

NO. 19-35415

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

LIGHTHOUSE RESOURCES, INC.;
et al.,

Plaintiffs-Appellants,

BNSF RAILWAY COMPANY,

Intervenor-Plaintiff-
Appellant,

v.

JAY R. INSLEE, in his official
capacity as Governor of the State of
Washington, et al.,

Defendants-Appellees,

WASHINGTON ENVIRONMENTAL
COUNCIL; et al.,

Intervenor-Defendants-
Appellees.

DEFENDANTS-APPELLEES'
AND INTERVENOR-
DEFENDANTS-APPELLEES'
JOINT MOTION TO DISMISS

I. INTRODUCTION

Defendants jointly move the Court for an order dismissing this pending appeal on the grounds that it is has been rendered moot by Plaintiffs' filing of a bankruptcy petition and subsequent divestment of all its right, title, and interest

in the site where the proposed coal export terminal would have been constructed.

II. BACKGROUND

Lighthouse Resources, Inc. (Lighthouse) proposed to construct a large coal export terminal on property located in Cowlitz County, Washington. The upland portion of the property is owned by Northwest Alloys, Inc., and was leased to Lighthouse's subsidiary, Millennium Bulk Terminals–Longview. Northwest Alloys leased the aquatic portion of the site from the state Department of Natural Resources. *See* Declaration of Thomas J. Young in Support of Motion to Dismiss (Young Decl.) Ex. 1, at 5.

In 2017, Lighthouse sought a water quality certification from the State of Washington pursuant to section 401 of the Clean Water Act to allow construction and operation of the proposed terminal. *See* Defs.-Appellees' Joint Answering Br. (Answering Br.) 5–6, Dkt. No. 43. In September 2017, the state Department of Ecology denied the certification with prejudice based on the project's projected environmental and water quality impacts. On appeal, the state Pollution Control Hearings Board upheld the certification denial. Millennium subsequently sued the state in state court alleging that the certification denial violated 42 U.S.C. § 1983. That lawsuit remains pending in

the state court of appeals. Answering Br. 8–9, Dkt. No. 43; *see also* Young Decl. Ex. 4. Separately, the state Department of Natural Resources denied Millennium’s request for a sublease of the aquatic lands on which the terminal was to be built, based on Millennium’s failure to provide requested financial information. That denial was upheld on appeal in the state courts. *See* Answering Br. 6–8, Dkt. No. 43.

Lighthouse and Millennium commenced this suit in 2018 against the State Defendants contending, among other things, that their actions denying the 401 certification and sublease violated the dormant Commerce Clause and were preempted by federal law. Lighthouse sought declaratory and injunctive relief. *See* Appellants’ II-ER 253–54, Dkt. No. 30-2. On motions for summary judgment, the District Court dismissed the preemption claims and all claims against Defendant Hilary Franz, the director of the state Department of Natural Resources. The court then abstained from considering the Commerce Clause claims under the *Pullman* abstention doctrine. Answering Br. 9–11, Dkt. No. 43. Lighthouse appealed those decisions, and this Court heard oral argument on the appeal on October 8, 2020. A decision from this Court remains pending.

Subsequently, on December 3, 2020, Lighthouse and all of its subsidiaries, including Millennium, filed voluntary bankruptcy petitions in the bankruptcy court for the District of Delaware. *See Young Decl. Exs. 2, 3.* In the bankruptcy court, Lighthouse indicated it no longer had funds to continue operation of the Millennium site on which the coal export terminal was to be built. *Id. Ex. 1, at 5.* Lighthouse moved for, and was granted, an Order from the bankruptcy court rejecting its ground lease with Northwest Alloys and relinquishing all its right, title, and interest in the Millennium property and related assets, as of January 8, 2021. *See Young Decl. Ex. 1, at 8 ¶ 2.13.* Lighthouse no longer has the ability to construct the proposed coal export terminal on that site.¹ Relatedly, Millennium has sought repeated continuances of the state court proceedings, and represented to the court there that the fate of the project rests in the hands of the bankruptcy court. *Young Decl. Ex. 4.*

III. ARGUMENT

A case is moot and must be dismissed if, at any time during the proceeding, it loses its character as a present, live controversy for purposes of Article III of the Constitution. *Rosemere Neighborhood Ass'n v. U.S. Eenvtl. Prot. Agency*, 581 F.3d 1169, 1173 (9th Cir. 2009). Courts lack jurisdiction to

¹ Lighthouse retains an interest in adjacent parcels that are not part of the site where the terminal was to be built.

hear a moot case. *Foster v. Carson*, 347 F.3d 742, 745 (9th Cir. 2003).

