution Control Hearings Board.[4] Third, Lighthouse simultaneously appealed the 401 denial to Cowlitz County Superior Court, which dismissed the case for failure to exhaust administrative remedies. SER 255–56. The Hearings Board upheld the 401 denial, and that decision is now final due to Lighthouse's failure to perfect its appeal. SER 155.

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[3] Lighthouse did not challenge the DNR's denial of its request to construct improvements on state-owned aquatic lands.

[4] The Board is an independent administrative tribunal that reviews certain decisions of state and local environmental agencies. Wash. Rev. Code. § 43.21B.010.

Fourth, Lighthouse filed a § 1983 lawsuit in Cowlitz County Superior Court challenging Ecology's 401 denial as violating equal protection and due process. A trial on those claims is scheduled for February 2021.

Fifth, Lighthouse challenged the County's denial of its shoreline land use permits to the Shorelines Hearings Board. The Shorelines Board affirmed the County's denial, and that case is currently pending at the court of appeals with oral argument scheduled for January 21, 2020. SER 249.

D. Lighthouse's Federal Lawsuit and the Summary Judgment Decisions on Appeal

Lighthouse filed this federal action, another § 1983 lawsuit, naming as defendants Governor Jay Inslee, Ecology Director Maia Bellon, and Public Lands Commissioner Hilary Franz. The lawsuit alleged that certain state decisions to deny the project were preempted and/or violated the Commerce Clause. ER 247–51. BNSF Railway intervened as a plaintiff and raised a foreign affairs doctrine claim. ER 123–24. Washington Environmental Council and other conservation organizations intervened as defendants.

The State Defendants filed a Civil Rule 12(b)(6) motion to dismiss Lighthouse's preemption claims and to dismiss claims against Commissioner Franz based on Eleventh Amendment immunity. The State also asked the court

to abstain from deciding the remaining claims until the state court lawsuits were resolved. The court denied the State's motions. SER 215.

After extensive documentary discovery, the Defendants moved for summary judgment on the Plaintiffs' preemption claims and to dismiss claims against Commissioner Franz.[5] This time, the court granted both motions. ER 017–49. Plaintiffs did not immediately seek entry of final judgment on those claims, as permitted by Civil Rule 54(b). Plaintiffs did, however, move for entry of final judgment in May 2019, several months after the dismissal orders had been entered.[6] The district court denied Plaintiffs' Civil Rule 54(b) motion. SER 001–005.

E. District Court's Abstention Order and Stay

In February 2019, Defendants moved to dismiss Plaintiffs' foreign and interstate Commerce Clause claims. Plaintiffs cross-moved for summary judgment on the foreign Commerce Clause claim. Through these motions, it became clear to the court that the parties sharply disagreed on applicable law

[5] These were filed as two separate motions because the district court asked the parties to file motions for partial summary judgment on single issues.

[6] The district court entered the Eleventh Amendment dismissal order on October 23, 2018, and the preemption order on December 11, 2018. ER 049, 035. The court also dismissed BNSF's foreign affairs preemption claim on April 1, 2019. SER 030. BNSF has not appealed that decision.

and the admissibility of evidence in light of the state administrative board decision upholding Ecology's water quality certification denial. ER 005, 011. The court agreed with the Defendants that the Board's decision had preclusive effect. ER 014. As a result, there were few or no issues remaining for federal trial. *Id*. The court noted that the Board's decision was being appealed within the state courts and that a different result could occur at each level of review. ER 013. In light of these "shifting sands," the court asked for additional briefing on whether to abstain under *Pullman*. ER 014–016. The parties filed additional briefing, and the court issued an order staying the case. ER 001–009.

Plaintiffs appealed the stay and claimed that some of the earlier summary judgment decisions could also be appealed before entry of final judgment because they "merge" with the stay order. Dkt. 20-1, at 24–28. Defendants moved to dismiss Plaintiffs' appeal due to lack of a final judgment. Dkt. 7-1. A motions panel denied that motion without prejudice. Dkt. 25.

V. SUMMARY OF ARGUMENT

The district court declined to certify the partial summary judgment orders for immediate appeal under Civil Rule 54(b). Plaintiffs nevertheless try to appeal those orders now, claiming that the "merger doctrine" allows them to do so. Plaintiffs are wrong; partial summary judgment orders only merge with

a final judgment, and the district court's abstention decision is not a final judgment.

The district court's abstention decision is also not an abuse of discretion. The three factors for *Pullman* abstention are met: (1) this case involves state land use planning, which is a sensitive issue of social policy; (2) a state court ruling on the state law issues would either moot this case or substantially alter the federal constitutional issues; and (3) resolution of the state law issues are uncertain because they are issues of first impression.

Abstention is also proper under the *Colorado River* doctrine, which seeks to avoid duplicative litigation in state and federal courts. Several *Colorado River* factors weigh especially heavily in favor of abstention, including the avoidance of piecemeal litigation and forum shopping.

In deciding to abstain, the district court did not err in considering principles of collateral estoppel. The court correctly found that the decision of the Pollution Control Hearings Board upholding the water quality certification denial had binding effect in the federal case. The court also correctly found that the Board's decision was just the first stop in the state court litigation and that the decision could change at higher levels of state court review. It was

reasonable not to hold a full federal trial on top of these shifting sands and to instead stay the federal case until the state court cases are resolved.

If this Court decides to review the partial summary judgment orders, both orders should be affirmed. The district court properly dismissed all claims against the state Public Lands Commissioner under the Eleventh Amendment. In denying a sublease for the proposed terminal, the Commissioner exercised sovereign control over state-owned aquatic lands. Plaintiffs seek to overturn the Commissioner's authority to decide who uses, and for what purpose, state-owned lands. In accordance with *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997), the district court properly concluded that the Eleventh Amendment bars the Plaintiffs from pursuing these claims in federal court.

The district court's summary judgment decision on ICCTA preemption is equally well supported. First, the court correctly found that Plaintiffs lacked Article III standing for their preemption claims because the court could not fashion any relief that would redress their alleged injury. The State denied a water quality certification on several grounds in addition to the rail-based grounds that Plaintiffs cite as evidence of preemption. Even if the rail-based grounds were improper (and they were not), Plaintiffs would still not obtain the permit they seek because of the additional reasons for permit denial.

Second, the district court properly ruled against Plaintiffs on the merits of their claim. The threshold question for ICCTA preemption is whether the regulated activity constitutes rail transportation by a "rail carrier." If not, then there can be no preemption. Lighthouse is not a rail carrier. BNSF is a rail carrier but has made it clear that it has no direct role in the coal terminal project. Under this Court's precedent and numerous Surface Transportation Board decisions, there can be no preemption because Plaintiffs do not meet the threshold requirement.

In sum, the district court's abstention decision should be affirmed. And if this Court reviews the partial summary judgment decisions, those decisions should also be affirmed.

VI. ARGUMENT

A. The Partial Summary Judgment Orders Are Not Appealable

The district court declined to certify the partial summary judgment orders for interlocutory appeal but Plaintiffs nevertheless seek to appeal those orders under a flawed interpretation of the merger doctrine. Partial summary judgment orders only merge with a *final judgment* for purposes of appeal. An abstention order that temporarily stays the case is not a final judgment because it does not resolve all claims, and the merger doctrine does not apply.

1. The district court declined to certify the partial summary judgment orders for interlocutory appeal

The partial summary judgment orders are not reviewable because they are not "final" under 28 U.S.C. § 1291. Partial summary judgment orders "do not dispose of all claims and do not end the litigation on the merits." *Williamson v. UNUM Life Ins. Co. of Am.*, 160 F.3d 1247, 1250 (9th Cir. 1998).

Typically, " 'a party is entitled to a single appeal, to be deferred until final judgment has been entered.' " *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (quoting *Digital Equip. Corp. v. Destkop Direct, Inc.*, 511 U.S. 863, 868 (1994)). Civil Rule 54(b) provides an exception to this general rule. Under Rule 54(b), a district court may certify a partial summary judgment order for interlocutory appeal if there is "no just reason" for delaying judgment on the underlying claim. Fed. R. Civ. P. 54(b).

Decisions on the appropriate time for appeals in a multiple claim action are best left to the sound discretion of the district court. *See, e.g.*, *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 8 (1980). The district court here denied Plaintiffs' motion to certify the preemption and Eleventh Amendment orders under Rule 54(b). SER 001–005. It found that "[d]irecting entry of a final judgment on the two orders, at this time, would increase the likelihood of

piecemeal appeals." SER 004. It also expressly declined to find that Lighthouse would be prejudiced by delaying its appeal. SER 005. This Court should likewise decline to review the orders at this time.

2. The orders do not "merge" into the abstention order

Having failed to obtain Rule 54(b) certification, Plaintiffs claim that the partial summary judgment orders are appealable now because they "merge" with the appeal of the abstention order. Dkt. 29, at 34–35. No authority supports this proposition.

Partial summary judgment orders merge with a final judgment and become reviewable on appeal from that final judgment. *Adkins v. Mireles*, 526 F.3d 531, 538 (9th Cir. 2008). A final judgment " 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.' " *Dannenberg v. Software Toolworks Inc.*, 16 F.3d 1073, 1074 (9th Cir. 1994) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978)). In contrast, a stay postpones the exercise of federal jurisdiction. *Columbia Basin Apartment Ass'n v. City of Pasco*, 268 F.3d 791, 801 (9th Cir. 2001). The abstaining court retains jurisdiction and does not terminate the action. *Id.* at 802.

Here, there is no final judgment and, therefore, no merger. In arguing to the contrary, Plaintiffs rely on two inapplicable cases, both of which involved final judgments. In *Jones v. McDaniel*, 717 F.3d 1062 (9th Cir. 2013), a partial summary judgment order merged into a final judgment entered after a jury trial. In *Hall v. City of Los Angeles*, 697 F.3d 1059 (9th Cir. 2012), an order denying leave to amend a complaint merged into a summary judgment decision that resolved all claims—i.e., a final judgment. Neither case supports Plaintiffs' argument that partial summary judgment orders merge with the appeal of an interlocutory abstention order.

In essence, Plaintiffs conflate appealability with finality. Even if the Court finds that the abstention order is appealable under an exception to § 1291's finality requirement, accepting review does not transform the order into a final judgment because the abstention order does not resolve all of the remaining claims. Appealability and finality are "not perfectly congruent." *O'Donnell v. Latham*, 525 F.2d 650, 652 (5th Cir. 1976). This Court should decline to review the partial summary judgment orders.[7]

[7] In *Walden v. Nevada*, No. 18-15691, 2019 WL 7046964 (9th Cir. Dec. 23, 2019), the Court recognized that it has jurisdiction under the collateral order doctrine to consider a state's immediate appeal of an interlocutory order denying that state's Eleventh Amendment immunity from suit. However, *Walden* did not establish that the Court has jurisdiction under the "merger"

B. The District Court Properly Stayed the Case

Plaintiffs' claims in this case are virtually identical to the claims they make in the parallel state cases. In both forums, Plaintiffs argue that Ecology's section 401 water quality decision was arbitrary and capricious and biased. Recognizing this overlap, the district court properly stayed this case under *Pullman*[8] and *Colorado River*.[9]

The pending state court cases either obviate the need for the federal court to rule on the constitutional issues presented in this case, or significantly affect the federal court's consideration of those issues. By contrast, proceeding with both cases simultaneously, as Plaintiffs urge, would result in inefficient, duplicative, and piecemeal litigation.

1. Standard of review

Pullman stays are reviewed under a modified abuse of discretion standard. *C-Y Dev. Co. v. City of Redlands*, 703 F.2d 375, 377 (9th Cir. 1983). This Court first reviews de novo whether the three *Pullman* factors in *Canton v. Spokane School District No. 81*, 498 F.2d 840, 845 (9th Cir. 1974), are met.

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doctrine to consider plaintiffs' appeal of a district court's order dismissing a state defendant under the Eleventh Amendment.

[8] *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496 (1941).

[9] *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

Courthouse News Serv. v. Planet, 750 F.3d 776, 782 (9th Cir. 2014). If the three factors are met, the Court then reviews the district court's stay for an abuse of discretion. *Courthouse News*, 750 F.3d at 782. The same modified abuse of discretion standard applies to review of *Colorado River* abstention. *Montamore Minerals Corp. v. Bakie*, 867 F.3d 1160, 1165 (9th Cir. 2017).

2. The *Pullman* factors are met here

This case presents a classic *Pullman* scenario: It is a dispute in which Plaintiffs allege federal constitutional claims based almost entirely on alleged violations of state laws, raising complex and sensitive questions regarding the proper interpretation of those laws. The district court properly abstained from deciding the constitutional issues until the state law issues are resolved.

Under *Pullman*, a federal court may postpone the exercise of its jurisdiction "in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law." *Cty. of Allegheny v. Frank Mashuda Co*., 360 U.S. 185, 189 (1959). Abstention in such cases avoids "both unnecessary adjudication of federal questions and 'needless friction with state policies.' " *Columbia Basin Apartment Ass'n*, 268 F.3d at 802 (quoting *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 236 (1984)).

A *Pullman* stay is warranted if (1) the case touches on a sensitive area of social policy upon which the federal courts ought not to enter unless there is no alternative to its adjudication; (2) constitutional adjudication can be avoided if a definitive ruling on the state law issue would terminate the controversy; and (3) resolution of the possibly determinative issue of state law is doubtful. *Canton*, 498 F.2d at 845.

All three factors are met here.

a. This case involves sensitive land use planning issues

There is no doubt that land use planning disputes such as this one raise sensitive questions of social policy that meet the first *Canton* requirement. *C-Y Dev.*, 703 F.2d at 377 ("[w]e have repeatedly stated that land use planning is a sensitive area of social policy which meets the first *Canton* requirement"); *Sinclair Oil Corp. v. City of Santa Barbara*, 96 F.3d 401, 409 (9th Cir. 1996) (same); *Pearl Inv. Co. v. City & Cty. of San Francisco*, 774 F.2d 1460, 1463 (9th Cir. 1985) ("land-use planning questions 'touch a sensitive area of social policy' into which the federal courts should not lightly intrude").

This case raises questions regarding the proper use and management of the state's aquatic lands, shorelines, and waterways resources that the Washington Legislature has declared are of critical importance to the State.

See, e.g., Wash. Rev. Code § 90.48.010 (declaring the public policy of the state "to maintain the highest possible standards to ensure the purity of all waters of the state"); Wash. Rev. Code § 90.58.020 (declaring that state shorelines are among the state's most valuable and fragile natural resources and that "there is great concern throughout the state" relating to their utilization and preservation); Wash. Rev. Code § 79.105.010 (state-owned aquatic lands are "an irreplaceable public heritage").

Plaintiffs argue that this case does not involve land use planning because only "facial" challenges to state laws implicate land use planning. Dkt. 29, at 47. This argument finds no support in either the facts or the law. Plaintiffs' central claim is that the State must approve its proposed export facility notwithstanding its inconsistency with state environmental and land use laws because refusing to permit the facility would violate the Commerce Clause. Dkt. 29, at 17 (arguing that the state "may not refuse to permit" commerce in coal). If the Court accepts this claim, the State's land use statutes and policies would be eviscerated as to Lighthouse's project. A ruling for the Plaintiffs would negatively impact the local community, Washington tribes, and the State due to the project's adverse impacts on water quality, public health, noise, air quality, traffic, and access to treaty-protected fishing grounds. SER 109–111.

This case bears directly on sensitive issues of state environmental policy, regardless of whether it is characterized as a "facial" or "as applied" challenge.

Moreover, Plaintiffs cite no case in which this Court recognized a distinction between facial and as-applied challenges.[10] Some of the land use cases where this Court upheld abstention involved challenges to specific permitting decisions at specific sites. *E.g., Pearl Inv.*, 774 F.2d at 1461 (challenging conditions in a building permit); *Kollsman v. City of Los Angeles*, 737 F.2d 830 (9th Cir. 1984) (challenging denial of a subdivision application). Others involved broader challenges to land use plans or ordinances as they affected various properties held by the challenger. *E.g., Sinclair Oil*, 96 F.3d at 404 (challenging land use plan's application to six lots); *C-Y Dev.*, 703 F.2d at 376 (challenging application of ordinance to subdivision proposals). The present case is not significantly different from any of these. Plaintiffs in effect ask the Court to overrule a number of the state's environmental laws as they

[10] Plaintiffs rely solely on an unpublished district court decision to support their argument. Dkt. 29, at 47 n.67. That case, however, involved a real estate sale, not land use planning. Order on Pls. Mot. to Abstain, *K&S Devs. LLC v. City of SeaTac*, 2013 WL 5603253, at *3 (W.D. Wash. Oct. 10, 2013) (No. C13-499 MJP) ("[n]ot every municipal purchase of real estate can be considered 'land use planning' as the Ninth Circuit has used the phrase").

apply to the proposed terminal. That claim necessarily involves sensitive land use planning issues; the first *Canton* factor is met.[11]

b. A ruling on the state law issues could moot this case

Second, a ruling on the state law issues might moot or substantially alter the federal constitutional issues. *Allegheny Cty.*, 360 U.S. at 189. In ongoing state court proceedings, Lighthouse makes the same arguments regarding the alleged impropriety of Ecology's section 401 decision as it makes in this case. *See* SER 049–057 (alleging that Ecology misused its authority due to anti-coal animus); ER 235–37 (alleging that Ecology denied the water quality certification due to alleged opposition to coal exports). If Lighthouse prevails on its claims in state court, it may obtain reversal of Ecology's decision, removing the alleged "roadblock" it challenges in this case. Dkt. 29, at 31. In fact, if Lighthouse prevails in state court, nothing will be left for the district court to decide, as it properly recognized. ER 007.

[11] Plaintiffs cite *Harper v. Public Service Commission of W. Virginia*, 396 F.3d 348 (4th Cir. 2005), to claim that abstention is never appropriate in Commerce Clause cases. Dkt. 29, at 49. To the contrary, the Fourth Circuit specifically stated that, where land use planning is involved, abstention *is* appropriate. *Harper*, 396 F.3d at 354 ("[i]interests like education, land use law, family law, and criminal law lie at the heart of state sovereignty, and a failure to abstain . . . would disrespect the allocation of authority laid in place by the Framers"). The court declined to abstain in that case because the state's interest there did not implicate any of those areas. *Id*. at 356.