“Mootness can be characterized as the doctrine of standing set in a time frame:

The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).”

Foster, 347 F.3d at 745 (quoting *Cook Inlet Treaty Tribes v. Shalala*, 166 F.3d 986, 989 (9th Cir. 1999)).

For a dispute to remain live, the parties must continue to have a personal stake in the outcome at both the trial and appellate levels. *Maldonado v. Lynch*, 786 F.3d 1155, 1160–61 (9th Cir. 2015); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 192 (2000) (case is moot when, for example, the parties have settled, or the plaintiff who asserts a non-surviving claim has died). “In general, a case becomes moot ‘when the issues presented are no longer “live” or the parties lack a legally cognizable interest in the outcome.’ ” *Pub. Utils. Comm’n of State of Cal. v. Fed. Energy Regulatory Comm’n*, 100 F.3d 1451, 1458 (9th Cir. 1996) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982)); *see also Lewis v. Cont’l Bank Corp.*, 494 U.S. 472, 479 (1990) (in order to pursue declaratory and injunctive relief, plaintiff must show a “specific live grievance” and not merely an “abstract disagreement”).

In *Public Utilities*, this Court determined, citing several similar cases, that the case before it was moot because the project proponent no longer intended to pursue the project at issue. *Pub. Utils.*, 100 F.3d at 1458 (“Mojave Pipeline has refused the required certificate of public convenience and necessity and has determined not to proceed with its proposed Northward Expansion, eliminating the subject of the jurisdictional controversy”). In *Qimoda AG v. LSI Corp.*, 857 F. Supp. 2d 570, 578–79 (E.D. Va. 2012), the court held the patent infringement case before it became moot when the plaintiff filed for bankruptcy and thereby transferred its assets, including the patent at issue, to a trustee. The court held the plaintiff no longer had a legally cognizable interest in the outcome of the case. *Id.*; see also *Jones Intercable of San Diego, Inc. v. City of Chula Vista*, 80 F.3d 320, 328 (9th Cir. 1996) (where plaintiff sold the property at issue, claim for declaratory and injunctive relief was moot).

Here, the present case is moot because neither Lighthouse nor Millennium have a legally cognizable interest in the outcome. Lighthouse and all of its subsidiaries have filed for bankruptcy, and they have transferred all their right, title, and interest in the Millennium site to Northwest Alloys. Young Decl. Ex. 1, at 8 ¶ 2.13 (“[a]t the end of the Transition Period . . . MBTL shall

relinquish all claims and rights to, release, return to, and convey to NWA all Land Improvements and such other assets described in Section 12 of the Ground Lease”). Millennium cannot proceed with construction or operation of its proposed project at the Millennium site. In effect, it has abandoned its plan to construct the terminal there and, as a result, this Court cannot provide Lighthouse any effective relief. The 401 certification and sublease decisions that Lighthouse challenges are, by their very nature, site specific. Without an interest in the site, Lighthouse has no interest in obtaining a 401 certification or sublease for that site.²

IV. CONCLUSION

For the reasons stated above, the present case has become moot and should be dismissed.

RESPECTFULLY SUBMITTED this 20th day of January 2021.

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s/ Thomas J. Young

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² Intervenor-Plaintiff-Appellant BNSF Railway Company also has no remaining interest in the case as its interest was entirely dependent on Lighthouse’s construction of the terminal, which is no longer possible.

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 27(d)(2)(A) and Ninth Circuit Rule 32-3, the attached motion contains 1,284 words, and is prepared in a format, typeface, and typestyle that complies with Fed. R. App. P. 32(a)(4)–(6).

DATED: January 20, 2021.

s/ Thomas J. Young

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PROOF OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 20, 2021.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: January 20, 2021.

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