Plaintiffs, however, argue that even if they prevail in state court they will "still need a federal court to prevent the State Defendants from using future state approvals to block coal exports." Dkt. 29, at 49. Plaintiffs appear to believe that the district court had authority to not only overturn permitting decisions the State had already made, but also to enjoin the State from denying Lighthouse any future permits as well. *Id*. ("[n]othing short of a fully permitted, shovel-ready terminal can resolve Lighthouse's Commerce Clause claims"). The district court was properly skeptical that it had such authority. *See* ER 005 ("this Court can't overlook, or void, all state environmental laws or decisions"). Contrary to Plaintiffs' arguments, the Commerce Clause is not a magic talisman that enables it to "circumvent state regulation and insure unrestricted expansion and protection of [its] opportunity to obtain the greatest margin of profit." *Ford Motor Co. v. Ins. Comm'r of Pa.*, 874 F.2d 926, 943 (3d Cir. 1989).

The scope of federal relief to which Plaintiffs may be entitled is limited to the specific decisions before the court (i.e., the water quality certification decision and the sublease denial). While those decisions could be set aside by the federal court, comparable, and perhaps broader, relief is available and sought by Lighthouse in the state proceedings. *See* SER 062 (seeking, among

other things, a declaration that Ecology waived its water quality certification authority). There is very little difference between the relief sought in federal court versus state court. *Compare* ER 253–55 (relief sought in federal court) *with* SER 062 (relief sought in state court). As a result, the district court properly concluded that resolution of the state court cases might moot, or at least alter, the federal constitutional issues. ER 007. The second *Canton* requirement is met.

c. Resolution of the state law issues is uncertain

Third, the state law issues in the state court cases are uncertain because they are of "first impression." ER 007. "Uncertainty for purposes of *Pullman* abstention means that a federal court cannot predict with any confidence how the state's highest court would decide an issue of state law." *Pearl Inv.*, 774 F.2d at 1465. An issue may be uncertain if it is "novel and of sufficient importance that it ought to be addressed first by a state court." *Id*. These factors are all present here.

The question of whether Ecology may use its SEPA authority to deny a water quality certification based in part on non-water quality factors has not been decided by the state courts. Furthermore, Lighthouse challenges Ecology's decision based on highly fact-specific arguments about the particular

language used in the decision versus the language in the EIS. *See, e.g.*, SER 020 ("[T]here is a gap, a discrepancy, a gulf between . . . the purported bases for the decision and the actual words that are on the FEIS document."). That fact-specific inquiry is one best left to the state courts to resolve. *See Sederquist v. City of Tiburon*, 590 F.2d 278, 282–83 (9th Cir. 1978) (where state law issue is fact intensive, resolution of that issue is uncertain and best left to the state courts).

Plaintiffs do not really contend otherwise. Instead, they first claim that no state law issues are involved "because compliance with state law has no bearing on the Commerce Clause claims in this litigation." Dkt. 29, at 50. Second, they contend that the state law claims are no longer uncertain because lower state courts have already ruled on them. *Id*. Both arguments lack merit.

Plaintiffs are wrong that no state law issues are implicated in the federal case. The propriety of Ecology's section 401 water quality decision as a matter of state law is directly implicated by, and underlies, Plaintiffs' Commerce Clause claims. For example, Plaintiffs argued to the district court that Ecology did not properly exercise its state law authority under SEPA because Ecology misinterpreted or misapplied the findings in the EIS. SER 020. They also argued that Ecology's use of SEPA to deny the 401 certificate was improper

because Ecology had never denied a certificate on that basis before. *See* ER 005 (quoting Plaintiffs' summary judgment brief). These are state law arguments, not Commerce Clause ones. The state courts will directly address these same issues, and it is uncertain how the state courts will ultimately resolve them.

The district court properly abstained to avoid making a duplicative and potentially inconsistent ruling on state law issues. *See Pearl Inv.*, 774 F.2d at 1464; *Harris Cty. Comm'rs Court v. Moore*, 420 U.S. 77, 88 (1975) (abstention proper where federal claims were "entangled in a skein of state law"). Plaintiffs cannot frustrate the policies underlying abstention by the simple expedient of couching their claims in federal terms. *Muskegon Theaters, Inc. v. City of Muskegon*, 507 F.2d 199, 204 (6th Cir. 1974).

And the mere fact that the state courts have not so far granted Lighthouse any relief does not mean the state law issues are no longer doubtful. As the district court recognized, until the state supreme court rules, or declines to rule, on the state law issues, they are not finally determined. ER 013 ("[a] different result may occur at each level of state court review"). The present case may be rendered entirely moot if the state courts ultimately grant relief to Plaintiffs.

Because all three of the *Canton* factors are met, the district court's abstention order should be upheld. The court made a thoughtful, carefully considered decision to wait until the state court proceedings conclude, and the state law issues are resolved, before proceeding to hear Lighthouse's constitutional claims. There was no abuse of discretion.

3. The district court's stay was also proper under *Colorado River*

The district court's abstention order should also be upheld under *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). The purpose of the *Colorado River* doctrine is to veer from a collision course of parallel state and federal proceedings and allow cases to proceed in an orderly fashion. As the district court recognized here, simultaneously proceeding with both state and federal cases creates a real risk of duplicative and/or conflicting decisions. ER 008. The district court properly eliminated that risk by allowing the state court cases to go first.[12] In doing so, the court appropriately rested its decision on "considerations of wise judicial

[12] Although the district court did not specifically mention *Colorado River* in its abstention order, it was briefed below and the district court referred to its standards as also justifying abstention. *See* ER 008 (referencing "considerations of judicial economy and the likelihood of inconsistent results").

administration, giving regarding to conservation of judicial resources and comprehensive disposition of litigation." *Colo. River*, 424 U.S. at 817.

a. *Colorado River* abstention avoids duplicative litigation

Colorado River abstention arises from the federal court's traditional concern with avoiding duplicative litigation. *Colo. River*, 424 U.S. at 817. While a federal district court generally has an "unflagging obligation" to assert jurisdiction notwithstanding a parallel state case, there are "exceptional circumstances" when the court may decline to do so. *Id*. This Court considers eight factors to determine if such abstention is appropriate:

> (1) which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court proceedings will resolve all issues before the federal court.

Montanore Minerals Corp. v. Bakie, 867 F.3d 1160, 1166 (9th Cir. 2017).

These factors are not a mechanical checklist—they are to be applied "in a pragmatic, flexible manner with a view to the realities of the case at hand." *Moses H. Cone Mem'l Hosp. v. Mercy Constr. Corp.*, 460 U.S. 1, 21 (1983). The weight to be given any one factor may vary greatly from case to case. *Id*.

at 16. The first two factors may not be relevant in a particular case. *R.R. St. & Co. v. Transp. Ins. Co*., 656 F.3d 966, 979 (9th Cir. 2011).

b. The *Colorado River* factors weigh in favor of abstention here

Here, the pertinent factors weigh in favor of abstention. The third factor—avoidance of piecemeal litigation—is particularly strong in this case and was a key factor in *Colorado River*. *Colo. River*, 424 U.S. at 819.

" 'Piecemeal litigation occurs when different tribunals consider the same issue, thereby duplicating efforts and possibly reaching different results.' " *R.R. St.*, 656 F.2d at 979 (quoting *Am. Int'l Underwriters, Inc. v. Continental Ins. Co*., 843 F.2d 1253, 1258 (9th Cir. 1988)). As the district court recognized, Plaintiffs pursue virtually identical claims in both state and federal court regarding Ecology's water quality certification denial. *Compare* SER 032–063 (complaint in state court) *with* ER 203–55 (complaint in federal court). In addition, Plaintiffs rely on virtually identical evidence and arguments in both courts. *Compare* ER 005 (quoting Plaintiffs' brief below) *with* SER 056; *see also* SER 013. In both state and federal court, Plaintiffs allege that Ecology's water quality certification denial is improper because Ecology relied in part on non-water quality factors and because Ecology had not denied such a water quality certificate on those bases before. ER 005; SER 056–057.

Although Plaintiffs assert different legal theories in support of their federal court claims, the underlying basis for all the claims is the same—namely, an alleged bias by Ecology against coal. SER 049 ("Ecology misused its authority due to its anti-coal animus"); SER 011 ("the heart of our case is about the defendants discriminating against Lighthouse's project for the sole reason it is a coal export facility"). As the district court recognized, if both state and federal cases proceed at the same time, there is a significant risk of inconsistent decisions and potentially wasted effort. ER 008.

The fourth factor also favors abstention. Lighthouse brought its claims first to the state court and the state Pollution Control Hearings Board. Only later did Plaintiffs bring overlapping claims in federal court. Moreover, the state cases continue to proceed and some or all of them may be concluded by the time this Court decides this appeal. The fact that the state cases, two of which are on appeal, are further along than this case, weighs strongly in favor of abstention. *R.R. St.*, 656 F.3d at 980; *Moses H. Cone*, 460 U.S. at 21.

The fifth factor weighs against abstention only if the federal courts have exclusive jurisdiction over the federal claims. *Nakash v. Marciano*, 882 F.2d 1411, 1416 (9th Cir. 1989) ("[i]f the state and federal courts have concurrent jurisdiction over a claim, this factor becomes less significant"). Here, Plaintiffs

could have brought their Commerce Clause claims in state court because Washington State courts have concurrent jurisdiction over constitutional claims. *See S. Pac. Transp. Co. v. Pub. Utils. Comm'n of Cal.*, 716 F.2d 1285, 1289 (9th Cir. 1983). Indeed, Lighthouse did bring some of its constitutional claims in state court (due process and equal protection). SER 058–060; *see also* Dkt. 29, at 50 n.71.

Plaintiffs do not explain why they split their constitutional claims between state and federal court. However, the fact that Plaintiffs brought their claims in several different fora shows that the seventh *Colorado River* factor—forum shopping—is also met. Having received initial adverse rulings from the state administrative agencies, Plaintiffs want the federal court to overturn those results without meeting the procedural requirements necessary to do so under state law. As the district court stated, however, it "is not an appeal court for the State Pollution Control Hearings Board." ER 004.

Finally, as to the sixth factor, Plaintiffs offer no persuasive reason why the state courts cannot protect their rights. Presumably, Plaintiffs would argue that the state courts cannot provide the broad relief they seek in this case, but as discussed above, that relief is not available here in any event. Plaintiffs do not suggest the state courts are unfair or hostile. And while there are some

differences between the state and federal actions—such as the fact that Plaintiffs argue the Commerce Clause here, and argue other constitutional theories in state court—this is no bar to abstention. Exact parallelism between the state and federal actions is not required. *Nakash*, 882 F.2d at 1416. This factor also weighs strongly in favor of abstention.

In sum, the district court's stay order should be upheld. The district court properly recognized that resolution of the state court proceedings was necessary and appropriate prior to proceeding with the federal case. While Plaintiffs insist they are entitled to a ruling on their Commerce Clause claim, this insistence rings hollow because the very same evidence and arguments made in support of that claim are already under consideration in the state courts. Rulings in those cases may provide Plaintiffs all the relief to which they are entitled.

4. The district court correctly considered collateral estoppel

The district court based its stay order in part on concerns about the potential estoppel effect of the Pollution Control Hearings Board's upholding Ecology's water quality certification denial. ER 004. Plaintiffs devote many pages of their brief to argue that the district court's views on estoppel were erroneous. Dkt. 29, at 35–45. However, the district court did not apply

estoppel—it did not dismiss any of Plaintiffs' claims—so the issue of collateral estoppel is not directly before this Court. Nevertheless, because the district court's concerns about estoppel were well founded and support its stay order, Defendants address those issues here.

Under the Full Faith and Credit Act, federal courts must give the same preclusive effect to state decisions, including administrative decisions, as the courts of that state would, if the state administrative decision satisfies the requirements of fairness set out in *United States v. Utah Construction & Mining Co*., 384 U.S. 394, 422 (1966). *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 798–99 (1986); *Miller v. Cty. of Santa Cruz*, 39 F.3d 1030, 1032–33 (9th Cir. 1994). The federal court must give preclusive effect to both the factual findings and legal conclusions of the state administrative agency. *Miller*, 39 F.3d at 1032.

Here, the district court correctly found that Washington courts give preclusive effect to decisions of state administrative agencies. ER 003 (citing *Reninger v. Wash. Dep't of Corr.*, 951 P.2d 782, 788 (Wash. 1998)). The district court also noted that the Board had already resolved many of Plaintiffs' factual and legal arguments. *See* ER 005. As noted above, Plaintiffs' Commerce Clause arguments are based on the contention that Ecology's

decision was improper under state law. The Board, however, already determined that Ecology's decision was lawful under both state and federal statutes, that it was supported by the EIS, and that it was not arbitrary or capricious or clearly erroneous. SER 134–55. Since Plaintiffs' Commerce Clause arguments are based on the notion that Ecology's decision is not, in fact, supported by the EIS and that it is improper under state law, the district court correctly noted that little, if anything, will remain of the Commerce Clause claim if the Board's decision survives appellate review. ER 014.

On appeal, Plaintiffs do not dispute that the Board's decision meets the criteria for estoppel in *Utah Construction*. Rather, Plaintiffs argue that the district court's concerns about collateral estoppel do not support the stay because (1) staying the case pending resolution of state court proceedings is effectively the same as requiring exhaustion of state remedies; (2) the Commerce Clause issues it raises are not "identical" to the issues raised in state court; and (3) it is allegedly unjust to apply estoppel in this case. Dkt. 29, at 36–45. These arguments must be rejected.

a. The district court did not require exhaustion of Plaintiffs' Commerce Clause claim

First, Plaintiffs are wrong that the stay is effectively the same as requiring exhaustion of state remedies. The district court did not require

Plaintiffs to present their Commerce Clause claim to the state court, and indeed, they have not done so. In addition, the district court stayed the case, rather than dismissing it, indicating that the district court will eventually decide the Commerce Clause claim, once the state court proceedings are completed. ER 008. Plaintiffs continue to have a federal forum for their Commerce Clause claim.

Plaintiffs essentially contend that a *Pullman* or *Colorado River* stay is never appropriate in a § 1983 case. The courts, however, rejected that broad proposition long ago. *See C-Y Dev.*, 703 F.2d at 381 ("there is no per se civil rights exception to the abstention doctrine"). While the courts are reluctant to abstain in civil rights cases involving free speech, racial equality, or voting rights, no similar rationale applies in land use cases. *Id*. As long as the relevant factors are met, the district court has discretion to abstain in such cases. *See also Pearl Inv.*, 774 F.2d at 1463 (abstention may be proper in civil rights cases to avoid unnecessary interference with an important state program).

Plaintiffs rely on *Knick v. Township of Scott*, __ U.S. __, 139 S. Ct. 2162 (2019). Dkt. 29, at 37–38. *Knick*, however, has nothing to do with abstention. *Knick* simply holds that a federal takings plaintiff is not required to first present its claims to the state court before pursuing its claims in federal court. *Knick*,

139 S. Ct. at 2169–70. *Knick* reaffirms the Supreme Court's prior holdings that a § 1983 plaintiff is not required to first exhaust claims in state court. *Id*.

Abstention pending resolution of state law claims that are intertwined with federal claims is not the same as requiring exhaustion of those federal claims in state court. When *Pullman* abstention occurs, the plaintiff is not required to present its federal claims to the state courts, but instead may expressly reserve them for resolution by the federal court. *England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411, 418–19 (1964); *see also Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 85 n.7 (1984).

By characterizing the district court's stay order as an exhaustion requirement, Plaintiffs implicitly acknowledge that the state court claims are, at bottom, the same as the Commerce Clause claim in federal court. The overlapping nature of the claims in the two fora serves to support, rather than undermine, the district court's abstention decision. *See Telesco v. Telesco Fuel & Masons' Materials, Inc.*, 765 F.2d 356, 362 (2d Cir. 1985).

b. Identity of issues is not required for abstention

Plaintiffs next contend that the issues before the federal court are not "identical" to the issues in state court, and abstention will not remove any issues from this case. Dkt. 29, at 38. Plaintiffs are again wrong. As discussed

above, the state court claims are based on the same evidence and arguments as the federal court claims. Moreover, regardless of whether the issues are the same, if Lighthouse prevails in state court, it may obtain the permits it seeks and the federal case may be rendered moot. *See* ER 007 ("If the § 401 denial is vacated [in state court], Plaintiffs could simply cease this litigation . . . .").

Plaintiffs argue that Washington courts have such a "narrow" view of estoppel that it would not apply in this case. Dkt. 29, at 39–40. In fact, Washington courts have repeatedly held that a plaintiff such as Lighthouse that loses an administrative appeal is barred by estoppel from subsequently bringing tort or § 1983 claims based on the same facts. *Reninger*, 951 P.2d at 791 (plaintiffs who lost administrative appeal barred from pursuing tort claims); *Shoemaker v. City of Bremerton*, 745 P.2d 858, 863 (Wash. 1987) (plaintiff who lost administrative appeal barred from pursuing § 1983 claim); *Christensen v. Grant Cty. Hosp. Dist. No. 1*, 96 P.3d 957, 968 (Wash. 2004) (plaintiff who lost administrative appeal barred from pursuing tort claim).

The district court noted that, under state cases, Plaintiffs' federal claims would likely be barred under Washington law. ER 002–004. Plaintiffs, however, claim that *Sprague v. Spokane Valley Fire Department*, 409 P.3d 160 (Wash. 2018) requires a different result. Dkt. 29, at 40. *Sprague* has no

application here. The court there decided not to apply estoppel under unique circumstances, including the fact that the free speech issue raised there potentially affected over 63,000 state employees. *Sprague*, 409 P.3d at 186. The present case, on the other hand, does not involve free speech and does not affect the interests of over 63,000 individuals. *Sprague* is not on point here.

Ultimately, Plaintiffs' argument rests on a confusion between issue preclusion and claim preclusion. *See* Dkt. 29, at 41–42 (arguing that different claims are raised in the two proceedings). Claim preclusion bars relitigation of the same legal claim or cause of action between the parties. Issue preclusion bars relitigation of the same issues between the parties even though a different claim or cause of action is asserted. *See Allen v. McCurry*, 449 U.S. 90, 94 (1980); *Christensen*, 96 P.3d at 960–61. Here, the district court was concerned with issue preclusion, not claim preclusion. ER 002 ("the relevance of the State Pollution Control Hearings Board's decisions as an issue preclusion question, not a claim preclusion question, becomes apparent").

While Plaintiffs' Commerce Clause claim will not be adjudicated in state court, the facts and issues underlying the claim—such as whether Ecology made an improper decision—are being adjudicated there. The facts and issues decided by the state court are entitled to preclusive effect in the federal

proceeding even though the legal claims in the two courts are different. *See Shoemaker*, 745 P.2d at 863. Plaintiffs' arguments ignore this basic point and misconstrue Washington law.

c. Application of collateral estoppel does not work an injustice

Last, Plaintiffs argue that estoppel should not apply because its application would be unjust. Dkt. 29, at 44. Under Washington law, the injustice prong of estoppel refers to procedural unfairness. *Thompson v. State Dep't of Licensing*, 982 P.2d 601, 608 (Wash. 1999). Washington courts "look to whether the parties to the earlier proceeding received a full and fair hearing on the issue." *Id*. Here, Plaintiffs' claim of unfairness fails because they had a full and fair hearing before the Board.

Plaintiffs do not cite any procedural unfairness arising from the Board proceedings. They allege a "disparity of relief" (Dkt. 29, at 43–44) between the Board proceeding and the federal suit, but in fact no such disparity exists. Plaintiffs could have obtained reversal of Ecology's decision from the Board. *See Port of Seattle v. Pollution Control Hearings Bd.*, 90 P.3d 659, 671–72 (Wash. 2004) (discussing role of the Board). Plaintiffs had every incentive to litigate the propriety of Ecology's denial to the Board, and in fact did so. Applying estoppel to this set of facts is not unjust. *Shoemaker*, 745 P.2d at 863

(where parties had incentive to litigate before the administrative tribunal, there is no injustice in applying estoppel).

Nor does this case involve any "overriding legislative purpose" that would justify relitigation of issues decided by the Board, as Plaintiffs claim. Dkt. 29, at 44. There is no federal statute regarding coal terminals nor any Congressional policy. The mere fact that Plaintiffs brought this case under § 1983 does not bar the application of estoppel. *See Univ. of Tenn.*, 478 U.S. at 797 ("[n]othing in the language of § 1983 remotely expresses any congressional intent to contravene the common-law rules of preclusion") (quoting *Allen*, 449 U.S. at 97–98).

Plaintiffs claim that this case raises "issues of federal trade policy and state control of the nation's ports" that are too important to leave to the state courts. Dkt. 29, at 44. In fact, this case does not involve these issues—the State simply applied its environmental laws to the project before it. Both state and local government agencies rejected permits for the project because it did not meet applicable environmental requirements. Plaintiffs are wrong in arguing that the denial of permits for this single project at this single location constitutes an attempt by the State to assert "control of the nation's ports" or

control over "federal trade policy."[13] Merely because the project would operate in interstate or international commerce does not mean the law does not apply to it. Plaintiffs cite no cases to the contrary.

C. The District Court Correctly Dismissed Claims Against Commissioner Franz Under the Eleventh Amendment

Plaintiffs sought declaratory and injunctive relief against Washington's Commissioner of Public Lands to force her to allow the construction and operation of Plaintiffs' proposed terminal on sovereign aquatic lands owned by the State of Washington. ER 043–046. And yet, inexplicably, Plaintiffs claim that they are not seeking to divest the State of a property interest. Dkt. 29, at 54. By insisting that the Constitution gives them a right, Plaintiffs are confusing the State's role as a regulator with the State's proprietary role as a landowner. *See, e.g.*, Dkt. 29, at 56. It is the latter under which Commissioner Franz manages the State's sovereign interests in its aquatic lands. *See* Wash. Rev. Code § 79.105.020. Accordingly, the district court was correct that all of Plaintiffs' claims against Commissioner Franz, including their claims for

[13] The district court rejected Plaintiffs' claim based on alleged interference with federal trade policy, and Plaintiffs have not appealed that decision. SER 028 ("BNSF has failed to point to an express executive policy which is in conflict with the State's denial of the permit.").

declaratory and injunctive relief under 42 U.S.C. § 1983, are barred by the Eleventh Amendment.

The existence of sovereign immunity under the Eleventh Amendment is a question of law reviewed de novo. *Ariz. Students Ass'n v. Ariz. Bd. of Regents*, 824 F.3d 858, 864 (9th Cir. 2016). The district court dismissed Commissioner Franz based on her Eleventh Amendment immunity, concluding that Plaintiffs' request for an order allowing Lighthouse to build its coal terminal on state-owned aquatic lands would divest the state of control over its aquatic lands. ER 048. As the court explained, "[b]y eliminating a large majority of the grounds upon which a decision about a sub-lease or improvement applications in the future may be made, Lighthouse and BNSF's requested relief functionally hamstrings Washington's authority to determine the use and control of its own aquatic lands." ER 046. If the district court granted the requested relief, "substantially all benefits of ownership and control would shift from Washington to a private company for the life of the sub-lease." *Id*. The district court correctly held that these claims are barred by the Eleventh Amendment under *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997).

1. Commissioner Franz is immune from suit for management decisions involving the use and control of state-owned aquatic lands

Under the Eleventh Amendment, "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." The Eleventh Amendment immunizes states from suit in federal court regardless of the relief sought, barring suits for equitable relief as well as suits for damages. *E.g.*, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58 (1996); *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). For purposes of sovereign immunity, a suit against a state official acting in his or her official capacity is treated as if it is a suit against the state itself. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102–03 (1984).[14]

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[14] While Plaintiffs assert claims against Commissioner Franz under 42 U.S.C. § 1983, Dkt. 29, at 55, § 1983 does not abrogate states' Eleventh Amendment immunity. *See Quern v. Jordan*, 440 U.S. 332, 341–45 (1979). Unless *Ex parte Young* applies, the Eleventh Amendment also bars § 1983 claims against state officials acting in their official capacity. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65–71 (1989) ("neither a State nor its officials acting in their official capacities are 'persons' under § 1983").

2. *Ex Parte Young* does not apply because state control over state-owned aquatic lands is an essential attribute of sovereignty

There are a few exceptions to Eleventh Amendment immunity, but the only one at issue is this appeal is the one established by *Ex parte Young*, 209 U.S. 123 (1908). *See* Dkt. 29, at 52. In *Ex parte Young*, the Supreme Court recognized a limited exception to sovereign immunity for a state official named in an official capacity, which permits a federal court to hear a suit when the "complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002). While *Ex parte Young* typically allows claims for prospective injunctive or declaratory relief against state officials in federal court, such claims cannot proceed when they involve certain decisions regarding the use and control of the beds of the State's navigable waters.[15] Contrary to the Plaintiffs' assertions, the Court must look at the relief requested to determine if the claims at issue are barred.

This exception was articulated by the Supreme Court in *Coeur d'Alene Tribe*, which involved an action by the Coeur d'Alene Tribe against the state of

[15] "Beds of navigable waters" are "those lands lying waterward of and below the line of navigability on rivers and lakes not subject to tidal flow, or extreme low tide mark in navigable tidal waters, or the outer harbor line where harbor area has been created." Wash. Rev. Code § 79.105.060(2).

Idaho, and several Idaho officials, seeking declaratory and injunctive relief establishing the Tribe's ownership over portions of the bed of Lake Coeur d'Alene. *Coeur d'Alene Tribe*, 521 U.S. at 264–65. In holding that the Tribe's claims were barred by the Eleventh Amendment, the Supreme Court recognized the unique nature of a state's ownership of the beds of its navigable waters as an "essential attribute" of a state's sovereignty. *Id*. at 283. The Court further recognized that "[t]he requested injunctive relief would bar the State's principal officers from exercising their governmental powers and authority over the disputed lands and waters." *Id*. at 282.

The states, upon entry into the Union, " 'became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government.' " *Id*. at 283 (quoting *Martin v. Lessee of Waddell*, 41 U.S. 367, 410 (16 Pet. 367) (1842)). The State's title to these sovereign lands arises under the equal footing doctrine.[16] As the Court stated, "[t]he principle which underlies the equal

[16] The equal footing doctrine means that, "States entering the Union after 1789 did so on an 'equal footing' with the original States and so have similar ownership over these 'sovereign lands.' " *Coeur d'Alene Tribe*, 521 U.S. at 283 (quoting *Lessee of Pollard v. Hagan*, 44 U.S. 212, 228–93 (3 How. 212) (1845)).

footing doctrine and the strong presumption of state ownership is that *navigable waters uniquely implicate sovereign interests*. The principle arises from ancient doctrines." *Coeur d'Alene Tribe*, 521 U.S. at 284 (emphasis added).

Because of the sovereign interests a state has in the beds of its navigable waters, the Court held that the Tribe's claims, which amounted to a quiet title action against a state in federal court, were barred by the Eleventh Amendment. In reaching this conclusion, the Court recognized that:

> It is apparent, then, that if the Tribe were to prevail, Idaho's sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury. Under these particular and special circumstances, we find the *Young* exception inapplicable. The dignity and status of its statehood allow Idaho to rely on its Eleventh Amendment immunity. . . .[17]

The State's ownership of its aquatic lands reflects its obligations under the public trust doctrine. *Pope Res., LP v. Wash. State Dep't of Nat. Res*., 418 P.3d 90, 95 (Wash. 2018). In Washington, state-owned aquatic lands are managed by DNR pursuant to the aquatic lands statutes under Wash. Rev. Code Title 79. *See* Wash. Rev. Code § 79.105.020. DNR is a tripartite entity

[17] *Coeur d'Alene Tribe*, 521 U.S. at 287.

consisting of the Board of Natural Resources, the Administrator (Commissioner of Public Lands), and the Supervisor. Wash. Rev. Code § 43.30.030; Wash. Rev. Code § 43.30.105; Wash. Rev. Code § 43.30.155. Through the aquatic lands statutes, "the State has granted sovereign powers to DNR for protection of the State's interest in the trust." *Pope Res.*, 418 P.3d at 95. As the manager of the State's aquatic lands, "DNR executes its leasing authority with a view toward the State's duty to protect the public trust." *Id*. The Commissioner's leasing decisions on state-owned aquatic lands are inextricably linked to State sovereignty. *See Nw. Alloys*, 447 P.3d at 629–30. Plaintiffs' claims against Defendant Franz are therefore, in effect, claims against the State itself, which are barred under the Eleventh Amendment.

3. The requested relief would impermissibly divest the State of control over its sovereign aquatic lands

Plaintiffs' claims against Commissioner Franz center on the State's authority and discretion to determine who uses, and for what purposes, state-owned aquatic lands. *See* ER 214–15; ER 233–34; SER 361–71; ER 115. Contrary to Plaintiffs' assertions, the State's control of its navigable waters was *the* sovereign interest that was implicated in *Coeur d'Alene Tribe*. Dkt. 29, at 53. This was also the same sovereign interest at issue in *Lacano Investments, LLC v. Balash*, 765 F.3d 1068, 1073–74 (9th Cir. 2014), where a private party

sought to use and control state aquatic lands. *Lacano*, 765 F.3d at 1073–74. As the *Lacano* court noted, " '[a] federal court cannot summon a State before it in a private action seeking to divest the State of a property interest.' " *Lacano*, 765 F.3d at 1073 (citing *Coeur d'Alene Tribe*, 521 U.S. at 289). Both *Lacano* and *Coeur d'Alene Tribe* stand for the proposition that when an action implicates "the state's control over submerged lands, federal courts lack jurisdiction to hear the case." *Lacano*, 765 F.3d at 1074.

It is a basic tenet of property law that "[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). Plaintiffs' requested relief would sever this strand of the State's ownership interest in its aquatic lands by establishing a right to use state property for the purposes of Lighthouse's terminal, and removing the Commissioner's future discretion over such uses. *See* ER 43–46; ER 253–55 ¶¶ A, F, G, H, I, J; ER 124–25 ¶¶ 127, 128, 132, 133, 134, 135. This requested relief is an attempt to establish a possessory interest in the State's aquatic lands via a sublease for the purpose of the proposed terminal. Such a leasehold would impair a core state property interest by subverting the State's discretion to determine who uses state property, and for what purposes. ER 046.

4. Plaintiffs rely on inapposite case law to argue that their claims can proceed under *Ex Parte Young*

Plaintiffs cite numerous cases to try to narrow the reach of *Coeur d'Alene Tribe*. Dkt. 29, at 53–56. However, none of these cases support their arguments that *Ex parte Young* allows their claims against Commissioner Franz to proceed. For example, *In re Ellett*, 254 F.3d 1135, 1143 (9th Cir. 2001), involved the collection of state income taxes from certain tribes. In differentiating the collection of taxes from the State's control over its aquatic lands, *In re Ellett* recognized that "[i]n *Coeur d'Alene,* it was the unique divestiture of the state's broad range of controls over its own lands that made the Young exception to sovereign immunity inapplicable." *In re Ellet*, 254 F.3d at 1143. The Court went on to recognize that the question under *Coeur d'Alene Tribe* is "whether the relief requested would be so much of a divestiture of the state's sovereignty as to render the suit as one against the state itself." *Id*. Collecting the taxes at issue there did not rise to this level. *Id*.

The other cases cited by Plaintiffs can be similarly distinguished by their facts, because none of those cases involved the State's management authority over its aquatic lands. Dkt. 29, at 53–56.[18] The only case cited by Plaintiffs that

[18] *E.g., Elephant Butte Irrig. Dist. of N.M. v. Dep't of Interior*, 160 F.3d 602 (10th Cir. 1998) (review of retention of net profits under a land lease);

even remotely involves the State's control over its aquatic lands is *Hamilton v. Myers*, 281 F.3d 520 (6th Cir. 2002). Dkt. 29, at 53 n.73. In *Hamilton*, the plaintiffs challenged the removal of their property from, and were asserting riparian rights over, Reelfoot Lake in Tennessee. *Id*. at 526–27. Importantly, the *Hamilton* Court was not called upon to determine whether the plaintiffs had such riparian rights, because this question was already affirmatively answered by the Tennessee Supreme Court. *Id*. at 527.

By contrast, in Washington, a riparian owner has no rights to the State's navigable waters incident to their estate. The scope of the public's interest in a state's navigable waters under the public trust doctrine is determined by state law because "each state individually determines the public trust doctrine's limitations within the boundaries of the state." *Wash. State Geoduck Harvest Ass'n v. Wash. Dep't of Nat. Res.*, 101 P.3d 891, 896 (Wash. 2004). In

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Cardenas v. Anzai, 311 F.3d 929 (9th Cir. 2002) (review of distribution of payments from tobacco settlement); *Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1043 (9th Cir. 2000) (collection of sales and use tax); *Lipscomb v. Columbus Mun. Separate Sch. Dist.*, 269 F.3d 494, 498–99 (5th Cir. 2001) (taxation of a leasehold not involving state aquatic lands); *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1329 (11th Cir. 1999) (challenge to statutes banning certain abortions); *Ameritech Corp. v. McCann*, 297 F.3d 582, 584 (7th Cir. 2002) (declaratory action seeking enforcement of Electronic Communications Privacy Act); and *Hill v. Kemp*, 478 F.3d 1236, 1260 (10th Cir. 2007) (challenge to Oklahoma's specialty license plate program).

Washington, unlike Tennessee, "riparian proprietors on the shore of the navigable waters of the state have no special or peculiar rights therein as an incident to their estate. To hold otherwise would be to deny the power of the state to deal with its own property as it may deem best for the public good." *Eisenbach v. Hatfield*, 26 P. 539, 543–44 (Wash. 1891).

Plaintiffs have no lease with the State at the proposed terminal site, and neither plaintiff is a party to the State's lease with Northwest Alloys. *See* SER 264. In order to obtain their requested declaratory and injunctive relief, Plaintiffs would need to establish that Lighthouse has a right to use state property for the proposed terminal. Establishing this possessory interest in state-owned aquatic lands would implicate the exact issue of *Coeur d'Alene Tribe*, namely the State's authority to determine who uses, and for what purposes, state-owned aquatic lands. As Justice O'Connor recognized in her concurring opinion, "[w]e have repeatedly emphasized the importance of submerged lands to state sovereignty. Control of such lands is critical to a State's ability to regulate use of its navigable waters." *Coeur d'Alene Tribe*, 521 U.S. at 289.

Although Plaintiffs dispute that their claims against Commissioner Franz are similar to the relief at issue in *Coeur d'Alene Tribe*, their arguments ignore

the basic fact that a leasehold *is* a possessory interest in real property. As the Washington State Supreme Court long ago stated, "[a] lease carries a present interest and estate in the property involved for the period specified therein . . . . It gives exclusive possession of the property, which may be asserted against everyone, including the lessor." *Conaway v. Time Oil Co*., 210 P.2d 1012, 1017 (Wash. 1949).

The requested declaratory and injunctive relief against Commissioner Franz, if granted, could result in Lighthouse's exclusive use and occupancy of state-owned bedlands for the entire multi-decade period of time their leasehold interest is in place. ER 046. The district court was correct that this is the functional equivalent of a quiet title in the state's bedlands. ER 048. The claims against Commissioner Franz are therefore claims against the State itself, which are barred under the Eleventh Amendment.

D. The District Court Properly Granted Summary Judgment on the Issue of Preemption

Plaintiffs allege federal preemption under the Interstate Commerce Commission Termination Act (ICCTA), 49 U.S.C. § 10101 *et seq*. In its order dismissing the ICCTA preemption claims, the district court found that neither Lighthouse nor BNSF met the jurisdictional requirements to bring ICCTA

challenges and dismissed the claims.[19] This conclusion was correct and should be upheld.

1. Standard of review

Standing is a question of law that this Court reviews de novo. *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 593 F.3d 923, 929 (9th Cir. 2010). Similarly, this Court reviews the district court's preemption decision de novo. *Or. Coast Scenic R.R., LLC v. Or. Dep't of State Lands*, 841 F.3d 1069, 1072 (9th Cir. 2016).

2. Plaintiffs lack standing for their preemption claim

The district court properly concluded that Plaintiffs failed the redressability prong of Article III standing with respect to their ICCTA preemption claim. ER 025. Plaintiffs must demonstrate standing as to each claim alleged and each form of relief sought. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 335 (2006). A key element of standing is redressability—plaintiffs must demonstrate that their injury will likely be redressed by a favorable court decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). "Relief that does not remedy the injury suffered cannot bootstrap a

[19] The district court also dismissed Lighthouse's preemption claims brought under the Ports and Waterways Safety Act. ER 033–035. Lighthouse has not appealed that ruling here.

plaintiff into federal court; that is the very essence of the redressability requirement." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998).

In the present case, Ecology denied Lighthouse's request for a water quality certificate on multiple grounds, many of which have nothing to do with railroad operations and are not preempted under any conceivable interpretation of ICCTA. SER 196–213. These grounds include Lighthouse's failure to demonstrate reasonable assurance of compliance with state and federal water quality requirements, destruction of a historic district, unavoidable adverse impacts to fish populations, and other adverse environmental impacts. SER 199–212.

Plaintiffs do not challenge most of these grounds. Rather, they focus exclusively on grounds that relate to rail transportation. Dkt. 29, at 57–58. But because there are adequate non-rail-based grounds for Ecology's decision, the district court correctly concluded that it could not reverse or vacate the decision even if it ruled in Plaintiffs' favor. ER 025 ("Lighthouse and BNSF fail to show that even if they demonstrate that ICCTA . . . preempt[s] some of the grounds upon which the State based its denial . . . the State's entire decision could be vacated."). In other words, the court could not redress Plaintiffs' claimed injuries.

On appeal, Plaintiffs contend that they have standing because a ruling in their favor would remove "some" of the grounds for the water quality certificate denial. Dkt. 29, at 57. They contend that it is enough for standing if a favorable decision will "partially redress[]" their injury. *Id*. The case Plaintiffs rely on to make this argument is inapposite because it involved procedural standing in which a different, more relaxed, redressability standard applies. *WildEarth Guardians v. U.S. Dep't of Agric*., 795 F.3d 1148, 1155 (9th Cir. 2015) ("[b]ecause WildEarth seeks to enforce a procedural right under NEPA, the requirements for causation and redressability are relaxed"). Here, Plaintiffs do not seek to enforce a procedural right and this relaxed standard does not apply.

Plaintiffs also erroneously contend that they have standing because a ruling in their favor will remove some of the legal "roadblocks" to development of the project. Dkt. 29, at 58. But a ruling in their favor on ICCTA preemption would not remove *any* roadblocks to development of the project. Such a ruling would not reverse the water quality certificate denial, which is supported by adequate independent grounds. Such a ruling would also not reverse the sublease denial, which was based on financial concerns, not rail impacts. A ruling in Plaintiffs' favor would provide nothing but worthless

relief, which is insufficient to confer standing. *Hells Canyon Pres. Council*, 593 F.3d at 929–30.

The fact that the district court could not provide effective relief even if it ruled in Plaintiffs' favor distinguishes this case from those relied on by Plaintiffs. Dkt. 29, at 57–60. In those cases, the plaintiffs had standing because, if the court ruled in their favor, the government decision at issue would be overturned. *Cal. Sea Urchin Comm'n v. Bean*, 883 F.3d 1173 (9th Cir. 2018) (favorable ruling from the court would reinstate otter relocation program); *Larson v. Valente*, 456 U.S. 228 (1982) (favorable ruling would reverse state determination requiring church to register as a charitable organization); *Seattle Audubon Soc'y v. Espy*, 998 F.2d 699, 703 (9th Cir. 1993) (favorable ruling would invalidate EIS and spotted owl management plan); *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 25 (1998) (favorable ruling would invalidate the basis for the government decision). Here, a favorable ruling would not undo the water quality certificate denial or the sublease denial.

Plaintiffs essentially sought an advisory opinion on ICCTA preemption, which they hoped would be helpful in their state litigation. ER 026. However, as the district court found, they never explained how it would be helpful. *Id*. In any case, advisory opinions—whether helpful or not—are precluded by

Article III. *Coal. for a Healthy Cal. v. F.C.C.*, 87 F.3d 383, 386 (9th Cir. 1996). The district court properly held that Plaintiffs failed the redressability prong for standing.

3. The district court correctly dismissed the ICCTA preemption claims because, as a matter of law, State Defendants' decisions did not regulate a rail carrier

ICCTA preemption can only apply if the activity regulated falls within the statutory jurisdiction of the Surface Transportation Board (STB). *Or. Coast*, 841 F.3d at 1072. ICCTA gives the STB exclusive jurisdiction over "transportation by rail carriers." To invoke Board jurisdiction, the disputed activity must be (1) transportation (2) by rail carrier (3) as part of the interstate rail network. *Or. Coast*, 841 F.3d at 1073.

Lighthouse is not a rail carrier and BNSF is neither a regulated nor operational part of the proposed project. The district court thus correctly concluded that the state decisions being challenged do not regulate "transportation by a rail carrier" and properly dismissed the preemption claim.

a. Lighthouse is not a rail carrier

"Rail carrier" is a defined statutory term in the ICCTA, and not every facility related to trains qualifies as one. 49 U.S.C. § 10102(5) (defining rail carrier as "a person providing common carrier railroad transportation for

compensation"). Plaintiffs do not argue that Lighthouse is a rail carrier. Instead, Plaintiffs skip this vital threshold question and go directly to arguing that the ICCTA preempts indirect attempts to control the activities of rail carriers. Dkt. 29, at 62. The district court correctly rejected this illicit shortcut, finding that "Lighthouse points to no evidence that it is a rail carrier, or that it will be 'performing transportation-related activities on behalf of [BNSF] or . . . any other rail carrier' at the proposed terminal. There is no showing that BNSF will 'exert[] control over' Lighthouse's operations at the facility." ER 030.

The Surface Transportation Board has repeatedly rejected Plaintiffs' argument that an incidental impact on rail transportation bestows jurisdiction. For example, when the city of Benicia, California denied a permit to build an oil transloading facility not operated or controlled by a railroad that would be nevertheless served by a rail carrier, the STB found "no preemption because the [denial] decision does not attempt to regulate transportation by a 'rail carrier.' " *Valero Ref. Co.—Petition for Declaratory Order*, S.T.B. 36036, 2016 WL 5904757, at *3 (Sept. 20, 2016).[20] *See also Washington & Idaho*

[20] Surface Transportation Board decisions provide guidance in determining the scope of ICCTA preemption and are accorded *Chevron* deference. *Or. Coast*, 841 F.3d at 1074.

Ry.—Petition for Declaratory Order, S.T.B. 36017, 2017 WL 1037370, at *5 (Mar. 15, 2017) (federal preemption does not apply to transloading facility where the activities are not being performed by or on behalf of a rail carrier, even if those activities fall within the definition of "transportation").

The cases make it clear that STB jurisdiction attaches to non-rail carriers only in situations where an acknowledged rail carrier is an operational part of the project, not merely a service provider. For example, the STB examined a transloading facility operated by a third party on a railroad's property in *Hi Tech Trans, LLC—Petition for Declaratory Order*, S.T.B. 34192, 2003 WL 21952136, at *1 (Aug. 14, 2003). There, the STB concluded that the railroad's involvement in the transloading facility was "minimal and insufficient to make [the operator's transloading] activities an integral part of [the railroad's] provision of transportation by rail carrier." *Id.* at *4. In a similar situation, the STB found no federal preemption of state or local regulation of transloading facilities where the railroad had "no involvement in the operations at the facility," even though the railroad owned the property at issue. *Town of Babylon & Pinelawn Cemetery—Petition for Declaratory Order*, S.T.B. 35057, 2008 WL 275697, at *4 (Jan. 31, 2008).

More recently, in *SEA-3—Petition for Declaratory Order*, S.T.B. 35853, 2015 WL 1215490, at *3–4 (Mar. 16, 2015), the STB denied a petition for a declaratory order that the ICCTA preempted local permits for proposed construction at a liquefied petroleum gas transloading facility served by rail. SEA-3 and two railroads argued that the city of Portsmouth, New Hampshire should be precluded from studying the risks and impacts of the proposed project. The STB rejected that argument because the fuel company was not a rail carrier, nor acting under the auspices of a rail carrier. Local permitting statutes and accompanying environmental review, therefore, applied to the project—even though it would be served by rail.

b. BNSF is not an integral, operational part of the Lighthouse project

Because Lighthouse itself is not a rail carrier, it relies on the intervening presence of BNSF to argue that ICCTA preemption extends to activities beyond those conducted by, or under the auspices of, a rail carrier. Dkt. 29, at 62. Again, the district court correctly rejected this approach: "the activities regulated here, are those of Lighthouse, not BNSF. BNSF fails to point to issues of material fact that the State's denial of Lighthouse's application for a

clean water certificate is a preempted action because it was not a regulation of BNSF or denial of an application by BNSF." ER 031.[21]

In fact, BNSF repeatedly stressed that it was not part of the proposed Millennium coal terminal project. ER 109 ¶ 45 ("the BNSF rail system is not part of the Project"); *see also* SER 160 ("[I]t is important to remember that BNSF is *not* an applicant for this project. We would serve Millennium, just as we would any other customer's terminal or rail-served business. Our rail system is not part of this project, and no permits are needed for BNSF."). BNSF was even more emphatic in written comments on the shoreline permits:

> Importantly, BNSF's rail system is not part of the Project, and no permits are requested for any part of the BNSF rail system. BNSF has operated a rail line along the Columbia River Gorge for over 100 years, and will continue to do so whether the Project is built or not. BNSF does not need special permits for Project trains, and BNSF's systems and operations are not properly part of the environmental analysis for the Project. The Project consists of a transloading facility that will be built entirely in Cowlitz County and does not include BNSF's tracks nor locomotives in Washington or any other state. The Project will be served by BNSF trains, but those trains do not belong to the Project and are not operated by the Project—nor is BNSF's track infrastructure.

[21] The district court granted motions to stay ruling on the preemption claims to give more time for Plaintiffs to present information on their rail carrier or project participant status. SER 129–32; *see* ER 031 (the court "gave BNSF every opportunity to develop its claim"). Neither Lighthouse nor BNSF produced relevant information or argument.

SER 178.

c. Lighthouse's expansive interpretation of ICCTA preemption ignores the threshold question of jurisdiction

Plaintiffs argue that "[i]f state or local governments regulate *any* facility in a manner that burdens rail transportation, ICCTA preemption applies." Dkt. 29, at 63. This position turns the ICCTA preemption standard on its head. Instead of asking whether a non-rail carrier acts as an agent of a rail carrier, Plaintiffs want this Court to extend STB jurisdiction over admitted non-rail carriers if a rail carrier provides them service. Not only is this unsupported by the statutory language, but it would also dramatically expand STB jurisdiction far beyond rail projects. Under Plaintiffs' theory, literally any one of countless projects—a coal shipping terminal, a food warehouse, a new car dealership—would become a rail project under STB jurisdiction simply if it was served by a railroad, preempting local land use permits, building and grading permits, local environmental requirements, unique lease requirements, and a host of other state and local regulations.

Such an expanded reading of STB jurisdiction would also allow project proponents to challenge any and every project near or served by a railroad. That is not the ICCTA's statutory command, nor the holding of any STB or court decisions. Congress intended the ICCTA to prevent piecemeal regulation

of interstate railroads, not to usurp traditional state police powers or dictate individual permit decisions. *See Norfolk S. Ry. Corp. v. City of Alexandria*, 608 F.3d 150, 157–58 (4th Cir. 2010) (ICCTA only preempts state laws that "manage" or "govern" rail transportation, not state laws that have "a more remote or incidental impact on rail transportation.") (citations omitted).

Plaintiffs incorrectly compare Lighthouse's position to *Northfolk Southern Railway Co.* There, the Fourth Circuit confirmed that an ordinance regulating truck traffic at a railroad-owned and operated ethanol transloading facility regulated a rail carrier for the purposes of STB jurisdiction and federal preemption. *Norfolk S. Ry.*, 608 F.3d at 158–59. It was undisputed that Norfolk Southern Railway controlled and operated the project. *See id.* at 159 (distinguishing Eleventh Circuit decision where regulation of railroad property was not preempted because there was no impact to railroad operations). The facts are vastly different here, as BNSF does not own and is "not part of the project." ER 109 ¶ 45.[22]

[22] Neither does the decision in *Boston & Maine Corp. & Springfield Terminal Railroad Co.—Petition for Declaratory Order*, S.T.B. 35749, 2013 WL 3788140 (July 19, 2013) support Plaintiffs. In *Springfield Terminal Railroad*, the STB invalidated a zoning decision that banned all rail traffic by rail carriers to a warehouse. This unsurprising result—that a town would be preempted by the ICCTA from directly prohibiting all rail traffic by undisputed rail carriers—is inapplicable here.

As this Court summarized in *Oregon Coast*, "[t]he Board's decisions show that work done by a non-carrier can be considered activity 'by a rail carrier' if there is a sufficient degree of integration between the work done by the non-carrier and the authorized rail carrier's own operations." *Or. Coast*, 841 F.3d at 1074 (citing Board decisions). It makes perfect sense that railroad repair done by a non-carrier at the direction of a rail carrier would fall under STB jurisdiction; that trucks serving a rail-carrier-owned and operated transloading facility would fall under STB jurisdiction; or that a state law that requires railroads to collect fees on shippers would also be preempted. *See BNSF Ry. Co. v. Cal. Dep't of Tax & Fee Admin.*, 904 F.3d 755 (9th Cir. 2018). But it does not follow that a non-rail carrier project with no operational interest or control from a rail carrier falls within STB jurisdiction simply because the railroad serves the project. "BNSF has operated a rail line along the Columbia River Gorge for over 100 years, and will continue to do so whether the Project is built or not." SER 178. As BNSF's operations are admittedly not part of the project, there is no STB jurisdiction and no federal preemption.[23]

[23] Plaintiffs cite expert testimony to argue that this single permit denial for a single project is "an impermissible attempt to regulate matters the STB regulates, such as constructing or expanding rail lines." Dkt. 29, at 66. Except,

d. Consideration of rail impacts in the state environmental review does not invoke federal preemption

Plaintiffs further confuse the preemption threshold argument by claiming that the state decisions are preempted not because they regulate rail, but because they were based in part on rail impacts identified through the unchallenged SEPA process.[24] Dkt. 29, at 64–65. This interpretation reverses the logical order of ICCTA preemption review; it would require a court to review the substance of challenged actions before deciding whether it had jurisdiction in the first place.

In making this argument, Plaintiffs misrepresent the facts and holding in *Valero Refining*, a Surface Transportation Board decision cited by the district court. Dkt. 29, at 64. *Valero* had remarkably similar facts to the present

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of course, that building a coal export terminal is not remotely like constructing or expanding rail lines. As the district court correctly found, "[t]he activity being regulated by the denial of the clean water certificate is the building and operation of the expanded coal export terminal. While BNSF has demonstrated that it stands to lose profits as a result of the State's denial of Lighthouse's application for the clean water certificate, the results are 'remote or incidental.' BNSF stands to lose profits if any potential customers are denied permits to start or expand businesses which utilize rail." ER 032.

[24] Defendants dispute Lighthouse's characterization that the water quality certificate denial "relied primarily on the perceived environmental effects of BNSF's rail operations." Dkt. 29, at 62, 65. The district court found otherwise. ER 031 (enumerating non-rail significant and unavoidable adverse impacts and failure to meet CWA reasonable assurance standard).

situation, including the parallel situation that the Benicia Planning Commission denied Valero's land use permit for a facility that would bring oil to the refinery by rail based in part on the potential effects of increased rail traffic. *Valero Refining*, 2016 WL 5904757, at *2. Valero, like Plaintiffs, argued that the City was preempted by the ICCTA from denying the permits because rail impacts partially formed the basis for its decision. *Id*. The STB rejected the refinery's position because Valero was not a rail carrier, nor was it acting on behalf of a rail carrier. *Id*. at *3.

As in *Valero*, the Department of Ecology here denied a permit to build a facility that would bring eight mile-and-a-half long coal trains to the site every day. The denials were based, in part, on environmental and public health risks and harms found in the final EIS, including some impacts related to rail traffic. Like *Valero*, Plaintiffs argue that the State Defendants were preempted from denying any permits or authorizations if rail impacts form part of the basis for those denials. The STB properly dismissed Valero's petition because there was no regulation of a rail carrier. This Court should likewise affirm the dismissal of the preemption claim.[25]

[25] The STB noted that the City might be preempted from requiring mitigation for any rail impacts, but it did not need to consider that issue because the City had simply denied the permit. *Id*. at *4. So too here, as

VII. CONCLUSION

The district court properly abstained from resolving the federal case during the pendency of duplicative and overlapping state court litigation. This Court should affirm the district court's abstention order.

This Court should also affirm the partial summary judgment orders if the Court concludes that it has jurisdiction to review them. The State Public Lands Commissioner is immune from federal suit for her proprietary decisions regarding the use and control of sovereign state-owned aquatic lands. Plaintiffs lack standing for their ICCTA preemption claims. Even if they had standing, their claim fails at the threshold step of the preemption analysis. The district court properly granted summary judgment to the Defendants on all of these issues.

RESPECTFULLY SUBMITTED this 30th day of December 2019.

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Ecology prescribed no mitigation for the rail-related impacts, instead simply denying for multiple reasons.

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STATEMENT OF RELATED CASES

Under Ninth Circuit Rule 28-2.6, Defendants-Appellees are not aware of any related cases pending before this Court.

DATED: December 30, 2019.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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